

**IN THE SUPREME COURT OF FLORIDA**

SIERRA CLUB,

Appellant,

v.

Case No.: SC17-82  
L.T. Nos.: 160021-EI  
160061-EI  
160062-EI  
160088-EI

JULIE IMANUEL BROWN, etc.  
et al.,

Appellees.

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**ON APPEAL FROM THE PUBLIC SERVICE COMMISSION**

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**AMICUS BRIEF OF CITY OF SOUTH MIAMI  
IN SUPPORT OF APPELLANT**

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John S. Mills  
Florida Bar No. 0107719  
jmills@mills-appeals.com  
Courtney Brewer  
Florida Bar No. 890901  
cbrewer@mills-appeals.com  
service@mills-appeals.com (secondary)  
The Mills Firm, P.A.  
The Bowen House  
325 North Calhoun Street  
Tallahassee, Florida 32301

*Counsel for City of South Miami*

RECEIVED, 07/28/2017 03:03:26 PM, Clerk, Supreme Court

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## **STATEMENT OF IDENTITY AND INTEREST OF AMICUS**

The City of South Miami, in Miami-Dade County, Florida, is home to more than 12,000 permanent residents. Additionally, two hospitals and numerous businesses are located there. The City has a direct interest in this case because it is in Florida Power & Light's ("FPL") service area, and so both the City and its resident families and businesses are now paying for new power plants, known as "peakers," as part of the rate hike approved by the Florida Public Service Commission (the "Commission").

Under section 366.06, Florida Statutes, Commission rate regulation is supposed to protect the City and its residents from shouldering just the sort of expenses at issue in this appeal, which extend Florida's reliance on expensive, polluting, and soon-to-be obsolete power plants that burn imported gas or oil to produce energy. The Commission approved rate hikes to cover FPL's new peaker expenses without evaluating other options available, contravening requirements under Florida law. The City is compelled to appear as amicus because, absent action by this Court, the legal wrong committed by the Commission will lock it and its residents into paying for FPL's exorbitant peaker expenses and impede the transition to local clean energy options that could save the City and its residents money and yield other significant benefits.



## **SUMMARY OF ARGUMENT**

The City's brief addresses the consequences the Commission's decision will have on Florida's residents, as well as highlights some of the alternatives to gas-burning plants that have worked in other cities and states. As thoroughly fleshed out in the initial brief, the Commission did not require FPL to show its expenses on the gas-burning peaker plants were prudent in light of the options that would better serve ratepayers, both economically and environmentally. Instead of protecting the public from self-serving and wasteful expenditures by FPL, the Commission has rubber-stamped a rate hike to cover expenses for soon-to-be obsolete resources. These imprudent rate hikes will be particularly burdensome for low-income families, who are already stretched thin with energy bills that eat up larger proportions of their monthly budgets.

Demand-side options like energy efficiency have proven effective in numerous communities for addressing peak power demand. Also, renewable and energy storage options rival gas peakers for cost-effectiveness in terms of acquisition and operating costs, with acquisition costs expected to drop still further. Because of their reduced carbon emissions, renewables pose less regulatory risk over the life of the system, and they pose a lower risk of becoming stranded assets. The intertwined economic and environmental benefits of these clean energy options would be particularly prudent investments in Florida, which stands to

suffer some effects of climate change more harshly than many other areas of the country. The Commission’s failure to consider these proven successful alternatives to peakers requires reversal.

## ARGUMENT

### **I. THE COMMISSION’S DECISION SHOULD BE REVERSED BECAUSE IT VIOLATES THE PRUDENCE STANDARD AND IMPOSES CONCRETE, SUBSTANTIAL HARM TO CITIES AND THEIR RESIDENTS IN FPL’S SERVICE AREA.**

Public utility regulation seeks to protect the welfare of Floridians. § 366.01, Fla. Stat. The Legislature has directed that the statutes guiding that regulation “shall be liberally construed for the accomplishment of that purpose.” *Id.*

Accordingly, the Commission “is charged with the responsibility of seeing that utilities do not abuse the monopoly power they enjoy.” *S. States Utils. v. Fla. Pub. Serv. Comm’n*, 714 So. 2d 1046, 1053 (Fla. 1st DCA 1998).

The legislative requirements supplant the typical role of the free market and ensure that public utilities seek out the most economically advantageous and efficient forms of providing power to consumers. Otherwise, public utilities can easily default to resources that provide the most economic gain to themselves, realizing the primary threat in any monopolistic system. *See State of Missouri ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm’n of Mo.*, 262 U.S. 276, 289 n.1 (1923) (Brandeis, J., concurring) (establishing that the term “prudent” in utility regulation was meant to exclude “what might be found to be dishonest or obviously wasteful

or imprudent expenditures”); *see also* Paul L. Gioia, *The Prudence Standard: Recent Experience and Future Relevance*, 123 Pub. Util. Fort 11, 13 (April 27, 1989) (“the requirement that utilities be denied recovery of investments imprudently made is an essential element of the regulatory compact”); Bentham Paulos, *Empowered: A Tale of Three Cities Taking Charge of Their Energy Future*, Midwest Energy News 2015, at 11 (noting that trade association to which FPL’s parent company belongs “has organized and supported member utilities to undermine state laws encouraging customers to produce their own solar and wind energy”). Or, more simply, rate hikes must be shown by the utility to serve public, not private ends. Whether more efficient or lower-cost alternatives exist is a natural and required consideration in this analysis.

Rate increases of \$10 per month or \$120 per year (App. 697) are not insignificant and will be particularly difficult for low-income families and small businesses in the City and throughout FPL’s service area. Utility bills already may cost low-income families an average of 7.2% of their annual household income, compared to 2.3% for middle and high-income families. Ariel Drehobl & Lauren Ross, Am. Council for an Energy-Efficient Economy [“ACEEE”], *Lifting the High Energy Burden in America’s Largest Cities: How Energy Efficiency Can Improve Low Income and Underserved Communities* 9 (Apr. 2016), <http://aceee.org/sites/default/files/publications/researchreports/u1602.pdf>; Patrick

Sabol, *From Power to Empowerment: Plugging Low Income Communities Into the Clean Energy Economy* 1 (Apr. 2016), [https://groundswell.org/frompower\\_to\\_empowerment\\_wp.pdf](https://groundswell.org/frompower_to_empowerment_wp.pdf). Such costs force families to make grim decisions about their budget priorities. See Inst. for Energy & Env'tl. Research, *Home Heating, Rent, or Medicine? The Impossible Choice* (Oct. 2015), <http://ieer.org/wp/wp-content/uploads/2015/10/RenMD-EnergyJustice-OneSheet-Oct2015.pdf> (2011 national survey indicated that in previous 5 years, one third of low-income households had to forego medical or dental care because of high energy bills).

Programs to assist low-income families in reducing their energy bills are typical among the demand-side resources utilities use to reduce electric bills as well as dependence on costly fossil fuels. Marcus Franklin & Caroline Kurtz, NAACP Env'tl. & Climate Justice Program, *Lights Out in the Cold: Reforming Utility Shut-Off Policies as if Human Rights Matter* 25-26 (Mar. 2017), [http://www.naacp.org/wp-content/uploads/2017/04/lights\\_out.pdf](http://www.naacp.org/wp-content/uploads/2017/04/lights_out.pdf) (explaining that “a utility cooperative in a persistent poverty area of North Carolina” has implemented an inclusive financing option to permit residents to make efficiency upgrades, saving them an average of \$50 per month). Programs to assist small businesses in energy efficiency are not as prevalent but, when used, are particularly helpful due to the hurdles small business owners face in attempting to implement

such measures on their own. *See generally* Seth Nowak, ACEEE, *Big Opportunities for Small Business: Successful Practices of Utility Small Commercial Energy Efficiency Programs* (Nov. 21, 2016), <http://aceee.org/research-report/u1607>.

Yet in one study surveying 49 major metropolitan areas that had programs for low-income residents, FPL's program in Miami was the worst of any utility surveyed both in terms of the miniscule six cents spent each year per low-income customer and the small savings FPL's customers secured. Ariel Dreihobl & Fernando Castro-Alvarez, ACEEE, *Low-Income Energy Efficiency Programs: A Baseline Assessment of Programs Serving the 51 Largest Cities* (July 2017), <http://aceee.org/sites/default/files/low-income-ee-baseline.pdf>. Indeed, Miami is one of five cities where 10% of the population living in poverty still pays over \$200 a month on power bills. Sabol, *supra* p. 4-5, at 2.

For the City's resident families dependent on FPL for their energy needs, the Commission's review is supposed to ensure that electricity rates rise only when FPL has pursued the least expensive and most prudent options to meet those electricity needs. The Commission's failure to require FPL to even show that it had considered alternatives to the peakers, let alone that those alternatives would not have been least cost and more prudent, flies in the face of the legislative purpose for the Commission's oversight. *E.g.*, *Gulf Power Co. v. Fla. Pub. Serv. Comm'n*,

453 So. 2d 799, 805 (Fla. 1984); *see also Gulf States Utils. Co. v. La. Pub. Serv. Comm'n*, 578 So. 2d 71, 95 (La. 1991) (“In this case, there is a sufficient basis in the record to support the Commission’s conclusion that lignite was a viable and economically beneficial alternative to River Bend, and that a prudent public utility would have chosen it in preference to completing the nuclear plant.”). Instead of protecting the public interest, the peakers will help FPL maintain profits from its multiple-million dollar hedging investment in gas generation. (App. 613-14.) Such a conflict of interest is decidedly imprudent.

The precedent of this case will have consequences beyond this particular rate hike; unless reversed, it signals that FPL can continue building gas-burning plants, even if they are not the least-cost alternative, and avoid the rigorous prudence review established by the Legislature for public protection. The Commission has already perpetuated the same half-hearted review standard employed here, as it just approved a proposal that exempts FPL from having to perform a routine market study of alternatives to yet another gas-burning plant replacement in Dania Beach.

*Regulators approve FPL’s administrative shortcut on Broward plant*, Miami

Herald, July 13, 2017, *available at*

<http://www.miamiherald.com/news/business/article161184638.html>; *In re: Fla.*

*Power & Light Co.’s Petition to Request Exemption Under Rule 25-22.082(18)*,

*F.A.C., from Issuing a Request for Proposals for the Modernization of the*

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<http://www.psc.state.fl.us/ClerkOffice/DocketFiling?docket=20170122>.

**II. THE VIABLE AND ECONOMICALLY BENEFICIAL ALTERNATIVES TO THE PEAKER PLANTS DEMONSTRATE THE IMPRUDENCE OF FPL'S GAS-BURNING REPLACEMENTS.**

Aside from not having their rates raised, residents of the City and all FPL customers stand to recoup numerous benefits from the alternatives identified by the Sierra Club, including solar energy, demand-side resources, and energy storage. (Init. Br. 6-11.) Indeed, cities around the United States have taken the lead on moving forward to shake off dependence on non-renewable power sources by embracing those very alternatives. Those efforts demonstrate the feasibility of alternatives that lower power bills, create jobs, and remove financial uncertainty in the communities in which they are implemented, as well as stem the harmful effects of climate change.

For instance, demand-side programs that make homes more energy efficient in areas like lighting, air sealing, and insulation can tremendously reduce the energy burden of a residence or place of business. Drehobl & Ross, *supra* p.4, at 28-29. The municipal utility in Tallahassee, for example, has numerous energy-efficiency resources and programs to help resident families and businesses reduce their use. City of Tallahassee, *Products & Servs. for Your Home*, <https://www.talgov.com/you/you-products-home-index.aspx> (last visited July 20,

2017); City of Tallahassee, *Products & Servs. for Your Business*, <https://www.talgov.com/you/you-products-business-index.aspx> (last visited July 20, 2017). Those resources were implemented to avoid “spending money to build the plants needed for future customer demand—and buying fuel to power them,” instead spending the money in a manner that reduces electricity use and demand, bringing benefits that include lower costs, less environmental impact, and local job opportunities. Energy Servs. Dep’t, City of Tallahassee, *Save Energy Save Money* 4-5 (Feb. 2008), [https://www.talgov.com/Uploads/Public/Documents/you/learn/library/documents/dsm\\_plan\\_022008.pdf](https://www.talgov.com/Uploads/Public/Documents/you/learn/library/documents/dsm_plan_022008.pdf). Across the southeastern United States, even state governments are focusing on implementing programs to promote energy efficiency. Jim Pierobon, *As Arkansas leads on efficiency, two states poised to follow*, *Se. Energy News* (June 26, 2017), <http://southeastenergynews.com/2017/06/26/as-arkansas-leads-on-efficiency-two-states-poised-to-follow/>. At the same time, FPL has worked to gut such energy conservation efforts in our state. Ivan Penn, *Lower energy conservation goals will protect ratepayers, utilities tell PSC*, *Tampa Bay Times*, July 23, 2014, available at <http://www.tampabay.com/news/business/energy/lower-energy-conservation-goals-will-protect-ratepayers-utilities-tell-psc/2189772>.



Other demand-side resources, like residential solar panels, are particularly well-suited for Florida. A U.S. Department of Energy study determined that Florida can offset 47% of its total energy consumption by using rooftop panels. Pieter Gagnon, Nat'l Renewable Energy Lab., *Rooftop Solar Photovoltaic Technical Potential in the United States: A Detailed Assessment* 35 (Jan. 2016), <http://www.nrel.gov/docs/fy16osti/65298.pdf>. The price of these panels continues to fall. U.S. Dep't of Energy, *Tracking the Sun IX: The Installed Price of Residential and Non-Residential Photovoltaic Systems in the United States* 1 (Aug. 2016), [https://emp.lbl.gov/sites/default/files/tracking\\_the\\_sun\\_ix\\_report.pdf](https://emp.lbl.gov/sites/default/files/tracking_the_sun_ix_report.pdf).

Renewable resources like solar energy “are already cost-competitive with conventional generation resources like coal and gas, and their prices keep falling fast.” (App. 451, *see also* App. 605.) The cost of solar electricity fell by 78 percent in the five-year span between 2009 and 2014. Travis Madsen et al., Env't Am./Frontier Grp., *We Have the Power: 100% Renewable Energy for a Clean, Thriving America* 8, 36 (Mar. 24, 2016), <http://www.environmentamerica.org/reports/ame/we-have-power>. In fact, FPL's sister company, NextEra Energy Resources, is selling solar energy to an Arizona utility at a “historically low price” of below 3-cents per kilowatt hour, when the average residential electricity cost in the country is around 13-cents per kilowatt hour. Joe Romm, ThinkProgress, *Arizona utility signs game-changing deal cutting*

*solar power prices in half* (May 23, 2017), <https://thinkprogress.org/arizona-utility-game-changing-solar-deal-8e7c0bcb093a>.

Energy storage is driving peaker obsolescence, allowing intermittent renewable energy sources to out-compete costly fuel-based peakers. Storage batteries are moving along the downward cost curve experienced by solar panels and other emerging technologies. See Jeff McMahon, *Did Tesla Just Kill Nuclear Power*, Forbes, May 1, 2015, <https://www.forbes.com/sites/jeffmcmahon/2015/05/01/did-tesla-just-kill-nuclear-power/#37bb2ace2bf8> (detailing “enormous breakthrough” from Tesla of plans to build industrial scale storage batteries for about 2 cents per kilowatt hour). Indeed, FPL’s parent company recognizes the value of energy storage, with its CEO calling it “the holy grail of the renewables business” and remarking that the technology progression on that front may render peaker plants obsolete in the next few years. Eric Wesoff, *NextEra on Storage: “Post 2020, There May Never Be Another Peaker Built in the U.S.”*, Greentech Media, Sept. 30, 2015, <https://www.greentechmedia.com/articles/read/NextEra-on-Storage-Post-2020-There-May-Never-be-Another-Peaker-Built-in-t>.

Gas-burning plants rely on fuel that must be purchased in a global marketplace that has endured extreme swings over the years. U.S. Energy Info. Admin., *Henry Hub Natural Gas Spot Price*,

<https://www.eia.gov/dnav/ng/hist/rngwhhdD.htm> (last visited July 14, 2017).

Ratepayers in Florida have overpaid for gas due to the hedging options utilities have employed to account for those swings. Jerome R. Stockfish, *Utilities put fuel hedging on hold*, Tampa Bay Times, Nov. 3, 2016, available at

<http://www.tampabay.com/news/business/energy/duke-tampa-electric-co-agree-to-halt-fuel-price-hedging-which-has-cost/2301251>. By contrast, renewable energy

“generation significantly reduces the exposure of electricity costs to natural gas price uncertainty.” Thomas Jenkin et al., Nat’l Renewable Energy Lab., *The Use of Solar and Wind as a Physical Hedge Against Price Variability Within a Generation Portfolio* vii (Aug. 2013),

<http://www.nrel.gov/docs/fy13osti/59065.pdf>.

Further upping the cost of gas peaker plants to the ratepayers is the likelihood that natural gas may become subject to carbon taxes. The push for carbon taxes continues to gain momentum in the United States—even among energy companies. John Schwartz, *Exxon Mobil Lends Its Support to a Carbon Tax Proposal*, N.Y. Times (June 20, 2017), available at

<https://www.nytimes.com/2017/06/20/science/exxon-carbon-tax.html>; see also

Carbon Tax Center, *States*, <https://www.carbontax.org/states/> (last visited July 18, 2017) (indicating “some potential” for a carbon tax in Florida). While FPL appeared to recognize the risk of a carbon tax in its calculation of emission price

forecasts (Ex. 403 at 741-42), it failed to take the logical next step of exploring options that would not impose the additional cost of the carbon risk on its customers. A carbon tax would make peaker operation more expensive for the ratepayers. Worse, it could make peaker operation uneconomic and require FPL's new peakers to retire early, stranding FPL's Commission-sanctioned gamble on the peakers. Both risks fall squarely on the ratepayers who will then have to pay higher rates, or pay again for alternative, cleaner generation.

Alternatives to gas peaker plants may provide benefits in addition to reduced short-term rates and long-term risk. Investing in clean energy sources requires developing and implementing new technologies and infrastructure, which will create new jobs. *See generally* The Solar Foundation, *National Solar Jobs Census*, <http://www.thesolarfoundation.org/national/> (last visited July 16, 2017); *see also* FPL Newsroom, *FPL, Veterans Florida and key partners come together to create clean energy opportunities for America's heroes* (Apr. 6, 2017), available at <http://newsroom.fpl.com/2017-04-06-FPL-Veterans-Florida-and-key-partners-come-together-to-create-clean-energy-opportunities-for-Americas-heroes> (FPL head remarking that new program seeks to connect “American heroes with jobs and educational opportunities right here at home in America’s growing renewable energy industry”). By promoting renewable energy, North Carolina has “attracted nearly \$2.7 billion in clean energy investment and built an industry that supported

more than 37,000 jobs in manufacturing, engineering, installation and other fields in the period from 2007 to 2013.” Clean Jobs Florida, *Sizing Up Florida’s Clean Energy Jobs Base and its Potential* 4-5, [http://cleanjobsflorida.org/wp-content/uploads/2014/10/FINAL.FloridaJobsReport\\_101014\\_LR.pdf](http://cleanjobsflorida.org/wp-content/uploads/2014/10/FINAL.FloridaJobsReport_101014_LR.pdf) (last visited July 26, 2017). “Solar on its own is one of the most job intensive energy investments in the United States, generating over 7 new positions for every megawatt of installed panels.” Sabol, *supra* p.4-5, at 5.

Renewable energy and energy conservation efforts promise to create local jobs that cannot be outsourced. Madsen, *supra* p.10, at 5. The jobs also are “predominately middle class,” relatively high paying, and in the construction, utility, and manufacturing industries. City of San Diego, *Climate Action Plan* 48 (Dec. 2015), [https://www.sandiego.gov/sites/default/files/final\\_july\\_2016\\_cap.pdf](https://www.sandiego.gov/sites/default/files/final_july_2016_cap.pdf); Sabol, *supra* p.4-5, at 5; Madsen, *supra* p.10, at 32. A study from the Natural Resources Defense Council indicates that energy efficiency programs alone “could create 10,000 new jobs in Florida’s energy efficiency sector.” Clean Jobs Florida, *supra*, at 5.

Numerous environmental benefits accrue to Floridians from ending regional dependence on dirty energy and reducing greenhouse gas emissions that contribute to climate change. Cities across the country are embracing local clean energy options for precisely these reasons. *See* Filippo Bosello & Anna Leidreiter, 100%

Renewables, *100% RE Building Blocks: A practical toolkit for a sustainable transition*, <https://go100re.net/wp-content/uploads/2017/05/100RE-Building-Blocks.pdf> (last visited July 15, 2017) (noting that as of late 2016, more than 300 cities, municipalities, and regions have made commitment to transition to 100% renewable energy); *see generally* Mayors National Climate Action Agenda Cities, *Climate Action Compendium*, available for download at <http://climatemayors.org/actions/climate-action-compendium/> (last visited July 15, 2017).

In Fort Collins, Colorado, for example, city leaders seek to greatly reduce building energy use by 2030 by implementing efficiency programs and switching from gas to renewable resources. Rocky Mountain Institute, *Stepping Up: Benefits and Cost of Accelerating Fort Collins' Energy and Climate Goals* (Jan. 2014), <http://www.fcgov.com/climateadaptation/pdf/stepping-up-report.pdf>. Not only will this reduce emissions, the City notes its program will create “a net benefit of \$140 million for the community in saved utility bills, spur[] local job growth through onsite construction and building projects, and transform[] Fort Collins' buildings into more comfortable and healthier places to live and work.” *Id.*

Closer to home, the Amicus City is doing all it can to work around FPL's resistance to gas alternatives to help its residents combat the problems of climate change. *See* City of South Miami, *Going Green!*,

<http://www.southmiamifl.gov/index.aspx?NID=512> (last visited July 26, 2017)

(documenting City's initiatives and programs embracing various clean energy and efficiency options). After all, the effect of climate change on sea levels will be felt particularly hard in South Florida. See Erika Spanger-Siegried et al., Union of Concerned Scientists, *When Rising Seas Hit Home: Florida Faces Chronic Inundation* (July 2017),

<http://www.ucsusa.org/sites/default/files/attach/2017/07/when-rising-seas-hit-home-florida-fact-sheet.pdf> (showing that effects of climate change threaten to

inundate much of Florida's coastline and practically all of South Florida with chronic flooding); see also Nat'l Oceanic & Atmospheric Admin., *Global and Regional Sea Level Rise Scenarios for the United States* Technical Report NOS CO-OPS 083, 36 (Jan. 2017),

[https://tidesandcurrents.noaa.gov/publications/techrpt83\\_Global\\_and\\_Regional\\_SL\\_R\\_Scenarios\\_for\\_the\\_US\\_final.pdf](https://tidesandcurrents.noaa.gov/publications/techrpt83_Global_and_Regional_SL_R_Scenarios_for_the_US_final.pdf) (showing range of estimated relative sea levels

for Miami through 2060). Rising sea levels threaten to damage Florida's infrastructure and environment, as well as threaten the lives of its citizens. NOAA,

*supra*, at 1. Those problems threaten economic catastrophes too. Christopher

Flavelle, *The Nightmare Scenario for Florida's Coastal Homeowners*, Bloomberg

(Apr. 19, 2017), [https://www.bloomberg.com/news/features/2017-04-19/the-](https://www.bloomberg.com/news/features/2017-04-19/the-nightmare-scenario-for-florida-s-coastal-homeowners)

[nightmare-scenario-for-florida-s-coastal-homeowners.](https://www.bloomberg.com/news/features/2017-04-19/the-nightmare-scenario-for-florida-s-coastal-homeowners)

Sea level rise has already begun to affect some coastal Florida real estate markets, driving up flood insurance costs and local government expenditures. These costs will not be offset by providing the cheapest electricity—electricity is useless (and dangerous) when your house is flooded. Recognizing the threat, Miami-Dade County and three other South Florida counties have banded together to adapt and mitigate. *See generally* Miami-Dade Sea Level Rise Task Force, *Report & Recommendations* (July 1, 2014), <http://www.miamidade.gov/planning/library/reports/sea-level-rise-final-report.pdf> ; *see also* Se. Fla. Reg’l Climate Change Compact Counties, *A Region Responds to a Changing Climate*, 10 (Oct. 2012), <http://www.southeastfloridaclimatecompact.org/wp-content/uploads/2014/09/regional-climate-action-plan-final-ada-compliant.pdf> (forecast in southeast Florida “highlights the need for continued mitigation of greenhouse gas emissions as a means to reduce future sea level rise impacts”). While local governments are doing what they can to serve the best interests of their residents, the Commission has ignored the long-term interests of all Floridians in controlling carbon emissions.

In addition to statewide environmental benefits, alternatives to burning gas have shown the potential to lower utility rates and improve local economies. The Commission’s failure to hold FPL to its burden of proof to demonstrate that it has



selected the least-cost and most prudent option will lock vulnerable ratepayers into dependence on an expensive and soon-to-be-obsolete energy source that pollutes their communities and threatens the entire state's economic stability.

### **CONCLUSION**

For the foregoing reasons, the Court should reverse the Commission's order approving the settlement and remand with instructions that the Commission only allow recovery of utility expenses that it determines are prudent investments, as well as the other relief requested by the Sierra Club in its initial brief.

Respectfully submitted,

/s/ Courtney Brewer  
John S. Mills  
Florida Bar No. 0107719  
jmills@mills-appeals.com  
Courtney Brewer  
Florida Bar No. 890901  
cbrewer@mills-appeals.com  
service@mills-appeals.com (secondary)  
The Mills Firm, P.A.  
The Bowen House  
325 North Calhoun Street  
Tallahassee, Florida 32301  
(850) 765-0897  
(850) 270-2474 facsimile

*Counsel for Amicus Curiae City of  
South Miami*

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following counsel by email on July 28, 2017:

*Counsel for Sierra Club:*

Diana A. Csank  
Diana.Csank@sierraclub.org  
Julie Kaplan  
Julie.Kaplan@sierraclub.org  
Sierra Club  
50 F St. NW, Suite 800  
Washington, DC 20001

Joshua Smith  
Joshua.Smith@sierraclub.org  
Sierra Club  
2101 Webster St., Suite 1300  
Oakland, CA 94612

*Counsel for Public Service Commission:*

Suzanne Brownless  
Samantha Cibula  
Rosanne Gervasi  
Office of the General Counsel  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-1400  
sbrownle@psc.state.fl.us  
scibula@psc.state.fl.us  
rgervasi@psc.state.fl.us

*Counsel for Federal Executive Agencies:*

Thomas A. Jernigan  
c/o AFCEC/JA-ULFSC  
139 Barnes Drive, Suite 1  
Tyndall AFB FL 32403  
Thomas.Jernigan.3@us.af.mil

*Counsel for Walmart Stores East, LP:*

Derrick Price Williamson  
Spilman Thomas & Battle, PLLC  
1100 Bent Creek Boulevard, Suite 101  
Mechanicsburg, PA 17050

*Counsel for the Citizens of the State of Florida:*

J.R. Kelly  
Patricia Christensen  
Charles J. Rehwinkel  
Erik Saylor  
Stephanie Morse  
Office of Public Counsel  
111 W. Madison Street, Room 812  
Tallahassee, FL 32311  
kelly.jr@leg.state.fl.us  
christensen.patty@leg.state.fl.us  
rehwinkel.charles@leg.state.fl.us  
saylor.erik@leg.state.fl.us  
morse.stephanie@leg.state.fl.us

*Counsel for FPL:*

Wade Litchfield  
Florida Power & Light Company  
215 S. Monroe Street, Suite 810  
Tallahassee, FL 32301-1859  
wade.litchfield@fpl.com

John T. Butler  
Maria Moncada  
Florida Power & Light Company  
700 Universe Blvd.  
Juno Beach, FL 33408-0420  
john.butler@fpl.com  
maria.moncada@fpl.com

Kenneth A. Hoffman  
Florida Power & Light Company  
215 South Monroe Street, Suite 810  
Tallahassee, FL 32301  
ken.hoffman@fpl.com

Stuart H. Singer  
Boies Schiller Flexner LLP  
401 E Las Olas Blvd Ste 1200

dwilliamson@spilmanlaw.com

Stephanie U. Roberts  
Spilman Thomas & Battle, PLLC  
110 Oakwood Drive, Suite 500  
Winston-Salem, NC 27103  
sroberts@spilmanlaw.com

*Counsel for AARP:*

Jack McRay  
AARP Florida  
200 West College Avenue, # 304  
Tallahassee, FL 32301  
jmcray@aarp.org

John B. Coffman  
John B. Coffman, LLC  
871 Tuxedo Blvd.  
St. Louis, MO 63119-2044  
john@johncoffman.net

*Counsel for the Larsons:*

Nathan A. Skop  
420 NW 50th Blvd.  
Gainesville FL32607  
n\_skop@hotmail.com

*Counsel for League of Women Voters of  
Florida, Inc.:*

Deb Swim  
1323 Diamond Street  
Tallahassee, Florida 32301  
Dswim.attorney@gmail.com  
daswim@gmail.com

Fort Lauderdale, FL 33301-2211  
ssinger@bsflfp.com

Kenneth B. Bell  
Gunster, Yoakley & Stewart, P.A.  
215 South Monroe Street, Suite 601  
Tallahassee, FL 32301  
Kbell@gunster.com

*Counsel for SFHHA:*

K. Wiseman  
M. Sundback  
William M. Rappolt  
1350 I Street NW, Suite 1100  
Washington DC20005  
kwiseman@andrewskurth.com  
wrappolt@andrewskurth.com

*Counsel for Florida Retail  
Federation:*

Gardner Law Firm  
Robert Scheffel Wright  
John T. La Via  
1300 Thomaswood Drive  
Tallahassee, FL 32308  
schef@gbwlegal.com

Courtney Brewer  
Attorney

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Courtney Brewer \_\_\_\_\_  
Attorney