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Public Service Commission

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DATE: April 14, 2011

TO: Office of Commission Clerk (Cole)

FROM: Division of Economic Regulation (Breman, Laux)
Office of the General Counsel (Young, Williams)
Division of Regulatory Analysis (Garl)

RE: Docket No. 100009-EI – Nuclear cost recovery clause.

AGENDA: 04/26/11 – Regular Agenda – Decision on Motion for Reconsideration – Oral Argument Not Requested – Participation at the Discretion of the Commission

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\100009.RCM.DOC

Case Background

On March 1, 2010, Progress Energy Florida, Inc. (PEF) and Florida Power & Light Company (FPL) filed petitions seeking prudence review and final true-up of the 2009 costs for certain nuclear power plant projects pursuant to Rule 25-6.0423, Florida Administrative Code (F.A.C.), and Section 366.93, Florida Statutes (F.S.). On April 30, 2010, PEF filed a petition seeking approval to recover estimated 2010 costs and projected 2011 costs. On May 3, 2010, FPL filed its petition seeking approval to recover estimated 2010 costs and projected 2011 costs. Both companies requested recovery of these costs through the Capacity Cost Recovery Clause (CCRC).

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Intervention in the 2010 NCRC proceeding was granted to the following parties: the Office of Public Counsel (OPC), Florida Industrial Power Users Group (FIPUG), White Springs Agricultural Chemicals Inc. d/b/a PCS Phosphate – White Springs (PCS Phosphate), Southern Alliance for Clean Energy (SACE), and the Federal Executive Agencies (FEA). Testimony and associated exhibits were filed by PEF, FPL, OPC, SACE, and Commission staff.

The evidentiary hearing for the PEF portion of the 2010 NCRC was held on August 24-25, 2010. The FPL portion of the evidentiary hearing was held on August 26-27, 2010 and September 7, 2010. During the FPL portion of the hearing FPL, OPC, and FIPUG filed a motion to defer the resolution of all FPL issues until the 2011 NCRC, except for Issue 3A, which is an issue that impacted both FPL and PEF:

> Does the Commission have the authority to require a "risk sharing" mechanism that would provide an incentive for a utility to complete a project within an appropriate, established cost threshold? If so, what action, if any, should the Commission take?

On September 7, 2010, the Commission approved the motion.[1] All parties, excluding FEA, filed post-hearing briefs on September 10, 2010.

Subsequently, on October 26, 2010, the Commission approved staff's recommendation addressing one legal issue and all the factual issues pertaining exclusively to PEF. However, the Commission deferred Issue 3A because the resolution of this issue would impact both FPL and PEF, and the Florida First District Court of Appeal (First DCA) stayed all matters pertaining to FPL on September 10, 2010.[2] On January 4, 2011, the First DCA lifted the stay. On February 2, 2011, Order No. PSC-11-0095-FOF-EI (Final Order) was issued finding that the Commission did not have the authority to require a risk-sharing mechanism that would provide an incentive for a utility to complete a project within an appropriate, established cost threshold (Issue 3A).[3]

On February 11, 2011, PCS Phosphate filed a Motion for Reconsideration seeking reconsideration of the Commission's decision on Issue 3A. On February 18, 2011, PEF and FPL filed separate responses in opposition to PCS Phosphate's Motion for Reconsideration. No party requested oral argument. Pursuant to Rule 25-22.0022, F.A.C., oral argument is not permitted unless it is requested by a party at the time of the motion or unless the Commission believes that oral argument will assist in its decision. Staff believes that the parties' filings clearly present their positions and that oral argument is not necessary. However, it is within the Commission's discretion to request oral argument if so desired. The parties' arguments and staff's analysis are detailed below.

The Commission has jurisdiction over this subject matter pursuant to the provisions of Chapter 366, Florida Statutes, including Sections 366.04, 366.05, 366.06, and 366.93, Florida Statutes (F.S.).

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[1] TR 1813.
[2] Florida Power & Light Company v. Public Service Commission, Case No.: 1D10-4757 (Fla. 1st DCA. 2010)
[3] Order No. PSC-11-0095-FOF-EI, issued February 2, 2011, in Docket No. 100009-EI, In re: Nuclear cost recovery clause.

Discussion of Issues

Issue 1: Should the Commission grant PCS Phosphate's Motion for Reconsideration?

Recommendation: No. In reaching its conclusion that it did not have the authority to require a risk sharing mechanism that would provide an incentive for a utility to complete a project within an appropriate, established cost threshold, the Commission considered and evaluated all the relevant Florida Statutes and case law, the parties' briefs, and record evidence. Because the Commission did not overlook or fail to consider the relevant Florida Statutes, case law, parties' briefs, or evidence in the record, the motion for reconsideration should be denied. (Young)

Staff Analysis:

Standard of Review

The standard of review for a motion for reconsideration is whether there was a fact or law that the Commission overlooked or failed to consider in reaching its decision. The standard of review for a motion for reconsideration, often cited by the Commission in considering motions for reconsideration, is:

> Whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. See, Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959), citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817(Fla. 1st DCA 1958).[4]
>
> In Diamond Cab, the Court stated:
>
> The purpose of a petition for rehearing is merely to bring to the attention of the trial court, or in this instance, the administrative agency, some point which it overlooked or failed to consider when it rendered its order in the first instance . . . . It is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or order . . . .

Id. at 891.

[4] Order No. PSC-07-0783-FOF-EI, issued September 26. 2007, in Docket No. 050958-EI, In re: Petition for approval of new environmental program for cost recovery through Environmental Cost Recovery Clause by Tampa Electric Company; Order No. PSC-07-0561-FOF-SU; issued July 5, 2007, in Docket No. 060285-SU, In re: Application for increase in wastewater rates in Charlotte County by Utilities, Inc. of Sandalhaven; Order No. PSC-06-1028-FOF-EU, issued December 11, 2006, in Docket No. 060635-EU, In re: Petition for determination of need for electrical power plant in Taylor County By Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee.

In Jaytex Realty, the court sets forth the limited nature of motions for reconsideration, stating:

> The sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision. Judges are human and subject to the frailties of humans. It follows that there will be occasions when a fact, a controlling decision or a principle of law even though discussed in the brief or pointed out in oral argument will be inadvertently overlooked in rendering the judgment of the court. There may also be occasions when a pertinent decision of the Supreme Court or of another District Court of Appeal may be rendered after the preparation of briefs, and even after oral argument, and not considered by the court. It is to meet these situations that the rules provide for petitions for rehearing as an orderly means of directing the court's attention to its inadvertence.

Jaytex Realty, 105 So. 2d at 818.

Furthermore, the court explained that it is not necessary to respond to every argument and fact raised by each party, stating:

> An opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant. For this reason it frequently occurs that an opinion will discuss some phases of a case, but will not mention others. Counsel should not from this fact draw the conclusion that the matters not discussed were not considered.
>
> It is not the purpose of these remarks to discourage the filing of petitions for rehearing in those cases in which they are justified. If we have, in fact, inadvertently overlooked something that is controlling in a case we welcome an opportunity to correct the mistake. But before filing a petition for rehearing a member of the bar should, as objectively as his position as an advocate will permit, carefully analyze the law as it appears in his and his opponent's brief and the opinion of the court, if one is filed. It is only in those instances in which this analysis leads to an honest conviction that the court did in fact fail to consider (as distinguished from agreeing with) a question of law or fact which, had it been considered, would require a different decision, that a petition for rehearing should be filed.

Id. at 819.

Florida Statute Sections 366.93(2), F.S.

> Section 366.93(2), F.S., states in pertinent part:
>
> Within 6 months after the enactment of this act, the commission shall establish, by rule, alternative cost recovery mechanisms for the recovery of costs incurred in the siting, design, licensing, and construction of a nuclear power plant.... Such

> mechanisms shall be designed to promote utility investment in nuclear power plants and allow for recovery in rates of all prudently incurred costs.

As discussed below, staff believes that PCS Phosphate's motion should be denied because it fails to identify a point of law or fact that the Commission overlooked or failed to consider when it rendered its decision.

The Nuclear Cost Recovery Statute and the Commission's Rate Setting Authority

In its motion, PCS Phosphate contends that the Commission's decision is incomplete and in error. PCS Phosphate asserts that in its discussion regarding the nuclear cost recovery statute, Section 366.93, F.S., the Commission's analysis begins and ends with the assertion that specific statutory provisions control over more general ones. PCS Phosphate argues that the error in the Commission's determination is that the presence of a specific provision, such as the nuclear cost recovery statute, does not end the legal analysis, but signifies where that analysis must begin. It contends that given the recitation of its broad rate-setting power, the nuclear cost recovery statute does not trump the Commission's over-arching public interest mission under Chapter 366, F.S. PCS Phosphate asserts that the extraordinary risk and cost shifting from the utility to ratepayers due to the nuclear cost recovery statute, as well as the evident high cost and schedule uncertainties associated with new nuclear power construction, compel concerted Commission action to ensure that a utility's continued pursuit of nuclear construction will yield just and reasonable rates for consumers. Thus, the Commission must look to reconcile the nuclear cost recovery statute with that broader rate-setting responsibility.

PEF contends that PCS Phosphate's motion fails to meet the applicable reconsideration standard because PCS Phosphate reargues issues that were presented to the Commission and which the Commission explicitly rejected in the Final Order.

FPL contends that PCS Phosphate's motion fails to meet the legal standard for a motion for reconsideration and should be denied. FPL asserts that PCS Phosphate fails to point to any issue of fact or law that was overlooked. Rather, PCS Phosphate's claim that the Commission committed "legal error" is actually a reargument of its position that the Commission considered and rejected.

Staff believes that these arguments advanced by PCS Phosphate in its motion are re-arguments of positions it asserted in its post hearing brief, which the Commission considered and rejected. For example, in its post hearing brief, PCS Phosphate stated "[t]he Commission must always reconcile the requirements of the nuclear cost recovery rule with its over-arching responsibility to ensure that utility rates charged to consumers are fair, just and reasonable." PCS Phosphate makes the same argument in its Motion for Reconsideration, asserting that "the Commission must look to reconcile the nuclear cost recovery statute with that broader rate-setting responsibility of setting rates that are fair, just and reasonable." Thus, PCS Phosphate's motion fails to meet the applicable standard for reconsideration.

Sufficiency of the Commission's Interpretation of Legislature's Intent.

PCS Phosphate also asserts that its motion should be granted because the Commission legal analysis was insufficient and misinterprets the Legislature's plain intent. PCS Phosphate contends that the Final Order erred in finding that a specific statute always trumps more general provisions, and in Florida this resolution of apparently conflicting requirements applies only where there is an "irremediable inconsistency" between the two statutes. People Against Tax Revenue Mismanagement v. County of Leon (PATRM), 583 So. 2d 1373, 1377 n.5 (Fla. 1991). PCS Phosphate asserts that the apparent inconsistency between the nuclear cost recovery statute and the general rate making statute requires an attempt to interpret the provisions in a manner that will avoid the inconsistency and carry out the legislative intent. According to PCS Phosphate, in this instance the Legislature expressly aimed to promote new nuclear power plant construction while ensuring reasonable electric power costs for Florida consumers. PCS Phosphate argues that the Final Order does not endeavor to reconcile the specific nuclear provisions with that basic statutory obligation, and the Commission should have attempted to harmonize two related but potentially conflicting statutes, and give effect to both. PCS Phosphate cites Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249 (Fla. 1987), as precedent for this proposition. PCS Phosphate asserts that the Legislature should be presumed to have passed any new enactment with full awareness of the existing statutory scheme, and without evidence to the contrary, the Commission should not assume that its entire rate-setting statutory scheme is undermined by the nuclear cost recovery statute.

PEF contends that this argument advanced by PCS Phosphate was considered and rejected by the Commission. PEF states that the Commission determined that the Legislature's enactment of Section 366.93, F.S., controlled its actions in the nuclear cost recovery arena. PEF asserts that while PCS Phosphate believes that the Commission's determination was incorrect, disagreement with the Final Order is not grounds for reconsideration. Moreover, PEF contends that PCS Phosphate's Motion should also be denied because it contains erroneous legal conclusions and the cases cited by PCS Phosphate do not support its argument.

FPL contends that PCS Phosphate's misinterpretation of Section 366.93, F.S., appears to form the basis of its position that a risk sharing mechanism, established pursuant to the Commission's general authority to ensure fair, just and reasonable rates, could be read in harmony with the cost recovery framework of Section 366.93, F.S. Moreover, FPL asserts that PCS Phosphate's position fails to meet the legal standard for reconsideration because the Final Order on its face makes it clear that the Commission has considered, addressed and rejected PCS Phosphate's position.

Staff believes that PCS Phosphate's argument fails to meet the applicable standard for a motion for reconsideration. First, while the Final Order did not cite every case and/or argument that serves as precedent on the topic of statutory construction when dealing with a general and specific statute, the Commission considered and rejected the arguments advanced by PCS Phosphate. Specifically, the Commission considered and rejected PCS Phosphate's and the other Intervenors' arguments that the Commission should reconcile its plenary authority to ensure fair, just, and reasonable rates and the specific directives of the nuclear cost recovery statute. The Commission's Final Order stated:

> we agree with the intervenors that we have broad authority and discretion to set fair, just, and reasonable rates and charges. . . . Section 366.93, F.S., however, is unambiguous in its language as it relates to recovery of costs, and it restricts our authority by statute from implementing a risk sharing mechanism that would preclude a utility from recovery of all prudently incurred costs, despite our authority to set fair, just, and reasonable rates per Storey v. Mayo.

Final Order, at p. 8. As stated in Jaytex Realty, 105 So. 2d at 818, it is not necessary to respond to every argument and fact raised by each party. Thus, the PCS Phosphate motion should be denied because it did not identify a point of fact or law the Commission overlooked or failed to consider when it rendered its decision.

Moreover, staff believes that PATRM and Palm Harbor Special Fire Control District, support the Commission's decision that the specific nuclear statute, Section 366.93, F.S., which explicitly provides for recovery of all prudently incurred costs, and governs the Commission's action in the area of nuclear cost recovery. For example, in PATRM, a group sought to invalidate a local referendum which passed an optional sales tax. Part of the dispute on appeal was which statute controlled as it related to or regarding who can be a defendant in the case. The two statutes, one general and the other specific, allowed for different defendants. The court, charged with interpreting both statutes, held that a specific statute will prevail over a general statute to the extent of any irremediable inconsistency, and because no inconsistency existed, both statutes control. Like PATRM, the Commission has consistently reconciled statutes that cover the same general subject matters. However, as PEF stated in its response, staff does not believe this statement means what PCS Phosphate suggested. First, two statutes with the same general topic would rarely be wholly incompatible. Thus, staff believes the Court meant that to the extent any inconsistencies appear, the specific statute controls. Second, when the Commission is setting a utility's rates and charges, it is required to set rates and charges that are fair, just, and reasonable, and it is given considerable discretion by the Legislature to do so. However, as stated by PEF, in the case of the recovery of nuclear costs, the Legislature has spoken directly to the question and expressly provided by the nuclear cost recovery statute that all prudently incurred nuclear costs as defined by the statute are to be recovered by the utility. Thus, the Commission's authority to prevent a utility from recovering prudently incurred nuclear costs is limited.

Recovery of Prudently-incurred Cost Under Section 366.93(2), F.S.

PCS Phosphate asserts that Section 366.93, F.S., is intended to establish alternative cost recovery mechanisms, but nothing in the statute changes the Legislature's standard for approving a utility's rates as fair, just, and reasonable. PCS Phosphate argues that contrary to the utilities' assertions, the provision does not guarantee that the utility recover all of its prudently-incurred costs; instead, the Legislature used a permissive term when it stated that the alternative cost recovery mechanism need only "allow" for the recovery of such costs. Moreover, Section 366.93, F.S., can be read in a way that no conflict exists between it and the Commission's general rate-making authority. Thus, the application of the general versus specific statute distinction in the Final Order was legal error, justifying Commission reconsideration of its Final Order. PCS Phosphate contends that

Section 366.93, F.S., should be read in a manner that avoids or minimizes the conflict upon which the Commission's decision is premised.

PEF asserts that PCS Phosphate takes a single word, "allow," in Section 366.93, F.S., out of the context of the entire sentence, to argue that it demonstrates cost recovery is permissive, not mandatory. PEF contends that no authority supports reading a single word out of the context of the statute as a whole, and PCS Phosphate cites none. PEF argues that the single word "allow" that PCS Phosphate takes out of context occurs in the quoted sentence below, which, read in its entirety, shows the mandatory nature of the statutory recovery expressly authorized by the Legislature: "Such [alternative cost recovery] mechanisms shall be designed to promote utility investment in nuclear or integrated gasification combined cycle power plants and allow for the recovery in rates of all prudently incurred costs . . ." Section 366.93(2), F.S.

FPL contends that PCS Phosphate's motion is premised upon the flawed representation that Section 366.93, F.S., does not guarantee that the utility recover all of its prudently incurred costs. FPL argues that is precisely what the statute does. FPL asserts that PCS Phosphate's argument that the alternative cost recovery mechanism need only 'allow' for the recovery of such cost, is misplaced. FPL argues that Section 366.93(2), F.S., states that the Commission shall establish an alternative cost recovery mechanism that shall allow for the recovery of all prudently incurred costs. The language is therefore mandatory, not permissive, with respect to allowing the recovery of all prudently incurred costs.

Again, staff believes PCS Phosphate's motion should be denied because it fails to identify a point of fact or law that the Commission failed to consider when rending its decision. First, the Final Order specifically discussed the Commission's harmonization of the two statutes and decided that it does not have the statutory authority to implement a risk sharing mechanism that would prevent a utility from recovering all prudently incurred costs, pursuant to Section 366.93, F.S. In the Final Order, the Commission cited examples of harmonization where applicable between the two statutes:

> However, we find that we do have the authority to address options relating to the timing of recovery and matters associated with rate impacts over the term of the projects, prior to and subsequent to the commercial in service dates of the nuclear power plants. For example, in Order No. PSC-09-0783-FOF-EI, issued November 19, 2009, in Docket No. 090009-EI, In re: Nuclear cost recovery clause, we approved PEF's request to establish a rate management plan whereby costs approved for recovery could be deferred to a later date in order to manage the rate impact for PEF's customers in a given year.[5] This authority is derived from our broad ratemaking powers to set fair, just, and reasonable rates and charges pursuant to Section 366.04, F.S., and does not conflict with the ultimate directive of Section 366.93, F.S., to allow recovery of all prudently incurred costs.

[5] In 2009, PEF requested a midcourse correction to defer $198 million of nuclear cost included in the Capacity Cost Recovery Clause in order to mitigate rate impact to its customers. The midcourse correction was approved by Order No. PSC-09-0208-PAA, issued April 6, 2009, in Docket No. 090001-EI, In re: Fuel Adjustment Clause.

Final Order, p. 9. Moreover, the Commission has and will continue to read Section 366.93, F.S., in a manner to avoid and minimize any statutory conflicts, as contemplated in the Final Order.

Second, PCS Phosphate's argument that the alternative cost recovery mechanism need only "allow" for the recovery of such costs was considered and rejected by the Commission. The Final Order stated:

> The statute expressly provides that a utility shall be allowed to recover all prudently incurred costs. The statute is silent regarding a risk sharing mechanism. . . . . [W]e find that the only statutory requirement is that the utility prove that its costs in new nuclear power plant capacity were prudently incurred.

Final Order at 7. Thus, the Commission expressly held that Section 366.93, F.S., restricts its authority from implementing a risk sharing mechanism that would preclude a utility from recovery of all prudently incurred costs.

Risk Sharing Mechanism

PCS Phosphate asserts that the Commission may have contemplated particular forms of risk sharing mechanisms that conflict with the recovery of all "prudently incurred" costs, the Commission should not confuse a potentially conflicting scenario with its general authority to take action required to safeguard consumer interests. PCS Phosphate also argues that the issue was posed as an abstract legal issue and should have been posed as a question concerning the legality of a specific rate-making mechanism. Thus, it understood the issue was to be deferred to subsequent NCRC dockets. Therefore, on reconsideration, PCS Phosphate requests that the Commission conclude that it retains its full complement of powers to oversee and control a utility's recovery of costs, including those costs associated with nuclear construction activities. Also, because any risk-sharing mechanism would still "allow" a utility to recover all of its prudently-incurred costs, based upon the satisfaction of certain prerequisites, the Commission should have concluded it has the authority to impose such a condition on a utility's recovery of nuclear costs. PCS Phosphate requests that the Commission delete "Section II, Risk Sharing Mechanism" from its Final Order, or determine that the issue is not ripe for determination. In the alternative, PCS Phosphate requests that the Commission modify the Final Order to state that it will continue to reconcile nuclear cost recovery under Section 366.93, F.S., to be consistent with the public interest, and that it will consider such alternative cost recovery mechanisms as may be deemed appropriate to carry out its public interest mission.

PEF and FPL assert that PCS Phosphate's Motion should be denied because the Motion asks the Commission to rewrite Section 366.93, F.S. by adding additional factors not placed in the statute by the Legislature. PEF and FPL contend that the Commission does not have the authority to do so.

Staff believes that these arguments advanced by PCS Phosphate fail to meet the standard upon which a motion for reconsideration could be granted. PCS Phosphate does not identify a point of law or fact the Commission overlooked or failed to consider when it rendered its decision. First, staff believes the Commission's authority is limited under Section 366.93(2), F.S., in creating a risk sharing mechanism that would prevent a utility from recovering prudently incurred costs. Staff would note that the Final Order does not prohibit PCS Phosphate, or any

party, from proposing a specific risk-sharing mechanism that is consistent with Section 366.93, F.S. Said mechanism cannot prevent a utility from recovering prudently incurred cost. Consequently, staff believes that no modification of the Final Order is necessary to address the specific relief PCS Phosphate requests.

In conclusion, staff recommends that the Commission deny PCS Phosphate's Motion for Reconsideration in its entirety. PCS Phosphate's motion fails to identify a point of law or fact that the Commission has failed to consider when rendering its decision that it did not have the authority to require a risk sharing mechanism that would provide an incentive for a utility to complete a project within an appropriate, established cost threshold. The motion simply reargues matters the Commission already addressed. The Commission considered and evaluated all the relevant Florida Statutes, case law, parties' briefs, and record evidence in making its decision.

Issue 2: Should this docket be closed?

Recommendation: Yes. Upon expiration of the time for appeal, if no appeal has been taken, this docket should be closed. (Young)

Staff Analysis: Upon expiration of the time for appeal, if no appeal has been taken, this docket should be closed.