

**SPEAKING TRUTH TO POWER COMPANY
REGULATORS:
THE CONSEQUENCES OF MODERN
REGULATORY INCENTIVES AND
ADMINISTRATIVE EXPEDIENCY**

MATTHEW HABER†
VICTORIA MÉNDEZ††

Providing modern communities with electricity is both a complex and a critical task. Therefore, the configuration of the regulatory framework, constructed by federal and state governments around the electric utility industry, has significant consequences for public expenditures and industry behavior. By altering investment incentives, policy decisions around utility regulation have equal capacity to move us towards an efficient and sustainable future or to impose needless costs on the public. State regulatory regimes, in particular, have tremendous ability to influence utility investment decisions.

The consequences of these policies were recently exemplified in Florida, where utility customers will ultimately pay Duke Energy over \$1 billion in fees—including \$150 million in profit—for two nuclear reactors the company has chosen not to build.¹ How did this occur in

Copyright © 2014 Matthew Haber & Victoria Méndez.

† Matthew Haber is a graduate of Duke University School of Law, Class of 2013, consulting with the City of Miami's Office of the City Attorney on matters of energy and administrative law.

†† Victoria Méndez is a graduate of the University of Miami School of Law, Class of 2000, and the City Attorney for the City of Miami.

1. Mary Ellen Klas, *Watchdog Report Says Power Companies Wield Too Much Influence in Florida Legislature*, TAMPA BAY TIMES (Mar. 30, 2014), <http://www.tampabay.com/news/business/energy/watchdog-report-says-power-companies-wield-too-much-influence-in-florida/2172513> [hereinafter *Watchdog Report*]; Justin Bachman, *Duke Kills Florida Nuclear Project, Keeps Customers' Money*, BLOOMBERG BUSINESSWEEK (Aug. 5, 2013), <http://www.businessweek.com/articles/2013-08-05/duke-kills-florida-nuclear-project-keeps-customers-money>. Although the state's utility regulators eventually directed Duke Energy to credit its customers for \$54 million of this money, which was collected for nuclear equipment that the utility was not able to acquire, this decision owed more to political pressure than legal requirements. Moreover, the credit is dwarfed by the total costs of the project that have been borne by Duke Energy customers. See Ivan Penn, *Duke Must Refund \$54M*, TAMPA BAY TIMES

Florida when government so tightly regulates the electric utility industry? With that question in mind, this comment briefly discusses: (1) a recently enacted regulatory incentive for electric utilities and its consequences for energy conservation and industry practices; (2) the policy of expediency underlying licensing energy infrastructure projects; and (3) the level of accountability provided by judicial review of administrative action. Similarly, this comment aims to broadly examine the results achieved and the activities encouraged by these legal regimes. The fourth section argues that the confluence of the three policies listed above produces conditions that are not conducive to consumer protection or preventing environmental degradation. Throughout, we use Florida as a case study to examine the way that these issues play out on the ground.

I. ADVANCED NUCLEAR COST RECOVERY—A DISINCENTIVE TO INNOVATE

Most states grant electric utilities a monopoly in providing energy services to the public.² Where investor-owned utilities are concerned, the utility is a for-profit company, often engaged in both generating electricity and supplying it to the retail market.³ Generally, a state utility commission regulates these services and approves the rates charged to customers.⁴ The purpose of these regulations is to protect consumers.⁵

Unlike most states, Florida—followed by others in the South such as Georgia and South Carolina—enacted an advanced nuclear cost recovery (ANCR) law in 2006.⁶ Through the cost recovery law,

(Oct. 3, 2014), <http://www.tampabay.com/news/business/energy/bondi-urges-psc-to-order-duke-to-refund-54-million-for-nuclear-equipment/2200407>.

2. Douglas Gagax & Kenneth Nowotny, *Competition and the Electric Utility Industry: An Evaluation*, 10 YALE J. ON REG. 63, 63 (1993); see generally Leonard W. Weiss, *Antitrust in the Electric Power Industry*, 5 J. REPRINTS ANTITRUST L. & ECON. 647, 650 (1973–74) (explaining that there are limited competition opportunities in electricity markets because individual generating companies also own the “transmission and distribution systems”).

3. *Id.* at 651.

4. State names vary for these agencies: Arizona Corporation Commission ARIZ. REV. STAT. ANN. § 40-202 (2014), Florida Public Service Commission, FLA. STAT. § 366.07 (2014), and the North Carolina Utilities Commission, N.C. GEN. STAT. § 62-22 (2014), etc.

5. Fed. Power Comm’n v. Natural Gas Pipeline Co., 315 U.S. 575, 583 (1942).

6. 2006 Fla. Laws Ch. 2006-230 at 59 (codified as amended at FLA. STAT. § 366.93(2)). In Florida Public Service Commission documents, ANCR is often referred to as the nuclear cost recovery clause (NCRC). Nuclear Cost Recovery Clause, PSC-11-0095-FOF-EI, 3–6 (Florida Public Service Commission Feb. 2, 2011) (admin. final order), available at <http://www.psc.state.fl.us/dockets/orders/>. As of this writing, Florida’s Public Service Commission has maintained a nuclear cost recovery docket for eight years. Nuclear Cost Recovery Clause, PSC-14-0384-

Duke Energy was able to recover the fees mentioned above before construction began.⁷ This section covers three points related to cost recovery: (1) ANCR entitles utilities to charge fees prior to construction, regardless of whether a plant is ever built, thereby altering the utility's investment risk analysis; (2) the legal standard applied to ANCR is designed to reimburse utilities for project-related expenses, rather than to protect consumers from unfair rates; and (3) policies like ANCR push utilities toward constructing only one type of capital-intensive project rather than directly promoting goals like grid reliability or energy conservation.

First, ANCR entitles utilities to recover, prior to construction, "costs incurred in the siting, design, licensing, and construction of a nuclear power plant, including new, expanded, or relocated electrical transmission lines and facilities"⁸ Under Florida's version of this law, utilities file a request annually with the state commission to be reimbursed for costs incurred, projected, and otherwise connected with the reactors. For example, Florida Power & Light Company received authorization to charge about \$17 million in advanced recovery costs related to planning and obtaining licenses in a single-plant expansion project for the year 2013 alone.⁹ After the new

PHO-EI, 2 (Fla. Pub. Serv. Comm'n July 24, 2014) (admin. prehearing order). In that time, only Duke Energy Florida (formerly Progress Energy Florida) and Florida Power & Light Company have sought ANCR fees under this statute. Nuclear cost recovery clause, PSC-11-0095-FOF-EI, 2 (Fla. Pub. Serv. Comm'n Feb. 2, 2011) (admin. final order). Florida Power & Light Company currently has two nuclear projects that qualify for ANCR: the Extended Power Uprate project at the St. Lucie and Turkey Point plants and the licensing of the new Turkey Point 6 & 7 nuclear units. Nuclear cost recovery clause, PSC-14-0384-PHO-EI, 8 (Fla. Pub. Serv. Comm'n July 24, 2014) (admin. prehearing order). As a matter of disclosure, both authors of this comment are involved in litigation concerning the Turkey Point 6 & 7 project. However, the issues being litigated are not discussed here.

7. *Watchdog Report*, *supra* note 1.

8. FLA. STAT. § 366.93(2) (2014). Note that Florida's statute provides early cost recovery for integrated gasification combined cycle power plants as well. For comparison with Georgia's nuclear cost recovery law see GA. CODE ANN. § 46-2-25(c.1) (2014). For comparison with South Carolina's nuclear cost recovery law see S.C. CODE ANN. §§ 58-33-210, 225 (2014).

9. Mary Ellen Klas, *Regulators Approve Nearly \$5 a Month Hike in Electric Bills*, MIAMI HERALD, Dec. 3, 2013, available at <http://www.miamiherald.com/news/state/article1958153.html> [hereinafter *Regulators Approve Hike*]. Again, as a matter of disclosure, the number quoted above references the cost recovery for a project related to litigation in which both authors of this comment are involved. The issues litigated in that case are not discussed here. Regarding ANCR, note that total costs recovered vary from year to year. For example, Florida Power & Light Company has requested \$14,287,862 during the current cost recovery docket. Nuclear Cost Recovery Clause, PSC-14-0384-PHO-EI, 9 (Fla. Pub. Serv. Comm'n July 24, 2014) (admin. prehearing order). Florida Power & Light Company's 2014 cost recovery amount was \$43,461,246. Nuclear cost recovery clause, PSC-13-0493-FOF-EI, 38 (Fla. Pub. Serv. Comm'n Oct. 18, 2013) (admin. final order). The company's 2013 cost recovery amount was

capital project is constructed and serving customers, the utility may increase its base rate charges.¹⁰

ANCR includes costs related to obtaining and maintaining state and federal licenses, preconstruction materials, and equipment purchases.¹¹ Moreover, a utility is able to preserve the opportunity for future recovery even if its reactors have not been constructed up to twenty years after receiving federal approval.¹² Finally, as Duke Energy demonstrated, “[i]f the utility elects not to complete . . . construction of the nuclear power plant . . . the utility shall be allowed to recover all prudent preconstruction and construction costs incurred”¹³

In sum, electric utilities that have long benefited from state-granted monopolies—through guaranteed customers, rates, and reasonable returns on their investments—are now shielded from the risks of investment in large capital projects through cost recovery laws.¹⁴ Reducing the financial risks associated with planning and obtaining permits for complex infrastructure projects is a valid policy, but it requires a balanced approach. ANCR introduces powerful new incentives for utilities into this environment. Without an early fee recovery arrangement, it takes years for utilities to earn back the funds invested into nuclear power projects.¹⁵ More immediate returns and greater financial recovery were designed to spur new plant construction.¹⁶

\$151,491,402. Nuclear Cost Recovery Clause, PSC-12-0650-FOF-EI, 78 (Fla. Pub. Serv. Comm’n Dec. 11, 2012) (admin. final order). Progress Energy Florida’s (now Duke Energy Florida) 2013 cost recovery amount was \$142,730,579. *Id.* at 44. Progress Energy Florida’s 2012 cost recovery amount was \$85,951,036. Nuclear cost recovery clause, PSC-11-0547-FOF-EI, 107 (Fla. Pub. Serv. Comm’n Nov. 23, 2011) (admin. final order).

10. FLA. STAT. § 366.93(4) (2014).

11. *Id.* § 366.93(3)(b), (d), (e)(1). Note that costs relating to obtaining state and federal licenses include vendor and legal fees.

12. *Id.* § 366.93(3)(f)(1).

13. *Id.* § 366.93(6). Note that, while Florida’s statute provides this cost recovery option even for integrated gasification combined cycle power plants, this is not a feature of all cost recovery laws.

14. *See, e.g., id.* § 366.041(1) (2014) (ensuring that a public utility receives a reasonable rate of return).

15. *See, e.g.,* David Indiviglio, *Why Are New US Nuclear Reactor Projects Fizzling?*, ATLANTIC, <http://www.theatlantic.com/business/archive/2011/02/why-are-new-us-nuclear-reactor-projects-fizzling/70591/> (last visited Oct. 11, 2014) (“It can sometimes take decades to recoup initial costs.”).

16. The Florida Legislature explicitly stated “[s]uch mechanisms must be designed to promote utility investment in nuclear or integrated gasification combined cycle power plants” FLA. STAT. § 366.93(2) (2014); *see* Nuclear Cost Recovery Clause, PSC-08-0749-FOF-EI, 2 (Fla. Pub. Serv. Comm’n. Nov. 12, 2008) (admin. final order), *available at*

Second, there are two occasionally conflicting goals in electric utility rate regulation: (1) protecting customers from unreasonable charges; and (2) the utility investor's right to just compensation.¹⁷ Regulatory rate approval before ANCR generally applied the "just and reasonable" standard.¹⁸ This standard has been enshrined by statute across the country, endeavoring to balance a utility's right to a reasonable rate of return with protecting consumers from unfair pricing.¹⁹ Under ANCR, it is instead the utility's revenue requirements for the proposed nuclear facility that help to drive the rates recovered. Utilities with projects that qualify for cost recovery are able to recover all prudently incurred costs related to site selection, preconstruction, and construction.²⁰ The "just and reasonable" standard is not applied to rates collected to cover these expenses.

As a former U.S. Nuclear Regulatory Commission member

<http://www.psc.state.fl.us/dockets/orders/> ("In 2006, the Florida Legislature enacted Section 366.93, F.S., to encourage utility investment in nuclear electric generation by creating an alternative cost recovery mechanism."). The original 2006 Florida legislation, SB 888, enabled the advanced fee described above. S.B. 888, 2006 Leg., Reg. Sess. (Fla. 2006), *available at* <http://archive.flsenate.gov/data/session/2006/Senate/bills/billtext/pdf/s0888c1.pdf>. In 2008, HB 7135 added plant-associated transmission lines as a recoverable expense. H.B. 7135, 2008 Leg., Reg. Sess. (Fla. 2008), *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h7135er.docx&DocumentType=Bill&BillNumber=7135&Session=2008. In 2013, SB 1472 added long-term time limits to projects' recovery. S.B.1472, 2013 Leg., Reg. Sess. (Fla. 2013), *available at* <http://www.flsenate.gov/Session/Bill/2013/1472/BillText/er/PDF>. See generally Joshua Gillin, *Florida GOP Says Charlie Crist 'Made It Easier for Duke to Take Your Money'*, POLITIFACT (Aug. 15, 2014), <http://www.politifact.com/florida/statements/2014/aug/15/republican-party-florida/florida-gop-says-charlie-crist-made-it-easier-duke/> (discussing Florida's recent legislative and political actions on "advance fees" for utilities).

17. See *Smyth v. Ames*, 169 U.S. 466, 544 (1898) (protecting the right of regulated industries to a "fair return" on their investments despite regulatory limits); *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) (excluding agency decisions that are "just and reasonable" from *Smyth v. Ames* holding).

18. *Hope Natural Gas Co.*, 320 U.S. at 603; see also *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 303 (1989) (reviewing an Administrative Law Judge decision that used the "reasonable and prudent" standard).

19. *Munn v. Illinois*, 94 U.S. 113, 133–35 (1877); see also *Gulf Power Co. v. Bevis*, 296 So. 2d 482, 488 (Fla. 1974) (establishing the Florida law equivalent of *Munn v. Illinois*).

20. FLA. ADMIN. CODE ANN. r. 25-6.0423 (2014). Note that Florida's process is distinct from a standard Construction Work in Progress (CWIP) policy because it includes a mechanism to cover costs related to pursuing licensing, etc., as they are projected and incurred prior to commencing construction. Nuclear cost recovery clause, PSC-11-0095-FOF-EI, 3–4 (Fla. Pub. Serv. Comm'n Feb. 2, 2011) (admin. final order), *available at* <http://www.psc.state.fl.us/dockets/orders/>. Note also that South Carolina's nuclear construction cost recovery law states that "the [utilities] commission may not rule on the prudence or recoverability of specific items of cost, but shall rule instead on the prudence of the decision to incur preconstruction costs for the nuclear plant." S.C. CODE ANN. § 58-33-225(D) (2014).

noted, this “is part of the risk to which the Legislature exposed Florida customers by passing such an open-ended piece of legislation The law basically says once the [state’s utility commission] approves the need for the plant all prudent costs are passed onto the customers.”²¹ This situation is further complicated by the way that need is calculated, which includes considerations other than true energy demand.²²

Third, the incentive structure built into policies like ANCR raises the question: why should a utility invest in cheaper or more energy-efficient alternatives, when state governments authorize early rate recovery for centralized capital projects regardless of completion? Regulation-induced financial incentives are neither new nor controversial. The issue here is that policies like ANCR privilege 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.

In an industry more accountable to market forces, privileging one form of power generating facility would have a limited effect; however, electric utilities do not operate in a competitive market.²³ They are state regulated monopolies, sensitive primarily to the rates they are authorized to collect and recover by state utility commissions.²⁴ Traditionally, this sensitivity already pushed electric utilities to pursue base rate increases by building large, centralized power plants.²⁵ Their goal was to create more power; not to use it

21. Ivan Penn, *Duke Energy’s Customers Face a Potential \$500 Million Bill*, TAMPA BAY TIMES (Apr. 5, 2014), available at <http://www.tampabay.com/news/business/energy/duke-energys-customers-face-a-potential-500-million-bill/2173654>.

22. For a review of need determination for electric power plants, see Lisa O. O’Neill, *Florida Electrical Power Plant Siting Act: Perpetuating Power Industry Supremacy in the Certification Process*, 36 U. FLA. L. REV. 817, 831–32 (1984) [hereinafter *FEPPSA: Perpetuating Power Industry Supremacy*]. As an example, present need for additional power is not required for the Florida Public Service Commission to determine that new electric power plants should be built. See *Panda Energy Int’l v. Jacobs*, 813 So. 2d 46, 52, 56 (Fla. 2002) (approving the Public Service Commission’s finding of need, based upon its consideration of economic needs and cost-effectiveness, in addition to the need for additional energy generating capacity); see also FLA. STAT. § 403.519(3)–(4) (2014) (establishing criteria for the Commission to consider in determining need for an electrical power plant).

23. Gagax, *supra* note 2, at 63.

24. *Id.*

25. Ivan Penn, *Utilities Will Ask PSC for Permission to Gut Energy-Saving Goals*, TAMPA BAY TIMES (July 19, 2014), <http://www.tampabay.com/news/business/energy/utilities-will-ask-psc-for-permission-to-gut-energy-saving-goals/2189192> [hereinafter Penn, *Utilities Will Ask PSC*].

more efficiently, decentralize its production through diverse methods like rooftop solar, or produce innovations in grid-level energy storage devices.²⁶ ANCR compounds this problem by providing further incentives for electric utilities to shy away from developing technologies that use energy efficiently, and encourages additional emphasis on constructing costly, new capital projects. In fact, while this comment was being written, Florida's investor-owned electric utilities began advocacy efforts to take this policy even further by asking the state to set aside its energy conservation goals.²⁷

Perhaps on purpose, the electric utility market is not designed to be vulnerable to disruption or decentralization. After all, ensuring a reliable electric grid promotes public safety and greater industry competition might lead to a less reliable grid. Nonetheless, policies like ANCR do not ensure grid reliability. As a policy, this type of incentive further insulates companies currently providing energy services to the public from disruption. In effect, the present system makes energy conservation unappealing for established utilities and curtails retail opportunities for alternative technology developers.

II. POWER PLANT LICENSING—EXPEDIENCY OVER BALANCED RESULTS

Once policymakers enact incentives for investor-owned utilities, the actual work of licensing utility projects falls to administrative agencies at both the state and federal level.²⁸ These agencies do much to regulate the electric industry. However, the distinct set of incentives created by the elected branches of government, guides agency staff.

26. Conversely, states like Florida do set numeric goals for energy conservation and demand side management (DSM) programs to push utilities to adopt new technology and toward efficient behaviors that minimize residential and commercial usage of electricity. See Adoption of Numeric Conservation Goals and Consideration of Nat'l Energy Policy Act Standards, PSC-94-1313-FOF-EG (Fla. Pub. Serv. Comm'n Oct. 25, 1994) (admin. order setting conservation goals) *available at* <http://www.psc.state.fl.us/dockets/orders/>. The drawback is that these incentives do not effectively counteract the much larger amounts of funding available through programs like ANCR.

27. Penn, *Utilities Will Ask PSC*, *supra* note 25; Ivan Penn, *Lower Energy Conservation Goals Will Protect Ratepayers, Utilities Tell PSC*, TAMPA BAY TIMES (July. 23, 2014), <http://www.tampabay.com/news/business/energy/lower-energy-conservation-goals-will-protect-ratepayers-utilities-tell-psc/2189772>.

28. See, e.g., David B. Spence, *Agency Discretion and the Dynamics of Procedural Reform*, 59 PUB. ADMIN. REV. 425, 426–27 (1999) (describing the founding of the Federal Regulatory Energy Agency (FERC), its task of licensing hydroelectric projects, and how the FERC adapted to meet the limitations Congress later placed upon the FERC).

For the federal portion of the nuclear power plant licensing process, the U.S. Nuclear Regulatory Commission oversees a safety review pursuant to the Atomic Energy Act; an environmental review pursuant to the National Environmental Policy Act (NEPA); and an antitrust review.²⁹ Where significant environmental impacts are expected under the NEPA review, the Nuclear Regulatory Commission, the Army Corps of Engineers, and other cooperating agencies may collaborate to submit an Environmental Impact Statement (EIS) to the Office of Federal Activities at the Environmental Protection Agency.³⁰ The EIS drafting process entails a public comment period as well.³¹ Final federal approval of new reactors is issued by a combined license (COL) that may be valid for up to six decades.³²

In recent years, the White House has directed federal agencies involved in permitting high-priority infrastructure projects to expedite these processes with clear objectives and timeframes.³³ The President has articulated “the goal of cutting aggregate timelines for major infrastructure projects in half, while also improving outcomes for communities and the environment”³⁴ The advantages of these directives include improved scheduling and interagency coordination.³⁵ The disadvantages are more fundamental: a swift permitting process may undermine the quality of review, and the infrastructure project’s eventual success.³⁶

29. *Backgrounder: Nuclear Power Plant Licensing Process*, U.S. NUCLEAR REGULATORY COMM’N (July, 2005), <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/licensing-process-bg.html>.

30. *National Environmental Policy Act (NEPA): Basic Information*, U.S. EPA (June 25, 2012), <http://www.epa.gov/compliance/basics/nepa.html>.

31. *Id.*

32. *See* 10 C.F.R. §§ 52.104, 54.31 (stating that the combined license is valid for forty years and may be renewed for an additional twenty).

33. Memorandum on Speeding Infrastructure Development Through More Efficient and Effective Permitting and Environmental Review, 2011 DAILY COMP. PRES. DOC. 201100601 (Aug. 31, 2011), *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-201100601/pdf/DCPD-201100601.pdf>.

34. Memorandum on Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures, 2013 DAILY COMP. PRES. DOC. 201300346 (May 17, 2013), *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-201300346/pdf/DCPD-201300346.pdf>.

35. Jena A. MacLean, *Utility-Scale Renewable Energy Development on Public Lands: Learning From Past Lessons to Improve the Potential for a Low Carbon Future*, ABA CTR. FOR PROF’L DEV. (July 15, 2014), *available at* http://www.americanbar.org/content/dam/aba/events/environment_energy_resources/2014/03/43rd-spring-conference/conference_materials_portal/maclean_jana-ppt.authcheckdam.pdf.

36. *See id.* Since streamlined permitting processes are generally swift, they may also curtail opportunities for public participation, thus limiting public input.

In Florida, where the Duke Energy reactors were authorized, the state's Electrical Power Plant Siting Act governs licensing new plants.³⁷ This process encourages expediency as well.³⁸ The Act has its origins in the 1970s oil embargo and "attempts to balance energy needs against their potential environmental impact to insure that the location and operation of new power plants will have only minimal adverse effects on the environment."³⁹ Despite this intent, the Act promotes two behaviors from state regulators: (1) aversion to delay; and (2) ineffective balancing of need against impact.⁴⁰

First, the state agency coordinating the licensing process is entitled to charge applicant utilities a filing fee to help cover administrative and hearing costs.⁴¹ Delays and alternative proposals increase these costs without affording the agency additional income.⁴² Also, if the agency rejects a utility's application, the utility would have to submit a revised application.⁴³ This only creates more work for the agency by forcing it to duplicate its effort.⁴⁴ Moreover, if the application qualifies for ANCR, the utility is permitted to recover costs related to pursuing a license.⁴⁵ These costs, which may increase with every delay in the licensing process, are then passed on to Florida utility customers. Hence, the agency "has an interest not only in approving initial [power] plant certification, but also in doing so quickly."⁴⁶

Second, under the Electrical Power Plant Siting Act, one agency determines the economic need for a new power plant⁴⁷ while another helps to determine whether adverse environmental impacts exist.⁴⁸

37. FLA. STAT. § 403.502 (2014).

38. *Id.* § 403.504 (2014); *see also* O'Neill, *supra* note 22, at 826–31, 834 ("FEPPSA has resulted in remarkably expedient power plant certification. ").

39. O'Neill, *supra* note 22, at 819–20; FLA. STAT. §§ 403.502, 403.509(3) (2014).

40. O'Neill, *supra* note 22, at 826–31, 834.

41. FLA. STAT. § 403.518 (2014). Currently, this agency is Florida's Department of Environmental Protection.

42. O'Neill, *supra* note 22, at 834.

43. *See id.* (explaining that "denial of an application would probably result in the proposal of an alternative site").

44. *See id.* (stating that refiling applications will require agencies "to duplicate their efforts").

45. *See* FLA. STAT. § 366.93(2) (2014) (requiring the commission to establish rules for recovering costs from licensing).

46. O'Neill, *supra* note 22, at 834.

47. *See* FLA. STAT. § 350.01 (2014) (establishing the Florida Public Service Commission); FLA. STAT. § 403.519(3) (establishing the Florida Public Service Commission as "the sole forum" for the determination of "the need for adequate electricity at a reasonable cost").

48. *See* FLA. STAT. § 403.504(1) (2014) (granting the Department of Environmental

Florida's Governor and Cabinet, acting as the Electrical Power Plant Siting Board,⁴⁹ then balance the need against the impact.⁵⁰ As noted earlier, the economic need for a power plant is not based solely on the present need for additional energy generating capacity.⁵¹ This policy makes sense if the only goal is to ensure that sufficient facilities exist to secure a consistent electricity supply.

The Act, however, does not assign value to adverse environmental impacts.⁵² In general, environmental externalities are not easily translated into financial terms.⁵³ As one Florida judge noted, “[i]t is like putting a known quantity on one side of a scale, and then weighing it against an unknown on the other side.”⁵⁴ Since economic need is simpler to quantify, it usually outweighs impacts to water quality, air, and wildlife.⁵⁵ Rather than balancing these interests against one another, the current arrangement creates further incentive for the Governor and Cabinet to base their licensing decision on short-term economic benefits.⁵⁶ Practically, “any determination of need preempts the balancing process.”⁵⁷ Therefore, regulatory incentives like ANCR reward utilities for proposing expensive capital projects, while policies like those embodied in portions of Florida's Electrical Power Plant Siting Act push these projects through the licensing process.

Protection the power to create rules “setting forth environmental precautions to be followed in relation to the . . . operation of electrical power plants”).

49. *Id.* § 403.503(8) (defining the “Board” as “the Governor and Cabinet”).

50. *Id.* § 403.509(3)(a)–(g) (articulating that, in evaluating applications, the board must attempt to “[e]ffect reasonable balance between the need for the facility as established pursuant to s. 403.519 and the impacts upon air and water quality, fish and wildlife, water resources, and other natural resources of the state resulting from the construction and operation of the facility . . .”).

51. *See Panda Energy Int'l v. Jacobs*, 813 So. 2d 46, 52, 56 (Fla. 2002) (approving the Public Service Commission's finding of need, based upon its consideration of economic needs and cost-effectiveness, in addition to the need for additional energy generating capacity).

52. *FEPPSA: Perpetuating Power Industry Supremacy*, *supra* note 222, at 830.

53. *Id.* at 832.

54. *Fla. Chapter of the Sierra Club v. Orlando Util. Comm'n*, 436 So. 2d 383, 391 (Fla. Dist. Ct. App. 1983) (Sharp, J., dissenting).

55. *See O'Neill*, *supra* note 22, at 833 (“hundreds of millions of dollars in savings easily outweigh an amorphous, economically unquantified environmental impact”).

56. *See Wade L. Hopping & Carolyn Songer Raepple, A Solution to the Regulatory Maze: The Transmission Line Siting Act*, 8 FLA. ST. U. L. REV. 441, 454 (1980) (speculating that, although the board is legally-bound to base its decisions on the evidence on the record, it “tends to be more sensitive to political realities than to legal niceties”).

57. *O'Neill*, *supra* note 22, at 830.

III. ADMINISTRATIVE PROCEDURE—LIMITED REVIEW OF COMPLEX FACTS

The judiciary also plays a role, although limited, in the electrical utility regulation arena. Generally, the courts act to provide a measure of accountability in our constitutional system. With specific regard to infrastructure projects, the judge's most common role is to review administrative decisions resulting from agency licensing processes.⁵⁸ This review normally occurs at the appellate level after an agency has taken final action,⁵⁹ which tends to preserve judicial economy. For the most part, the review focuses on the court's primary area of expertise: legal matters. Nevertheless, infrastructure projects in the energy industry commonly have far reaching impacts on consumers and the environment.⁶⁰ Factual determinations, made by the agency or submitted with the license application, typically drive the judiciary's understanding of these impacts.⁶¹

At the federal level, the actions of agencies like the Environmental Protection Agency, Nuclear Regulatory Commission, Army Corps of Engineers, and Fish and Wildlife Service are subject to judicial review pursuant to the Administrative Procedure Act.⁶² Under NEPA, agencies must first fulfill additional procedural obligations before proceeding with a project.⁶³ Then, the courts may review the adequacy of agency consideration concerning a project's environmental impact.⁶⁴

Florida law also provides for judicial review of state

58. *See, e.g.,* *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524–25 (1978) (establishing that the primary responsibility of courts in a lawsuit regarding agency decisions is to review them to see if the agency followed its own decision-making procedure).

59. *See* 5 U.S.C. § 704 (limiting judicial review of appellate courts to final agency actions).

60. *See, e.g.,* Steve Henn, *Sandy Reveals Troubled Past for Long Island Utility*, NAT'L PUB. RADIO, <http://www.npr.org/2012/11/17/165321973/sandy-reveals-troubled-past-for-long-island-utility> (last visited Oct. 11, 2014) (describing how mismanagement of the construction of the Shoreham nuclear power plant in Long Island led to a successful racketeering case against and the near-insolvency of a public utility company); *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 874 (arising from local concern that water used for cooling nuclear reactors discharged into an abutting estuary was hot enough to kill nearby organisms living in the estuary).

61. *See, e.g.,* *Vermont Yankee*, 435 U.S. 519, 545–46 (excluding factual determinations and sufficiency of agency procedure from the purview of reviewing federal courts).

62. *See* 5 U.S.C. §§ 701–706 (2012) (providing the terms for judicial review).

63. *See Vermont Yankee*, 435 U.S. at 553 (“NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action,” including allowing interveners to participate).

64. *See id.* at 551–58 (evaluating the adequacy of the administrative review process undertaken by the Atomic Energy Commission).

administrative actions.⁶⁵ To facilitate certain agency proceedings, such as licensing a power plant, Florida's Division of Administrative Hearings (DOAH) will assign an Administrative Law Judge (ALJ) to conduct a hearing on the matter.⁶⁶ The ALJ's duty is to conduct fact-finding, make conclusions of law, and recommend a disposition of the issue before the agency itself makes a decision.⁶⁷ These factual findings are especially significant when engineering projects and complex environmental impacts are at issue.⁶⁸

Once the ALJ has made a factual determination or weighed evidence, it is difficult, although not impossible, to reverse their decision.⁶⁹ Under Florida law, reviewing courts, and even the agency heads empowered to make the final licensing decision, generally cannot make their own factual findings or overturn the ALJ's findings unless they are unsupported by "competent substantial evidence."⁷⁰ Legally, "competent substantial evidence" refers to the quantity of evidence presented and not its quality. In licensing a power plant, if the applicant utility can provide "reasonable assurances" (essentially, "a substantial likelihood that the project will be successfully implemented"), an ALJ will usually determine that a fact is based on "competent substantial evidence."⁷¹ Depending on the circumstances, state appellate courts will review legal conclusions reached by the ALJ or the agency under either a *de novo* or "clearly erroneous" standard.⁷²

65. FLA. STAT. § 120.68 (2014).

66. The hearing overseen by the ALJ may involve disputed issues of material fact. It also presents the opportunity for parties to offer evidence that competes with the applicant's view of the project. See FLA. ADMIN. CODE ANN. r. 28-106.201 (1997).

67. FLA. STAT. § 120.57(1)(k) (2014).

68. See, e.g., David Abel, *NRC Staff Recommends Renewing License for the Pilgrim Nuclear Power Station in Plymouth*, BOSTON GLOBE (Apr. 27, 2012), <http://www.boston.com/metrosdesk/2012/04/27/nrc-staff-recommends-renewing-license-for-the-pilgrim-nuclear-power-station-plymouth/HouSwmBA5gkMESO94jyFYJ/story.html> (demonstrating that even an NRC license renewal for a nuclear power plant may take up to six years and may be the subject of further litigation).

69. See FLA. STAT. § 120.57(1)(k) (2014) (requiring that, in order to reject or modify findings of fact, the agency must first determine "from a review of the entire record . . . that the findings of fact were not based upon competent substantial evidence").

70. *Id.*

71. *Metro Dade Cnty. v. Coscan Fla., Inc.*, 609 So. 2d 644, 648 (Fla. Dist. Ct. App. 1992) (requiring the hearing officer to examine proposals to ensure that the project provides "reasonable assurance"); see *Hamilton Cnty. Bd. of Cnty. Comm'rs v. Fla. Dep't of Envtl. Regulation*, 587 So. 2d 1378, 1387 (Fla. Dist. Ct. App. 1991) (concluding that there was "competent, substantial evidence" in support of the agency decision).

72. FLA. STAT. § 120.68(7)(d) (2014). (remanding a case occurs upon a finding that an agency "erroneously interpreted a provision of law"); *Doyle v. Dep't of Bus. Regulation*, 794

Nonetheless, the facts (and environmental impacts) of a given project are essentially determined at an early stage. This is especially significant within energy and environmental law practices because the facts are generally more complex, and less easily discovered, than in the average civil trial.⁷³ For example, impacts to natural resources and the efficacy of mitigation techniques, which require sophisticated projections, are very important to the decision whether or not to license a power plant.⁷⁴ In addition, the normal rules of civil procedure do not govern the discovery process in these proceedings⁷⁵ and hearsay is allowed to play a greater role.⁷⁶ In short, complicated facts are being determined in a setting with fewer procedural safeguards. Accordingly, the licensing agency and the utility have tremendous influence in creating the factual record that defines a given project's impact.

IV. CONSEQUENCES FOR CONSUMERS AND THE ENVIRONMENT

The combination of policies discussed above has created a system that enables utility companies like Duke Energy to collect billions of dollars in fees, regardless of whether or not they decide to construct the power generating facilities they propose.⁷⁷ Individually, each of these bodies of law is internally logical. Furthermore, they serve legitimate government interests, including judicial economy, national energy independence, and, where nuclear power is concerned, a decreased reliance on fossil fuels.

The environmental impacts of facilities that do become operational, however, are substantial and direct. For example, a

So. 2d 686, 690 (Fla. Dist. Ct. App. 2001) (explaining situations where deference should not be afforded to agency decisions and electing to review an agency decision de novo).

73. See, e.g., Robert Guy Matthews, *Permits Drag On U.S. Mining Projects*, WALL ST. J. (Feb. 8, 2010), <http://online.wsj.com/articles/SB10001424052748703822404575019123766644644> (reviewing some of the complex environmental facts surrounding mining permits).

74. For guidance on federal agencies' handling of impacts and mitigation in the NEPA context, see Memorandum from Nancy H. Sutley, Chair of Council for Env'tl. Quality, for Heads of Fed. Dep'ts & Agencies (Jan. 14, 2011), available at http://energy.gov/sites/prod/files/NEPA-CEO_Mitigation_and_Monitoring_Guidance_14Jan2011.pdf.

75. In Florida, for example, DOAH maintains its own uniform rules of procedure. E.g., FLA. ADMIN. CODE ANN. r 28-106.101-106.217 (1997).

76. See, e.g., FLA. STAT. § 120.57(1)(c) (2014) ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence.").

77. See *Watchdog Report*, *supra* note 1 (reporting that Duke Energy was allowed to keep \$819.5 million with a further \$350 million slated for collection from its customers for the construction of a power plant, even though plans to build the plant were cancelled); see also Bachman, *supra* note 1 (citing examples of utilities "recoup[ing] their engineering and planning costs from customers years before any construction begins on new plants").

power plant must use millions of gallons of water per day to cool nuclear reactors.⁷⁸ Likewise, in Florida, the National Park Service recently issued a draft EIS that contemplates the possibility of constructing transmission lines, associated with expanding a power plant, within the current boundaries of Everglades National Park.⁷⁹ These impacts should not be glossed over despite regulators' desire to expedite new project approvals.

Additionally, there is little opportunity for utility customers to affect these industry practices. Meaningful participation in legal proceedings is not only difficult and cost-prohibitive, but may also require early intervention. The technical subjects at issue are partially to blame for this difficulty and expense. In Florida, a recent DOAH hearing related to licensing a power plant produced a transcript over 8,000-pages that cost about \$160,000 in total to purchase.⁸⁰ Obviously, the size of these records has consequences for the judicial review process. Similarly, the lack of transparency and shortage of opportunities for consumer participation are also significant problems that limit public accountability. Recently, Florida legislators rejected a proposal that would have required utilities to disclose ANCR fees to customers in their monthly electric bill.⁸¹ Moreover, public comment was not allowed at the regulatory hearing when utilities sought to restrict energy conservation programs.⁸²

V. CONCLUSION

Although a dependable electricity supply is critical to contemporary society, the incentive structure created by the policies

78. See Jenny Staletovich, *Feds OK Hotter Water to Operate Turkey Point Nuclear Reactors*, MIAMI HERALD (Aug. 5, 2014), <http://www.miamiherald.com/news/local/community/miami-dade/article1978565.html> (discussing a request to allow fourteen million gallons of water a day to remove heat created by power plants); Jenny Staletovich, *Hot Cooling Canals Threaten Shutdown of Turkey Point Nuclear Power Plants*, MIAMI HERALD (July 16, 2014), <http://www.miamiherald.com/news/local/community/miami-dade/article1975835.html> (recounting power plant request for "daily injections of millions of gallons" of water for cooling processes).

79. Draft Environmental Impact Statement for the Acquisition of Florida Power and Light Company Land in the East Everglades Expansion Area, Everglades National Park, Florida, 79 Fed. Reg. 2688, 2688-90 (Jan. 15, 2014). As an additional matter of disclosure, the power plant expansion mentioned above is the subject of litigation in which both authors of this comment are involved. The issues litigated in that case are not discussed here.

80. The cost of this document was split among four parties, including the City of Miami and the project applicant.

81. *Watchdog Report*, *supra* note 1.

82. See *Utilities Will Ask PSC*, *supra* note 25 (detailing the Public Service Commissioner's decision not to hold a public hearing, but to allow the public to submit written comments).

described above promotes expediting new power plant licensing at the cost of other goals like energy conservation, balanced environmental impact considerations, and greater industry innovation. Where ANCR statutes have been enacted, modern regulatory oversight of electric utilities disproportionately rewards pursuing expensive capital projects instead of energy-efficient programs, and instills a tendency to fast-track review within licensing agencies.

In Florida, the Electrical Power Plant Siting Act enables utilities to build new power plants when there is not a present need for the additional electric generation capacity.⁸³ If the power plant project qualifies for the state's version of nuclear cost recovery, additional fees are authorized based on prudent utility expenditures, without consideration of the "just and reasonable" standard that was designed to protect consumer interests.⁸⁴ Under this law, recovery is available for the entire licensing process and for preconstruction activities, even if the utility later decides to abandon the project.⁸⁵ This arrangement does not encourage thoughtful investment by utility companies.

Nationally, administrative procedure and processes for power plant licensing reinforce this behavior through expedited capital project review and insufficient opportunities to contest industry license applications. The difficulty of properly valuing important environmental resources further complicates the regulator's task.

The issue at hand is not that each of these individual policies is baseless, nor that power plants are poor infrastructure investments. The regulatory dilemma is far more complex than deciding whether a single project or policy is sound. Rather, it is the *combination* of policies presently in force that discourages accountability, efficient energy usage, and even grid reliability. This problem will persist so long as the significant financial and administrative incentives created under current law are left unbalanced.

83. See *Panda Energy Int'l v. Jacobs*, 813 So. 2d 46, 54 (Fla. 2002) (rejecting the argument that a utility must "demonstrate an actual present in-service need for all the electrical power to be generated at the proposed plant").

84. See *Duquesne Light Co.*, 488 U.S. at 315 (upholding a regulatory scheme which prevented cost recovery for cancelled power plants).

85. See FLA. STAT. § 366.93(6) (2014) (providing for recovery of "prudent preconstruction and construction costs" for a cancelled power plant). Recall that vendor and legal fees are costs associated with licensing that are eligible for recovery.