IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. SC11-2465

SOUTHERN ALLIANCE FOR CLEAN ENERGY,

Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION, FLORIDA POWER & LIGHT COMPANY AND PROGRESS ENERGY FLORIDA, INC.,

Appellees.

BRIEF OF AMICUS CURIAE THE NUCLEAR ENERGY INSTITUTE, INC. IN SUPPORT OF APPELLEES AND THE CONSTITUTIONALITY OF FLORIDA STATUTE 366.93

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

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STATEMENT OF IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

The Nuclear Energy Institute, Inc., is the organization responsible for establishing and advocating a unified policy on matters affecting the nuclear energy industry. The Institute represents the nuclear energy industry in litigation and on the regulatory aspects of generic operational and technical issues. Its members include all companies licensed to operate commercial nuclear power plants in the United States, as well as nuclear plant designers, architect/engineering firms, nuclear material licensees and other entities involved in the nuclear energy industry. The companies that are currently seeking to construct new U.S. nuclear generating capacity both in Florida and in other states are all members of the Institute.

The Nuclear Energy Institute has a clear interest in this case and can provide a unique and useful perspective on the issues presented. The 104 operating commercial nuclear power plants in the United States form an integral part of the nation's energy production infrastructure. The Florida statute being challenged in this appeal – § 366.93, Florida Statutes (2011) ("FS 366.93") – recognizes the importance of nuclear generation by providing an incentive for electric utilities in Florida to invest time, effort, and resources in additional nuclear production. The Institute has a strong interest in increasing nuclear output from currently operating plants ("power uprates"), in promoting new nuclear plant development, and, accordingly, in state and federal laws that encourage new nuclear generating capacity. The Institute submits this brief *amicus curiae* to provide the Court with

information that the Institute believes will be helpful to the Court's consideration of this case, including information about the benefits of nuclear powered electricity generation. We also address the appropriateness of investment incentives for new nuclear plant development and power uprates like those set forth in FS 366.93, as well as other state statutes that prescribe similar investment incentives for new nuclear generating capacity.

SUMMARY OF ARGUMENT

For decades, nuclear power has provided substantial economic, environmental and other benefits to citizens and businesses in Florida and across the country. Recognizing these benefits, and also that the creation of nuclear power plants involves high capital costs and long lead times, FS 366.93 provides for alternative cost recovery of costs prudently incurred in the siting, design, licensing and construction of new power plants, such as those being developed by appellees Florida Power & Light Co. and Progress Energy Florida, Inc.

The statute also allows alternative cost recovery for "uprate" projects that increase generating capacity at existing nuclear plants, such as FPL's uprate projects at the existing Turkey Point and Saint Lucie plants, which are already delivering additional megawatts for the benefit of Florida citizens, and will be completed in 2013. Appellant, SACE, seems to recognize the benefit being delivered by the uprate projects, because it does not challenge the cost recovery that the PSC allowed for those projects.

FS 366.93 simply recognizes that the high upfront capital costs of nuclear power generation may deter utilities from new nuclear construction, even though the initial costs are ultimately more than offset by the lower fuel and production costs of nuclear generation. Traditional utility ratemaking principles—which would apply absent FS 366.93—would not allow recovery of any costs until a new facility is placed in service. FS 366.93 mitigates that disincentive by allowing alternative recovery of a portion of upfront costs, namely preconstruction costs and the carrying costs of construction. FS 366.93 does not allow alternative recovery of construction costs, which will be borne, in the future, by those who will benefit from the plants when they are put into service.

At least nine other states have adopted statutes or regulatory orders that provide similar incentives to encourage the development of new nuclear generating capacity. Several of those states allow alternative cost recovery virtually identical to the recovery allowed by FS 366.63. In sum, FS 366.93 implements sound public policy by encouraging the development of new nuclear generation in Florida.

ARGUMENT

I. Section 366.93, Florida Statutes, Appropriately Encourages Development Of New Nuclear Power Plants and Power Uprates for Existing Nuclear Plants in Florida.

A. Nuclear Power Is Essential to the U.S. Energy Production Infrastructure.

Commercial nuclear power plants are vital to this country's energy production infrastructure because of their stability, output reliability and comparatively low electricity production costs. The 104 nuclear power plants operating in the United States today generate approximately 20% of the nation's electricity. These plants are an extremely important source of "base load" power. In contrast to other sources of electricity, the supply and cost of nuclear power do not fluctuate significantly because of weather, climate conditions, fuel costs, or the availability of imported energy supplies. Further, nuclear plants are capable of operating without interruption for extended periods – up to 24 months at a time – without shutting down. In addition, nuclear plants are currently estimated to be the lowest-cost producers of base load electricity.[1]

Nuclear power also offers important environmental advantages over other forms of electricity production, including the fact that nuclear power plants emit no greenhouse gases. This attribute is particularly important given the serious threats from climate change.[2] Today, nuclear plants generate more than 60% of all carbon-free electricity in the United States.[3] In 2011, nuclear generation helped the U. S. avoid emitting an estimated 613 million metric tons of carbon dioxide,

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1 *See Costs: Fuel, Operation, and Waste Disposal*, NUCLEAR ENERGY INST., http://www.nei.org/resourcesandstats/nuclear_statistics/costs (last visited June 7, 2012).

2 *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 521-23 (2007).

3 *See Environment: Emissions Prevented*, NUCLEAR ENERGY INST., http://www.nei.org/resourcesandstats/nuclear_statistics/environmentemissionsprevented/ (last visited June 7, 2012).

1.4 million tons of sulfur dioxide and 0.5 million tons of nitrous oxide.[4] To put this in perspective, the amount of carbon dioxide emissions avoided in 2011 by nuclear power plants in the U. S. is equal to taking 118 million passenger cars (90% of all passenger cars in the country) off the road for a year.[5] *See also* Answer Brief Of Appellee Florida Power & Light Co. ("FPL Br.) at 7 (Noting the Turkey Point Project will reduce carbon dioxide emissions by an estimated 287 million tons – "the equivalent of operating FPL's entire generating system with zero carbon dioxide emissions for 7 years.").

B. Section 366.93, Florida Statutes, Facilitates Development of Nuclear Generating Capacity in Florida.

The new nuclear generating capacity that appellees propose to construct will provide additional thousands of megawatts of needed base load electricity capacity, reduce air emissions and environmental compliance costs, and improve the long-term stability and reliability of the electric grid. These nuclear projects will provide jobs, contribute to the tax base, improve the mix of power plant fuel diversity in the state, and reduce Florida's dependence on fuel oil and natural gas (which are vulnerable to cost fluctuation and supply disruptions). *See, e.g.,* FPL Br. at 7 (Turkey Point Project will decrease use of natural gas by about 13% and

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4 *See Emissions Avoided By the U.S. Nuclear Industry Yearly*, NUCLEAR ENERGY INST., *available at* http://www.nei.org/filefolder/Emissions_Avoided_by_the_US_Nuclear_Industry_Yearly.xls (last updated May 2012).

5 *See Environment: Emissions Prevented*, *supra* note 3.

save customers about $1.1 billion in the first year). The alternative cost recovery provisions in FS 366.93 appropriately encourage utilities to build and operate new nuclear power plants to bring these advantages to Florida citizens and businesses.[6]

C. Section 366.93, Florida Statutes, Encourages Power Uprates for Existing Nuclear Plants in Florida.

The Florida statute also provides valuable benefits by facilitating "uprate" projects at existing nuclear power plants, which when completed will increase the flow of steam from the nuclear reactor to the turbine-generator, enabling the plant to produce more electricity. Power uprates provide significant capital improvements and an increase to a nuclear plant's generating capacity of 2–20% without increasing the plant's footprint. By allowing alternate cost recovery for this "new" nuclear power generation, FS 366.93 strongly encourages nuclear utilities to increase base load nuclear generation through these important investments. The Nuclear Regulatory Commission estimates that since 1977, over 6,200 megawatts of new nuclear capacity have been added through power uprate projects at existing U.S. nuclear plants.[7] In the past twelve years alone, the NRC has authorized 94 power uprates, yielding a cumulative capacity increase of 4,244

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6 *See* C.T. Whitman, "It's dangerous to depend on natural gas," CNN Money (May 9, 2012), http://tech.fortune.cnn.com/2012/05/09/christine-whitman-nuclear-energy/.

7 *See Approved Applications for Power Uprates*, NUCLEAR REGULATORY COMM'N, http://www.nrc.gov/reactors/operating/licensing/power-uprates/status-power-apps/approved-applications.html (last updated June 1, 2012).

megawatts.[8] (This is the rough equivalent of constructing four new nuclear plants.). The NRC is currently reviewing 19 applications for uprates, totaling approximately 1,476 megawatts of capacity.[9] Over the next five years, the NRC anticipates that companies will apply for more power uprates that could represent an additional 1,161 megawatts of new capacity.[10]

II. The Capital Costs And Long Lead Times Associated With Nuclear Plant Construction Make It Particularly Appropriate, And Necessary, To Provide Incentives For Utilities To Invest In The Development Of New Nuclear Plants.

Although the all-in economic cost of nuclear-powered generation of electricity is competitive with the cost of generation from other sources, upfront licensing and capital construction costs represent a greater percentage of the overall cost of nuclear generation. Nuclear generation makes up the capital cost differential in several ways. First, nuclear plants have comparatively low fuel costs. Second, nuclear power plants have high "capacity" factors, meaning they can run for long periods of time without need for maintenance shutdowns, thus spreading fuel and operating costs over a larger amount of electricity generated.

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8 *Id*.

9 *See Pending Applications for Power Uprates*, NUCLEAR REGULATORY COMM'N, http://www.nrc.gov/reactors/operating/licensing/power-uprates/status-power-apps/pending-applications.html (last updated June 1, 2012).

10 *See Expected Applications for Power Uprates*, NUCLEAR REGULATORY COMM'N, http://www.nrc.gov/reactors/operating/licensing/power-uprates/status-power-apps/expected-applications.html (last updated March 29, 2012).

Regarding fuel costs, in 2011 nuclear power plants paid an average of 0.68 cents (less than a penny) for nuclear fuel for every kilowatt-hour generated, compared to the 3.98 cents per kilowatt-hour that gas-powered generation plants paid for natural gas and the 2.52 cents per kilowatt-hour that coal-fired plants paid for coal. Taking account of operations and maintenance expenses as well as fuel costs, nuclear generation has long had lower total production costs than coal- or gas-powered generation (for 2011, total nuclear generation production costs: 2.19 cents/kilowatt hour; total gas generation production costs: 4.51 cents/kilowatt hour; total coal generation production costs: 3.23 cents/kilowatt hour).[11]

In addition to relatively high capital costs (which are offset by low operating costs), the licensing and construction of nuclear power plants typically take place over a much longer time period than that needed for other generation sources. It takes several years to obtain a Nuclear Regulatory Commission license for a new nuclear plant, and several more to complete construction. Even after such a license is obtained, the prospect of capital costs may prudently lead utilities to delay actual construction until market conditions favor the substantial investment involved. The result is comparatively long lead times for development of a nuclear power plant. For example, Southern Nuclear Operating Company, which recently commenced actual construction of two new nuclear power plants in Georgia at its

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[11] *See U.S. Electricity Production Costs and Components (1995–2011)*, NUCLEAR ENERGY INST., *available at* http://www.nei.org/filefolder/US_Electricity_Production_Costs_and_Components.xls (last updated May, 2012).

Vogtle site, first announced its intent to seek a combined construction and operating license from the NRC in 2005. After preparing the extensive safety and environmental analyses that comprise the license application and obtaining all related federal and state permits, Southern filed its application with the NRC in 2008, obtained that license in 2012, and projects that commercial operation of the two new plants will commence in 2016 and 2017, respectively.[12]

Given the high capital costs and comparatively long lead times for new nuclear plants, the need for alternative cost recovery provisions such as those enacted by the Florida legislature in FS 366.93 is manifest. Absent alternative cost recovery, traditional utility ratemaking principles would preclude the recovery of any costs of developing a new nuclear plant until the plant is completed and placed in service. Under that cost recovery regime, the capital costs and long lead times associated with nuclear plants can and often do deter new nuclear plant projects because of the need for the sponsoring utilities to absorb the substantial capital costs over the entire period prior to plant completion. This is just another way of saying that FS 366.93 provides a reasonable and necessary investment incentive for new nuclear generation, ensuring that the many advantages of safe, efficient nuclear power generation will accrue to Florida citizens and businesses.

Moreover, absent alternative cost recovery, upon completion of a new nuclear plant in Florida individual and business ratepayers would be subject to a

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[12] *See* Southern Company, *Nuclear Energy Milestones*, http://www.southerncompany.com/nuclearenergy/milestones.aspx.

significant “rate shock” from the sudden addition to the rate base of all plant costs in the year of completion. Enactment of FS 366.93 avoids that undesirable impact to Florida’s electric utility ratepayers. By contrast, the result sought by SACE would impose precisely that result on Florida’s ratepayers.

The AARP argues that FS 366.93 introduces generational inequities by requiring senior consumers to pay for investment in nuclear power plants that might not be completed in their lifetimes. *See* Corrected Brief *Amicus Curiae* of AARP at 17-20. AARP ignores the fact that construction costs are not recovered until a new plant goes into service (likely 2022-23), and right now, alternative recovery under the statute is only for preconstruction costs and carrying costs of construction. Construction costs will be borne, in the future, by ratepayers who will be benefiting from the new plants (and their efficiencies) at that time. Also, today’s customers benefit from the investments made in nuclear plants 30 years ago.

The AARP assertion also ignores that all investment in electric generating capacity of any kind constitutes an investment in future assets. Power plants of all types provide benefits throughout their lengthy operating lives, long after ratepayers who paid toward the cost of the facility have moved, gone out of business, or are deceased. Existing ratepayers also frequently benefit from investments by those who preceded them. In any event, the Florida legislature has prudently enacted alternative cost recovery to incentivize investment in new nuclear plants, and the AARP simply disagrees with that policy choice.

III. Other State Legislatures Have Enacted Similar Incentives To Encourage New Nuclear Plants, Including The Same Kind Of Alternative Cost Recovery Prescribed in FS 366.93.

Florida is not alone in proactively encouraging new nuclear plant development. Since 2006, at least nine states have adopted legislation or regulatory orders that support new nuclear plant construction. In that year, Florida became the first with enactment of S.B. 888, which became FS 366.93.[13] Louisiana[14], North Carolina[15], South Carolina[16] and Virginia[17] followed in 2007. The legislatures in Kansas[18] and Mississippi[19] passed their own legislation in 2008, while the most recent legislation was enacted in Georgia in 2009.[20] Idaho also enacted legislation in 2009 creating cost recovery mechanisms for all utility power plant construction, including new nuclear plants.

Many of these states have recognized the importance of capital cost recovery mechanisms and their value in "protect[ing] . . . ratepayers by enhancing the

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13 § 366.93, Florida Statutes (2011).

14 Louisiana Public Service Commission Docket No. R-29712 In re: Investigation into the ratemaking and generation planning implications of nuclear construction in Louisiana (2007).

15 2007 N. C. SESS. LAWS 397.

16 2007 S.C. ACTS 16.

17 2007 VA. ACTS 888.

18 2008 KAN. SESS. LAWS 174.

19 2008 MISS. LAWS 531.

20 2009 GA. LAWS 13.

certainty of investments in the infrastructure of electric utilities."[21] Furthermore, the Louisiana Public Service Commission specifically noted that "if nuclear power is going to be developed over the next five years, it is more than likely to occur in the Southeast, and not other parts of the country."[22] Like the Louisiana rule and other cost-recovery legislation, the Florida statute provides "a high degree of regulatory certainty for utilities considering developing nuclear power plants,"[23] encourages investment in increased base load power generation, and protects ratepayers from an inevitable rate shock when new nuclear plants come online.

The Florida statute is not unique in prescribing a cost recovery mechanism that allows recovery of certain costs for the purposes of facilitating new plant construction and avoiding rate shock when that plant comes online. South Carolina, Georgia, Mississippi, Louisiana, North Carolina, and Virginia allow utilities to petition for revised rates to recover capital costs and/or capital financing charges on the project, before construction of a new nuclear power plant is complete. Kansas allows utilities to recover projected development costs associated with potential nuclear power plant construction.

FS 366.93 allows utilities to recover, "through the capacity cost recovery clause . . . any preconstruction costs."[24] South Carolina's Base Load Review Act

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21 2007 S.C. ACTS 16.

22 Louisiana Public Service Commission Docket No. R-29712, at 3.

23 *Id*.

24 § 366.93(2)(a), Florida Statutes (2011).

contains similar language, giving a utility the opportunity to petition for a project development order that would allow it to incur, and recover, prudent preconstruction costs.[25] North Carolina permits utilities to recover capital costs leading to new nuclear plant construction by petitioning for review of project development costs at any point before filing an application for certification.[26] The decision to incur project development costs will be approved if the utility demonstrates that the decision is reasonable and prudent, and it can then include such costs in "the public utility's rate base" to be "fully recoverable through rates in a general rate case proceeding."[27] Kansas also allows recovery of costs prudently incurred during the development and planning stages.[28] The recoverable development costs can include preliminary engineering, study and feasibility costs, and repayments for major equipment and permitting costs.[29]

FS 366.93 also allows for recovery of "the carrying costs on the utility's projected construction cost balance associated with the nuclear . . . power plant." Like other state laws, full construction costs are not recoverable until the plant actually enters commercial operation. In South Carolina, once construction has begun, the utility can request revised rates to recover "its weighted average cost of capital applied to all or, at the utility's option, part of the outstanding balance of

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25 S.C. CODE ANN. § 58-33-225 (2011).

26 N.C. GEN STAT. 62-110.7(b) (2011).

27 *Id*. § 62-110.7(b), (c).

28 KAN. STAT. ANN. § 66-128q (2011).

29 *Id*.

construction work in progress."[30] In Georgia, utilities can recover from customers "the costs of financing associated with the construction of a nuclear generating plant which has been certified by the commission."[31] Under the Louisiana rule, once construction of a new nuclear plant has been certified a utility is automatically entitled to recover a return on construction work in progress.[32] Virginia permits utilities to petition for an enhanced return on common equity to be applied to the allowance for funds used during construction and construction work in progress, but to no other costs of the facility, prior to beginning commercial operations.[33] North Carolina permits utilities to include construction work in progress in the cost of the utility's property to be considered when fixing rates during a general rate case.[34]

IV. Section 366.93, Florida Statutes, Accounts For The Possibility That A Nuclear Plant May Not Be Completed In Order To Make The Alternative Cost Recovery Incentive Effective.

Appellant SACE complains that FS 366.93 allows alternative recovery of new nuclear plant development costs even in the event a plant under development ultimately is not completed. But that feature is necessary to make the investment incentive of alternative cost recovery effective. Requiring repayment of a utility's

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30 S.C. CODE ANN. § 58-33-280(B) (2011).

31 GA. CODE ANN. § 46-2-25(c.1)(1) (2011).

32 Louisiana Public Service Commission Docket No. R-29712, § 3.310 (2007).

33 VA. CODE ANN. § 56-585.1(A)(6) (2011).

34 N.C. GEN STAT. 62-133(b)(1) (2011).

nuclear plant development costs in the event of plant cancellation would provide no financial incentive at all to the utility – and in fact, would impose essentially the same deterrent to nuclear plant development that existed before FS 366.93 was enacted. Recognizing this, the Florida legislature provided explicitly in the statute that "the utility shall be allowed to recover all prudent preconstruction and construction costs incurred" even in the event that "the utility elects not to complete or is precluded from completing construction of the nuclear power plant."

Between 1978 and 1985, during the initial wave of U.S. nuclear power plant construction, a number of projects (some only on the drawing board) were cancelled. There are many reasons why highly complex and expensive construction projects such as nuclear power plants were not completed in the past. In the U.S., changing economic conditions, financial challenges, changes in the predicted need for power, as well as regulatory and licensing issues during this time period, all contributed to those cancellations. While utilities were generally permitted to recover the costs related to the cancelled plants through an increase in rates, in some instances utilities were not allowed to recover those costs, which resulted in significant economic loss. Today, due to standardization of plant design and a new streamlined NRC licensing framework,[35] the potential for plant cancellation is vastly reduced. Nonetheless, given the industry's historical

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[35] *See* 10 C.F.R. Part (2012) (providing for issuance of a combined construction and operating license).

experience, the Florida legislature correctly deemed it unlikely that public utilities would be willing to undertake the substantial economic risks of building new nuclear generating capacity without real assurance that they could still obtain reimbursement of their prudently incurred costs if the project were cancelled. Absent that provision, development of new nuclear power plants and power uprates for existing nuclear plants in Florida would likely be thwarted.

Notably, similar to the provision in FS 366.93, the U.S. Federal Energy Regulatory Commission has recognized by Rule that in order to render effective the investment incentives provided to electric utilities for new transmission facilities, there must be an opportunity to recover prudently incurred development and construction costs even if a particular project is ultimately not completed. *See Promoting Transmission Investment Through Pricing Reform,* Order No. 679, *FERC Stats. and Regs. [Regulations Preambles 2006-2007]* ¶ 31,222 at P 155 (2006). Under that FERC Rule, utilities may petition for various incentives to support their investment in new electric transmission facilities, including recovery of costs in the event a project is cancelled. *Id. See also Pacific Gas and Elec. Co.*, 123 FERC ¶ 61,067 at p. 36 (2008) (approving recovery of project abandonment costs).

Most of the other state statutes that encourage nuclear plant development, discussed in Section III above, also parallel FS 366.93 in specifically providing for recovery of prudently incurred costs when a nuclear plant construction project cannot be completed. Under the South Carolina statute, if a nuclear plant project is abandoned once recovery of the cost of construction has been approved through a

base load review order, the capital costs and allowance for funds used during construction are recoverable.[36] Mississippi allows recovery of prudently incurred costs throughout the construction of a new plant "whether or not the construction of any generating facility is ever commenced or completed, or the generating facility is placed into commercial operation."[37] However, once a utility has been granted a certification for a new plant, it cannot cancel or abandon construction of the facility without a finding by the Mississippi utility commission "that construction is no longer in the public interest."[38] In North Carolina, if construction of a nuclear plant is cancelled, and it has been subject to ongoing review by the state's commission, and no prudency concerns arose, then the utility can recover those approved costs of construction that were actually incurred prior to cancellation.[39] The Louisiana rule permits recovery of prudently incurred costs unless the state's commission concludes that cancellation would violate the public interest.[40]

CONCLUSION

The alternative cost recovery prescribed by FS 366.93 implements sounds public policy – by encouraging the development of new nuclear generation in

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36 S.C. CODE ANN. § 58-33-280(K) (2011).

37 MISS. CODE ANN. § 77-3-105(1)(a)(2011).

38 *Id*. § (1)(e)

39 N.C. GEN. STAT. §62-110.1(f)(2) (2011).

40 Louisiana Public Service Commission Docket No. R-29712, §§ 3.1.11, 3.2.11, 3.3.11 (2007).

Florida – and the statute is more than specific enough to pass constitutional muster.

SACE's arguments to the contrary should be rejected.

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CERTIFICATE OF SERVICE

I certify that on June 8, 2012, an original and 8 copies of this Brief of Amicus Curiae were sent by overnight mail to the Clerk of the Court for filing, and a copy was filed with the Court electronically pursuant to AOSCO4-84, and that copies of the brief have been served by U.S. Mail on the following attorneys of record:

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief of *Amicus Curiae* for The Nuclear Energy Institute, Inc. complies with the type-volume, typeface and type style requirements of Rule 9.210(a). The brief has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point.

Arthur J. England, Jr.