BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear cost recovery clause.	DOCKET NO. 100009-EI ORDER NO. PSC-11-0224-FOF-EI ISSUED: May 16, 2011

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR
RONALD A. BRISÉ
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

BACKGROUND

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

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

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

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

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

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

On February 11, 2011, PCS Phosphate filed a Motion for Reconsideration seeking reconsideration of our decision on the aforementioned issue. On February 18, 2011, PEF and FPL filed separate responses in opposition to PCS Phosphate's Motion for Reconsideration. No party requested oral argument. Pursuant to Rule 25-22.0022, F.A.C., oral argument is not permitted unless it is requested by a party at the time of the motion or unless we believe that oral argument will assist us in our decision. We find that the parties' filings clearly present their positions and that oral argument is not necessary. The parties' arguments and our analysis are detailed below.

We have jurisdiction over this subject matter pursuant to the provisions of Chapter 366, Florida Statutes, including Sections 366.04, 366.05, 366.06, and 366.93, F.S.

DECISION

Standard of Review

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

> Whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. See,

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

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

Id. at 891.

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

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

Jaytex Realty, 105 So. 2d at 818.

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

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

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

Id. at 819.

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

As discussed below, we find that PCS Phosphate's motion shall be denied because it fails to identify a point of law or fact that we overlooked or failed to consider when we rendered our decision.

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

In its motion, PCS Phosphate contends that our decision is incomplete and in error. PCS Phosphate asserts that in our discussion regarding the nuclear cost recovery statute, Section 366.93, F.S., our analysis begins and ends with the assertion that specific statutory provisions control over more general ones. PCS Phosphate argues that the error in our determination is that the presence of a specific provision, such as the nuclear cost recovery statute, does not end the legal analysis, but signifies where that analysis must begin. It contends that given the recitation of its broad rate-setting power, the nuclear cost recovery statute does not trump our over-arching public interest mission under Chapter 366, F.S. PCS Phosphate asserts that the extraordinary risk and cost shifting from the utility to ratepayers due to the nuclear cost recovery statute, as well as the evident high cost and schedule

uncertainties associated with new nuclear power construction, compel concerted Commission action to ensure that a utility's continued pursuit of nuclear construction will yield just and reasonable rates for consumers. Thus, we must look to reconcile the nuclear cost recovery statute with that broader rate-setting responsibility.

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

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

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

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

PCS Phosphate also asserts that its motion should be granted because our legal analysis was insufficient and misinterprets the Legislature's plain intent. PCS Phosphate contends that the Final Order erred in finding that a specific statute always trumps more general provisions, and in Florida this resolution of apparently conflicting requirements applies only where there is an "irremediable inconsistency" between the two statutes. People Against Tax Revenue Mismanagement v. County of Leon, 583 So. 2d 1373, 1377 n.5 (Fla. 1991) (PATRM). PCS Phosphate asserts that the apparent inconsistency between the nuclear cost recovery statute and the general rate making statute requires an attempt to interpret the provisions in a manner that will avoid the inconsistency and carry out the legislative intent. According to PCS Phosphate, in this instance the Legislature expressly aimed to promote new nuclear power plant construction while ensuring reasonable electric power costs for Florida consumers. PCS Phosphate argues that the Final Order does not endeavor to reconcile the specific nuclear provisions with that basic statutory obligation, and we should have attempted to harmonize two related but potentially conflicting statutes, and give effect to both. PCS Phosphate cites Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249 (Fla. 1987), as precedent for this proposition. PCS Phosphate asserts that the Legislature should be presumed to have

passed any new enactment with full awareness of the existing statutory scheme, and without evidence to the contrary, we should not assume that our entire rate-setting statutory scheme is undermined by the nuclear cost recovery statute.

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

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

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

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

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

Moreover, we find that PATRM and Palm Harbor Special Fire Control District, support our decision that the specific nuclear statute, Section 366.93, F.S., which explicitly provides for recovery of all prudently incurred costs, and governs our action in

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

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

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

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

FPL contends that PCS Phosphate's motion is premised upon the flawed representation that Section 366.93, F.S., does not guarantee that the utility recover all of

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

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

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

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

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

> The statute expressly provides that a utility shall be allowed to recover all prudently incurred costs. The statute is silent regarding a risk sharing mechanism. . . . . [W]e find that the only statutory requirement is that the

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

> utility prove that its costs in new nuclear power plant capacity were prudently incurred.

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

Risk Sharing Mechanism

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

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

We find that these arguments advanced by PCS Phosphate fail to meet the standard upon which a motion for reconsideration could be granted. PCS Phosphate does not identify a point of law or fact we overlooked or failed to consider when we rendered our decision. We find our authority is limited under Section 366.93(2), F.S., in creating a risk sharing mechanism that would prevent a utility from recovering prudently incurred costs. We would note that the Final Order does not prohibit PCS Phosphate, or any party, from proposing a specific risk-sharing mechanism that is consistent with Section 366.93, F.S. Said mechanism cannot prevent a utility from recovering prudently incurred cost. Consequently, we find that no modification of the Final Order is necessary to address the specific relief PCS Phosphate requests.

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

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that that White Springs Agricultural Chemicals Inc. d/b/a PCS Phosphate – White Springs' Motion for Reconsideration concerning our decision that we did not have the authority to require a risk-sharing mechanism that would provide an incentive for a utility to complete a project within an appropriate, established cost threshold, is denied in its entirety. It is further

ORDERED that upon expiration of the time for appeal, if no appeal has been taken, this docket should be closed.

By ORDER of the Florida Public Service Commission this 16th day of May, 2011.

ANN COLE
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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.