IN THE SUPREME COURT
STATE OF FLORIDA

SOUTHERN ALLIANCE FOR CLEAN ENERGY, Appellant, v. FLORIDA PUBLIC SERVICE COMMISSION, FLORIDA POWER AND LIGHT COMPANY, and PROGRESS ENERGY FLORIDA, INC., Appellees.	)	SC Case No.: SC11-2465 PSC Docket No.: 110009-EI

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

REPLY BRIEF OF APPELLANT SOUTHERN ALLIANCE FOR CLEAN ENERGY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **PAGE**

OTHER AUTHORITIES

Florida Constitution

SUMMARY OF ARGUMENT

In order to be in compliance with § 366.93, Fla. Stat., and eligible for cost recovery thereunder, a utility must demonstrate that it intends to build the nuclear power plant for which it seeks advance recovery of costs. The record in this matter, when viewed in totality, plainly demonstrates that the Commission's finding in Docket 110009-EI that FPL and PEF intend to build their respective proposed new nuclear power plants is arbitrary and unsupported by competent substantial evidence. Moreover, Appellees' attempts at mischaracterization of Commission precedent and SACE's arguments do not change the fact that the mere intent to obtain a COL does not equate to the intent to build.

From a constitutional standpoint, the Legislature's failure to include adequate standards in § 366.93, Fla. Stat., has allowed the Commission to treat advance nuclear cost recovery as a blank check for utilities. Even in areas of complex subject matter, all legislative enactments delegating authority must contain adequate standards and guidelines to prevent administrators, like the Commission, from acting with unbridled discretion and/or making law. Section 366.93, Fla. Stat, despite the incorporation the traditional notion of "prudence" into the statute, does not contain any real objective standards and guidelines to prevent the Commission from acting with unbridled discretion and making law.

ARGUMENT

I. THE COMMISSION'S 2011 NUCLEAR COST RECOVERY ORDER IS ARBITRARY AND UNSUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

In their Answer Briefs, Appellees make two major arguments, both of which are without merit, in an attempt to convince this Court that the Commission's decision to approve cost recovery in Docket 110009-EI related to FPL's TP 6 & 7 project and PEF's LNP projects was supported by substantial competent evidence as required by the courts. *See, e.g., Shevin v. Yarborough*, 274 So.2d 505, 508 (Fla. 1973) (holding that the Court will not affirm a decision of the Commission if it is arbitrary and unsupported by substantial competent evidence). First, the Commission and FPL, based on a fundamental misunderstanding of Commission precedent, contend that simply because the costs approved by the Commission were found to be incurred in the "siting, design, licensing and construction" of a nuclear power plant, the costs were, thus, *per se* recoverable under § 366.93, Fla. Stat.[1] Second, Appellees make a collective attempt to mischaracterize SACE's arguments as asking this Court to reweigh the evidence and/or the credibility of the witnesses before the Commission. Instead, SACE is simply demonstrating that the record, viewed in totality, is devoid of substantial competent evidence to support the Commission's finding that FPL and PEF demonstrated the intent to build these

[1] It is telling that PEF does not even attempt to make this argument.

proposed new nuclear reactors. Therefore, neither utility was in compliance with § 366.93, Fla. Stat., and, thus, neither utility was eligible for recovery of costs related to these proposed nuclear reactors.

A. COMMISSION PRECEDENT EXPLICITLY REQUIRES FPL AND PEF TO DEMONSTRATE INTENT TO BUILD PROPOSED NEW NUCLEAR REACTORS IN ORDER TO BE ELIGIBLE FOR COST RECOVERY UNDER SECTION 366.93, FLA. STAT.

In their Answer Briefs, the Commission and FPL argue that merely because the Commission found the costs related to the utilities' proposed new nuclear reactors were incurred in the siting, design, licensing and construction of these proposed reactors, the Commission's decision to allow recovery of these costs under § 366.93, Fla. Stat. should be upheld. However, this argument is baseless because the Appellees fail to acknowledge that Commission precedent explicitly requires a threshold demonstration of intent to build in order for a utility to be in compliance with, and eligible for, cost recovery under § 366.93, Fla. Stat. [2]

[2] FPL, in the face of the explicit holding of the Commission in Order No. PSC-11-0095-FOF-EI requiring demonstration of intent to build in order to be eligible for cost recovery, which is discussed in detail in SACE's Initial Brief and *infra*, goes so far as to disingenuously contend that the Commission never created an intent to build requirement. FPL Answer, at 16-17. As noted by the Commission in its Answer, Order No. PSC-11-0095-FOF-EI was not appealed, and the time for filing an appeal has long since passed. FPL cannot make up for the fact it failed to appeal this decision of the Commission by pretending it doesn't exist. *See also* PEF Answer at 11 (stating that the "intend to build" requirement is "an appropriate tool for determining whether the utility has met the express requirements of Section 366.93").

In its Final Order issued at the conclusion of Docket 100009-EI, the Commission interpreted § 366.93, Fla. Stat., to mean that a utility does not have to simultaneously engage in the "siting, design, licensing, and construction" of a nuclear power plant to be in compliance with § 366.93, Fla. Stat.[3] However, the Commission expressly qualified this holding by finding that a utility still "must continue to demonstrate its intent to build the nuclear power plant for which it seeks advance recovery of costs to be in compliance with Section 366.93, F.S."[4] Therefore, in order to be eligible for cost recovery under, § 366.93, Fla. Stat., both FPL and PEF must demonstrate the intent to build their proposed new nuclear reactors, and only after this threshold determination is satisfied does Commission consideration of any factors pertaining to whether the costs qualify for recovery become warranted.

As a result of this misinterpretation of Commission precedent, Appellees assert that the Commission's approval of cost recovery for FPL and PEF relating to the proposed new nuclear reactors as issue was proper simply because the costs

[3] Order No. PSC-11-0095-FOF-EI, at 9 (emphasis added), Issued February 2, 2011, Docket 100009-EI, *In re: Nuclear cost recovery clause*. As this was explicitly recognized and discussed in SACE's Initial Brief, the Commission's contention that SACE's argument is based on the premise that these activities do in fact have to occur simultaneously is a complete mischaracterization. PSC Answer, at 19.

[4] *Id.* (emphasis added). Demonstration of intent to build is required in order for the Commission to strike a balance between the broad legislative intent of § 366.93, Fla. Stat., and the statutory mandate of the Commission to fix "fair, just, and reasonable" rates for Florida ratepayers.

were found to be: (1) recoverable "preconstruction costs;" (2) "prudently incurred;" and/or (3) generally incurred during the "siting, design, licensing and construction" of a nuclear power plant. *See, e.g.*, PSC Answer at 13, 18-21, 22, 27-29; FPL Answer at 14-15. These arguments completely ignore the fact that FPL and PEF have to first demonstrate intent to build before questions relating to whether or not particular costs are recoverable are properly before the Commission for review.[5] As discussed in detail in SACE's Initial Brief, FPL and PEF failed to demonstrate intent to build by substantial competent evidence. Therefore, whether or not the costs approved for FPL and PEF relating to the utilities' proposed new nuclear reactors were properly found to be recoverable costs because they were generally incurred in the "siting, design, licensing and construction" of a nuclear power plant does not address the threshold intent to build requirement.

C. THERE IS NOT COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE COMMISSION'S FINDING THAT FPL AND PEF DEMONSTRATED INTENT TO BUILD IN DOCKET 110009-EI.

As discussed in detail in SACE's Initial Brief, FPL and PEF failed to demonstrate with competent substantial evidence that they intend to build TP 6 & 7 or the LNP. Realizing this, Appellees resort to mischaracterizing SACE's arguments as merely asking this Court to reweigh the evidence and/or the

[5] The Commission and FPL concede as much by arguing in their Answers that intent to build was in fact demonstrated.

credibility of witnesses. SACE is fully cognizant that it is not the role of this Court to conduct such an inquiry, *see, e.g., Gulf Power Co. v. Public Service Commission*, 480 So.2d 97, 98 (Fla. 1995), and is not asking the Court to do so in the instant matter.[6] In sharp contrast, SACE is simply asking that the Court review the record in totality, which fails to demonstrate the intent to build by FPL and PEF.

In *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957), this Court explained the term "competent substantial evidence" as follows:

> Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. In employing the adjective 'competent' to modify the word 'substantial' ….. the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.

Moreover, the determination of whether there is substantial competent evidence should be made based on the whole record. *See, e.g., Florida Cities Water Co. v. State of Florida*, 705 So.2d 620, 627 (Fla. 1st DCA 1998) (holding that PSC's determination was not supported by competent evidence of any substance in light

[6] SACE acknowledges calling into question the credibility of FPL and PEF witnesses in its Initial Brief. Initial Brief, at n.19, n. 24, n. 29. However, this was done for the sole purpose of demonstrating to the Court that the record as a whole, as compared to isolated statements of utility witnesses, demonstrates that there is not substantial competent evidence in the record to support the Commission's finding of intent to build for FPL and PEF.

of the whole record). When these principles are applied to the instant matter, FPL and PEF have failed to demonstrate intent to build by substantial competent evidence.[7]

The isolated statement by PEF and FPL witnesses that they intend to build these proposed new reactors, relied on almost exclusively by Appellees, is not substantial competent evidence at all in the face of their further testimony, as described in SACE's Initial Brief. Rather, as plainly evidenced by the record, FPL and PEF have resorted to "option creation" approaches, where the only demonstrated intent on the part of the utilities is to attempt to obtain the licenses and approvals for these proposed new nuclear reactors, in order to create or preserve the option to construct if it becomes feasible at some point in the future.[8] Such an approach does not, as argued by the Commission, "comport with" the intent to build; in fact, these are markedly different approaches with significant legal consequences in light of the Commission's requirement that the utilities

[7] The activities of FPL and PEF relied on by the Commission to support its finding of intent to build do not evidence such an intent. Initial Brief, at 15-16, 26-27. Moreover, the testimony of the utility witnesses, and Staff witnesses, minus one or two statements relied on by Appellees, confirms that the Commission's finding in this regard was arbitrary band unsupported by the record. Initial Brief, 16-21, 27-29.

[8] Both FPL and PEF both admit in their Answers, consistent with the record evidence, that their intent is limited to obtaining a COL from the NRC. FPL Answer, at 7 ("FPL's primary focus … is to obtain federal …approvals); PEF Answer, at 14 ("Mr. Elnitsky acknowledged … that development of the LNP is proceeding slower … so that PEF can focus on its efforts on obtaining a COL").

demonstrate intent to build prior to being eligible for cost recovery under § 366.93, Fla. Stat. In the instant matter, the legal consequence for FPL and PEF, due to their failure to demonstrate intent to build, is that they should have to refund the cost recovery arbitrarily approved by the Commission in its Final Order relating to the utilities' proposed new reactors.

II. SECTION 366.93, FLA. STAT., IS UNCONSTITUTIONAL BECAUSE IT DOES NOT CONTAIN ADEQUATE STANDARDS AND GUIDELINES TO GUIDE THE COMMISSION IN THE IMPLENTATION AND ADMINISTRATION OF NUCLEAR COST RECOVERY IN FLORIDA.

In an attempt to save § 366.93, Fla. Stat. from the constitutional infirmity from which it suffers, Appellees proffer several unfounded contentions which they claim demonstrate that § 366.93 is not an unconstitutional delegation of legislative authority in violation of the separation of powers doctrine. Appellees first argue that simply because of the complexity of nuclear cost recovery, the Legislature was permitted to draft § 366.93, Fla. Stat., in broad, general, and unrestrictive terms, thereby vesting in the Commission unbridled discretion in its administration of the statute. Appellees next, ask this Court to rely on nothing more than a couple of defined terms in the statute and the incorporation of the subjective notion of "prudence" into the statute, to conclude that § 366.93, Fla. Stat., does in fact contain adequate standards and guidelines in order to pass constitutional muster. However, both of these arguments fail, because, due to the lack of real standards

and guidelines in the statute, § 366.93, Fla. Stat., constitutes nothing less than a blank check for utilities seeking approval of advance cost recovery under the statute.

A. ALL LEGISLATIVE ENACTMENTS DELEGATING AUTHORITY MUST CONTAIN ADEQUATE STANDARDS, AND THE LEGISLATURE SHOULD HAVE INCLUDED EVEN MORE SPECIFIC STANDARDS AND GUIDELINES IN SECTION 366.93, FLA. STAT.

Appellees contend that simply because of the complexity of nuclear cost recovery, and the Commission's expertise in utility ratemaking and regulation, the Legislature's failure to include adequate standards in § 366.93, Fla. Stat., is excusable. As noted by Appellees, SACE acknowledged in its Initial Brief that the specificity of legislative guidelines may in fact depend on the complexity of the subject matter addressed and the degree of difficulty involved in articulating standards. SACE Initial Brief, at 35. However, Appellees conveniently ignore the fact that, as SACE also noted in its Initial Brief, this Court has expressly held that:

> Even where a general approach would be more practical than a detailed scheme of legislation, enactments may not be drafted in terms so general and unrestrictive that administrators are left without standards for the guidance of their official acts.

State Dep't of Citrus v. Griffin, 239 So.2d 577, 581 (Fla. 1970) (emphasis added); *see also Bush v. Schiavo,* 885 So.2d 321, 333 (Fla. 2004). Section 366.93, Fla. Stat., is just what *Griffin* prohibits – an enactment drafted in such broad, general,

and unrestrictive terms that the Commission has been left with unbridled discretion to declare what the law is – a blank check for utilities.

Further, despite Appellees' assertions to the contrary, SACE is not contending that the Legislature should have spelled out standards in "exhaustive detail." In sharp contrast, as discussed *infra*, it is SACE's position that there are not any real standards or guidelines in the cost recovery statute that serve to limit the Commission's authority. Moreover, given that this is the rare instance where advance recovery of utility expenditures is permitted, thereby drastically altering principles of traditional utility ratemaking, § 366.93, Fla. Stat. should contain even more specific standards and criteria than what is normally required in order to ensure that the charges for these nuclear projects being incurred by ratepayers are fair, just and reasonable, as required by law.[9]

B. INCORPORATION OF THE SUBJECTIVE NOTION OF "PRUDENCE" INTO SECTION 366.93, FLA. STAT., IS NOT ENOUGH TO PREVENT THE COMMISSION FROM ACTING WITH UNBRIDLED DISCRETION IN VIOLATION OF THE NONDELEGATION DOCTRINE.

Appellees next argue that because the Legislature did define certain terms contained in § 366.93, Fla. Stat., and also incorporated the traditional, subjective

[9] *See* § 366.03, Fla. Stat. (providing that "All rates and charges made, demanded, or received by any public utility for any service rendered, or to be rendered by it, and each rule and regulation of such public utility, shall be fair and reasonable"); *see also* Corrected Brief *Amicus Curiae* of AARP, at 3-6, 11-14; Amended *Amicus Curiae* Brief of the Village of Pinecrest, at 8-11.

notion of "prudence" into the cost recovery statute, § 366.93, Fla. Stat., does not constitute an unconstitutional delegation of legislative authority to the Commission. However, the fact that certain statutory terms are broadly defined is not enough to prevent the Commission from acting with unbridled discretion when deciding whether to approve advanced cost recovery. Furthermore, the incorporation of the subjective idea of "prudence" into the statute does not provide any objective guidance for, and/or restriction on, the Commission's discretion to determine how far to go in promoting the statute's broad policy to promote utility investment in nuclear power. Ultimately, due to the lack of any real standards or guidelines, the Commission is left acting with unbridled discretion and making law through each successive nuclear cost recovery docket in violation of the separation of powers and nondelegation doctrines.

In regards to the defining of statutory terms, Appellees' focus on the fact that the Legislature did in fact provide a definition of "cost" in § 366.93, Fla. Stat. PSC Answer, at 31; FPL Answer, at 23; PEF Answer, at 31. Section 366.93(1)(a), Fla. Stat., provides, in pertinent part:

> Cost includes, <u>but is not limited to</u>, all capital investments, including rate of return, any applicable taxes, and all expenses, including operation and maintenance expenses, <u>relating to or resulting from</u> the siting, design, licensing, construction, or operation of the nuclear power plant ….

[Emphasis added]. This an extremely broad definition of what costs are recoverable, and, as defined, would include almost any cost, investment, tax, or expense that is in any way related to the siting, design, licensing, construction, or operation of a nuclear power plant. Further, this definition, and others cited by Appellees, deal with what costs may be recovered, but they do not provide any guidance as to whether the costs should be recovered or contain any standards or guidelines for the Commission in making this determination. Therefore, Appellees' argument that these definitions serve as adequate standards or guidelines that provide any real limitation on the Commission's unbridled discretion is without merit.

Appellees next contend that the incorporation of the traditional notion of "prudence" into § 366.93, Fla. Stat., allowing for recovery of all "prudently incurred" costs, is an adequate standard or guideline that serves to prevent the Commission from acting with unbridled discretion.[10] However, the reiteration of this subjective, "reasonable person" standard into § 366.93, Fla. Stat., does not, in and of itself, prevent the Commission from acting with unbridled discretion, as it provides no objective guidance for, or restriction on, the Commissions' authority to

[10] SACE acknowledged in its Initial Brief that the subjective "prudent investment" standard does have a discernible meaning in Commission jurisprudence. However, inclusion of this "standard," to the extent it serves as one, in the statute is simply not enough, without more, to comply with the separation of powers and protect ratepayers.

award recovery of costs. *See Smith v. Portante,* 212 So.2d 298, 299 (Fla. 1968) (holding that objective guidelines and standards should appear expressly in the act where a delegation of authority is involved).[11] The Legislature, without remaining in "perpetual session" as alleged by Appellees, could have easily included any number of objective standards in § 366.93, Fla. Stat., in order to guide and/or restrict the Commission's authority, including, but certainly not limited to: a cap on the amount of recoverable costs; a point in which costs are no longer recoverable due to the estimate presented in the need determination being far exceeded; a point in which the utility seeking cost recovery has to share costs with its ratepayers; benchmarks of progress that must be made towards completion in order for costs to remain recoverable; and/or any combination of the above. In the absence of such objective guidelines in the statute, the Commission is able to exercise unbridled discretion and impermissibly make law on a case by case basis - exactly what the nondelegation doctrine prohibits.

Furthermore, SACE acknowledges that other Florida statutory provisions which are administered by the Commission contain some variation of the traditional notion of "prudence." *See* PSC Answer, at 34-35. SACE also acknowledges that "prudent investment" rule has been addressed in federal and

[11] Moreover, the "guidance" in § 403.519, Fla. Stat., as to what "imprudence" does not include does not cure this constitutional deficiency. § 403.519(4)(e), Fla. Stat., simply provides, *inter alia*, that imprudence "shall not include any cost increases due to events beyond the utility's control."

state jurisprudence. *See* PEF Answer, at 33-36. However, none of these statutes or cases cited by Appellees presents a situation like the one at hand, where traditional principles of utility ratemaking have been dramatically altered, and all of the financial risk for siting, designing, licensing, and constructing a nuclear power plant has been shifted to a utility's ratepayers through advanced cost recovery. In this instance, the subjective notion of "prudence" is, without more, simply not enough to ensure that FPL and PEF ratepayers are not subjected to unfair, unjust and unreasonable costs as required by statute.

Finally, all of the cases cited by SACE in its Initial Brief, as well as those cited by Appellees, in which delegations of authority to the Commission were upheld by courts of the State of Florida, dealt with legislative enactments containing far more definitive, and objective, guidelines and standards as compared to those in § 366.93, Fla. Stat. *See, e.g., Florida Gas Transmission Co. v. Public Service Company*, 635 So.2d 941 (Fla. 1994) (noting that the Commission should consider, amongst other things, the reliability, safety, delivery, and integrity of the proposed pipeline, the economic well-being of the public, and the pipeline's commencement and terminus points, and its effect on the environment). Thus, Appellees' argument that simply because this Court has not, to date, struck down a delegation of authority to the Commission, it should not do so in the instant matter, is without merit.

CONCLUSION

The Court should reverse the Commission's decision to approve cost recovery for FPL and PEF in Docket 110009-EI relating to the utilities' proposed new reactors and refund these costs to the utilities' ratepayers. The Court should further find that § 366.93, Fla. Stat., constitutes an unconstitutional delegation of legislative authority in violation of the separation of powers doctrine contained in Article II, Sec. 3 of the Florida Constitution.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and eight copies of the **REPLY BRIEF OF APPELLANT SOUTHERN ALLIANCE FOR CLEAN ENERGY** was sent for filing with the Clerk of the Florida Supreme Court by federal express and electronic filing on June 27, 2012, and served by electronic and/or US Mail to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Reply Brief of Appellant Southern Alliance for Clean Energy is submitted in 14 point Times New Roman font in Microsoft Word Format.

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