IN THE SUPREME COURT OF FLORIDA

SOUTHERN ALLIANCE FOR
CLEAN ENERGY,

Appellant,

CASE NO.: SC11-2465
LT CASE NO.: 110009-EI

v.

ART GRAHAM, ETC., ET AL.,

Appellees.
_____/

APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE
FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND REFERENCES

Appellees, the Florida Public Service Commission and Commissioners Art Graham, Lisa Polak Edgar, Ronald A. Brisé, Eduardo E. Balbis, and Julie I. Brown, are collectively referred to as "the Commission." Appellee, Florida Power & Light Company, is referred to as "FPL." Appellee, Progress Energy Florida, Inc., is referred to as "Progress." Appellant, Southern Alliance for Clean Energy is referred to as "SACE." References to SACE's Amended Initial Brief are designated "SACE Br. Pg. [Page Number]."

References to the record on appeal are designated "R. Vol. [Volume Number], Pg. [Page Number]." References to the transcript of the August 2011 administrative hearing are designated "R. Attach. 1, T. Vol. [Volume Number], Pg. [Page Number]."

References to the final order on appeal, *In re: Nuclear cost recovery clause*, 11 F.P.S.C. 11:254, 2011 Fla. PUC LEXIS 392 (2011)(Order No. PSC-11-0547-FOF-EI), are designated "Final Order 11-0547."

All references to the Florida Statutes are to the Florida Statutes (2011), unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

This is an appeal of Florida Public Service Commission ("Commission") Final Order No. PSC-11-0547-FOF-EI ("Final Order 11-0547"), which allowed Florida Power & Light Company ("FPL") and Progress Energy Florida, Inc. ("Progress") cost recovery, pursuant to section 366.93, Florida Statutes, and Rule 25-6.0423, Florida Administrative Code, for costs incurred for the siting, design, and licensing necessary to construct nuclear power plants. (R. Vo1. 62, Pgs. 12247, 12361) On March 1, 2011, FPL and Progress filed separate petitions with the Commission seeking approval to recover, via the Commission's capacity cost recovery clause factor,[1] the prudent and actual costs incurred in the siting, design, licensing, and construction of their planned nuclear reactors for the period of 2009 and 2010. (R. Vol. 2, Pg. 227, Vol. 7, Pg. 1280) On May 2, 2012, both utilities petitioned the Commission to recover estimated 2011 costs and projected 2012 costs for the planned nuclear reactors. (R. Vol. 14, Pg. 2650, Vol. 18, Pg. 3527)

[1] The capacity cost recovery clause factor was established by the Commission in 1992. *In re: Generic Investigation of the proper recovery of purchased power capacity cost by investor-owned electric utilities*, 92 F.P.S.C. 2:520, 1992 Fla. PUC LEXIS 359 (1992). The purpose of the clause is to allow investor-owned utilities recovery of capacity related purchase power costs. *Id.* at *14. The clause includes a true-up mechanism designed for the over or under recovery of costs. *Id.* at *15. The clause operates in a manner similar to the Commission's fuel cost recovery clause factor. *Id.* *5.

An administrative hearing was held on August 10-11, 2011, to receive evidence on FPL's petition and was continued on August 16-17, 2011, to receive evidence on Progress' petition. (R. Vol. 62, Pg. 12250) Upon review of the record from the administrative hearing, the Commission voted to approve nuclear cost recovery amounts for FPL and Progress at a public meeting held on October 24, 2011. (R. Vol. 61, Pg. 12146) The Commission subsequently issued, on November 23, 2011, Final Order 11-0547 memorializing its decision. (R. Vol. 62, Pg. 12247, 12319, 12353)

SACE filed its Notice of Administrative Appeal of Final Order 11-0547 on December 21, 2011. (R. Vol. 62, Pg. 12361)

II. STATEMENT OF THE FACTS

Section 366.93(2) and (3), Florida Statutes, authorizes "any investor-owned electric utility that owns, maintains, or operates an electric generation, transmission, or distribution system within the State of Florida that is regulated by [chapter 366, Florida Statutes]" to petition the Commission, after a petition for determination of need is granted by the Commission, for "the recovery of costs incurred in the siting, design, licensing, and construction of a nuclear power plant, including new, expanded, or relocated electrical transmission lines and facilities that are necessary thereto, or of an integrated gasification combined cycle power plant" (R. Vol. 62, Pgs. 12256, 12334) "Cost" is defined in the statute as

including, but not limited to, "all capital investments, including rate of return, any applicable taxes, and all expenses, including operation and maintenance expenses, related to or resulting from the siting, licensing, design, construction, or operation of the nuclear power plant, including new, expanded, or relocated electrical transmission lines or facilities of any size that are necessary thereto, or of the integrated gasification combined cycle power plant." §366.93(1)(a), Fla. Stat.

Section 366.93(2) required the Commission to adopt a rule to provide alternative cost recovery mechanisms for the recovery of all prudently incurred costs in rates. The Legislature directed the Commission to design the alternative cost recovery mechanisms to promote utility investment in nuclear or integrated combined cycle power plants. §366.93(2), Fla. Stat.

In 2007, the Commission adopted Rule 25-6.0423, Florida Administrative Code, to implement section 366.93, Florida Statutes. *See* Fla. Admin. Code R. 25-6.0423. In accordance with section 366.93(2), the rule sets forth the procedure by which a utility may request cost recovery. Fla. Admin. Code R. 25-6.0423(1); (R. Vol. 62, Pg. 12250)

A hearing is held annually to determine the reasonableness of projected preconstruction expenditures and the prudence of actual preconstruction

expenditures made by the utility.[2] Fla. Admin. Code R. 25-6.0423(5)(c)2.; (R. Vol. 62, Pg. 12250) Based on the evidence from the hearing, the Commission determines the reasonable and prudent costs to be included in the capacity cost recovery clause factor. Fla. Admin. Code R. 25-0423(5)(c)3.; (R. Vol. 62, Pgs. 12319, 12353) Four hearings have been held since the rule's inception. (R. Vol. 63, Pg. 12250)

Section 366.93 also instructs the Commission as to how costs should be treated when the plant is placed into commercial service. §366.93(4), Fla. Stat. If the utility elects not to complete or is precluded from completing construction of the power plant, the statute instructs the Commission to allow the recovery of all prudent preconstruction and construction costs and states the time frame for recovery of the costs. §366.93(6), Fla. Stat.

Prior to the enactment of section 366.93 and Rule 25-6.0423, all eligible power plant construction projects were afforded the same regulatory accounting and ratemaking treatment. (R. Vol. 62, Pg. 12249) Once the need for the project is determined, the utility books all expenditures associated with the project into the construction-work-in-progress account. (R. Vol. 62, Pg. 12249) A monthly

[2] Under this procedure, a "roll-over docket" has been created, wherein each year the Commission trues-up projected costs from previous years based on actual expenditures, trues-up projections based on current year actual/estimated expenditures, and reviews and approves cost projections for the subsequent year. (R. Vol. 62, Pg. 12250)

allowance-for-funds-used-during-construction rate is applied to the average balance of this account. (R. Vol. 62, Pg. 12249) The resulting dollar amount is then added to the account balance. (R. Vol. 62, Pg. 12249) This process continues until the completion of the project. (R. Vol. 62, Pg. 12249)

The construction-work-in-progress account balance is transferred to the appropriate plant-in-service account and becomes part of the utility's rate base when the plant is placed in commercial service. (R. Vol. 62, Pg. 12249) The impacts of including the total project costs in a utility's rate base, as well as the impacts of additional plant operations expenses, are addressed in a subsequent proceeding. (R. Vol. 62, Pg. 12249) Whether the customer base rate charges should be changed in order to provide the opportunity to recover these costs is determined in the subsequent proceeding. (R. Vol. 62, Pg. 12249)

FPL and Progress are investor-owned electric utilities regulated by the Commission pursuant to chapter 366, Florida Statutes. (R. Vol. 2, Pg. 232, Vol. 7, Pg. 1280, Vol. 14, Pg. 2651, Vol. 18, Pg. 3529) In 2008, the Commission granted FPL's petition for determination of need for the construction of two new nuclear generating units, Turkey Point Units 6 & 7. *In re: Petition for determination of need for Turkey Point Nuclear Units 6 and 7 electrical power plant, by Florida Power and Light Company,* 2008 Fla. PUC LEXIS 119 (2008); (R. Vol. 62, Pg. 12248) That same year, the Commission also granted Progress' petition for

determination of need for the construction of two nuclear generating units, Levy Units 1 & 2. *In re: Petition for determination of need for Levy Units 1 and 2 nuclear power plants, by Progress Energy Florida, Inc.*, 08 F.P.S.C. 8:141, 2008 Fla. PUC LEXIS 278 (2008); (R. Vol. 62, Pg. 12249) In their petitions filed on March 1, and May 2, 2011, FPL and Progress sought approval to recover, via the Commission's capacity cost recovery clause factor, actual costs incurred in 2009 and 2010 and estimated 2011 costs and projected 2012 costs incurred in the siting, design, licensing, and construction of Turkey Point Units 6 & 7 and Levy Units 1 & 2. [3] (R. Vol. 2, Pg. 227, Vol. 7, Pg. 1280, Vol. 14, Pg. 2650, Vol. 18, Pg. 3527)

The Commission opened Docket No. 110009-EI to consider FPL's and Progress' petitions for cost recovery. (R. Vol. 62, Pg. 12248) The Office of Public Counsel, the Florida Industrial Power Users Group, White Springs Agricultural Chemicals Inc. d/b/a PCS Phosphate – White Springs, and the Southern Alliance for Clean Energy (SACE) intervened in the administrative proceeding. (R. Vol. 1, Pgs. 79, 89, 91, Vol. 30, Pg. 5844, Vol. 62, Pg. 12250)

At the August 2011 hearing, the Commission took evidence on the reasonableness of the projected preconstruction expenditures and the prudence of the actual preconstruction expenditures for the projects. (R. Vol. 62, Pg. 12250)

[3] To date, no utility has petitioned pursuant to section 366.93 for recovery of costs incurred in the siting, design, licensing, and construction of an integrated gasification combined cycle power plant.

FPL proffered 10 witnesses, Progress proffered 5 witnesses, the Office of Public Counsel proffered 2 witnesses, and the Commission's staff proffered 6 witnesses at the hearing. (R. Vol. 51, Pgs. 10161-10163) SACE did not proffer any witnesses at the hearing. (R. Vol. 51, Pgs. 10161-10163)

Based on the evidence presented at the hearing, the Commission found that FPL demonstrated its continued intent to build the Turkey Point Units 6 & 7 nuclear reactors and that the estimated commercial operations dates for Units 6 & 7 were 2022 and 2023, respectively. (R. Vol. 62, Pgs. 12256-12257, 12269) In support of its findings, the Commission relied on evidence showing that FPL was pursuing the siting, design and licensing approvals from both state and federal governments necessary to construct and operate the nuclear reactors. (R. Vol. 62, Pgs. 12256-12257) FPL had maintained its reservations with the manufacturers of long-lead material by negotiating several extensions; continued negotiations for a land exchange agreement with the Everglades National Park and for approvals of a Comprehensive Development Master Plan amendment for roadway improvements needed for construction activities; and sought approval and execution of a Joint Participation Agreement for reclaimed water from Miami-Dade County for the Turkey Point Units 6 & 7 project's cooling water needs. (R. Vol. 62, Pgs. 12256, 12257)

The Commission found that the Turkey Point project remained economically and technically feasible. (R. Vol. 62, Pgs. 12264, 12265) The Commission also found that the project was still feasible from a regulatory and funding availability standpoint. (R. Vol. 62, Pgs. 12264, 12265) The Commission allowed FPL to recover the prudently incurred costs associated with the utility's continued pursuit of the siting, design and licensing approvals from both state and federal governments necessary to construct and operate Turkey Point Units 6 & 7. (R. Vol. 62, Pgs. 12255, 12256, 12257, 12319)

The Commission also found that Progress demonstrated its intent to build the Levy Units 1 & 2 nuclear reactors. (R. Vol. 62, Pgs. 12334, 12335) In support of this finding, the Commission gave weight to evidence showing that the project had been approved by Progress' Senior Management Committee and Board of Directors; it was an active project under existing Nuclear Regulatory Commission licensing application and construction contract; the in-service date for Unit 1 is 2021 and 2022 for Unit 2; and the project schedule supported the in-service dates. (R. Vol. 62, Pg. 12335) The Commission found that Office of Public Counsel witness Jacobs' testimony did not support a conclusion on Progress' intent to build. (R. Vol. 62, Pg. 12334)

The Commission found that Progress' project plan had not materially changed since the Commission approved the plan in 2010. (R. Vol. 62, Pgs.

12334, 12335) The Commission found the Levy project remained economically and technically feasible. (R. Vol. 62, Pgs. 12325 12326) The project was also shown to be feasible from a regulatory and funding availability standpoint. (R. Vol. 62, Pgs. 12326, 12327) The Commission allowed Progress to recover the prudently incurred costs for the siting, design and licensing necessary to construct Levy Units 1 & 2. (R. Vol. 62, Pgs. 12335, 12353)

In making its decision, the Commission cited to two key decisions it made in the 2010 nuclear cost recovery proceeding and memorialized in *In re: Nuclear cost recovery clause,* 11 F.P.S.C. 2:44, 2011 Fla. PUC LEXIS 77 (2011)("Order No. PSC-11-0095-FOF-EI"). The Commission found that a utility did not have to simultaneously engage in the siting, design, licensing, and construction of a nuclear power plant to be eligible for cost recovery under section 366.93. Order No. PSC-11-0095-FOF-EI, 2011 Fla. PUC LEXIS 77 at *20-*30; (R. Vol. 62, Pgs. 12255, 12256, 12334, 12335) Moreover, the Commission found Progress' project plan to be reasonable, pursuant to which Progress would concentrate on obtaining its Combined Operating License from the Nuclear Regulatory Commission and defer most other project work until the Combined Operating License was obtained. *Id.* at *84-*85; (R. Vol. 62, Pgs. 12334, 12335) Order No. PSC-11-0095-FOF-EI is a final order, and the time to appeal the order has passed. 2011 Fla. PUC LEXIS 77 at *1-*3.

SUMMARY OF ARGUMENT

Section 366.93 and Rule 25-6.0423 require the Commission to allow for recovery in rates of all prudent costs incurred in the siting, design, licensing, and construction of a nuclear power plant. In accordance with the statute and rule, the Commission allowed FPL and Progress to recover the costs prudently incurred for the siting, design, and licensing necessary to construct their nuclear reactors. The record shows that both FPL and Progress intend to build their nuclear power plants. The utilities' pursuit of an option to build comports with their intent to build the plants.

A closer look at SACE's argument shows that it is requesting this Court to reweigh the Commission's factual findings. This is something the Court simply cannot do. The Commission's decision to allow FPL and Progress cost recovery for the prudent costs each utility incurred for the siting, design, and licensing necessary to build their nuclear reactors is supported by competent, substantial record evidence and comports with the plain language and intent of section 366.93.

SACE's challenge to the constitutionality of section 366.93 has no basis in the law. Section 366.93 explicitly states the Legislature's fundamental policy to promote utility investment in nuclear or integrated gasification combined cycle power plants and allows for the recovery in rates of all prudent costs incurred in the siting, design, licensing, and construction of these types of power plants. The

statute defines the utilities that are eligible for cost recovery, specifies the type of costs that the Commission must allow the utilities to recover, and sets forth the time frame for cost recovery. The alternative cost mechanisms required by section 366.93 are simply the procedures by which the Commission implements this legislative policy. The factual determination of whether a cost is prudent and, thus, should be included in rates is within the Commission's ratemaking expertise and the type of subordinate function properly transferred to the Commission by the Legislature. Section 366.93 sets forth sufficient standards to guide the Commission in implementing the Legislature's policy objectives and, thus, does not violate Article II, Section 3 of the Florida Constitution.

SACE has failed to overcome the presumption of correctness that attaches to Commission orders and the presumption of constitutionality that attaches to statutes. The Court should, therefore, affirm Final Order 11-0547 and find section 366.93 constitutional.

ARGUMENT

I. THE COMMISSION'S DECISION TO APPROVE NUCLEAR COST RECOVERY AMOUNTS FOR FPL AND PROGRESS COMPORTS WITH SECTION 366.93, FLORIDA STATUTES, AND RULE 25-6.0423, FLORIDA ADMINISTRATIVE CODE, AND IS SUPPORTED BY COMPETENT, SUBSTANTIAL RECORD EVIDENCE.

Orders of the Commission come before the Court "clothed with the statutory presumption that they have been made within the Commission's jurisdiction and

powers, and that they are reasonable and just and such as ought to have been made." *E.g.*, *Ameristeel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla. 1997). "The party challenging an order of the Commission bears the burden of overcoming these presumptions by showing a departure from the essential requirements of law." *Id.* The Court will approve the Commission's findings and conclusions if they are based on competent, substantial record evidence and if they are not clearly erroneous. *Id.*

The standard of review for Point I is whether there is competent, substantial record evidence supporting the Commission's action. *See* §120.68(7)(b), Fla. Stat. The Court, however, shall not substitute its judgment for that of the fact-finder as to the weight of the evidence on any disputed finding of fact. §120.68(7)(b) and (10), Fla. Stat. Moreover, the Commission's interpretation of statutes and rules it is charged with enforcing is entitled to great deference and will be approved by the Court unless it is clearly erroneous. *BellSouth Telecommunications, Inc. v. Johnson*, 708 So. 2d 594, 596 (Fla. 1998); *Pan American World Airways, Inc. v. Florida Public Service Commission*, 427 So. 2d 716, 719 (Fla. 1983).

There is competent, substantial record evidence supporting the Commission's approval of the recovery of costs incurred by FPL and Progress for the siting, design, and licensing necessary to construct their nuclear power plants.

Moreover, the Commission's decision comports with section 366.93, Florida Statutes, and Rule 25-6.0423, Florida Administrative Code.

A. The Commission was correct to allow FPL and Progress cost recovery pursuant to section 366.93, Florida Statutes, because the record shows that the costs recovered were incurred in the siting, design, licensing and construction of nuclear power plants.

SACE's argument that the Commission's decision approving cost recovery is arbitrary and not supported by the record (SACE Br. Pgs. 14-15) is baseless. The record evidence shows that the costs for which FPL and Progress were granted recovery were incurred in the siting, design, licensing, and construction of their nuclear power plants. (R. Attach. 1, T. Vol. 2, Pgs. 152, 178-180, Vol. 11, Pgs. 1683-1684) Thus, the Commission was correct to allow recovery of these costs pursuant to section 366.93, Florida Statutes, and Rule 25-6.0423, Florida Administrative Code.

1. The record shows that the costs recovered by FPL were incurred for the siting, design, and licensing necessary to construct the Turkey Point Units 6 & 7 nuclear reactors.

a. FPL demonstrated that it intends to build the Turkey Point Units 6 & 7 nuclear reactors.

SACE argues that FPL did not establish the requisite "intent to build" to support cost recovery for the Turkey Point project. (SACE Br. Pgs. 15-22) This argument should be rejected because there is competent, substantial record evidence showing that FPL intends to build the plants.

The record shows that FPL continues to pursue the licenses and approvals from both state and federal governments necessary to construct and operate Turkey Point Units 6 & 7. (R. Attach. 1, T. Vol. 2, Pgs. 149-150, 204, 219, 242, 294, Vol. 4, Pg. 527) FPL has maintained its reservations with manufacturers of long-lead material by negotiating several extensions. (R. Attach. 1, T. Vol. 2, Pgs. 149, 151) The utility continued negotiations for a land exchange agreement with the Everglades National Park and for approvals of a Comprehensive Development Master Plan amendment for roadway improvements needed for construction activities. (R. Attach. 1, T. Vol. 2, Pgs. 149, 152, 178) FPL sought approval and execution of a Joint Participation Agreement for reclaimed water from Miami-Dade County for the project's cooling water needs. (R. Attach. 1, T. Vol. 2, Pgs. 149, 152, 178) These are all actions necessary to construct the Turkey Point 6 & 7 nuclear reactors. (R. Attach. 1, T. Vol. 2, Pgs. 149, 152, 178) The Commission allowed recovery for the costs FPL incurred associated with these activities. (R. Vol. 62, Pg. 12256)

FPL continues to move forward with the project, and the target commercial operation dates for Turkey Point Units 6 & 7 are 2022 and 2023, respectively. (R. Attach. 1, T. Vol. 2 Pgs. 149, 151, 219, 272) While SACE points to evidence that FPL has not entered into an engineering, procurement, and construction contract and has deferred procurement of long lead construction materials in an effort to

support its assertion that FPL has not demonstrated an intent to build (SACE Br. Pgs. 15-16), FPL witness Scroggs testified that FPL does not have to initiate long lead procurement until 2015 nor enter into an engineering, procurement, and construction contract at this time to maintain the current schedule for completion of the nuclear reactors. (R. Attach. 1, T. Vol. 2, Pgs. 151, 183, Vol. 3, Pgs. 295, 298, 299)

Although FPL's primary focus has been on obtaining a Combined Operating License from the Nuclear Regulatory Commission before moving forward with other phases of the project, the project has not been cancelled. (R. Attach. 1, T. Vol. 2, Pgs. 156, 164, 204, 242, 272, 273, Vol. 3, Pg. 294) Witness Diaz testified that FPL's decision to take a stepwise approach to licensing and project scheduling for Turkey Point Units 6 & 7 is "consistent with the overriding objective of minimizing nuclear power plant cost and schedule risks, in accordance with the U.S. system of regulation of nuclear power and with best management practices." (R. Attach. 1, T. Vol. 3, Pgs. 325-326)

SACE's assertion that there is growing evidence that the development and construction of new nuclear generation in the United States is not economically feasible is contrary to the record evidence. (SACE Br. Pgs. 5, 6, 15, 16) Even when taking in consideration the declining demand due to the economic downturn, lower natural gas prices, the lack of laws placing a cost on carbon dioxide emissions, and

the 2011 Fukushima nuclear disaster in Japan, the record shows that it is still technically and economically feasible for FPL to build the nuclear generating units. (R. Attach.1, T. Vol. 2, Pgs. 156, 164, 180, 233, 254, 255, Vol. 3, Pgs. 314, 315, 316)

FPL witness Scroggs testified that FPL is pursuing the completion of the nuclear reactors. (R. Attach. 1, T. Vol. 2, Pgs. 204, 242, 273, Vol. 3, Pg. 294) During cross-examination by the Florida Industrial Power Users Group, witness Scroggs could not be clearer in regard to FPL's intent to construct Turkey Point Units 6 & 7:

> Q. Okay. As we sit here today, is it Florida Power & Light's intent to construct these units?
> A. Yes, it is.

(R. Attach. 1, T. Vol. 2, Pg. 273) No witness provided testimony contrary to this testimony.

The record shows that FPL's pursuit of an option to build comports with its intent to build the plants. (SACE Br. Pgs. 14-22) Witness Scroggs testified as to what FPL meant by the term "option" in response to questions from the Florida Industrial Power Users Group:

> Q. When you use the term "option," what did you mean by that, you were creating the option by obtaining these licenses?
> A. Well, at present time, the potential to build new nuclear units in Florida doesn't exist because we don't have the requisite licenses or approvals to do that. So the first thing we need to do is create that option. I think there's some misconception that option is a selection

> of whether or not to build. It's really about when to build. And when to build means when is it in the best interest of the customers.
>
> Our belief is that by pursuing the option through getting the licenses, we define the project, we define the conditions of certification of the project, and we're much closer to the time that we would execute contracts to build the project. That allows us to learn from what's happened with the Southern project and the SCANA project and incorporate those into our decision-making.
>
> So I think the option has been perhaps twisted to determine -- to make it sound as if we would or wouldn't choose to. We intend to. We wouldn't be engaged in the licensing process if we didn't intend to. And it's really a question about when is the appropriate time to initiate the construction expenditures.
>
> Q. So when you use the term "option," you're not talking about whether or not you're going to do it, you just aren't able to tell us when you would actually complete the project?
>
> A. That's, that's correct.

(R. Attach. 1, T. Vol. 2, Pgs. 273-275) Thus, while SACE attempts to characterize FPL's witnesses' testimony as contradictory (SACE Br. Pg. 17, fn. 19, Pg. 19), FPL's pursuit of the option does not contradict its statement that the utility intends to build the Turkey Point 6 & 7 nuclear reactors. As discussed *supra*, the record shows that this stepwise approach to licensing and project scheduling for Turkey Point Units 6 & 7 is consistent with the objective of minimizing nuclear power plant cost and schedule risks and with best management practices. (R. Attach. 1, T. Vol. 3, Pgs. 325-326, 327)

SACE admits that FPL does not have to simultaneously engage in the siting, design, licensing, and construction of the nuclear reactors to receive cost recovery

under section 366.93.[4] (SACE Br. Pg. 21) Yet, this is exactly what SACE is arguing when it asserts that because "[a]ll activities directly related to construction have been cancelled and/or delayed" FPL has not demonstrated the requisite intent to build by "simply pursuing the [Combined Operating License] from the [Nuclear Regulatory Commission]." (SACE Br. Pg. 21) The record shows that the costs for which the Commission granted FPL recovery were for the siting, design and licensing approvals necessary to construct Turkey Point Units 6 & 7. (R. Attach. 1, T. Vol. 2, Pgs. 152, 178; R. Vol. 62, Pgs. 12255-12257) As there is no requirement that actual physical construction activities must take place simultaneously with the siting, design and licensing of the plant to be eligible for cost recovery under section 366.93, SACE's argument fails.

b. The Commission's finding that FPL demonstrated the intent to build the Turkey Point Units 6 & 7 nuclear reactors comports with section 366.93, Florida Statutes, and Rule 25-6.0423, Florida Administrative Code, and is supported by competent, substantial record evidence.

SACE argues that the Commission's finding that FPL demonstrated the intent to build Turkey Point Units 6 & 7 is arbitrary and unsupported by the

[4] In Order No. PSC-11-0095-FOF-EI, the Commission resolved the issue of whether a utility must simultaneously engage in the siting, design, licensing, and construction of a nuclear power plant to obtain cost recovery under section 366.93, finding that this was not a requirement for cost recovery under the statute. 2011 Fla. PUC LEXIS 77 at *20-*30; (R. Vol. 62, Pgs. 12255, 12334) Order No. PSC-11-0095-FOF-EI was not appealed, and the time for filing an appeal has long-since passed. *Id.* at *1-*3.

evidence. (SACE Br. Pgs. 22-25) This argument is also baseless. As demonstrated *supra*, the Commission's decision is based on competent, substantial record evidence. Moreover, the Commission's decision to allow FPL cost recovery comports with section 366.93 and Rule 25-6.0423.

Section 366.93 and Rule 25-6.0423 require the Commission to allow for the recovery in rates of all prudent costs incurred in the siting, design, licensing, and construction of a nuclear power plant. In accordance with the statute and rule, the Commission allowed FPL to recover the prudently incurred costs associated with the utility's continued pursuit of siting, design and licensing approvals from both state and federal governments necessary to construct and operate Turkey Point Units 6 & 7. (R. Vol. 62, Pgs. 12255, 12256, 12275)

SACE argues that the activities relied upon by the Commission to support a finding of intent to build are "insufficient to support a finding of intent to build" because "FPL has cancelled and/or delayed all activities directly related to the construction that would demonstrate intent to build [Turkey Point] 6 & 7." (SACE Br. Pg. 24) As discussed above, SACE's argument seems to be based on the faulty premise that section 366.93 and Rule 25-6.0423 require construction activities to occur simultaneously with siting, design, and licensing activities and that all decisions concerning the physical construction of the plants must be made before a utility is eligible for cost recovery. This interpretation of section 366.93 and Rule

25-6.0423 was rejected by the Commission in Order No. PSC-11-0095-FOF-EI, 2011 Fla. PUC LEXIS 77 at *20-*30. (R. Vol. 62, Pgs. 12255, 12256)

As discussed *supra*, the record shows that FPL's pursuit of an option to build comports with the utility's intent to build the plant. Pursuing an option just means that the utility is not moving forward with the actual physical construction of the nuclear reactors until it obtains the required licenses to build the plant. (R. Attach. 1, T. Vol. 2, Pgs. 273-275) This stepwise approach to licensing and project scheduling for the Turkey Point Units 6 & 7 is consistent with the objective of minimizing nuclear power plant cost and schedule risks and with best management practices. (R. Attach. 1, T. Vol. 3, Pgs. 325-326, 327) Moreover, FPL's pursuit of an option does not take away from the fact that the costs were incurred for siting, design, and licensing activities necessary to construct the nuclear reactors. §366.93(2), Fla. Stat.

SACE's argument centers around its disagreement with the Commission's evaluation of the evidence in making its decision and is essentially a request that the Court reweigh the Commission's factual findings. (SACE Br. Pg. 17, fn. 19, Pg. 19) However, it is the Commission's job, as fact-finder, to evaluate and weigh the testimony and other evidence from the administrative hearing, and it is not the function of the appellate court to reevaluate the evidence from the record on appeal below. *See* §120.68(7)(b), Fla. Stat. (stating that the court shall not substitute its

judgment for that of the agency as to the weight of the evidence on any disputed finding of fact); *see also Gulf Power Company v. Public Service Commission*, 480 So. 2d 97, 98 (Fla. 1985)(holding that the Court cannot reweigh and reevaluate the evidence presented to the Commission).

All the costs for which FPL was allowed recovery were incurred in the siting, design, and licensing necessary to construct Turkey Point Units 6 & 7. (R. Attach. 1, T. Vol. Pgs. 152, 178; R. Vol. 62, Pgs. 12255-12257) Disallowing these costs would be contrary to the plain language and intent of section 366.93(2) and (3) and Rule 25-6.0423(5)(c)3. The Commission's interpretation of section 366.93 and Rule 25-6.0423 is entitled to great deference. *See BellSouth Telecommunications*, 708 So. 2d at 596 (stating that an agency's interpretation of a statute it is charged with enforcing is entitled to great deference and will be approved by this Court unless it is clearly erroneous); *see also Pan American World Airways*, 427 So. 2d at 719 (stating that the great deference afforded by the Court to an agency's interpretation of a statute it is charged with enforcing is accorded to agency rules which have been in effect over an extended period of time).

2. The record shows that the costs recovered by Progress were incurred for the siting, design and licensing necessary to construct the Levy Units 1 & 2 nuclear reactors.

a. Progress demonstrated that it intends to build the Levy Units 1 & 2 nuclear reactors.

SACE argues that Progress did not establish the requisite "intent to build" to support cost recovery for the Levy Units 1 & 2 nuclear reactors. (SACE Br. Pgs. 25-29) This argument should also be rejected because there is competent, substantial record evidence demonstrating Progress' intent to build the plants.

The record shows that the construction of Levy Units 1 & 2 is an active project under existing Nuclear Regulatory Commission licensing application and construction contract. (R. Attach. 1, T. Vol. 11, Pg. 1684) Progress witness Elnitsky testified that the utility is performing the following work in 2011 and 2012 to meet the current anticipated in-service dates for Levy Units 1 and 2 in 2021 and 2022, respectively:

> (1) the performance of work activities needed to support environmental permitting and implementation of conditions for certification ("CoC"); (2) the continued disposition of long lead equipment ("LLE") purchase orders; (3) the commencement of work on an updated transmission study given the current, anticipated in-service dates for Levy Units 1 and 2, the commencement of an updated Transmission Study, and any associated, targeted land acquisitions; (4) the preparations for, and the negotiations of, the [Engineering, Procurement and Construction] Agreement Amendment(s) necessary to efficiently end the current partial suspension of the [Levy Units 1 & 2 Project] and continue with the [Levy Units 1 & 2 Project] work on the current, anticipated [Levy Units 1 & 2 Project] schedule; (5) continued participation in industry

> groups to advance the AP1000 design and operation; (6) active involvement in industry groups such as the Nuclear Energy Institute's ("NEI") New Plant Working Group and Nuclear Plant Oversight Committee in addition to INPO's New Plant Deployment Executive Working Group to engage and support industry peers and constructively influence [Nuclear Regulatory Commission] senior management in the development of regulatory response to emerging issues; and (7) continued joint owner negotiations.

(R. Attach. 1, T. Vol. 11, Pgs. 1683-1684) The Commission allowed Progress cost recovery for these activities. (R. Vol. 62, Pgs. 12334-12335, 12353)

In Order No. PSC-11-0095-FOF-EI, the Commission determined that Progress' decision to amend its Engineering, Procurement, and Construction Agreement for the Levy project to focus its efforts on obtaining its Combined Operating License and defer most other project work until the Combined Operating License is obtained was reasonable. 2011 Fla. PUC LEXIS 77 at *84-*85; (R. Attach. 1, T. Vol. 11, Pg. 1682; R. Vol. 62, Pgs. 12334, 12335) Progress has continued to follow the plan approved by the Commission in Order No. PSC-11-0095-FOF-EI and took the necessary steps to obtain the Combined Operating License from the Nuclear Regulatory Commission and performed engineering support work associated with the Nuclear Regulatory Commission's approval of the AP1000 Standard Plant Design and Reference Combined Operating License Application. (R. Attach. 1, T. Vol. 11, Pgs. 1682-1684)

Progress witness Elnitsky consistently testified that Progress is performing the work necessary to move the Levy nuclear units forward on schedule with the

expected in-service dates of the units in 2021 and 2022. (R. Attach. 1, T. Vol. 11, Pgs. 1681-1682, 1683, 1697, 1734-1735, 1738, 1743, 1744, 1746, 1748, 1768, 1769, 1771, 1797, 1853-1854, 1929) Moreover, Progress performed an analysis that shows that the planned units continue to be feasible both from a regulatory and technical perspective. (R. Attach. 1, T. Vol. 11, Pgs. 1681-1682, 1699-1701, 1710-1711, 1730) Witness Elnitsky further testified that there is no need at this time to cancel the planned construction of the units. (R. Attach. 1, T. Vol. 11, Pgs. 1682, 1734-1735, 1739)

The only witness to offer testimony counter to the testimony offered by the Progress witnesses in regard to intent to build Levy Units 1 & 2 was Office of Public Counsel witness Jacobs. (R. Vol. 62, Pgs. 12331-12334) Although witness Jacobs testified that Progress' intent to build the project appears to be decreasing, he stopped short of testifying that Progress does not intend to build the nuclear reactors. (R. Attach. 1, T. Vol. 12, Pgs. 2029-2030) Witness Jacobs testified that he was not advocating that Progress should not be able to recover costs that it spent in reliance on the "[Combined Operating License]-receipt approach" approved by the Commission in Order No. PSC-11-0095-FOF-EI. (R. Attach. 1, T. Vol. 12, Pgs. 2007-2008) Moreover, witness Jacobs agreed that Progress was implementing the integrated project plan approved by the Commission in Order No. PSC-11-0095-FOF-EI. (R. Attach. 1, T. Vol. 12, Pg. 2028) He specifically stated that it was not

his opinion that Progress should cancel the Levy nuclear projects. (R. Attach. 1, T. Vol. 12, Pg. 2030)

In determining Progress' intent to build the nuclear reactors, the Commission, as fact-finder, assigned greater weight to Progress' testimony. (R. Vol. 62, Pg. 12334) As witness Jacobs only questioned Progress' resolve to complete the project, the Commission was correct to find that witness Jacobs' testimony "would not lead one to a conclusion concerning intent." (R. Vol. 62, Pg. 12334)

The record shows that Progress' creation of an option to build comports with its intent to build the new nuclear reactors. At the administrative hearing, witness Elnitsky testified as to what Progress meant by the phrase "option to build" in response to questions from the Florida Industrial Power Users Group:

> Q. I want to go through a few things in your testimony, and in the opening statement I said that I thought you might agree, or I would have some questions about intent, but you would agree that the intent to move forward is probably properly characterized with a little i, correct?
>
> A. No, I would not.
>
> Q. Notwithstanding the statement in the [Securities and Exchange Commission] that, you know, you are looking at getting an option, or the statement in the [Securities and Exchange Commission] filing that you are going to reevaluate after you get the [Combined Operating License], you think that the large I is appropriate?
>
> A. Yes, I do. As I have previously discussed, we are taking all the actions necessary to move forward with the project above and beyond those required just to get the license. But as I answered in my previous question, we are not taking any actions that are irreversible, so we continue to do that evaluation year over year.

(R. Attach. 1, T. Vol. 11, Pg. 1930) Mr. Elnitsky likewise testified on the meaning of the phrase "option to build" in response to questions from SACE:

> Q. Thank you. So it's not a matter of when, it's a matter of if, I'll ask you again, correct?
> A. I disagree.
> Q. Mr. Elnitsky, we just established that the final decision of whether to build the Levy nuclear project has not been made, correct?
>
> ***
>
> THE WITNESS: No, I think what we established was that we have not taken any actions at this point that are irreversible. We continue to do all the things necessary in good project management to move the schedule forward on the current plan.

(R. Attach. 1, T. Vol. 11, Pg. 1945) The record shows that Progress is moving forward with the Levy project in an effort to meet the 2021 and 2022 in-service dates. (R. Attach. 1, T. Vol. 11, Pgs. 1681-1682, 1683, 1697, 1734-1735, 1738, 1743, 1744, 1746, 1748, 1768, 1769, 1771, 1797, 1853-1854, 1929) Thus, the Commission was correct to find that Progress demonstrated the intent to build as the activities for which it sought cost recovery were incurred for the siting, design and licensing necessary to construct the Levy project. §366.93(2), Fla. Stat.

Just like its argument with regard to FPL, the basis of SACE's argument regarding Progress' intent to build seems to rest on an interpretation of section 366.93, rejected by the Commission, that would require siting, design and licensing activities to occur simultaneously with actual physical construction of the plants in

order for a utility to obtain cost recovery. (SACE Br. Pgs. 29, 31) However, as SACE admits (SACE Br. Pgs. 21, 23, 30), there is no requirement that construction activities must take place simultaneously with the siting, design and licensing of the plants for a utility to receive cost recovery under section 366.93. Order No. PSC-11-0095-FOF-EI, 2011 Fla. PUC LEXIS 77 at *20-*30. Thus, SACE's argument fails.

b. The Commission's finding that Progress demonstrated the intent to build the Levy Units 1 & 2 nuclear reactors comports with section 366.93, Florida Statutes, and Rule 25-6.0423, Florida Administrative Code, and is supported by competent, substantial record evidence.

SACE's argument that the Commission's decision to allow Progress cost recovery is arbitrary and unsupported by the evidence (SACE Br. Pgs. 30-31) should also be rejected. As demonstrated *supra*, the Commission's decision is based on competent, substantial record evidence. Moreover, the Commission's decision to allow Progress cost recovery comports with section 366.93 and Rule 25-6.0423.

Section 366.93 and Rule 25-6.0423 require the Commission to allow for the recovery in rates of all prudent costs incurred in the siting, design, licensing, and construction of a nuclear power plant. In accordance with the statute and rule, the Commission allowed Progress to recover the prudently incurred siting, design, and

licensing costs necessary to construct Levy Units 1 & 2. (R. Vol. 62, Pgs. 12334-12335, 12353)

As with the costs at issue for FPL discussed *supra*, disallowing these costs would be contrary to the plain language and intent of section 366.93(2) and (3) and Rule 25-6.0423(5)(c)3., which specifically state that cost recovery shall be allowed for all prudent costs incurred in the siting, design, licensing, and construction of a nuclear power plant. The Commission's interpretation of section 366.93 and Rule 25-6.0423 is entitled to great deference. *See BellSouth Telecommunications*, 708 So. 2d at 596; *see also Pan American World Airways*, 427 So. 2d at 719.

A closer look at SACE's argument shows that SACE is requesting the Court reweigh the Commission's findings on the evidence presented to the Commission at the administrative hearing. (SACE Br. Pg. 27, fn. 24, Pg. 31, fn. 29) This is not something the Court is permitted to do. It is the Commission's job, as fact-finder, to evaluate and weigh the testimony and other evidence from the administrative hearing, and it is not the function of the appellate court to reevaluate the evidence from the record on appeal below. *See* §120.68(7)(b), Fla. Stat. (stating that the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact); *see also Gulf Power Company*, 480 So. 2d at 98 (holding that the Court cannot reweigh and reevaluate the evidence presented to the Commission).

Progress demonstrated the intent to build Levy Units 1 & 2 as the utility continues to engage in activities that fall under the siting, design, licensing, and construction of a nuclear power plant. (R. Attach. 1, T. Vol. 11, Pgs. 1683-1684; R. Vol. 62, Pgs. 12334-12335) Thus, the Commission was correct to approve cost recovery for these activities, and the Commission's allowance of these costs comports with section 366.93 and Rule 25-6.0423.

II. SECTION 366.93, FLORIDA STATUTES, IS NOT AN UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY AND DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE OF ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION.

SACE challenges the constitutionality of section 366.93, asserting that it violates Article II, Section 3 of the Florida Constitution, the nondelegation doctrine. (SACE Br. Pgs. 32-49) This argument lacks foundation in law.

A. SACE has not demonstrated that section 366.93, Florida Statutes, is unconstitutional.

In *Lewis v. Leon County*, 73 So. 3d 151, 153 (Fla. 2011), the Court sets forth the standard by which it reviews a statute to determine whether it is constitutional. The Court states that, although its review of the constitutionality of a statute is a question of law subject to *de novo* review,

> [s]tatutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome…"[S]hould any doubt exist that an act is in violation…of any constitutional provision, the presumption is in favor of constitutionality. To overcome the presumption, the invalidity must

> appear beyond a reasonable doubt, for it must be assumed the legislature intended to enact a valid law."

Id. (citations omitted).

Unlike the statutes at issue in *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978), *Lewis v. Bank of Pasco County*, 346 So. 2d 53 (Fla. 1976), *Sarasota County v. Barg*, 302 So. 2d 737 (Fla. 1974), and *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004), section 366.93 contains adequate standards and, thus, does not violate the nondelegation doctrine. (SACE Br. 33-36) Indeed, as discussed in further detail *infra*, section 366.93 defines the utilities that are eligible for cost recovery, specifies the type of costs that the Commission must allow the utilities to recover, and sets forth the time frame for cost recovery. In its cursory challenge to section 366.93, SACE has failed to overcome the heavy burden of demonstrating, beyond a reasonable doubt, that section 366.93 is unconstitutional.

B. Section 366.93, Florida Statutes, does not violate the nondelegation doctrine because it contains adequate standards to guide the Commission in its implementation of the Legislature's policy objectives.

Contrary to SACE's assertions (SACE Br. Pgs. 37, 38, 40, 41, 42), section 366.93 is clear as to which costs are recoverable under the statute. Section 366.93 specifically states that the Commission shall allow the recovery in rates of all costs prudently "incurred in the siting, design, licensing and construction of a nuclear power plant, including any new, expanded, or relocated transmission lines and

facilities necessary thereto, or of an integrated gasification combined cycle power plant." §366.93(2), Fla. Stat.[5] The statute also requires the recovery of the carrying costs on the utility's projected construction cost balance, and sets forth how the carrying costs are determined. §366.93(2)(b), Fla. Stat.

The statute also instructs the Commission as to how costs should be treated when the plant is placed into commercial service. §366.93(4), Fla. Stat. If the utility elects not to complete or is precluded from completing construction of the power plant, the statute specifically instructs the Commission to allow the recovery of all prudent preconstruction and construction costs and states the time frame for recovery of the costs. §366.93(6), Fla. Stat. "Preconstruction" is defined as "that period of time after a site, including any related electrical transmission lines or facilities, has been selected through and including the date the utility completes site clearing work." §366.93(1)(f), Fla. Stat.

The statute defines the term "cost" as including, but not limited to, "all capital investments, including rate of return, any applicable taxes, and all expenses, including operation and maintenance expenses, related to or resulting from the siting, licensing, design, construction, or operation of the nuclear power plant, including new, expanded, or relocated electrical transmission lines or facilities of

[5] As the statute only allows for the recovery of incurred costs, SACE's suggestion that the statute leaves open to the Commission the option to allow utilities to recover double their actual costs in order to promote investment in nuclear power plants is incorrect. (SACE Br. Pg. 39)

any size that are necessary thereto, or of the integrated gasification combined cycle power plant." §366.93(1)(a), Fla. Stat. The statute recognizes that actual costs may exceed cost estimates as the utility proceeds forward in constructing the plant. §366.93(5), Fla. Stat.

Section 366.93 unequivocally requires the Commission to allow the recovery of all prudently incurred costs. Although SACE argues that "prudently incurred costs" is not an objective standard (SACE Br. Pg. 40), this term is not inherently ambiguous nor subject to varying interpretations in the context for which is it used in the statute. As SACE acknowledges, the Commission has defined the term in its orders as "consideration of what a reasonable utility manager would have done, in light of the conditions and circumstances which were known, or should have been known, at the time the decision was made." (R. Vol. 62, Pgs. 12274, 12337)

Moreover, in section 403.519(4)(e), Florida Statutes, which addresses the same subject as section 366.93 and was enacted in the same bill as section 366.93, Chapter 2006-230, sections 43 and 44, Laws of Florida, the Legislature provides guidance to the Commission on the definition of prudence by instructing as to what "imprudence" does not include. In this regard, section 403.519(4)(e) states that "[p]roceeding with the construction of a nuclear or integrated combined cycle power plant following an order by the commission approving the need for the

nuclear or integrated gasification combined cycle power plant under this act shall not constitute or be evidence of imprudence" and that "[i]mprudence shall not include any cost increase due to events beyond the utility's control." Section 366.93 and section 403.519(4)(e) should be construed together to effectuate the Legislature's intent. *See Florida Department of State v. Martin*, 916 So. 2d 763, 768 (Fla. 2005)("The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent.").

While the issue of whether a cost was prudently incurred is a factual matter,[6] it is the Commission's job to make such factual determinations. *See, e.g., International Minerals and Chemical Corporation v. Mayo*, 336 So. 2d 548, 553 (Fla. 1976)(recognizing that the Commission is required to make findings of fact in rate proceedings). This is exactly what the Commission did in the matter at hand. And the Commission's decision is subject to judicial review. §120.68, Florida Statutes; *see also Gulf Power Company v. Florida Public Service Commission*, 487 So. 2d 1036, 1037 (Fla. 1986)(wherein this Court reviewed a Commission decision on managerial imprudence).

[6] Section 403.519(4)(e) contemplates that the Commission's determination on the prudence of costs incurred will be based on evidence adduced at a hearing. Rule 25-6.0423(5)(c)2., Florida Administrative Code, requires the Commission to conduct a hearing to determine the prudence of the utility's expenditures.

Section 366.93 is not the only statute the Commission is charged with enforcing that requires it to determine the prudence of costs. *See* §366.82(11), Fla. Stat. ("Reasonable and prudent unreimbursed costs projected to be incurred, or any portion of such costs, may be added to the rates which would otherwise be charged by a utility upon approval by the commission. . . ."); §366.825(3), Fla. Stat. ("Approval of a plan submitted by a public utility shall establish that the utility's plan to implement compliance is prudent and the commission shall retain jurisdiction to determine in a subsequent proceeding that the actual costs of implementing the compliance plan are reasonable…."); §366.8260(2)(b)1.b., Fla. Stat. ("The commission shall issue a financing order authorizing financing of reasonable and prudent storm-recovery costs….Any determination of whether storm-recovery costs are reasonable and prudent shall be made in reference to the general public interest in, and the scope of effort required to provide, the safe and expeditious restoration of electric service."); §366.91(3), Fla. Stat. ("Prudent and reasonable costs associated with a renewable energy contract shall be recovered from the ratepayers of the contracting utility, without differentiation among customer classes, through the appropriate cost-recovery clause mechanism administered by the commission."); §366.92(4), Fla. Stat. (. . .the commission shall provide for full cost recovery under the environmental cost-recovery clause of all reasonable and prudent costs incurred by a provider for renewable energy projects.

. .. Such costs shall be deemed reasonable and prudent for the purposes of cost recovery. . . .); §367.081(3), Fla. Stat. ("The commission, in fixing rates, may determine the prudent cost of providing service during the period of time the rates will be in effect. . . .); §367.0817(2), Fla. Stat. ("The commission shall review the utility's reuse project plan and shall determine whether the projected costs are prudent. . . ."); and §367.0817(3), Fla. Stat. ("All prudent costs of a reuse project shall be recovered in rates."). Whether a cost is prudent and, thus, should be included in rates is within the Commission's ratemaking expertise and the type of subordinate function properly transferred to the Commission by the Legislature. *See Microtel, Inc. v. Florida Public Service Commission*, 464 So. 2d 1189, 1191 (Fla. 1985)(holding that "[s]ubordinate functions may be transferred by the Legislature to permit administration of legislative policy by an agency with the expertise and flexibility needed to deal with complex and fluid conditions").

The statute is also specific as to the utilities eligible for cost recovery. (SACE Br. Pg. 42) Section 366.93(3) states a utility that has been granted a determination of need by the Commission is eligible for cost recovery under the statute. Section 366.93(1)(b) defines "electric utility" or "utility" as "any investor-owned electric utility that owns, maintains, or operates an electric generation,

transmission, or distribution system within the State of Florida and that is regulated under [chapter 366, Florida Statutes]."[7]

As for the time frame for eligibility for cost recovery (SACE Br. Pgs. 39, 41), the statute specifically states that a utility may petition for cost recovery after a petition for need determination is granted by the Commission, section 366.93(3), and costs may be recovered until the time the plant is either put into commercial service, section 366.93(4), or until the utility either elects not to complete or is precluded from completing the construction of the plant, section 366.93(6). The statute states how the Commission is to administer costs under either of these scenarios. §366.93(4) and (6), Fla. Stat.

The "alternative cost recovery mechanisms" that the Legislature requires the Commission to establish in section 366.93(2) are simply the procedures by which the Commission implements the Legislature's policy directive to allow the utility to recover all prudently incurred costs. The alternative cost mechanisms required by section 366.93(2) are set forth in Florida Administrative Code Rule 25-6.0423. *See* Fla. Admin. Code R. 25-6.0423(1)(stating that the purpose of the rule is "to establish alternative cost recovery mechanisms for the recovery of costs incurred in the siting, design, licensing, and construction of nuclear or integrated gasification

[7] Section 366.93(1)(b) states that "electric utility" and "utility" has the same meaning as defined in section 366.8255(1)(a). This is the definition in section 366.8255(1)(a).

combined cycle power plants in order to promote electric utility investment in nuclear or integrated gasification combined cycle power plants and allow for the recovery in rates of all such prudently incurred costs").

Rule 25-6.0423 includes such things as the date a utility must file its petition for cost recovery, when the Commission will conduct the hearing on the petition, and when the Commission will enter its vote and issue its order. Fla. Admin. Code R. 25-6.0423(5)(c). The rule also sets forth the information the Commission has deemed necessary to make a determination on whether the costs for which the utility is seeking recovery are prudent, as required by section 366.93(2). *See* Fla. Admin. Code R. 25-6.0423(5)(c)1.a.-c. and 5., (8). Such subordinate functions may be transferred by the Legislature to the agency. *Microtel*, 464 So. 2d at 1191.

Alternative cost recovery mechanisms are not new to the Commission. They are procedures by which costs are recovered outside of a traditional base rate proceeding. (R. Vol. 62, Pg. 12249) Examples of other alternative cost recovery mechanisms implemented by the Commission include the procedure for the recovery of environmental compliance costs, set forth in section 366.8255, Florida Statutes, and the Commission-established fuel adjustment clause, which is a regulatory tool designed to pass through to utility customers the costs associated with fuel purchases by utilities. *See In re: Petition on behalf of Citizens of State of*

Florida to require Progress Energy Florida, Inc. to refund to customers $143 million, 2007 Fla. PUC LEXIS 502 (2007).

The matter at hand is in no way analogous to *Cross Key Waterways*, 372 So. 2d at 913. (SACE Br. Pg. 41) The statute at issue in *Cross Key Waterways* was found to violate the nondelegation doctrine because it required the agency to make policy by determining which geographic areas and resources in the State of Florida were in greatest need of environmental protection. Section 366.93, in contrast, explicitly states the Legislature's policy in the statute – to promote utility investment in nuclear or integrated gasification combined cycle power plants – and then requires the Commission to allow utilities to recover in rates all prudently incurred costs in order to promote the utility's investment in the plants. §366.93(2) As discussed above, the statute defines the terms "cost" and "utility," and specifically sets forth the time frame for allowing cost recovery – after a petition for need is granted until the plant comes into commercial service or the utility either elects not to complete or is precluded from completing construction of the nuclear power plant. §366.93(1), (3), (4), and (6), Fla. Stat.

SACE's reliance on *Schiavo*, 885 So. 2d at 333, is also misplaced. (SACE Br. Pgs. 33, 35, 47) In *Schiavo*, the Court found that the statute at issue was unconstitutional because "[t]he Legislature failed to provide any standards by which the Governor should determine whether, in any given case, a stay should be

issued and how long the stay should remain in effect." *Id.* at 334. Section 366.93, however, specifically states that the Commission shall allow recovery in rates of all prudently incurred costs and defines the term "cost." Thus, the Legislature specifically limits cost recovery to only prudently incurred costs and only those costs incurred in and associated with the construction of a nuclear or integrated gasification combined cycle power plant. Unlike the statute in *Schiavo*, section 366.93 does not give the Commission the option to allow the recovery of the prudent costs, but states that the Commission shall allow the recovery in rates of all prudent costs defined in the statute. §366.93(2), Fla. Stat.

Moreover, unlike the statute in *Schiavo*, section 366.93 addresses the time period for which the utility may seek recovery of costs. In this regard, the statute states the utility may petition for cost recovery after a petition for need is granted by the Commission and that cost recovery shall be allowed until the plant is placed in commercial service or until the utility either elects not to complete or is precluded from completing the power plant. § 366.93(3), (4) and (6).

C. The Commission's interpretation of section 366.93, Florida Statutes, is consistent with the plain language and intent of the statute.

SACE's argument that the Commission has exercised unbridled discretion in its interpretation of the section 366.93 (SACE Br. Pgs. 44-47) also fails. As illustrated in Point I of this Brief, the Commission has consistently interpreted the statute to allow for the recovery in rates of all prudent costs incurred in the siting,

design, licensing and construction of a nuclear power plant for which an investor-owned utility has been granted a need determination. (R. Vol. 62, Pgs. 12255-12257, 12319, 12334-12335, 12353). Thus, the Commission's interpretation of section 366.93 comports with the plain language and intent of the statute.

The Court has often stated that, as the agency responsible for utility regulation, the Commission's interpretation of its statutory authority is entitled to great weight. *P.W. Ventures v. Nichols*, 533 So. 2d 281, 283 (Fla. 1988). This principle also applies where constitutionality is at issue. As the Court noted in *Department of Insurance v. Southeast Volusia Hospital District*, 438 So. 2d 815, 820 (Fla. 1983):

> A statute is not unconstitutional simply because it is subject to differing interpretations. The administrative construction of a statute by the agency charged with its administration is entitled to great weight. We will not overturn that agency's interpretation unless clearly erroneous.

(citation omitted).

Although SACE alleges that the Commission is inconsistently applying the long-term feasibility analysis requirement of Rule 25-6.0423 (SACE Br. Pgs. 45-46), the record shows that the Commission required each utility to file the analysis. (R. Vol. 62, Pgs. 12257, 12320) The Commission's 2008 requirement that each utility include certain information in its analysis necessary for the Commission to

make a determination on the feasibility of each utility's individual project does not deviate from the rule nor does it render section 366.93 unconstitutional.

Likewise, SACE's disagreement with the weight the Commission gave to the evidence in finding that the projects remain feasible (SACE Br. Pgs. 46-47) is not a proper basis for finding the statute unconstitutional. As discussed in Point I of this Brief, it is the Commission's job, as fact-finder, to evaluate and weigh the testimony and other evidence from the administrative hearing, and it is not the function of the appellate court to reevaluate the evidence from the record on appeal below. *See* §120.68(7)(b), Fla. Stat.; *see also Gulf Power Company*, 480 So. 2d at 98.

As illustrated *supra*, section 366.93 sets forth sufficient standards by which the Commission has implemented the Legislature's policy to promote utility investment in nuclear and integrated gasification combined cycle power plants. Thus, SACE's reliance on *High Ridge Management Corp. v. State of Florida*, 354 So. 2d 377 (Fla. 1977), and *Department of State v. Martin*, 885 So. 2d 453 (Fla. 1st DCA 2004), *affirmed by*, 916 So. 2d 763 (Fla. 2005) (SACE Br. Pg 47), is misplaced.

D. Section 366.93, Florida Statutes, is similar to other Commission statutes found by this Court to be constitutional.

SACE's argument that section 366.93 is different than other statutes administered by the Commission which have successfully withstood constitutional

challenges in the courts (SACE Br. Pgs. 48-49) is not supported by case law. Indeed, the two cases cited by SACE, *Florida Gas Transmission Company v. Public Service Commission*, 635 So. 2d 941 (Fla. 1994), and *Microtel*, 464 So. 2d at 1189, support the constitutionality of section 366.93.

In *Florida Gas Transmission Company*, 635 So. 2d at 944, the Court found another Commission statute, section 403.9422, constitutional because it provided sufficient guidelines and standards to limit the Commission's authority. In reaching this conclusion, the Court found that "[t]he fact that the statute allows the Commission to consider 'other matters within its jurisdiction' does not represent an attempt by the legislature to abdicate its constitutional lawmaking responsibility" because the statute set forth very specific and mandatory guidelines for the Commission to carry out the purpose of the legislation. *Id.* at 944.

Likewise, in the case at hand, section 366.93 sets forth very specific and mandatory standards for the Commission to carry out the purpose of the legislation. As discussed in detail *supra*, the statute defines the utilities that are eligible for cost recovery, section 366.93(1) and (3), Florida Statutes, specifies the type of costs that the Commission must allow the utilities to recover, section 366.93(1), (2), (4), and (6), Florida Statutes, and sets forth the time frame for cost recovery, section 366.93(3), (4), and (6), Florida Statutes. Despite SACE's

assertion that there is "sharp contrast" between section 366.93 and section 403.9422 (SACE Br. Pg. 49), there is very little difference at all.

Moreover, similar to the statute at issue in *Microtel*, 464 So 2d at 1189, section 366.93 provides adequate standards. In section 366.93(2), the Legislature made the fundamental policy to promote utility investment in nuclear and integrated gasification combined cycle power plants. Section 366.93 instructs the Commission on how to achieve this policy objective by specifically requiring the Commission to allow for the recovery in rates of all prudently incurred costs as defined in the statute. While Rule 25-6.0423 establishes a procedure by which utilities must provide information to the Commission so that it can implement the legislative policy set forth in the statute, these subordinate functions may be transferred by the Legislature to the agency. *Id.* at 1191.

CONCLUSION

SACE has failed to overcome the presumption of correctness that attaches to Commission orders, *Ameristeel Corp.*, 691 So. 2d at 477, and the presumption of constitutionality that attaches to statutes, *Leon County*, 73 So. 3d at 153. Thus, the Commission respectfully requests that this Court affirm Final Order No. PSC-11-0547-FOF-EI and hold that section 366.93, Florida Statutes, is constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY, pursuant to Rule 9.210(a)(2), Florida Rules of Appellate Procedure, that this brief was prepared using Times New Roman 14-point typeface.

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