

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WILLIAM B. NEWTON and NOREEN
ALLISON, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

DUKE ENERGY FLORIDA, LLC, a Florida
Limited Liability Company, and FLORIDA
POWER & LIGHT COMPANY, a Florida
Profit Corporation

Defendants.

Case No.

CLASS ACTION COMPLAINT FOR
DECLARATORY JUDGMENT,
INJUNCTIVE RELIEF, AND DAMAGES

JURY TRIAL DEMANDED

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COUNT IV FLORIDA COMMON LAW UNJUST ENRICHMENT
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REQUEST FOR RELIEF32

DEMAND FOR JURY TRIAL33

Plaintiffs William B. Newton and Noreen Allison, individually and on behalf of all others similarly situated (the “Class,” as more specifically defined herein), allege the following:

I. INTRODUCTION

1. Customers of Duke Energy Florida, LLC (“Duke”) and Florida Power & Light Company (“FP&L”) (the “ratepayers”) have been required to pay \$2 billion in their electric bills for nuclear power plant projects, most of which will never generate any electricity or any other benefit for ratepayers.

2. These nuclear costs were imposed on ratepayers by orders of the Florida Public Service Commission (“FPSC”) under a new law passed by the Florida Legislature in 2006.¹ The new law created a regime (the “Nuclear Cost Recovery System”), which makes ratepayers into involuntary investors in nuclear projects, charges them interest on their own money, and never returns their “investment.” When the projects are abandoned, the utilities keep the money and collect even more.

3. Duke and FP&L, the two largest utility companies in Florida, have a monopoly over the retail electricity market in their respective territories.² Since November 12, 2008, Duke and FP&L ratepayers have been forced to pay inflated rates to fund various nuclear power plant projects launched by Defendants. Duke abandoned all of its nuclear projects in 2013, and FP&L’s proposed expansion of an existing plant continues to be bogged down in red tape.³

¹ See the Florida Renewable Energy Technologies and Energy Efficiency Act, 2006 Fla. Laws ch. 230. The provisions of this Act challenged herein were codified at FLA. STAT. §366.93 (2007) and §403.519(4) (2007) (the latter now codified at §403.519(5) (2015)).

² See *Florida Public Power*, FLORIDA MUNICIPAL ELECTRIC ASSOCIATION, available at <http://publicpower.com/floridas-electric-utilities-2/> (last visited Feb. 9, 2016).

³ Carolina Bolado, *Fla. Allows DEF To Charge Customers For Failed Nuke Projects*, LAW360 (Aug. 5, 2013), <http://www.law360.com/articles/462535/fla-allows-def-to-charge-customers-for-failed-nuke-projects>; October 27, 2015 letter from U.S. Nuclear Regulatory Comm’n to FP&L, available at <http://www.cleanenergy.org/wp->

4. Plaintiffs, on behalf of themselves and a class of the utilities' ratepayers, bring this action pursuant to the Declaratory Judgment Act, 28 U.S.C. §2201, for a declaration that the Nuclear Cost Recovery System violates the Commerce Clause, is preempted by the Atomic Energy Act of 1954 and the Energy Policy Act of 2005 under the Supremacy Clause, and that nuclear cost recovery orders issued by the FPSC under it are void.⁴ Plaintiffs seek damages and other relief from the utilities in quasi-contract for unjust enrichment under Florida law.

5. First, the Nuclear Cost Recovery System violates the dormant Commerce Clause of the U.S. Constitution by discriminating against all out-of-state energy providers. It also discriminates against energy producers in Florida that use other sources of energy. The Florida law provides financial immunity to private utilities in Florida which seek to build nuclear power plants, thereby favoring select utilities in Florida at the expense of everyone else. The Commerce Clause not only forbids discrimination against out-of-state businesses; it also forbids favoring in-state businesses over others.

6. Second, the Nuclear Cost Recovery System is preempted by the federal Atomic Energy Act of 1954 because it promotes nuclear energy production, an area occupied exclusively by the federal government. Because the law is preempted, it is invalid and cannot be enforced.

7. Third, the Nuclear Cost Recovery System is preempted by the federal Energy Policy Act of 2005 because it invades an extensive federal regulatory scheme concerning the advancement of nuclear power, which is so comprehensive that it admits no regulation by state authorities. It also is preempted because it conflicts with the federal loan program, which permits qualified applicants to receive loans that are 80% guaranteed by the Department of [content/uploads/NRC_NoticeofDeadlineExtensionforFPLTurkeyPtFinalEIS_102715.pdf](#) (last visited Feb. 9, 2016).

⁴ The nuclear cost orders are identified in the chart in paragraph 20 below and footnotes to that chart, 5 – 15, *infra*.

Energy (“DOE”). By allowing resident Florida utilities to pass on to ratepayers all of their costs, the utilities are not subject to DOE restrictions and not held accountable for financial losses associated with nuclear plants.

8. As a result of this unconstitutional law, Duke and FP&L have been wrongfully enriched at the expense of their ratepayers arising from the improperly inflated electrical rate. Plaintiffs file this action on behalf of themselves and the 6.4 million retail customers of Duke and FP&L to enjoin Defendants from charging their ratepayers for their failed nuclear projects and recover unlawful charges and damages incurred under this illegal statute.

II. JURISDICTION

9. This Court has jurisdiction under 28 U.S.C. §1331 because Plaintiffs raise questions of federal statutory and constitutional law. This Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. §1367. Jurisdiction is not affected by the Johnson Act, 28 U.S.C. §1342, because the challenged utility rates interfere with interstate commerce and are preempted by the Atomic Energy Act of 1954 and the Energy Policy Act of 2005.

III. VENUE

10. Venue is proper in this District under 28 U.S.C. §1391 because both Defendants provide service in this District. Therefore, both Defendants reside in this District for purposes of 28 U.S.C. §1391(c)(2), and a substantial part of the events or omissions giving rise to Plaintiffs’ claims occurred in this District.

IV. PARTIES

A. Plaintiffs

11. Plaintiff William B. Newton is a resident of Clearwater, in Pinellas County, Florida. He is the Deputy Director of the Florida Consumer Action Network and a Duke

customer since October 2009. As a Duke customer, Mr. Newton has incurred a financial obligation to pay unlawful charges imposed on Duke ratepayers under the Nuclear Cost Recovery System.

12. Plaintiff Noreen Allison is a resident of Naples, in Collier County, Florida. She is a retired worker with the U.S. National Park Service and an FP&L customer since 1991. As an FP&L customer, Ms. Allison has incurred a financial obligation to pay unlawful charges imposed on FP&L ratepayers under the Nuclear Cost Recovery System.

B. Defendants

13. Defendant Duke Energy Florida, LLC, formerly Florida Power Corporation, doing business as Progress Energy Florida, Inc., was acquired by North Carolina-based Duke Energy Corporation (NYSE: DUK) in 2012. It distributes power to 1.7 million retail customers over much of central and north Florida, including Highland County, which is located in this District.⁵ It participates in wholesale electricity markets, which are in interstate commerce. It owns a plant in Avon Park, in Highlands County, located within this District.⁶ Defendant Duke Energy Florida is a subsidiary of Duke Energy Corp. and operates as the sole supplier of electricity within its service territories.⁷ Duke Energy Corp. is the largest electric power holding company in the United States.⁸

⁵ *Id.*; Duke Energy service area map, *Florida Region*, available at <https://www.progress-energy.com/florida/business/economic-development/florida/index.page> (last visited Feb. 9, 2016).

⁶ Duke Energy, *Other Combustion Turbine Stations*, available at <http://www.duke-energy.com/power-plants/oil-gas-fired/other.asp> (last visited Feb. 9, 2016).

⁷ Duke Energy Form 10-K for fiscal year ending December 31, 2014, at 20.

⁸ Duke Energy webpage, *About Us*, available at <http://www.duke-energy.com/about-us/default.asp> (last visited Feb. 9, 2016).

14. Florida Power & Light Company is a subsidiary of Juno Beach, Florida-based NextEra Energy, Inc. (NYSE: NEE).⁹ FP&L is the third-largest electric utility in the United States, serving more than 4.8 million customer accounts across nearly half of the state of Florida, including Miami, Fort Lauderdale, and Boca Raton residents, which are located in this District.¹⁰ It participates in wholesale electricity markets, which are in interstate commerce.

V. FACTUAL ALLEGATIONS

A. Duke and Florida Power and Light's Nuclear Projects

15. On February 28, 2007, the FPSC granted Duke (then known as Progress Energy Florida, Inc.) preliminary approval (a "Determination of Need") to increase the generating capacity of its existing nuclear plant Crystal River 3 (CR3) located in Citrus County, Florida.¹¹ This proposed "uprate" would have increased the plant's electric capacity by 180 millawatts ("MW").

16. On January 7, 2008, the FPSC granted FP&L a Determination of Need to increase the generating capacity of four nuclear reactors – Turkey Point 3 and 4 and St. Lucie 1 and 2 – located in Dade and St. Lucie Counties, respectively.¹² The proposed uprates at these four plants have increased generating capacity by a total of approximately 400 MW.

⁹ FP&L, *Company Profile*, available at <https://www.fpl.com/about/company-profile.html> (last visited Feb. 9, 2016).

¹⁰ *Id.*; FP&L service territory map, available at <http://www.fplmaps.com/map/index.html> (last visited Feb. 9, 2016).

¹¹ Order No. PSC-07-0119 (Dkt. No. 060642).

¹² Order No. PSC-08-0021 (Dkt. No. 070602).

17. On April 11, 2008, the FPSC granted FP&L a Determination of Need to build two new reactors, Turkey Point 6 and 7, in Dade County, Florida.¹³ The proposed reactors would have a generating capacity of 2200 MW.

18. On August 12, 2008, the FPSC granted Duke a Determination of Need to build two new nuclear power plants in Levy County, Florida. The proposed new plants would have a generating capacity of 2200 MW.

19. Once the utilities received Determinations of Need, they were eligible to collect the cost of construction from their ratepayers under the Nuclear Cost Recovery System before the plants were completed. This is contrary to the normal practice, where utilities add pre-construction and construction cost to their rate base after the new plant enters commercial service and recover those costs through a rate of return on that rate base.

20. Since 2008, the FPSC has awarded the utilities approximately \$2 billion for their nuclear projects. The costs included site selection and acquisition, licensing, pre-construction, construction, and carrying costs. The chart below summarizes the FPSC's orders.

¹³ Order No. PSC-08-0237 (Dkt. No. 070650).

Summary of FPSC Orders Awarding Nuclear Costs¹⁴

Date of Order	Recovery Year ¹⁵	Florida Power & Light	Duke Energy Florida (f/k/a Progress Energy Florida)
Nov. 12, 2008 ¹⁶	2009	\$220,529,243	\$418,311,136
Dec. 22, 2008 ¹⁷	2009	\$60,080,341	\$(30,525,952)
Nov. 19, 2009 ¹⁸	2010	\$62,676,366	\$206,907,726
Feb. 2, 2011 ¹⁹	2011	\$31,288,445	\$163,580,660
Nov. 23, 2011 ²⁰	2012	\$196,088,824	\$85,951,036
Dec. 11, 2012 ²¹	2013	\$151,491,402	\$142,730,579
Oct. 18, 2013 ²²	2014	\$43,461,246	\$0
Oct. 27, 2014 ²³	2015	\$14,287,862	\$167,195,304
Nov. 3, 2015 ²⁴	2016	\$34,249,614	\$56,469,745
TOTALS		\$814,153,343	\$1,210,620,234

21. In September 2009, a crack was discovered in the containment vessel of CR3, and it was shut down. Duke's attempts to repair the crack made it worse. At the time the crack was discovered, much of the work on the uprate had been done, but the plant never resumed operation. In February 2013, Duke announced it would close CR3 and decommission it.

¹⁴ This table is based solely on the FPSC orders cited herein.

¹⁵ The amounts in this chart are those authorized for recovery in the capacity cost recovery clause for the indicated recovery year.

¹⁶ Order No. PSC-08-0749 (Dkt. No. 080009-EI) at 36 (FP&L) and 21-22 (Progress Energy Florida (PEF)).

¹⁷ Order No. PSC-08-0824 (Dkt. No. 080001-EI) at 25 (FP&L and PEF).

¹⁸ Order No. PSC-09-0783 (Dkt. No. 090009-EI) at 23 (FP&L) and 79 (PEF).

¹⁹ Order No. PSC-11-0096 (Dkt. No. 100009-EI) at 47 (FP&L) and 49 (PEF).

²⁰ Order No. PSC-11-0547 (Dkt. No. 110009-EI) at 107 (FP&L and PEF).

²¹ Order No. PSC-12-0650 (Dkt. No. 120009-EI) at 44 (FP&L) and 78 (PEF).

²² Order No. PSC-13-0493 (Dkt. No. 130009-EI) at 38 (FP&L).

²³ Order No. PSC-14-0617 (Dkt. No. 140009-EI) at 37 (FP&L and Duke).

²⁴ Order NO. PSC-15-0521 (Dkt. No. 150009-EI) at 37 (FP&L and Duke).

22. Duke purchased land for the proposed two new reactors in Levy County and associated transmission lines for \$55 million. That amount was included in the cost recovery order the FPSC issued on November 12, 2008. Duke still owns the land.

23. Duke announced its decision to abandon the Levy plant on August 1, 2013. Under the Nuclear Cost Recovery System, Duke can keep all the costs it collected for the project and is entitled to additional costs the FPSC determines are “prudent.”

24. FP&L has completed the uprates at Turkey Point 3 and 4 and St. Lucie 1 and 2. All of them entered commercial service in 2014.

25. FP&L is still seeking a combined operating license for Turkey Point 6 and 7 from the Nuclear Regulatory Commission. No hearing has been scheduled, and no date has been set for a decision on the license application.

B. How Nuclear Cost Recovery Works

26. The purpose of the Nuclear Cost Recovery System was to promote private investment in nuclear power plants and to protect the utilities from the financial risk associated with building nuclear power plants.²⁵ The legislature was motivated by a desire to promote local economic interests by providing Florida utilities and energy companies with financial benefits not available to out-of-state competitors.

27. Under the law, the FPSC is required to approve nuclear costs that are prudent and reasonable. Prudent costs are passed through to ratepayers in the “capacity construction recovery” clause of the retail rates. The FPSC has no authority to consider whether the costs, when added to retail electric rates, are unfair to ratepayers.

²⁵ See *Southern Alliance v. Graham*, 113 So. 3d 742, 745 (Fla. 2013) (law was designed to “promote utility company investment in nuclear power plants”).

28. When the FPSC makes a determination that costs are prudent, they become “regulatory assets,” which is the property of the utilities and has the same value as the costs awarded. They charge consumers interest between 7% and 8% until they are collected. If the costs are collected in the next year, the carrying charges are smaller. If the utility elects to recover costs over many years, the total interest is greater. Either way, the interest charged ratepayers is added as “carrying charges” to the next year's nuclear cost request. Not only are ratepayers being charged interest on their own money, they are charged interest on the interest on their own money.

29. For example, in 2009, Duke was allowed to defer collection of \$273 million over five years, and, on information and belief, ratepayers are still paying off those costs. They have been paying interest on the interest on their own money for six years.

30. As the utilities use their regulatory asset to pay for site selection, licensing, pre-construction and construction costs, and carrying charges, those costs are added to the construction work-in-progress (“CWIP”) account. When the project is completed, the money in the CWIP account is added to the utilities’ rate base and the ratepayers have to pay the utilities a return on equity (“ROE”), often between 10 and 12%, for the useful life of the uprate or new nuclear reactor.

31. On information and belief, FP&L customers are paying a ROE for the completed uprates.

C. The Nuclear Cost Recovery System Discriminates Against Interstate Commerce

32. The Nuclear Cost Recovery System facially discriminates against out-of-state utilities. The FPSC only has authority to regulate Florida utilities, and only Florida investor-owned utilities are allowed to pass on the costs of their nuclear power projects to their

ratepayers. As a result, on its face, the law provides financial immunity to Florida utilities at the expense of out-of-state competitors.

33. In addition, the Nuclear Cost Recovery System only allows for cost recovery for two types of plants – nuclear power plants and integrated gasification combined cycle (“IGCC”) power plants.²⁶ No other plants receive this benefit.

34. For example, the Nuclear Cost Recovery System excludes natural gas plants. Approximately 61% of Florida’s net electricity generation is derived from natural gas, the second highest in the nation.²⁷ It also discriminates against alternate sources of energy in Florida, including solar and hydro-powered plants. Although Florida is the “Sunshine State,” the U.S. Energy Information Administration reports that “[r]enewable energy accounted for 2.3% of Florida’s total net electricity generation in 2014, and the state ranked 10th in the nation in net generation from utility-scale solar energy.”²⁸ In addition, “[u]tility-scale solar technologies comprise almost one-sixth of the state’s renewable electricity generating capacity but contributed less than 5% to the state’s renewable net generation in 2014.”²⁹

35. In addition, the purpose of the Nuclear Cost Recovery System is to promote investment in Florida and discriminate against out-of-state utilities. As stated by the Florida Court of Appeals, this “public purpose” is accomplished by “transferring the risk for proposed nuclear projects to” ratepayers.³⁰

²⁶ IGCC plants turn coal into a synthesis gas, which produces steam. *See* Duke Energy, *How IGCC Works*, available at <https://www.duke-energy.com/about-us/how-igcc-works.asp> (last visited Feb. 9, 2016).

²⁷ *See* U.S. Energy Information Administration, *Florida*, available at <http://www.eia.gov/state/?sid=FL#tabs-5> (last visited Feb. 9, 2016).

²⁸ *See id.*

²⁹ *Id.*, <http://www.eia.gov/state/analysis.cfm?sid=FL>.

³⁰ *Smalley v. Duke Energy Fla., Inc.*, 154 So. 3d 439, 441 (Fla. Dist. Ct. App. 2d 2014).

36. By immunizing the investor-owned utility companies from the financial consequences of their actions, the Nuclear Cost Recovery System distorts and restricts the energy market in Florida. Investor-owned utility companies in Florida can charge their ratepayers their planning and construction costs based on a mere showing that their nuclear project costs are “prudent.” The investor-owned utilities no longer need to show that they have attempted to meet their needs on the fair open market. Nor is it necessary for them to assume any financial risk. That risk – and the resulting distortions in the marketplace – land squarely on the shoulders of the ratepayers. As the City Attorney of Miami and her co-author explained in a Duke Law Review article, the Nuclear Cost Recovery System “privilege[s] one form of energy production above all others. Hence, utilities may be motivated to seek a license for a particular facility, not because it is the best or most-efficient technology but because the potential rates garnered will be greater and the investment may be recovered sooner.”³¹ Moreover, the Nuclear Cost Recovery System “further insulates companies currently providing energy services to the public from disruption. In effect, the present system makes energy conversation unappealing for established utilities and curtails retail opportunities for alternative technology developers.”³² Such a discriminatory scheme – including discriminating against in-state utility companies – violates the Commerce Clause.

37. As a result, ratepayers have paid higher utility bills than they otherwise would have paid during the relevant period, with nothing to show for it. Duke abandoned a nuclear power plant in Levy County, which reportedly cost Florida ratepayers \$1.3 billion, and that full

³¹ See Matthew Haber & Victoria Méndez, *Speaking Truth to Power Company Regulators: The Consequences of Modern Regulatory Incentives and Administrative Expediency*, 25 DUKE ENVTL. L. & POL’Y F. 185, 190 (Fall 2014).

³² *Id.* at 191.

amount has not yet been collected.³³ Through the end of 2015, newspaper reports indicate that FP&L customers have paid \$241 million toward the Turkey Point nuclear plant project.³⁴

38. Although the Nuclear Cost Recovery System permits Defendants to charge ratepayers these rate hikes to reimburse Defendants' nuclear power investment, by law, Defendants are not required to disclose the rate hike attributable to these charges on their customers' monthly bills. The ratepayers are being charged for a project that ultimately only benefits the investor-owned utilities and are not permitted to even know the amount of the price hike.³⁵

39. Moreover, although the Nuclear Cost Recovery System saddles Defendants' ratepayers with the high costs of nuclear plant construction, it is far from clear that nuclear power makes financial sense (even if the plants had opened). Taking construction costs into account, the cost of electricity from a new nuclear plant is about 60% higher than from a new coal or gas plant.³⁶ By comparison, the price of solar energy has steadily declined.³⁷ According to one estimate, thin film solar photovoltaic power is already more cost effective than a new reactor, and solar power is rapidly growing cheaper, while nuclear costs are not likely to decline.³⁸

³³ See Ivan Penn, *Duke Energy to Cancel Proposed Levy County Nuclear Plant*, TAMPA BAY TIMES (Aug. 1, 2013), available at <http://www.tampabay.com/news/business/energy/duke-energy-to-cancel-proposed-levy-county-nuclear-plant-fasano-says/2134287>.

³⁴ See *FPL's Turkey Point Cost Estimate Rises to Top Range of \$20 billion*, MY PALM BEACH POST (June 27, 2015), available at <http://www.mypalmbeachpost.com/news/business/fpls-turkey-point-cost-estimate-rises-to-top-range/nmmCN/> (last visited Feb. 9, 2016).

³⁵ Haberd & Méndez, *supra*, at 198.

³⁶ Amanda Leiter, *The Perils of a Half-Built Bridge: Risk Perception, Shifting Majorities, and the Nuclear Power Debate*, 35 *Ecology L.Q.* 31, 56-57 (2008).

³⁷ Jonathan Kahn, *Keep Hope Alive: Updating the Prudent Investment Standard for Allocating Nuclear Plant Cancellation Costs*, 22 *FORDHAM ENVTL. L. REV.* 43, 83 (2010).

³⁸ Travis Madsen *et al.*, *Generating Failure: How Building Nuclear Power Plants Would Set America Back in the Race Against Global Warming*, ENVIRONMENT AMERICA RESEARCH &

D. The Nuclear Cost Recovery System is Preempted by the Atomic Energy Act of 1954

40. The Atomic Energy Act of 1954 (the “1954 Act”) establishes federal jurisdiction over all nuclear aspects of energy production, including the construction of nuclear power plants.³⁹ The 1954 Act reserves to states only those powers which states have traditionally exercised as part of their police power. Promoting nuclear energy is a uniquely federal field, and the Florida Legislature exceeded its authority in enacting the Nuclear Cost Recovery System, whose purpose is to promote the construction of nuclear energy plants in Florida.

41. Nuclear energy, which has its origins with the development of the atomic bomb, has always been a matter of national security. To understand why nuclear energy development is predominately a federal concern, a brief history of nuclear power is provided below.

42. Following the demonstration of the first nuclear reactor in 1942, the test of the atomic bomb in 1945, and its effective military use in the final stages of World War II, it became readily apparent that legislation was needed to control such a dangerous source of energy; Congress’ response was the Atomic Energy Act of 1946 (the “1946 Act”).⁴⁰ Although the United States recognized the potential of nuclear power for the generation of electricity after World War II, it was principally concerned that other countries, especially in the Eastern Bloc, would acquire nuclear weapons capacities.⁴¹ To maintain nuclear dominance, Congress believed that nuclear power had to be tightly controlled and, accordingly, passed the 1946 Act.⁴²

POLICY CENTER (Nov. 2009) at 3, <http://www.usclimatenetwork.org/resource-database/generating-failure-how-building-nuclear-power-plants-would-set-america-back-in-the-race-against-global-warming>.

³⁹ 42 U.S.C. § 2021(c); *PG&E Co. v. State Energy Res. Conserv. & Dev. Comm’n*, 461 U.S. 190, 209-10, 212 (1983).

⁴⁰ *Jersey Cent. Power & Light Co. v. Lacey*, 772 F.2d 1103, 1110-11 (3d Cir. 1985).

⁴¹ Joseph P. Tomain, *Nuclear Futures*, 15 DUKE ENVTL. L. & POL’Y F. 221, 226-27 (Spring 2005).

⁴² *Id.*

Consistent with the concern that atomic energy would be used as a weapon of mass destruction, the 1946 Act placed all control of nuclear power in the hands of the military, thereby preventing private ownership and commercial development.⁴³ During this time, the use, control, and ownership of all nuclear technology remained a tightly controlled federal monopoly.

43. The federal government opened up the nuclear market somewhat with the passage of the 1954 Act. Under that Act, the use, control, and ownership of all nuclear technology remain a federal monopoly,⁴⁴ but it introduced a new federal policy of encouraging the private sector to develop atomic energy for peaceful purposes under a program of federal regulation and licensing.⁴⁵ The 1954 Act implemented this policy decision by opening the door to private construction, ownership, and operation of commercial nuclear power plants under the strict supervision of a federal agency, the Atomic Energy Commission.⁴⁶

44. The federal government retains exclusive authority over the construction of nuclear power plants.⁴⁷ The 1954 Act permits limited state regulation of non-nuclear aspects of energy production, but only to the extent consistent with states' traditional police powers.⁴⁸ There is no traditional state authority to promote nuclear energy or to construct nuclear power plants. That is the exclusive province of the federal government.⁴⁹ The 1954 Act also authorizes the federal government "to make grants and contributions to the cost of construction and operation of reactors and other facilities and other equipment to colleges, universities, hospitals,

⁴³ *Id.*

⁴⁴ *PG&E.*, 461 U.S. at 206-07.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 42 U.S.C. § 2021(c)(1).

⁴⁸ *PG&E.*, 461 U.S. at 210-12.

⁴⁹ *Id.* at 194.

and eleemosynary or charitable institutions for the conduct of educational and training activities relating to” research activities.⁵⁰ Notably absent from the 1954 Act is any provision permitting grants or contributions for commercial nuclear projects, which is essentially what the Nuclear Cost Recovery System does by shifting nuclear costs to ratepayers.

45. As a result, the Nuclear Cost Recovery System’s statutory incentives to build nuclear plants are strictly preempted.⁵¹

E. The Nuclear Cost Recovery System is Preempted by the Energy Policy Act of 2005

1. The federal government provides a comprehensive regulatory scheme to promote sound investment in nuclear power.

46. When Congress passed the Energy Policy Act of 2005 (“2005 Act”), it introduced an elaborate scheme of incentives for building new nuclear plants, including tax incentives and loan guarantees, but the policy was balanced to promote sound investments and prevent a repeat of the mass abandonment of nuclear construction sites in the 1980s and 1990s. The 2005 Act allocated several billion dollars to the promotion of nuclear power in 2005, an amount that has been expanded with subsequent amendments.

47. As enacted in 2005, the 2005 Act provided:

- Authorization of more than \$432 million over 3 years for nuclear energy research and development, including the Department of Energy’s (DOE) *Nuclear Power 2010* program to construct new nuclear plants, and its *Generation IV* program to develop new reactor designs [Secs. 951 and 952 of the Energy Policy Act]
- Authorization of \$580 million over 3 years for DOE’s program for research and development of nuclear reprocessing and transmutation technologies [Secs. 951 and 953]
- Authorization of \$420 million over 3 years for DOE to develop a plan to improve infrastructure at national laboratories for nuclear

⁵⁰ 42 U.S.C. § 2051(b).

⁵¹ *PG&E*, 161 U.S. at 212.

energy R&D, including a plan for the facilities at the Idaho National Laboratory [Secs. 951 and 955]

- Authorization of \$149.7 million over 3 years for DOE to invest in human resources and infrastructure in the nuclear sciences and engineering fields through fellowships and visiting scientist programs; student training programs; collaborative research with industry, national laboratories, and universities; upgrading and sharing of research reactors; and technical assistance [Secs. 941 and 944]

- Authorization of \$1.1 billion over 3 years for the Fusion Energy Sciences program for fusion energy R&D; authorization for DOE to negotiate an agreement for the United States to participate in the ITER (International Fusion Energy Project); requirement of DOE to submit a plan for a domestic burning plasma experiment if ITER becomes “unlikely or infeasible.” [Secs. 961 and 962]

- Authorization of \$100 million for DOE to establish two demonstration projects for the commercial production of hydrogen at existing reactors [Sec. 634]

- Authorization of \$18 million over 3 years for DOE to survey industrial applications of radioactive sources and develop a R&D plan for developing small particle accelerators [Secs. 951 and 957]

- Requirement of DOE to use 0.9 % of its applied energy R&D budget for matching funds with private partners to promote “promising technologies” for commercial use, which could include nuclear power technologies [Sec. 1001]

- Authorization of \$60 million over 3 years for DOE to give grants to train technical personnel in fields in which a shortage is identified [Sec. 1101]

- Authorization of \$250,000 for research and development to use radiation to refine oil [Sec. 1406]

- Authorization of \$2 billion in “risk insurance” to pay the industry for any delays in construction and operation licensing for 6 new reactors, including delays due to the Nuclear Regulatory Commission or litigation. The payments would include interest on loans and the difference between the market price and the contractual price of power [Sec. 638]

- Authorization of more than \$1.25 billion from FY2006 to FY2015 and “such sums as are necessary” from FY2016 to

FY2021 for a nuclear plant in Idaho to generate hydrogen fuel [Secs. 641-645]

- Exemption of construction and operation license applications for new nuclear reactors from an NRC antitrust review [Sec. 625]
- Unlimited taxpayer-backed loan guarantees for up to 80% of the cost of a project, including building new nuclear power plants [Title XVII]
- Reauthorization of the Price-Anderson Act, extending the industry's liability cap to cover new nuclear power plants built in the next 20 years [Sec. 602]
- Incentives for “modular” reactor designs (such as the pebble bed reactor) by allowing a combination of smaller reactors to be considered one unit, thus lowering the amount that the nuclear operator is responsible to pay under Price-Anderson [Sec. 608]
- Production tax credits of 1.8 cents for each kilowatt-hour of nuclear-generated electricity from new reactors during the first 8 years of operation for the nuclear industry, costing \$5.7 billion in revenue losses to the U.S. Treasury through 2025 (considered one of the most important subsidies by the nuclear industry) [Sec. 1306]
- Changes to the rules for nuclear decommissioning funds that are to be used to clean up closed nuclear plant sites by repealing the cost of service requirement for contributions to a fund and allowing the transfer of pre-1984 decommissioning costs to a qualified fund, costing taxpayers \$1.3 billion [Sec. 1310].⁵²

48. The 2005 Act was enacted following an avalanche of nuclear power plant defaults. The energy crisis in the early 1970s propelled a major drive toward expanding commercial nuclear power in the United States.⁵³ But the rapid expansion of nuclear power ultimately led to 120 nuclear power plant cancellations between 1972 and 1990.⁵⁴ For example, over-commitment to nuclear power brought about the financial collapse of the Washington

⁵² *Nuclear Giveaways in the Energy Policy Act of 2005*, PUBLIC CITIZEN, available at www.citizen.org/documents/NuclearEnergyBillFinal.pdf (last visited Feb. 9, 2016).

⁵³ Kahn, *supra*, at 47.

⁵⁴ *Id.*

Public Power Supply System (“WPPSS”), a public agency which undertook to build five large nuclear power plants in the 1970s.⁵⁵ WPPSS defaulted on \$2.25 billion of municipal bonds, which is still one of the largest municipal bond defaults in U.S. history.⁵⁶ In 1985, Forbes magazine labeled the nuclear power industry “the largest managerial disaster in business history.”⁵⁷ Most cancellations were the result of unanticipated cost overruns, reduced demand for electricity, and the emergence of strong grassroots political opposition to nuclear power following the 1979 accident at the Three Mile Island nuclear plant.⁵⁸ The Union of Concerned Scientists reports that, since Three Mile Island, there have been more than 47 other instances in which U.S. nuclear reactors have been shut down for more than a year for safety reasons.⁵⁹ Construction costs for nuclear plants are also astronomically high.⁶⁰

49. With the enactment of the 2005 Act, the federal government promotes research and development of nuclear energy while ensuring fiscally sound investment in construction of nuclear plants. For example, the 2005 Act provides a 1.8-cents/kilowatt-hour tax credit for up to 6,000 megawatts of new nuclear capacity for the first eight years of operation.⁶¹ This ensures that the tax incentives are provided only to those power plants that are intended to remain in

⁵⁵ *Haberman v. Wash. Pub. Power Supply Sys.*, 744 P.2d 1032, 1043 (Wash. 1987).

⁵⁶ Rob Russell, *Muni Bonds: The Most Dangerous Bonds to Own*, U.S. NEWS & WORLD REPORT (Feb. 22, 2013), <http://money.usnews.com/money/blogs/the-smarter-mutual-fund-investor/2013/02/22/muni-bonds-the-most-dangerous-bonds-to-own>.

⁵⁷ Kahn, *supra*, at 47.

⁵⁸ *Id.*

⁵⁹ *Id.* at 78-79 (citing Bob Herbert, *We’re Not Ready*, N.Y. TIMES (July 19, 2010), at A23).

⁶⁰ Amanda Leiter, *The Perils of a Half-Built Bridge: Risk Perception, Shifting Majorities, and the Nuclear Power Debate*, 35 ECOLOGY L.Q. 31, 56-57 (2008).

⁶¹ Mark Holt, *Nuclear Energy Policy*, CONGRESSIONAL RESEARCH SERVICE (CRS Report for Congress, No. RL33558) (Oct. 15, 2014), at 22, *available at* <http://fas.org/sgp/crs/misc/RL33558.pdf> (last visited Feb. 9, 2016).

operation for a number of years. The 2005 Act also authorizes federal loan guarantees for up to 80% of construction costs of new nuclear plants, provided the plans meet DOE requirements.⁶²

50. The comprehensive federal regulatory scheme under the 2005 Act demonstrates Congress' intent that the federal government occupy the entire field of the promotion and development of nuclear energy. The Nuclear Cost Recovery System invades the field exclusively occupied by the federal government by promoting the construction of nuclear power plants in Florida.

2. The Nuclear Cost Recovery System directly conflicts with the federal guaranteed loan program.

51. The DOE guaranteed loan program requires a utility to demonstrate that the federal investment makes sense financially and advance other federal policies, *e.g.*, environmental protection and fair labor laws. The DOE's most recent application form for the program outlines numerous requirements the agency places on applicants to ensure that the project is worth funding.⁶³ For one, to be eligible, the project must be an "Advanced Nuclear Energy Facility" (as defined by Section 1703(b)(4) of the 2005 Act) and reduce greenhouse gas emissions and employ new or significantly improved technology.⁶⁴ No such requirements exist in the Nuclear Cost Recovery System.

52. The DOE also considers "[w]hether an Application for a loan guarantee for a project could be fully financed on a long-term basis by commercial banks, internally generated corporate funds, or other commercial means without a federal loan guarantee ... as an evaluation

⁶² 42 U.S.C. §§16512(c); 16513(b)(4).

⁶³ *Loan Guarantee Solicitation Announcement, Federal Loan Guarantees for Advanced Nuclear Energy Projects*, U.S. DEP'T OF ENERGY (Dec. 10, 2014), http://energy.gov/sites/prod/files/2015/12/f27/DOE-LPO_ADV-NUCLEAR_Solicitation_10-Dec-2014.pdf. ("*Loan Guarantee Solicitation*")

⁶⁴ *Id.* at 2.

factor.”⁶⁵ An applicant must demonstrate to DOE’s satisfaction that the project provides a reasonable prospect of repayment of the principal and interest on the guaranteed obligation and other project debt, and the guaranteed obligation, when combined with amounts available from other sources, will be sufficient to carry out the project.⁶⁶ Again, under the Nuclear Cost Recovery System, utilities seeking to pass on their advance nuclear costs are under no such obligation.

53. The National Environmental Policy Act (“NEPA”) requires the DOE to consider the potential environmental impacts of their proposed actions. “Therefore NEPA compliance is integrated into DOE’s Loan Guarantee Program decision-making procedures to ensure that a project’s environmental impacts are properly considered.”⁶⁷ By comparison, Florida’s environmental review under its Electrical Power Plant Siting Act is considerably more limited, and there is no specific requirement that nuclear recovery costs are contingent on compliance with environmental regulations.⁶⁸

54. Under the DOE guaranteed loan program, all construction workers must be paid the prevailing wage under the Davis-Bacon Act.⁶⁹ Recipients of the federal loan guarantee must warrant with each disbursement that they are in compliance with the Davis-Bacon Act and all applicable Davis-Bacon Act regulations.⁷⁰ All projects that receive a loan guarantee must also comply with the Cargo Preference Act of 1954, which establishes certain requirements for the

⁶⁵ *Id.* at 3.

⁶⁶ *Id.*

⁶⁷ *Id.* at 4.

⁶⁸ Haber & Méndez, *supra*, at 194-97.

⁶⁹ *Loan Guarantee Solicitation, supra*, at 5.

⁷⁰ *Id.*

use of U.S.-flagged vessels in the movement of cargo in international waters.⁷¹ The Nuclear Cost Recovery System places no restrictions on Defendants' labor or shipping practices as a condition for recovery of nuclear costs.

55. DOE applicants are charged significant non-refundable administrative fees. To open the application, they must submit \$50,000. They also pay a non-refundable facility fee calculated at 1.0% of the first \$150 million of the Guaranteed Obligation and an additional 0.6% of any amount above \$150 million.⁷² They are also charged a \$500,000 annual maintenance fee⁷³ and are required to reimburse the DOE for any extraordinary expenses incurred beyond standard monitoring relating to technical, financial, or legal matters or other events (*e.g.*, engineering failure or financial workouts). Defendants, by contrast, pay only an administrative hearing fee to process their application, which they are also entitled to charge to their ratepayers.⁷⁴

56. DOE guaranteed loan applicants are assessed at the first stage of review according to their creditworthiness (45%); technical relevance, merit, technical approach, work plan, and construction plan (35%); and legal, environmental, and regulatory factors (20%).⁷⁵ There are no comparable criteria under the Nuclear Cost Recovery System.

57. Some companies have decided the federal loan program is not worth the risk. Constellation Energy, the company that owns Baltimore Gas and Electric, combined with Areva to plan a reactor in Virginia and sought a guarantee for a \$7.76 billion loan, but negotiations with

⁷¹ *Id.*

⁷² *Id.* at 17-18.

⁷³ *Id.* at 18.

⁷⁴ Haber & Méndez, *supra*, at 193.

⁷⁵ *Loan Guarantee Solicitation, supra*, at 9.

the DOE broke down in October 2010 when the DOE asked for an \$880 million payment in exchange for taking the risk, and Constellation walked away from the planned reactor.⁷⁶

58. In fact, the first loan guarantees for nuclear power plants under the 2005 Act were not signed until February 20, 2014. The government issued \$6.5 billion in loan guarantees for two reactors being constructed at the Vogtle nuclear plant in Waynesboro, Georgia.⁷⁷ Thomas A. Fanning, Chairman of Southern Company, the plant's lead owner, estimated it would save the company's customers \$200 million – substantial, but a fraction of the total project cost, now expected to be in the range of \$15.5 billion.⁷⁸

59. Permitting Defendants to benefit from free money under the Nuclear Cost Recovery System while DOE loan applicants must pay significant fees and comply with onerous regulations directly conflicts with the federal guaranteed loan program.

60. The Nuclear Cost Recovery System encourages the risky investment that the federal guaranteed loan program seeks to avoid. For example, FPSC authorized Duke to collect more than \$1.2 billion for an uprate of its Crystal River 3 (“CR3”) plant and two proposed new reactors in Levy County (the “Levy plant”). The CR3 uprate was completed, but the plant never operated again because an unrelated repair damaged the containment vessel. In February 2013, Duke announced its decision to abandon CR3, and, on August 1, 2013, Duke abandoned the Levy plant as well. In 2013, Duke reached a settlement with the FPSC, Office of Public Counsel, and large industrial users relating to CR3, the Levy plant, and a proposed new gas

⁷⁶ Troutman Sanders LLP, *Constellation Energy Withdraws from DOE Loan Guarantee; Senator Bingaman Calls for Reform of DOE Loan Guarantee Program*, <http://www.troutmansandersenergyreport.com/2010/10/constellation-energy-withdraws-from-doe-loan-guarantee-senator-bingaman-calls-for-reform-of-doe-loan-guarantee-program/>.

⁷⁷ Holt, *supra*, at 22.

⁷⁸ Matthew L. Wald, *Loan Program for Reactors is Fizzling*, N.Y. TIMES (Feb. 18, 2014), available at http://www.nytimes.com/2014/02/19/business/energy-environment/loan-program-for-reactors-is-fizzling.html?_r=0 (last visited Feb. 9, 2016).

plant.⁷⁹ The settlement provided refunds for consumers arising out of the botched repair of CR3 but not for the nuclear costs collected for that plant or the Levy plant. It affirmed Duke's right to collect \$350 million more in "prudent" nuclear costs and set the stage for Duke to collect from its customers damages it may owe for canceling the construction contract for the Levy plant.

VI. CLASS ALLEGATIONS

61. Plaintiffs bring this action for declaratory judgment, injunctive relief and damages pursuant to the provisions of Rules 23(a), 23(b)(2), and 23(b)(3) of the Federal Rules of Civil Procedure, on behalf of themselves and the following proposed Class:

All persons or entities who are or have been customers of Duke Energy Florida or Florida Power and Light from November 12, 2008, through the present.

62. Excluded from the Class are Defendants, any entity in which Defendants have a controlling interest, and Defendants' legal representatives, predecessors, successors, assigns, and employees, the presiding judicial officer, the presiding judicial officer's staff, and the presiding judicial officer's immediate family members.

63. The definition of the Class is unambiguous. Plaintiffs are Defendants' ratepayers and are members of the Class of ratepayers they seek to represent. Members of the Class can be identified using Defendants' billing databases. Class members can be notified of the class action through publication and direct mailings to address lists maintained in the usual course of business by Defendants.

64. Numerosity: Class members are so numerous that their individual joinder is impracticable. According to Duke Energy Florida, it currently serves 1.7 million customers in

⁷⁹ *In re: Petition for limited proceeding to approve revised and restated stipulation and settlement agreement by Duke Energy Florida, Inc., d/b/a Duke Energy*, Dkt. No. 130208-EI, Order No. PSC-13-0598-FOF-EI (Fla. P.S.C. Nov. 12, 2013).

Florida.⁸⁰ Florida Power and Light states that it serves more than 4.8 million customers in Florida.⁸¹

65. Typicality: Federal Rule of Civil Procedure 23(a)(3): Plaintiffs' claims are typical of the other Class members' claims. Plaintiffs paid for energy as reflected on their monthly bills. All Class members were comparably injured through Defendants' wrongful conduct as described above.

66. Adequacy: Federal Rule of Civil Procedure 23(a)(4): Plaintiffs are adequate Class representatives because their interests do not conflict with the interests of the other members of the Class they seek to represent; Plaintiffs have retained counsel competent and experienced in complex class action litigation; and Plaintiffs intend to prosecute this action vigorously. The Class's interests will be fairly and adequately protected by Plaintiffs and their counsel.

67. Common questions of law and fact predominate over the questions affecting only individual Class members. Some of the common legal and factual questions include:

- a. Whether the Nuclear Cost Recovery System violates the dormant Commerce Clause;
- b. Whether the 1954 Act preempts the Nuclear Cost Recovery System;
- c. Whether the 2005 Act preempts the Nuclear Cost Recovery System;
- d. Whether Defendants should be enjoined from charging Plaintiffs and members of the Class charges approved by the FPSC pursuant to the Nuclear Cost Recovery System;

⁸⁰ Duke Energy fact sheet, *Fast Facts*, available at <http://www.duke-energy.com/pdfs/de-factsheet.pdf> (last visited Feb. 9, 2016).

⁸¹ FP&L webpage, *Company Profile*, available at <https://www.fpl.com/about/company-profile.html> (last visited Feb. 9, 2016).

- e. Whether Defendants have unjustly benefited through their receipt of payments arising from charges approved by the FPSC pursuant to the Nuclear Cost Recovery System;
- f. Whether it would be unjust for Defendants to retain payment arising from charges approved by the FPSC pursuant to the Nuclear Cost Recovery System; and
- g. The nature and extent of damages, restitution, and other remedies to which the conduct of Defendants entitles the Class members.

68. The injuries sustained by the Class members flow, in each instance, from a common nucleus of operative facts – that Defendants charge Plaintiffs and members of the Class charges approved by the FPSC pursuant to Nuclear Cost Recovery System.

69. The Class members have been damaged by Defendants' charges. The rates Class members have paid include unlawful charges because the Nuclear Cost Recovery System is unconstitutional and renders FPSC's approval of the charges under the Florida law invalid.

70. Defendants engaged in a common course of conduct giving rise to the legal rights sought to be enforced by the Class members. The same constitutional and common law violations are involved. Individual questions, if any, are minor in comparison to the numerous common questions that predominate.

71. The injuries sustained by the Class members flow, in each instance, from a common nucleus of operative facts. In each case, Defendants charge Plaintiffs and members of the Class charges approved by the FPSC pursuant to an invalid law.

72. Declaratory and Injunctive Relief: Federal Rule of Civil Procedure 23(b)(2): Defendants have acted, or refused to act, on grounds generally applicable to Plaintiffs and the other members of the Class, thereby making appropriate final injunctive relief and declaratory relief, as described below, with respect to the Class as a whole.

73. Superiority: Federal Rule of Civil Procedure 23(b)(3): A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The individual damages or other financial detriment suffered by Plaintiffs and the other Class members are relatively small compared to the burden and expense that would be required to individually litigate their claims against Defendants, so it would be impracticable for the members of the Class to individually seek redress for Defendants' wrongful conduct. Even if Class members could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

VII. CAUSES OF ACTION

COUNT I

VIOLATION OF THE DORMANT COMMERCE CLAUSE

(Declaratory Judgment and Injunctive Relief)

74. The preceding paragraphs of this Complaint are realleged and incorporated by reference and asserted by Plaintiff on behalf of themselves and members of the Class.

75. Plaintiffs and members of the Class purchase electricity from Defendants at rates set by the FPSC that include advance nuclear costs passed on to them under the Nuclear Cost Recovery System. They seek a declaratory judgment that the Nuclear Cost Recovery System violates the Commerce Clause and a preliminary injunction against Defendants from charging an excess rate approved by the FPSC under the Nuclear Cost Recovery System.

76. The Commerce Clause of the Constitution provides that “[t]he Congress shall have power ... [t]o regulate Commerce ... among the several States.”⁸² As a corollary, the dormant Commerce Clause forbids a state or municipality from impeding the flow of goods and services across state borders, or from favoring in-state economic interests at the expense of out-of-state economic interests.⁸³

77. The Nuclear Cost Recovery System facially discriminates against electricity producers outside of Florida. The law only provides financial immunity and advanced cost recovery to utilities subject to FPSC’s regulation,⁸⁴ which means that it is only available to Florida utilities.⁸⁵ The law also discriminates against companies both within and outside of Florida that to seek to develop any other type of power plants. Favoring one group of companies engaged in interstate commerce over another violates the Commerce Clause, even if the disfavored companies are in-state.⁸⁶

78. The rates Defendants charge Plaintiffs and members of the proposed Class include costs impermissibly approved by the FPSC under the Nuclear Cost Recovery System. Unless enjoined, Defendants will continue to charge Plaintiffs and Class members unlawful charges under an invalid law.

79. Plaintiffs and the class they represent are participants in the interstate commerce because they purchase electricity.

⁸² U.S. Const. Art. I, § 8, cl. 3.

⁸³ *Amerijet Int’l, Inc. v. Miami-Dade Cnty.*, 7 F. Supp. 3d 1231, 1240 (S.D. Fla. 2014), *aff’d*, 2015 U.S. App. LEXIS 16700 (11th Cir. 2015).

⁸⁴ FLA. STAT. § 366.93.

⁸⁵ *See id.* § 366.04.

⁸⁶ *Bacchus Imps. v. Dias*, 468 U.S. 263 (1984).

80. The Nuclear Cost Recovery System discriminates against interstate commerce in violation of the Commerce Clause.

81. The Nuclear Cost Recovery System unduly burdens interstate commerce and is not supported by any legitimate or sufficient state purpose.

82. Plaintiffs and the Class they represent seek a declaration under the Declaratory Judgment Act 28 U.S.C. §2201 binding on Defendants that the Nuclear Cost Recovery System, and all nuclear cost recovery orders issued under it, are unconstitutional and void and an order enjoining Defendants from further unlawful charges.

COUNT II

PREEMPTION UNDER THE ATOMIC ENERGY ACT OF 1954, 42 U.S.C. §2011 *et seq.*

(Declaratory Judgment and Injunctive Relief)

83. Plaintiffs incorporate all factual allegations made herein on behalf of themselves and members of the Class.

84. Plaintiffs and members of the Class purchase electricity from Defendants at rates set by the FPSC that include advance nuclear costs passed on to them under the Nuclear Cost Recovery System. They seek a declaratory judgment that the Nuclear Cost Recovery System is preempted by the 1954 Act and a preliminary injunction against Defendants from charging an excess rate approved by the FPSC under the Nuclear Cost Recovery System.

85. The 1954 Act retains for the federal government exclusive “authority and responsibility with respect to regulation of . . .the construction and operation of any production

or utilization facility,”⁸⁷ subject only to “pre-existing state authority outside the NRC’s [or DOE’s] jurisdiction.”⁸⁸

86. The Nuclear Cost Recovery System interferes with the federal government’s exclusive authority to regulate construction of nuclear power plants because it provides a financial incentive to utilities to build nuclear power plants.⁸⁹ There is no pre-existing state authority to promote nuclear energy. Domestic nuclear energy is the exclusive province of the federal government, in which states have no sovereign interest or enforcement authority. Any state effort to promote nuclear energy invades a field exclusively occupied by the federal government.

87. The federal government also has exclusive control over all “nuclear aspects” of energy production under the 1954 Act, subject only to the States’ traditional authority to regulate the “generation, sale, or transmission of electric power produced through the use of nuclear facilities[.]”⁹⁰ The Nuclear Cost Recovery System exceeds the State’s permissible regulatory authority by regulating nuclear aspects of energy production.

88. The rates Defendants charge Plaintiffs and members of the proposed Class include costs impermissibly approved by the FPSC under the Nuclear Cost Recovery System. Unless enjoined, Defendants will continue to charge Plaintiffs and Class members unlawful charges under an invalid law.

⁸⁷ 42 U.S.C. §2021(c)(1).

⁸⁸ *PG&E*, 461 U.S. at 209-10.

⁸⁹ 42 U.S.C. §2021(c)(1).

⁹⁰ 42 U.S.C. §2018.

89. Plaintiffs and the Class they represent seek a declaratory judgment that the Nuclear Cost Recovery System is unconstitutional and nuclear cost recovery orders issued under it are void and an order enjoining Defendants from further unlawful charges.

COUNT III

PREEMPTION UNDER THE ENERGY POLICY ACT OF 2005, PUB. L. NO. 109-58, 119 STAT. 594

(Declaratory Judgment and Injunctive Relief)

90. Plaintiffs incorporate all factual allegations made herein on behalf of themselves and members of the Class.

91. Plaintiffs and members of the Class purchase electricity from Defendants at rates set by the FPSC that include advance nuclear costs passed on to them under the Nuclear Cost Recovery System. They seek a declaratory judgment that the Nuclear Cost Recovery System is preempted by the 2005 Act and a preliminary injunction against Defendants from charging an excess rate approved by the FPSC under the Nuclear Cost Recovery System.

92. Federal preemption may be implied when federal regulation in a legislative field is so pervasive that it can reasonably be inferred that Congress left no room for the states to supplement it.⁹¹

93. With the enactment of the 2005 Act, Congress provided an extensive federal regulatory scheme to promote nuclear power. In so doing, Congress expressed its intent that the federal government occupy the entire field of nuclear promotion. The Nuclear Cost Recovery System invades the federal government's exclusive regulatory authority by providing financial incentives to promote construction of nuclear power plants in Florida.

⁹¹ *Williams v. Educ. Credit Mgmt. Corp.*, 88 F. Supp. 3d 1338, 1344 (M.D. Fla. 2015).

94. Preemption also occurs when a state law stands as an obstacle to the objective of the federal law.⁹²

95. Under the 2005 Act, the DOE federal loan program guarantees up to 80% of the construction costs of new nuclear power plants. The objective of this law is to encourage nuclear energy production by utilities that have demonstrated a technically and fiscally sound construction plan. This plan was enacted after 100+ nuclear plants were abandoned or defaulted. In light of the considerable cost and economic loss associated with abandoned nuclear construction plans, the federal program establishes a balance between promoting nuclear power, while holding utilities partially accountable for any losses in the event of a default.

96. The federal loan program also requires recipients to reduce greenhouse gas emissions and comply with other federal environmental, labor, and shipping policies.

97. The Nuclear Cost Recovery System conflicts with federal policies underlying the guaranteed loan program. It weakens the federal government's balanced approach between encouraging investment in nuclear power and holding utilities accountable, in part, for defaulting or abandoned construction plans. Florida's law immunizes utilities from any cost overruns or the cost of abandoned plans and does not encourage fiscal responsibility. The Nuclear Cost Recovery System also impermissibly allows Defendants to accept money without complying with other rigorous federal requirements under the federal guaranteed loan program.

98. The rates Defendants charge Plaintiffs and members of the proposed Class include costs impermissibly approved by the FPSC under the Nuclear Cost Recovery System. Unless enjoined, Defendants will continue to charge Plaintiffs and Class members unlawful charges under an invalid law.

⁹² *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1167 (11th Cir. 2008).

99. Plaintiffs and the Class they represent seek a declaratory judgment under the Declaratory Judgment Act that the identified provisions of the Nuclear Cost Recovery System are unconstitutional and nuclear cost recovery orders issued under it are void and an order enjoining Defendants from further unlawful charges.

COUNT IV

FLORIDA COMMON LAW UNJUST ENRICHMENT

(Damages or Restitution)

100. The preceding paragraphs of this Complaint are realleged and incorporated by reference and asserted by Plaintiff on behalf of itself and members of the Class.

101. Plaintiffs and the Class they represent have conferred a benefit on the utility Defendants by paying nuclear costs included in their electric bills pursuant to nuclear cost recovery orders that are unconstitutional and void.

102. The utility Defendants have knowingly accepted the nuclear costs they have collected in the plaintiffs' electric bills.

103. Defendants have unjustly benefited from the FPSC's invalid exercise of state authority, and they continue to benefit to the detriment of Plaintiffs and members of the Class. It would be unjust for Defendants to retain payment for costs passed on to their ratepayers pursuant to an invalid law.

104. Plaintiffs and members of the Class seek full recovery of Defendants' enrichment benefits acquired as a result of the unlawful collection.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of members of the proposed Class, respectfully request the Court enter judgment in their favor and against Defendants as follows:

A. Certification of the proposed Class, including appointment of Plaintiffs' counsel as Class Counsel;

B. Issuance of a Declaratory Judgment, pursuant to 28 U.S.C. §2201 and Rule 57 of the Federal Rules of Civil Procedure, declaring the Nuclear Cost Recovery System is unconstitutional;

C. An order enjoining Defendants from charging Plaintiffs and the Class unlawful charges approved by the FPSC through an invalid exercise of state authority under the Nuclear Cost Recovery System, as alleged in this Complaint;

D. Restitution and damages, in an amount to be determined at trial;

E. An order requiring Defendants to pay both pre- and post-judgment interest on any amounts awarded;

F. An award of costs and attorneys' fees; and

G. Such other or further relief as may be appropriate.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial for all claims so triable.

February 22, 2016

ROBBINS GELLER RUDMAN
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