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Subject: SACE legal brief of Issues 1-3, Docket No. 130009
Attachments: SACE 2013 NCRC legal brief-Issues1-3.pdf

Dear Commission Clerk,

In accordance with the electronic filing procedures of the Florida Public Service Commission, the following filing is made:

A.
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B. This filing is made in Docket No. 130009-EI: In re: Nuclear Cost Recovery Clause.

C. This document is filed on behalf of Southern Alliance for Clean Energy (SACE).

D. The document is 15 total pages.

E. The attached document is SACE's Legal Brief on Issues 1, 2 & 3 in the above docket.

Sincerely,

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Cost Recovery Clause	**DOCKET NO. 130009-EG**
	Date: July 29, 2013

THE SOUTHERN ALLIANCE FOR CLEAN ENERGY'S BRIEF ON LEGAL ISSUES 1, 2 & 3

The Southern Alliance for Clean Energy ("SACE"), by and through its undersigned counsel, and pursuant to Order No. PSC-13-0333-PHO-EI, Prehearing Order dated July 23, 2013, providing the opportunity to brief the legal issues in the case, hereby submits its legal brief in the above-styled docket for legal issues 1, 2 and 3.

INTRODUCTION

Section 366.93, F.S., passed in 2006, provided, in large part, for definitions for certain costs that could be recovered in advance of the in-service date for proposed nuclear reactors, and the process for recovery of such costs by a utility. Due to concerns that the unbridled cost recovery process needed to be reigned-in and because all the financial risk of new proposed reactor projects was borne by ratepayers, the Florida Legislature passed SB 1472 during the 2013 legislative session. The bill passed with unanimous support in the Florida Senate[1] and was signed by the governor on June 14, 2013.[2] In so doing, the Florida Legislature has a sent clear message to the Commission that it expects more consumer protection through a higher level of scrutiny during the current and subsequent nuclear cost recovery dockets.

The provisions of Chapter 2013-184, Laws of Florida include procedural revisions of AFUDC rate application and a procedural separation of the cost recovery process into stages. For instance, during the time that a utility seeks to obtain a combined license ("COL") from the Nuclear Regulatory Commission ("NRC") for a nuclear power plant, the utility may recover only costs related to, or necessary for, obtaining licensing.[3] Additionally, after the utility obtains the COL, it must petition the commission before proceeding with preconstruction work beyond

[1] Senate 2013 Session, Bill 1472 Senate Floor Vote, at:
http://www.flsenate.gov/Session/Bill/2013/1472/FloorVotes/0UrUy6%3DPL%3DGBTOOSBxL5fnhwlTjUdY%3D%7C14%2FPublic%2FVotes%2FBill%2F20130502%2FSenateVote_s1472e2002.PDF
[2] Chapter 2013-184, Laws of Florida, 366.93.
[3] *Id.* at (3)(b).

activities related to obtaining or maintaining the COL.[4] If the commission finds that the plant remains feasible and the projected costs are reasonable, the utility may proceed with preconstruction work on a plant.[5] The utility must once again petition the commission prior to the construction phase and the commission must find that the plant remains feasible and that projected costs are reasonable for work to proceed.

The legal issues presented in this docket go to the applicability of the provisions of Chapter 2013-184, Laws of Florida (SB 1472) in this docket. This brief addresses the following issues and concludes that the new law must be applied to the facts in this year's proceeding.

ISSUE 1: Does recently enacted Senate Bill 1472, effective July 1, 2013, change the AFUDC rate that should be used for nuclear cost recovery clause computations in this year's pending case?

ISSUE 2: Does recently enacted Senate Bill 1472, effective July 1, 2013, preclude a utility from continuing preconstruction work not related to obtaining a combined operating license from the Nuclear Regulatory Commission or certification, that was under contract or commenced prior to July 1, 2013?

ISSUE 3: Does recently enacted Senate Bill 1472, effective July 1, 2013, preclude a utility from recovering costs associated with preconstruction work not related to obtaining a combined operating license from the Nuclear Regulatory Commission or certification, that was under contract or commenced prior to July 1, 2013?

SUMMARY OF ARGUMENT

Chapter 2013-184, Laws of Florida was enacted as a remedial measure to reign-in unbridled cost recovery for proposed new nuclear reactors. The amendment of Section 366.93, F.S. is procedural in nature and does not impose any new substantive rights or impose any new legal burdens. *Arrow Air, Inc. v. Michael Walsh*, 645 So.2d 422, 424 (Fla. 1994). The law merely effectuates the means and methods to apply and enforce already existing duties and rights. *Alamo Rent-a-Car, Inc. v. Michael Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994). Therefore, the fundamental legal effect of the Section 366.93, F.S. remains in place. A utility can continue to recover an AFUDC rate; it can continue to recover costs related to pursuance of a COL from the NRC; it is not precluded from engaging in and recovering preconstruction cost not related to the

[4] *Id.* at (3)(c).
[5] *Id.* at (3)(c)2.

pursuance of a COL from the NRC; and it is not precluded from recovering construction costs. It must simply do so through the new process established by the Florida Legislature. Since the provisions are procedural, no further analysis of the substantive nature of Chapter 2013-184, Laws of Florida is required. *Smiley v. State of Florida*, 966 So.2d 330, 334 (Fla. 2007) (citing *City of Lakeland v. Catinella*, 129 So.2d 133, 136 (Fla. 1961)).

Should the Commission find that a procedural provision in the amended statute creates new substantive rights or imposes new legal burdens on a utility, it must also find that the law must be applied retroactively to meet intent of the Florida Legislature.

ARGUMENT

Chapter 2013-184, Laws of Florida was enacted as a consumer protection remedial measure to reign-in unbridled cost recovery for proposed new nuclear reactors. The relevant provisions of Chapter 2013-84 are procedural in nature and do not impose any new substantive rights or impose any new legal burdens and is therefore not subject to the presumption that it must be applied prospectively. *Arrow Air, Inc. v. Michael Walsh*, 645 So.2d 422, 424 (Fla. 1994). Such laws can be presumptively applied in pending cases. *Id.* Moreover, the "presumption in favor of prospective application generally does not apply to 'remedial' legislation; rather, *whenever possible, such legislation should be applied to pending cases in order to fully effectuate the legislation's intended purpose.*" *Id.* (citing *City of Orlando v. Desjardins*, 493 So.2d 1027 (Fla. 1986) (emphasis added).

In *Arrow Air*, an employee filed a wrongful discharge action against a Florida company. The suit was dismissed by a District Court for failure to state a cause of action. During the appeal, the Florida legislature passed the Whistle–Blower's Act that prohibits private sector employers from taking retaliatory personnel action against employees who "blow the whistle" on employers who violate the law. Since the passage of the law created a new cause of action that did not formerly exist, it gave the employee a substantive right that he did not have at the time he was discharged and would subject the employer to *new* liability for its past conduct. As such, the Court ruled that the law was substantive in nature and must be applied prospectively given no legislative intent that it be applied retroactively.

Likewise "[r]emedial statutes or statutes relating to remedies or modes of *procedure*, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a

retrospective law, or the general rule against retrospective operation of statutes." *Smiley v. State of Florida*, 966 So.2d 330, 334 (Fla. 2007) (citing *City of Lakeland v. Catinella*, 129 So.2d 133, 136 (Fla. 1961)). In *Smiley*, a Defendant charged with first-degree murder moved to permit jury instructions based on newly enacted statute expanding right of self-defense by eliminating the duty to retreat before using deadly force. The Court held, as it did in *Arrow Air*, that the newly enacted law created a right, a new affirmative defense to first-degree murder charge, that did not previously exist. As such, the Court ruled that the new law could not apply retroactively without legislative intent for retroactive application.

"Substantive law prescribes duties and rights and procedural law concerns the *means and methods to apply and enforce those duties and rights.*" *Alamo Rent-a-Car, Inc. v. Michael Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994) (quoting *Benyard v. Wainwright*, 322 So. 2d 473, 475 (Fla. 1975) (emphasis added). In *Alamo*, the Petitioner rental car company sought review of a decision of the District Court regarding a malicious prosecution action. The court considered whether the Respondent could avail himself of a malicious prosecution amendment to a statute that was enacted after the cause of action. The Court held that the amendment was a punitive provision that granted a new legal right to the Respondent and imposed a new legal burden on the Petitioner, and as such, was not procedural in nature and could not be applied retroactively, absent legislative intent. *Id.*

In applying a statute, it's axiomatic that the plain language of a statute is the starting point in statutory interpretation. *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000); *accord BellSouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003). When the statute is clear and unambiguous, it is not necessary to look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. *See Lee County Elec. Coop., Inc. v. Jacobs*, 820 So. 2d 297, 303 (Fla. 2002).

If the Commission feels that it must resort to statutory construction, it can utilize legislative history. The Supreme Court has in the past utilized Legislative Staff Analysis of bills to guide its legislative intent analysis, although the Court is "not unified in its view on the use of legislative staff analysis to determine legislative intent." *Kasichke v. State*, 991 So. 2d 803, 810 (Fla. 2008) (quoting *GTC, Inc. v. Edgar*, 967 So. 2d 781, 789 n.4 (Fla. 2007)). However, the Court has recognized that staff analysis is "one touchstone of the collective legislative will." *Id.* (quoting *SunBank/South Fla.,N.A. v. Baker*, 632 So. 2d 669, 671 (Fla. 4th DCA 1994)). The

Commission can likewise rely on the title of the new law for guidance on how to interpret the intent of the provisions. *Parker v. State*, 406 So. 2d 1089, 1092 (Fla. 1981) (recognizing that title of enacting legislation is one indicator of legislative intent).

In the instant case, Chapter 2013-184 was enacted by the Florida Legislature as a consumer protection remedial measure to eliminate abusive cost recovery practices for proposed new nuclear reactors. It establishes a new *process* in the application of an AFUDC rate, the authorization for preconstruction work and construction work, and the recovery of costs related to the construction of proposed nuclear reactors. As such, those provisions are procedural in nature and do not create new substantive rights or impose any new legal burdens. Therefore, the new law must be applied to the facts in the current proceeding.

Legal Issue 1

Does recently enacted Senate Bill 1472, effective July 1, 2013, change the AFUDC rate that should be used for nuclear cost recovery clause computations in this year's pending case?

Yes. The provision is clearly procedural and must be applied in the present case. Chapter 2013-184 (Senate Bill 1472) revises the AFUDC rate that must be applied for nuclear cost recovery clause computations in this year's pending case. The relevant provision states the following:

> To encourage investment and provide certainty, ~~for nuclear or integrated gasification combined cycle power plant need petitions submitted on or before December 31, 2010~~, associated carrying costs must ~~shall~~ be equal to the most recently approved pretax AFUDC at the time an increment of cost recovery is sought ~~in effect upon this act becoming law.~~

Chapter 2013-184, Laws of Florida, 366.93(2)(b)

The deleted language and the added language is plain on its face and evinces a legislative intent to apply a new method to enforce an already existing right - the right to earn an AFUDC (allowance for funds used during construction) rate.[6] Therefore, the provision is clearly procedural. *Alamo,* 632 So. 2d at 358.

[6] The AFUDC rate is a method of allowing a utility to recover its costs of raising capital. It includes both a debt component (for borrowed funds for interest paid on bonds and short-term debt) and an equity component (for

In 2006, the Florida Legislature adopted legislation to encourage the development of nuclear energy in the state. It provided that the AFUDC rate would be the most recently approved AFUDC rate at the law took effect. The AFUDC rate provides for deferred accounting treatment. Site selection and pre-construction costs are afforded deferred accounting treatment and accrue a carrying charge equal to the utility's AFUDC rate until recovered in rates. R. 25-6.0423(3),(5), F.A.C.

The effect of the implementation of legislative revision is to change the process by which the AFUDC rate is established. The Commission must no longer apply the rate that was in effect at the time Section 366.93, F.S. was enacted in 2006. Rather, it must now apply the AFUDC at "the time an increment of cost recovery is sought." Chapter 2013-184, Laws of Florida, 366.93(2)(b). The "increment of cost recovery" is being sought in the current docket. The current AFUDC rates are 7.44 percent for Duke Energy Florida ("DEF") and 6.41 percent for Florida Power & Light ("FPL"); and are less than the 2006 AFUDC rates[7] due to a decrease in their cost of raising capital (debt and equity).[8] Thus, under current conditions, the new law will reduce the AFUDC rate for each utility to fit its current circumstances. If either component of a utility's AFUDC rate increases in the future above its 2006 level (that is, if its interest rates for debt or its allowed rate of return increases), the applicable AFUDC rate could increase to above the 2006 level. Therefore, pursuant to the amended statute, the AFUDC rate will now more closely match the utilities' cost of capital. At times the rate may be lower than the 2006 level, and at times it may be higher, allowing the utility to earn a higher rate – it depends on the applicable cost of capital rate in any given year.

The application of a rate that more closely aligns the AFUDC rate with a utility's true cost of capital does not create new substantive rights or impose any new legal burdens. *Arrow Air,* 645 So.2d at 424. The utility still retains the right to recover carrying charges under the amended statute. The amendment ensures that the rate will be one which accurately reflects the true cost of capital for the utility which protects customers from excessive cost recovery due to an inflated AFUDC rate. The statute does not create new or take away vested rights, but only operates in furtherance of the remedy or confirmation of rights already existing. *Smiley*, 966

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common and preferred equity funds used to support a project's construction). These components are weighted to determine that utility's overall cost of capital at that time.

[7] The AFUDC rate in effect in 2006 was 8.848% for Duke, and 7.42% for FPL. *See* The House of Representatives Final Bill Analysis, HB 7167, July 11, 2013

[8] The Florida Senate, Bill Analysis and Fiscal Impact Statement, p. 5, April 16, 2013.

So.2d at 334. The law effectuates the means and methods to apply and enforce existing duties and rights." *Alamo*, 632 So. 2d at 1358. This is evidenced by the fact that at times the rate may be lower than the 2006 level, and at times it may be higher, allowing the utility to earn a higher rate. The fundamental right to earn such a right has been untouched by the amended statute. The only aspect that has changes is the method by which to apply an already existing right. Therefore, the provision clearly does not rise to the level of a substantive new right or the imposition of a new legal burden as contemplated in *Arrow Air, Smiley, or Alamo.*

Further evidence of the procedural nature of the amendment is found in the legislative history and the title of the amendment. *Kasichke*, 991 So. 2d at 810. ; *Parker*, 406 So. 2d at 1092. For instance, the legislative intent of SB 1472 bill is to, in part, "establish a process" for review and approval by the Public Service Commission before a utility continues with specified steps in developing a new power plant for which it is obtaining early cost recovery.[9] Moreover, the title of the amendment states that it is "modifying" an alternative cost recovery mechanism and "establishing a procedure" related to cost recovery based on preconstruction and construction phases. Chapter 2013-184, Laws of Florida. While the intent language in the legislative history and the amendment title is not dispositive of the procedural nature of the AFUDC provision, it corroborates the plain meaning and intent of AFUDC provision of Chapter 2013-184 as a procedural amendment.

Since the amended statute provision regarding the application of an AFUDC rate clearly does not rise to the level of a substantive new right or the imposition of a new legal burden as contemplated in *Arrow Air, Smiley, or Alamo*, and that further evidence of its procedural nature are found in the legislative history and the title of the amendment, the provision is clearly procedural and must be applied in the present case.[10]

Legal Issue 2

Does recently enacted Senate Bill 1472, effective July 1, 2013, preclude a utility from continuing preconstruction work not related to obtaining a combined operating license from the Nuclear Regulatory Commission or certification, that was under contract or commenced prior to July 1, 2013?

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[9] *Id.* at p.1

[10] The necessity of a supplemental filing or the response to further Commission staff discovery requests does not rise to the level of an imposition of new legal burden as contemplated in *Arrow Air, Smiley, or Alamo.*

Yes. The provision is clearly procedural and must be applied in the present case. Chapter 2013-184, Laws of Florida (Senate Bill 1472) changes the process by which preconstruction work, unrelated to the pursuance of a COL by the NRC may be authorized and how such cost may be recovered. When the relevant provisions, subsection (2)(b) and (c) are read together, it is clear that the Florida Legislature created a preconstruction work and cost recovery process that must be followed in the present case.

> During the time that a utility seeks to obtain a combined license from the Nuclear Regulatory Commission for a nuclear power plant or a certification for an integrated gasification combined cycle power plant, the utility may recover only costs related to, or necessary for, obtaining such licensing or certification.

Chapter 2013-184, Laws of Florida, 366.93(2)(b)

> After a utility obtains a license or certification, it must petition the commission for approval before proceeding with preconstruction work beyond those activities necessary to obtain or maintain a license or certificate.

Chapter 2013-184, Laws of Florida, 366.93(2)(c)

The doctrine of *in pari materia* requires that related statutes be read together to give effect to legislative intent. *McGhee v. Volusia County*, 679 So. 2d 729, 730 (Fla. 1996). It is important to read *related subsections of statue in harmony, i.e.,* in *pari materia*, so as to avoid rendering statutory provisions meaningless or producing a patently absurd result. *Statutory interpretations that lead to absurd results should be avoided. City of St. Petersburg v. Siebold*, 48 So. 2d 291, 294 (Fla. 1950) (emphasis added).

Prior to the enactment of the amendment, there was no temporal restriction on when a utility could engage in preconstruction work not related to the pursuance of a COL from the NRC. The amendment language does not preclude a utility from engaging in preconstruction work, rather it establishes a process by which preconstruction work must be authorized by the Commission prior to a utility engaging in such work. A harmonious reading of the provisions above leads to the following procedure: 1) a utility can only engage in and recover costs related to the pursuance of a COL from the NRC prior to receiving the COL; 2) once the COL is obtained, the utility must petition the Commission to engage in additional preconstruction work. The amendment to the law is a mere change in process in the timing preconstruction activity

unrelated to the pursuance of a COL from the NRC may be undertaken. It does not create new substantive rights or impose any new legal burdens. *Arrow Air,* 645 So.2d at 424. The utility still retains the right to engage in and recover costs related preconstruction work. The statute does not create new or take away vested rights, but only operates in furtherance of the remedy or confirmation of rights already existing. *Smiley*, 966 So.2d at 334. The law effectuates the means and methods to apply and enforce existing duties and rights. *Alamo,* 632 So. 2d at 1358. This is evidenced by the fact that the fundamental right to engage is such activity has not been touched by the amended statute, only the timing of such activity. In short, the amendment changes the method by which to apply an already existing right. Therefore, the provisions, read together, does not rise to the level of a substantive new right or the imposition of a new legal burden as contemplated in *Arrow Air, Smiley, or Alamo.*

Further evidence of the procedural nature of the amendment can be found in the legislative history and the title of the amendment as discussed *supra*. While the intent language in the legislative history and the amendment title is not dispositive of the procedural nature of the preconstruction activity provision, it corroborates the plain meaning and intent of preconstruction activity provisions of the amendment.

In relation to FPL, SACE is not aware of any continuing preconstruction work not related to obtaining a COL from the NRC that was under contract or commenced prior to July 1, 2013 that would be affected by the amendment. In regards to DEF, notwithstanding the settlement approved by Order No. PSC-12-0104-FOF-EI, issued March 8, 2012, in Docket No. 120022-EI, DEF is precluded from continuing any preconstruction work not related to obtaining a COL from the NRC.

If the Commission finds that the procedural nature of the provisions creates a substantive new right or imposes a legal obligation, the amendment must be applied retroactively in this year's case to meet the intent of the Florida Legislature. See the argument for retroactive application *infra*, in Legal Issue 3.

Legal Issue 3

Does recently enacted Senate Bill 1472, effective July 1, 2013, preclude a utility from recovering costs associated with preconstruction work not related to obtaining a combined operating license from the Nuclear Regulatory Commission or certification, that was under contract or commenced prior to July 1, 2013?

Yes. The provision in the amended statute is procedural in nature and does not create new substantive rights or impose new legal burdens. Alternatively, if the Commission finds that the procedural nature of the provision imposes a new legal burden, the provision must be implemented in this case to meet legislative intent.

Chapter 2013-184, Laws of Florida (Senate Bill 1472) specifically precludes any recovery of preconstruction costs not related to the pursuance of a COL from the NRC until after the utility has obtained a COL. The relevant amendment states the following:

> During the time that a utility seeks to obtain a combined license from the Nuclear Regulatory Commission for a nuclear power plant or a certification for an integrated gasification combined cycle power plant, the utility may recover only costs related to, or necessary for, obtaining such licensing or certification.

Chapter 2013-184, Laws of Florida, 366.93(2)(b)

Prior to the enactment of the amendment, there was no temporal restriction on when a utility could recover preconstruction costs not related to the pursuance of a COL from the NRC. The amendment does not preclude a utility from recovering preconstruction costs not related to the pursuance of a COL from the NRC, rather it establishes a process below by which such costs may be recovered.

> After a utility obtains a license or certification, it must petition the commission for approval before proceeding with preconstruction work beyond those activities necessary to obtain or maintain a license or certificate.
> 1. The only costs that a utility that has obtained a license or certification may recover before obtaining commission approval are those that are previously approved or necessary to maintain the license or certification.
> 2. In order for the commission to approve preconstruction work on a plant, it must determine that:
> a. The plant remains feasible; and
> b. The projected costs for the plant are reasonable.

Chapter 2013-184, Laws of Florida, 366.93(2)(c)

Therefore, after petitioning the Commission and receiving an affirmative determination that the plant remains feasible and that projected costs are reasonable, the utility can engage in preconstruction work, and recover those costs if they are found to be prudently incurred. §366.93(2), Fla. Stat. Additionally, the law continues to provide the utility the right to recover all

preconstruction and construction cost if it elects to abandon the nuclear reactor project.[11] The amendment to the law is a mere change in process on the timing in the recovery of such costs. It does not create new substantive rights or impose any new legal burdens. *Arrow Air,*645 So.2d at 424. The utility still retains the right to engage in and recover costs related to preconstruction work. The statute does not create new rights or take away vested rights, but only operates in furtherance of the remedy or confirmation of rights already existing. *Smiley,* 966 So.2d at 334. The law effectuates the means and methods to apply and enforce existing duties and rights." *Alamo* 632 So. 2d at 1358. This is evidenced by the fact that the fundamental right to recover such costs has not been touched by the amended statute, only the timing of such recovery has been revised. The provision does not rise to the level of creating a new substantive right or imposing a legal burden as discussed in *Arrow Air, Smiley and Alamo*, therefore it is a procedural provision.

Further evidence of the procedural nature of the amendment can be found in the legislative history and the title of the amendment as discussed *supra.* While the intent language in the legislative history and the amendment title is not dispositive of the procedural nature of the preconstruction cost recovery provision, it corroborates the plain meaning and intent of the recovery of preconstruction costs provision of the amendment.

In relation to FPL, SACE is not aware of any continuing preconstruction work not related to obtaining a COL from the NRC that was under contract or commenced prior to July 1, 2013 that would be affected by the amendment. In regards to DEF, notwithstanding the settlement approved by Order No. PSC-12-0104-FOF-EI, issued March 8, 2012, in Docket No. 120022-EI, DEF is precluded from recovering preconstruction costs, to the extent those costs are related to preconstruction activities that are not related to obtaining a COL from the NRC.

If the Commission finds that the procedural nature of the provision imposes a new legal burden, then Chapter 2013-184, Laws of Florida law is also clear that the Legislature intended for the law to be applied retroactively. "The general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively." *Metropolitan Dade County v. Chase Federal Housing Corporation*, 737

[11] §366.93, Fla. Stat. ("If the utility elects not to complete or is precluded from completing construction of the nuclear power plant, including new, expanded, or relocated electrical transmission lines or facilities necessary thereto, or of the integrated gasification combined cycle power plant, *the utility shall be allowed to recover all prudent preconstruction and construction costs* ....") (emphasis added).

So.2d 494, 499 (Fla. 1999). In order to determine legislative intent as to retroactivity, both the *terms of the statute and the purpose of the enactment* must be considered. *Id.* at 500 (emphasis added). Moreover, "if a statute is silent on *forwards or backwards application*, it is presumed to be applied prospectively." *Florida Insurance Guarantee Assoc., Inc. v. Devon, Neighborhood Assoc., Inc.*, 67 So. 3d 187, 196 (Fla. 2011) (emphasis added).

It is important to note that the presumption against retroactivity is only a *default* rule of statutory construction. The essential purpose of statutory construction is to determine legislative intent. *City of Boca Raton v. Gidman*, 440 So. 2d 1277, 1281 (Fla. 1983); *State v. Sullivan*, 95 Fla. 191, 207, 116 So. 255, 261 (1928) (emphasis added). The Supreme Court has rejected the unbending principle that the inclusion of an effective date in a statute will always supersede the expressed legislative intent that the statute be applied retroactively. *Chase*, 737 So.2d at 502. If a law is found to apply retroactively, then the second inquiry is whether retroactive application is constitutionally permissible. *Devon,* 67 So.3d at 194.

In the instant case, the meaning of the remedial amendment is plain on its face: no preconstruction costs unrelated to the pursuance of COL can be recovered prior to the issuance of a COL. Additionally, the *language, structure and purpose* of Chapter 2013-184 evidences that it is *not silent on its forward or backwards application.* The inclusion of an effective date of July 1, 2013 is irrelevant since the Florida Legislature intended the amendment to apply retroactively, in the current docket.

Lawmakers structured SB 1472 and used language that exhibits both a forward reach and a backward reach to the bill. The Legislature, for instance, provided differing effective dates for various provisions in Chapter 2013-184, thus indicating careful thought by the Legislature as to when the various provisions would be given effect. The following provisions patently evidence a forward reach.

> *Beginning January 1, 2014*, in making its determination for any cost recovery under this paragraph, the commission may find that a utility intends to construct a nuclear or integrated gasification combined cycle power plant only if the utility proves by a preponderance of the evidence that it has committed sufficient, meaningful, and available resources to enable the project to be completed and that its intent is realistic and practical.

Chapter 2013-184, Laws of Florida, 366.93(3)(f)3(emphasis added)

> *Ten years after the date on which the utility obtains a combined license* from the Nuclear Regulatory Commission for a nuclear power plant or a certification for an integrated gasification combined cycle power plant, the utility must petition the commission to preserve the opportunity for future recovery under this section for costs relating to that plant. The commission must determine whether the utility remains intent on building the plant.

Chapter 2013-184, Laws of Florida, 366.93(f)1a (emphasis added)

> *Twenty years after the date on which the utility obtains a combined license* from the Nuclear Regulatory Commission for a nuclear power plant or a certification for an integrated gasification combined cycle power plant, the utility may not, under this section, recover future costs relating to that plant.

Chapter 2013-184, Laws of Florida, 366.93(f)1b (emphasis added)

Additionally, the Florida Legislature left a foundational provision of Section 366.93, F.S. intact. The legislature intentionally did not amend the already-existing language below, thereby reaching *backwards* to preserve a specific cost recovery right for both FPL and DEF.

> If the utility elects not to complete or is precluded from completing construction of the nuclear power plant, including new, expanded, or relocated electrical transmission lines or facilities necessary thereto, or of the integrated gasification combined cycle power plant, *the utility shall be allowed to recover all prudent preconstruction and construction costs* ....

§366.93(6), Fla. Stat. (emphasis added).

This preserved provision is a "safe harbor" for any costs that have been expended but not yet recovered by FPL and DEF. It *guarantees* full recovery of all utility investment in a yet-to-be completed reactor, including a return on equity. The Florida Legislature could have amended this provision to deny all recovery, or a portion, of preconstruction and / or construction costs if a utility elects to abandon a reactor project, but it did not. In so doing, it reached back and preserved the right of both FPL and DEF to recover already-expended preconstruction and construction costs either through the new cost recovery process discussed *supra,* or if they choose to abandon the project, through the provision above. Not only has the Florida Legislature reached forward when it passed SB 1472, but also backwards. Therefore, there the presumption of prospective application is rebutted. In fact, both the forward and backward reach of the new law as constructed through the language, structure and purpose of the amendment

exhibits that Chapter 2013-184 is intended by the Florida Legislature to apply retroactively. Thus, the new law must be applied to the facts in this year's proceeding.

The retroactive application of the amendment is constitutionally permissible because it procedural nature, and as such, does not affect any constitutional rights. The amendment, for instance, merely changes the timing of approval for preconstruction work and the recovery of such costs. It does not create new substantive rights or impose any new legal burdens. *Arrow Air,* at 424. The utility still retains the right to engage in and recover costs related to preconstruction work, but it must do so consistent with current law. The statute does not create new or take away vested rights, but only operates in furtherance of the remedy or confirmation of rights already existing – the right to engage in preconstruction activity and recover associated costs. *Smiley,* 966 So.2d at 334. The law effectuates the means and methods to apply and enforce existing duties and rights." *Alamo,* 632 So. 2d at 1358. This is evidenced by the fact that the fundamental right to recover preconstruction costs has not been touched by the amended statute, only the timing of such recovery. Additionally, Section 366.93(6), F.S. preserves the right of FPL and DEF to recover both preconstruction and construction costs should they elect to abandon their respective proposed reactor projects as discussed *supra.*

Therefore, if the Commission finds that the application of the preconstruction work authorization procedural provision (implicated in Legal Issue 2) and, or the preconstruction cost recovery procedural provision (implicated in Legal Issue 3) creates a new substantive right or imposes a legal burden, it must also find legislative intent of its retroactive application and that it does not affect any constitutional right of FPL or DEF.

CONCLUSION

The Florida Legislature passed SB 1472 as a remedial consumer protection amendment to Section 366.93, F.S. The provisions are procedural in nature. They must be applied in the current case. If the Commission finds that revisions effecting the authorization of certain preconstruction work, or cost recovery related to such work creates a substantive right or imposes a legal burden on FPL or DEF, then it is also apparent that the Florida Legislature intended the provisions to apply retroactively. Therefore, the new law must be applied to the facts in the current proceeding because the very procedural nature of the provisions does not implicate a constitutional right of FPL or DEF.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by US mail and or electronic mail this 29th day of July, 2013 to the following:

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