

**BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION**

**In Re: Fuel and Purchased Power )  
Cost Recovery with Generating )  
Performance Incentive Factor )**  
\_\_\_\_\_)

**DOCKET NO. 140001-EI  
Filed: November 5, 2014**

**RESPONSE OF  
WHITE SPRINGS AGRICULTURAL CHEMICALS, INC.  
d/b/a PCS PHOSPHATE TO THE FPL MOTION TO DENY PARTICIPATION BY  
PCS PHOSPHATE AND TO STRIKE THE PREHEARING STATEMENT OF  
PCS PHOSPHATE FILED IN ACCORDANCE WITH COMMISSION ORDERS**

By motion dated November 3, 2014, Florida Power & Light Company (“FPL”) filed a motion (“FPL Motion”) to deny White Springs Agricultural Chemicals Inc., d/b/a PCS Phosphate (“PCS,” “PCS Phosphate,” or “White Springs”) an opportunity to be heard on fuel clause issues that were deferred from the adjustment clause hearing held on October 22, 2014, but that remain issues in this docket. The deferred issues are scheduled to be addressed at a hearing to be held on December 1-2, 2014. FPL’s motion asserts that PCS, although an active party in Docket No. 140001-EI and in prior fuel clause proceedings, lacks standing to participate. FPL further moves to strike the prehearing statement concerning the deferred fuel clause issues that PCS Phosphate filed on October 27, 2014, in accordance with the Commission’s Orders Establishing Procedure in this docket (Order Nos. PSC-14-0084-PCO-EI and PSC-14-0439-PCO-EI).

As is explained below, the standing of PCS Phosphate to participate as a party in the fuel clause proceeding was confirmed by a final Commission order, is well established, and in all other respects is in accordance with Commission rule and practice. The Commission’s order granting the PCS petition to intervene in fuel clause issues does not limit the issues upon which PCS may take a position in this consolidated docket. As an attack on PCS Phosphate’s

continuing right to intervene as a party in fuel clause proceedings, which is where the gas exploration issues reside, the FPL Motion is untimely and unfounded and should be summarily rejected.

Further, although presented as a motion challenging the standing of an entity to intervene in the fuel clause proceeding, FPL really seeks to eject an established party from an ongoing proceeding (after respecting that Party's rights in the proceeding concerning the gas exploration proposal for months). To arrive at that curious and untenable spot, FPL relies upon a transparently inaccurate statement of facts and a theory of regulatory procedure that is impractical, utterly lacking in legal support, and designed to deny PCS due process and an adequate opportunity to be heard as required by Florida law. Finally, FPL's motion inappropriately seeks to deny PCS an opportunity to be heard on issues that plainly involve landmark energy and regulatory policy issues that concern all Florida consumers.

In the briefest terms, PCS Phosphate has indisputable standing to participate fully in every aspect of every issue in Docket No. 140001-EI, a fact that is the subject of a final Commission order. There is no basis whatsoever for FPL's incongruous assertion that PCS must petition to intervene and establish standing on individual issues in this consolidated docket simply because a separate hearing date was established to consider those issues in this docket.

### **Statement of Facts**

1. Fuel clause Docket No. 140001-EI is one of several continuing, annual reviews of utility cost "true-up" rate mechanisms that the Commission conducts each year in a consolidated docket. All five major electric utilities (FPL, Duke, TECO, Gulf Power, and FPUC) file testimony and supporting materials at the same time in the same docket, and *all issues* arising

from those filings are addressed in a consolidated hearing and addressed through a single Staff recommendation and Commission order.

2. On March 11, 2008, PCS Phosphate filed a petition to intervene in that year's fuel clause proceeding. In its petition, PCS asserted all of the required elements to establish its standing to participate as a party applying the accepted test set forth in *Agrico Chemical Company v. Department of Environmental Regulation*.<sup>1</sup> No party, including FPL, objected to the PCS request. By order dated April 8, 2008, the Commission granted the PCS intervention petition, finding that "it appears that White Spring's substantial interests may be affected by this proceeding."<sup>2</sup> This final order constitutes the agency finding required by §120.52 (13)(c) F.S. that entitles PCS Phosphate to appear as a party in the fuel clause proceedings. The Commission thereupon ordered all parties to the proceeding to file copies of all testimony, exhibits, pleadings and other documents "which may hereinafter be filed in this proceeding" on PCS Phosphate.<sup>3</sup> That directive applied to FPL and other utilities participating in the fuel clause proceeding and was not limited to the utility providing electric service to PCS (Duke Energy Florida).<sup>4</sup>

3. That is exactly what has transpired in the ensuing years.<sup>5</sup> Each of the five utilities, again including FPL, has served PCS with all non-confidential filings, pleadings, and other documents in fuel clause proceedings. Notably, the filings that have been served upon PCS as an active party to the fuel clause dockets include the June 25, 2014 petition and supporting testimony of FPL with respect to its proposal to recover revenue requirements associated with its

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<sup>1</sup> 406 So. 2d 478 (Fla. 2d DCA 1981).

<sup>2</sup> Order No. PSC-08-0233-PCO-EI, p. 1.

<sup>3</sup> *Id.*

<sup>4</sup> In 2008, the utility providing retail electric service to PCS was known as Progress Energy Florida ("PEF"). PEF was subsequently acquired by Duke Energy in 2012, and all references herein are to "Duke" for ease of reference.

<sup>5</sup> In accordance with Commission practice, PCS Phosphate has reaffirmed its party status in the fuel clause proceeding each year, including this year, and no party has objected to PCS Phosphate's participation as a party.

natural gas exploration plans and the FPL proposed guidelines that would authorize additional expenditures in that arena without further Commission action.

4. On August 1, 2014, FPL and the Office of Public Counsel (“OPC”) jointly moved the Commission to approve their “stipulation to a schedule for presenting evidence, briefing and decision on the issues arising out of FPL’s June 25, 2014 petition for approval of a gas reserve project and guidelines for future gas reserve projects (the “Gas Reserve Petition”), as an amendment to the schedule set forth in the fuel clause Order Establishing Procedure (Order No. PSC-14-0084-PCO-EI).”<sup>6</sup> The Joint Motion did not establish a separate proceeding but expressly left all of the deferred issues to be addressed in the fuel clause docket. In fact, in the Joint Motion FPL was adamant that these issues be addressed in the fuel clause this year.<sup>7</sup> Significantly, prior to filing the joint motion, FPL, in accordance with F.A.C. Rule 28-106.204, conferred with PCS Phosphate as one of the parties of record to this docket regarding its support or opposition to the joint motion (PCS Phosphate indicated by e-mail response dated August 1, 2014 (9:04 AM) that it could support the Joint Motion). In the Joint Motion, FPL affirmed that it “contacted counsel for all parties of record by email concerning [the] motion” and that PCS supported it.<sup>8</sup>

5. On February 4, 2014, the Commission issued its Order Establishing Procedure in Docket No. 140001-EI, Order No. PSC-14-0084-PCO-EI. As is Commission practice, this order mandates that all parties file a prehearing statement in accordance with the schedule established.<sup>9</sup>

Further, as a party PCS was required to state its position on “each question of fact, question of

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<sup>6</sup> Joint Motion of Florida Power & Light Company and Office of Public Counsel for Approval of Stipulation for Schedule to Decide on Gas Reserve Project Issues and Deferral of St. Lucie Unit 2 Extended Refueling Outage Issues (“Joint Motion”) at p. 1 (Aug. 1, 2014).

<sup>7</sup> *Id.* at p. 2.

<sup>8</sup> *Id.* at p. 3.

<sup>9</sup> Order Establishing Procedure at p. 5.

law, and policy question that the party considers at issue, along with the party's position on each issue."<sup>10</sup> On September 26, 2014, PCS Phosphate filed its prehearing statement in the fuel clause in which, in accordance with the Commission's directive, PCS stated its position on all 35 issues presented. Those issues addressed both generic and utility-specific questions.<sup>11</sup> No party, including FPL, objected to any portion of the PCS Prehearing Statement.

6. In addition, as a party in Docket No. 140001-EI, PCS Phosphate also was obliged to file a prehearing statement on the deferred fuel clause issues pursuant to the August 22 Order Establishing Procedure on those issues, and PCS filed its statement on October 24, 2014, in accordance with the schedule contained in that order.

7. On August 22, 2014, OPC filed a Motion to Dismiss the FPL June 25, 2014 Petition for Lack of Subject Matter Jurisdiction. That Motion is pending before the Commission at this time.

8. On October 31, 2014, in accordance with F.A.C. Rule 28-106.204, requiring that it consult with all parties of record concerning its planned motion to Deny PCS's Participation and to strike the PCS Prehearing Statement, FPL contacted PCS to inquire whether PCS Phosphate would support or oppose the motion.

### **Argument**

9. FPL's motion ultimately rests upon two factual assertions that are transparently false. The first is FPL's novel but baseless notion that in deferring the hearing for the gas exploration issues to a later date in 2014 in order to accommodate OPC's understandable demand for additional time to evaluate the groundbreaking issues posed by the FPL proposal, these issues

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<sup>10</sup>*Id.* at p. 6.

<sup>11</sup> *See, e.g., id.*, Issues 2A-2D, concerning FPL.

have been “sort of” spun off into a separate docket.<sup>12</sup> In a bizarre effort to lend credence to that fiction, the most FPL can muster is to re-christen the deferred issues as a “Deferred Proceeding.”<sup>13</sup> In fact, as FPL actually acknowledges, the deferred issues never left the fuel clause proceeding.<sup>14</sup> Because those issues remain in Docket No. 140001-EI, the requirements of the Orders Establishing Procedure in this docket apply, and all of the parties admitted to the proceeding, including PCS Phosphate, are both obliged to take positions on all issues and free to state any position they choose.

10. Second, because FPL imagines that the gas exploration issues have been moved to a separate docket (a move FPL undoubtedly would oppose if requested by another party), the utility presupposes that PCS Phosphate would need to petition to intervene in that ersatz docket. Next, claiming that the PCS Prehearing Statement filed on October 24, 2014, indicated “its intent to participate in the Deferred Proceeding,” FPL treats that filing as a quasi-petition to intervene (which it then opposes through its Motion).<sup>15</sup> In fact, there is no PCS petition to intervene because there is no separate docket. The PCS October 24 Prehearing Statement is not a request to participate on the deferred issues but constitutes a required pleading made by an existing party to the docket that is actually before the Commission (Docket No. 140001-EI). Thus, as long as the gas exploration issues remain in Docket No. 140001-EI, PCS Phosphate and any other party permitted by the Commission or statute to participate as a party in that docket are entitled to be heard on those issues.

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<sup>12</sup> Motion at p. 7, para. 14.

<sup>13</sup> *Id.* at pp. 2, 3, and 7.

<sup>14</sup> *Id.* at para. 14.

<sup>15</sup> *Id.* at para. 3.

**1. The FPL Motion to Deny PCS Phosphate's Participation and Motion to Strike Is Untimely and Must Be Summarily Rejected.**

11. Petitions to intervene, demonstrations of substantially affected interests, and Commission findings on these matters with respect to the standing of an entity to participate as a party in a Commission proceeding are preliminary matters. In order to appear as a party, an entity must first establish that it has a substantial interest in the outcome of a proceeding.<sup>16</sup> In accordance with F.A.C. Rule 25-22.0239, in response to a petition to intervene, the Commission must determine upfront whether a customer has demonstrated that its substantial interests are affected by the proceeding. If that substantial interest is established, the entity is entitled to intervene in the docket as a party. In this instance, the Commission correctly decided in April 2008 that PCS Phosphate has standing to participate as a party in all respects in fuel clause proceedings.<sup>17</sup> PCS has actively participated in fuel clause matters since 2008, and it has actively participated in Docket No. 140001-EI. PCS Phosphate's substantial interests in the fuel clause proceeding are undiminished (fuel charges constitute a significant component of PCS's electric bills), and its continuing standing to participate in this docket is beyond question. To the extent that FPL is now challenging the ability of PCS Phosphate to participate in Docket No. 140001-EI, the utility's challenge is far too late and should be rejected as a matter of course.

12. Next, the Commission's granting of party status in fuel clause dockets does not include a list of exceptions for certain companies or issues. Parties that have been permitted by the Commission to intervene are not required to engage in a debate over their entitlement to be heard on each and every issue that may arise in those dockets. That is not Commission practice, and it is not the requirement of Rule 25-22.0239. As the Commission has explained, "[r]ule 25-

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<sup>16</sup> See *Agrico Chem. Co. v. Dep't of Env'tl Regulation*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

<sup>17</sup> Order No. PSC-08-0233-PCO-EI.

22.039, Florida Administrative Code, does not contemplate or provide for limited intervention.

As a party to this proceeding the [party] may limit its participation to only certain issues, *as it sees fit*.”<sup>18</sup> Moreover, having achieved party status in fuel clause proceedings, PCS does not need to demonstrate that its interests are being determined by any particular issue in the docket.<sup>19</sup>

13. Because the fuel clause is a consolidated docket, each utility, not simply Duke, is required to file all pleadings on PCS, and PCS is required by the Order Establishing Procedure to take a position on each and every issue presented or it waives the ability to later take a position. As long as the fuel clause remains a consolidated docket (a moot issue at this time with respect to Docket No. 140001-EI), each party must state a position on all issues, but it is up to the party to decide what those positions will be.

14. This is exactly what PCS has done. In its September 26, 2014 Prehearing Statement in the fuel clause, PCS stated a position on all 35 issues posed in the case, as was required by the Order Establishing Procedure. Neither FPL nor any other party objected to any position taken by PCS on any issue. In its October 24, 2014 Prehearing Statement, again in compliance with the August 22 Order Establishing Procedure, PCS announced its position on all remaining fuel clause issues. Other than timing, there is no distinction between the two filings. Both represent a required filing by a party that long ago established its substantial interests to participate in this docket. There is no standing issue with respect to PCS Phosphate’s continuing entitlement to full

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<sup>18</sup> *In Re Intercoastal Utilities, Inc.*, Order No. PSC-00-0336-PCO-WS, Docket No. 990696-WS (Feb. 17, 2000) (emphasis added).

<sup>19</sup> *See Phibro Resources Corp. v. DER*, 579 So. 2d 118, 122 (DCA 1991); *Golden State Bank v. Lewis*, 348 So. 2d 343 (1977).



participation as a party in Docket No. 140001-EI because the Commission settled that question in 2008.<sup>20</sup>

**2. Because There Is No Separate Docket With Respect to the FPL Gas Exploration Petition, PCS Phosphate, as an Admitted Party in Docket No. 140001-EI, Is Entitled to Be Heard on All Issues To Be Addressed in the Fuel Clause Proceeding.**

15. Recognizing that it is grasping at straws, FPL asserts that the deferred Docket No. 140001-EI issues are “akin” to a separate proceeding and that PCS Phosphate should be required to establish its standing to participate in the FPL-invented “Deferred Proceeding.”<sup>21</sup> In fact, of course, there is no separate proceeding, and each of the gas exploration deferred issues remain in the fuel clause docket in which PCS is a well established party. There is no separate petition by PCS to participate in the imagined separate proceeding because that proceeding does not actually exist. Finally, under no circumstances in Commission practice is the filing of a party’s prehearing statement an accepted point of entry into a docket. That required pleading is in no way the functional equivalent of a petition to intervene and cannot reasonably be construed as such.

16. Thus, when FPL claims that PCS Phosphate “has no standing to participate in this Deferred Proceeding,”<sup>22</sup> it refers to a nonexistent docket. PCS does, however, as discussed above, have indisputable standing to continue participating as a party in the fuel clause docket, which is where the deferred issues are being addressed.

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<sup>20</sup> To the extent FPL is seeking reconsideration of the Commission’s order granting PCS Phosphate’s intervention, its right to do so was waived in 2008 under Rule 25-22.0376(3) of the Florida Administrative Code, which states “[f]ailure to file a timely motion for reconsideration or a response, shall constitute a waiver of the right to do so.”

<sup>21</sup> FPL Motion at p. 7, para 14.

<sup>22</sup> *Id.* at p. 2, para. 5.

17. There is no precedent, nor does FPL cite to any, for the Commission to limit a party's right to participate in a proceeding in which its substantial interests in that proceeding are beyond question. If FPL had requested that its June 25 Petition be docketed and scheduled as a separate matter from the fuel clause proceeding, PCS would have considered whether to petition to intervene in light of the significant policy questions presented, and FPL's standing arguments may then have become ripe and timely, but that is not the case. FPL requested that its petition be considered in Docket No. 140001-EI, and insisted in its Joint Motion with OPC that a decision on the deferred issues be made in this docket be scheduled.

18. In Paragraph 4 of its Motion, FPL appears to confuse the PCS statement of basic position in its October 24, 2014 Prehearing Statement (which it quotes) for an attempt to define a substantial interest in the imagined "Deferred Proceeding." This exemplifies the incongruity of the FPL Motion in its entirety. FPL acknowledges PCS Phosphate's status as a party in the fuel clause proceeding generally. It also effectively concedes PCS Phosphate's party status in Docket No. 140001-EI when applied to the June 25, 2014, gas exploration petition. It served that petition and supporting testimony on PCS as required by the Commission. FPL subsequently has served non-confidential discovery responses concerning the gas exploration proposal on PCS. Also, as required by F.A.C. Rule 28-106.204, FPL has conferred with PCS as a party of record concerning both its Joint Motion with OPC to set the gas exploration issues for a separate hearing within the fuel clause, and, ironically enough, on its motion to deny PCS the right to participate in those remaining fuel clause matters. In short, with respect to procedural matters, FPL has expressed no objection to treating PCS as a party. It has only been when PCS complied with the Commission's Order to state its position on the matters at hand that FPL voiced an untimely objection. Clearly, FPL cannot acknowledge the standing of an established party to be heard until it hears what the party intends to say, and then assert a standing claim. FPL's

attempts to deny PCS Phosphate's further participation in the fuel clause proceeding and to strike its required Prehearing Statement are baseless.

19. In sum, Rule 25-22.039 F.A.C., which addresses intervention in Commission matters, requires that "Intervenors take the case as they find it," and the flip side of that equation applies with equal force. If FPL wants its deferred gas exploration issues heard in Docket No. 140001-EI, it must take the case, and the active party list, as it finds it. This is a consolidated docket, and all issues arising from the filings of all utilities are "in play." Unless the FPL issues are removed from the fuel clause docket, FPL must accept the participation of all parties that have been granted party status in that case, which most assuredly includes PCS Phosphate.

**3. The Substantial Interests of PCS Phosphate Are Affected by the General Policy Question of First Impression That Are Presented in the Docket No. 14001-EI Deferred Issues.**

20. The FPL petition asserts that (1) it is prudent for FPL to acquire an interest in a natural gas reserve project in Oklahoma, (2) it is reasonable and appropriate for FPL to recover the revenue requirements (including depreciation, depletion and return on investment) associated with investing in and operating the gas reserve project through its fuel and purchased power recovery clause, and that (3) the Commission should establish guidelines under which FPL could participate in other gas reserve projects and recover the revenue requirements associated with those ventures through the fuel clause without seeking prior approval from the Commission.<sup>23</sup> In essence, FPL claims that, at least over a very long timeframe, natural gas secured at production costs from the proposed Project will provide a physical hedge that will produce lower revenue requirements on a net present value basis for rate recovery through the fuel clause than purchasing natural gas needed for its gas-fired generating units at market-determined prices and

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<sup>23</sup> See FPL June 25, 2014 Petition at p. 1; *see also* FPL Motion to Deny Participation at p. 1.

flowing those costs through to its customers through the fuel clause. FPL does not claim to possess any relevant prior experience in oil and gas exploration activities.

21. Each of the three basic elements described above raises substantial questions concerning the lawfulness and reasonableness of the policies proposed in the gas exploration petition in the context of rates set by the Commission pursuant to Section 366 of the Florida Statutes.<sup>24</sup> For this reason:

- The Public Counsel reasonably sought an adjustment to the hearing schedule to permit additional time for discovery, evaluation of the FPL Petition, and the preparation of responsive testimony (which was filed by OPC and FIPUG).
- The August 22, 2014 Order Establishing Procedure for FPL's Deferred Issues in Docket No. 140001-EI accurately noted at the outset that FPL's June 25 petition was a novel "case of first impression that will impact the Commission's consideration of gas reserves on a going forward basis."<sup>25</sup> This could not be a stronger signal from the Commission to all parties that they must be heard here if they want to be heard on the policies that will be established.
- On August 22, 2014, OPC filed a motion to dismiss the FPL gas exploration petition because it maintains the Commission does not have subject matter jurisdiction over the gas exploration venture and the associated costs, therefore, cannot be recovered in regulated rates. That motion is pending before the Commission.
- Issue #7 expressly directs the parties in Docket No. 140001-EI (which, as noted above, includes PCS Phosphate) to address, whether, if FPL's basic proposal to physically hedge natural gas through gas exploration ventures has merit, the attending issues should be addressed in a rulemaking proceeding (in which general Florida policy considerations could be fully vetted and all interested stakeholders would have an opportunity to participate in that debate). That is a very important issue upon which PCS most definitively has a position. There is no way to be heard on that issue if PCS is excluded from this portion of the fuel hearing. For the Commission to permit such a "Catch-22" dilemma to apply would stand the notions of fair and due process on their collective heads.

22. It is inarguable that the basic subject matter of the FPL proposal, the cost recovery construct that FPL proposes, and the FPL-proposed guidelines governing future spending on gas

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<sup>24</sup> There may be significant factual and timing issues as well.

<sup>25</sup> Order No. PSC-14-0439-PCO-EI at p. 1.

exploration ventures that may or may not require Commission pre-approval each pose policy questions carrying far-reaching ramifications for all Florida consumers. The Order Establishing Procedure on the Deferred Issues alone dispels FPL's claim that the precedential effect of the Commission's decision concerning its petition would be "remote."<sup>26</sup> Similarly, OPC's pending Motion to Dismiss the FPL June 25, 2014, petition for lack of subject matter jurisdiction reinforces the landmark regulatory policy questions that are presented, regardless of how that motion ultimately is resolved by the Commission.

23. FPL's stunningly understated assertion that the precedential effect of its petition will be remote<sup>27</sup> does not begin to encompass the readily apparent policy ramifications of the approvals the utility seeks to secure. It proposes to define the rules, cost recovery and scope of Commission review in an area wholly beyond the Commission's historic oversight of regulated utility operations. FPL's assertion that these issues do not have far-reaching policy implications is not in the least credible. In fact, all consumer parties in the fuel clause docket recognize that FPL is seeking a landmark ruling from the Commission to authorize unprecedented fuel clause recovery over costs that the Commission currently has limited ability to audit and control.<sup>28</sup>

### **Conclusion**

FPL's Motion to deny PCS Phosphate's participation in the remaining issues in the fuel clause proceeding is meritless, inconsistent with the Commission's Order granting PCS party status in fuel clause proceedings, and completely lacking in any legal foundation. The FPL Motion does not involve a request to confer standing but concerns FPL's effort to strip

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<sup>26</sup> See FPL Motion at p. 5, para. 12.

<sup>27</sup> *Id.*

<sup>28</sup> The Office of Public Counsel, FIPUG, and the Florida Retail Federation all oppose the FPL Motion to Deny PCS Phosphate's participation, with FRF noting in particular that "[t]he Commission's decisions on these issues are likely to be precedential, and we believe that the Commission should allow PCS to participate." See FPL Motion at p. 7 (disclosing FRF's opposition to the FPL Motion).

participation rights of a party that has long established its right to intervene in fuel clause matters. As long as these issues remain in Docket No. 140001-EI as FPL insists, the standing of PCS Phosphate to fully participate as a party is already settled. Moreover, even if the standing for an existing party in that docket to be heard on those issues were in question, it should be granted considering the far-reaching policy impacts of FPL's proposed requests in its petition.

Respectfully submitted

**BRICKFIELD, BURCHETTE, RITTS & STONE, P.C.**

*s/ James W. Brew*

James W. Brew

Owen J. Kopon

Laura Wynn

1025 Thomas Jefferson Street, N.W.

Eighth Floor, West Tower

Washington, DC 20007

Tel: (202) 342-0800

Fax: (202) 342-0807

E-mail: [jbrew@bbrslaw.com](mailto:jbrew@bbrslaw.com)

*Attorneys for*

*White Springs Agricultural Chemicals, Inc.*

*d/b/a/ PCS Phosphate – White Springs*

Dated: November 5, 2014

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail and/or U.S. Mail this 5th day of November, 2014, to the following:

James D. Beasley/J. Jeffry Wahlen/Ashley Daniels  
Ausley Law Firm  
P.O. Box 391  
Tallahassee, FL 32302  
[jbeasley@ausley.com](mailto:jbeasley@ausley.com)  
[jwahlen@ausley.com](mailto:jwahlen@ausley.com)  
[adaniels@ausley.com](mailto:adaniels@ausley.com)

Jeffry Stone/Russell Badders/Steven Griffin Beggs &  
Lane  
P.O. Box 12950  
Pensacola, FL 32591-2950  
[jas@beggslane.com](mailto:jas@beggslane.com)  
[rab@beggslane.com](mailto:rab@beggslane.com)  
[srg@beggslane.com](mailto:srg@beggslane.com)

John T. Burnett/Dianne M. Triplett  
Duke Energy  
299 First Avenue North  
St. Petersburg, FL 33701  
[John.burnett@duke-energy.com](mailto:John.burnett@duke-energy.com)  
[Dianne.Triplett@duke-energy.com](mailto:Dianne.Triplett@duke-energy.com)

Matthew R. Bernier/Paul Lewis, Jr.  
Duke Energy  
106 East College Avenue, Suite 800  
Tallahassee, FL 32301  
[Matthew.bernier@duke-energy.com](mailto:Matthew.bernier@duke-energy.com)  
[Paul.lewisjr@duke-energy.com](mailto:Paul.lewisjr@duke-energy.com)

Florida Industrial Power Users Group  
Jon C. Moyle, Jr.  
c/o Moyle Law Firm  
118 North Gadsden Street  
Tallahassee, FL 32301  
[jmoyle@moylelaw.com](mailto:jmoyle@moylelaw.com)

John T. Butler  
Florida Power & Light Company  
700 Universe Boulevard  
Juno Beach, FL 33408-0420  
[John.Butler@fpl.com](mailto:John.Butler@fpl.com)

Kenneth Hoffman  
Florida Power & Light Company  
215 South Monroe Street, Suite 810  
Tallahassee, FL 32301-1858  
[Ken.Hoffman@fpl.com](mailto:Ken.Hoffman@fpl.com)

Cheryl Martin  
Florida Public Utilities Company  
1641 Worthington Road, Suite 220  
West Palm Beach, FL 33409  
[Cheryl\\_Martin@fpuc.com](mailto:Cheryl_Martin@fpuc.com)

Robert Scheffel Wright/John T. LaVia  
Florida Retail Federation  
c/o Gardner Law Firm  
1300 Thomaswood Drive  
Tallahassee, FL 32308  
[Schef@gbwlegal.com](mailto:Schef@gbwlegal.com)

J.R. Kelly/P. Christensen/J. McGlothlin  
Office of Public Counsel  
c/o The Florida Legislature  
111 W. Madison Street, Room 812  
Tallahassee, FL 32393-1400  
[Christensen.patty@leg.state.fl.us](mailto:Christensen.patty@leg.state.fl.us)  
[Kelly.jr@leg.state.fl.us](mailto:Kelly.jr@leg.state.fl.us)  
[Rehwinkel.charles@leg.state.fl.us](mailto:Rehwinkel.charles@leg.state.fl.us)

Beth Keating  
Gunster Law Firm  
215 South Monroe Street, Suite 601  
Tallahassee, FL 32301  
[bkeating@gunster.com](mailto:bkeating@gunster.com)

Robert L. McGee, Jr.  
Gulf Power Company  
One Energy Place  
Pensacola, FL 32520-0780  
[rlmcgee@southernco.com](mailto:rlmcgee@southernco.com)

Ms. Paula K. Brown  
Tampa Electric Company  
Regulatory Coordination  
P.O. Box 111  
Tampa, FL 33601  
[regdept@tecoenergy.com](mailto:regdept@tecoenergy.com)

*/s/ Owen J. Kopon*