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100009-EI

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**Subject:** FPSC Docket No. 100009 - PCS Phosphate's Motion for Reconsideration

**Attachments:** PCS Reconsideration Final.pdf

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b. Docket No. 100009-EI, In Re: Nuclear Cost Recovery Clause

c. Filed on behalf of White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

| | | |
|---|---|---|
| **In re: Nuclear Cost Recovery Clause** | ) | **Docket No. 100009-EI** |
| | ) | **Filed: February 11, 2011** |

**MOTION FOR RECONSIDERATION OF ORDER NO. PSC-11-0095-FOF-EI OF WHITE SPRINGS AGRICULTURAL CHEMICALS, INC. d/b/a PCS PHOSPHATE – WHITE SPRINGS**

White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs ("PCS Phosphate" or "PCS") moves the Florida Public Service Commission ("PSC" or ("Commission") to reconsider Order No. PSC-11-0095-FOF-EI ("NCRC Order"). PCS Phosphate specifically requests that the Commission reconsider and revise its determination with respect to the Commission's authority to entertain and implement risk-sharing or other rate mechanisms to safeguard consumer interests.

**BACKGROUND**

On March 1, 2010, Progress Energy Florida ("Progress" or "PEF") filed a petition seeking prudence review and a final true-up of its 2009 costs for the Crystal River Unit 3 uprate project and the construction of two new nuclear generating units, Levy Units 1 and 2 ("LNP"). On April 30, 2010, PEF filed a petition seeking approval of its estimated 2010 costs and its projected 2011 costs. In this filing, PEF announced an expected delay to both Levy units of five years, which Progress estimated would add approximately $5 billion to the overall project capital cost. With this delay and a revised estimated cost of approximately $22-25 billion for both units, PCS Phosphate and others voiced concerns regarding the financial feasibility and affordability of the project, particularly with PEF as the sole project owner.

On August 24-25, 2010, the Commission held an evidentiary hearing on PEF's requests to recover its past and projected costs through the nuclear cost recovery clause ("NCRC"). PCS Phosphate was an active party throughout the course of the proceeding, serving discovery on PEF, participating in the evidentiary hearing and filing a post-hearing brief.

On October 26, 2010, the Commission approved one legal issue and the factual issues regarding PEF's requests for cost recovery. At the time, the Commission deferred resolution of Issue 3A, which queried:

> 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?

At its agenda conference held on January 11, 2011, the Commission subsequently reached a determination with respect to this issue. On February 2, 2011, the Commission issued the NCRC Order, which formally adopted the recommendations approved on October 26, 2010 and January 11, 2011. With respect to Issue 3A, above, the Commission concluded that it lacked the statutory authority to require a risk sharing mechanism in view of the specific provisions of the nuclear cost recovery statute, Section 366.93 F.S.[1] As is explained below, this assessment of the Commission's authority in the final Order is incomplete and in error.

[1] The nuclear cost recovery rule adopted by the Commission pursuant to the statute, Rule 25-6.0423 F.A.C. neither adds to nor diminishes the Commission's statutory authority and responsibility.

## CONCISE STATEMENT OF GROUNDS FOR RECONSIDERATION

On reconsideration, the Commission should conclude that it retains its full complement of powers to oversee and control a utility's recovery of costs, including those costs associated with nuclear construction activities by:

- Concluding concluded it has the authority to impose such a condition on a utility's recovery of its nuclear costs.
- Deleting item "II, Risk Sharing Mechanism" from the final Order, or determine that the issue is not ripe for determination; or
- In the alternative, modifying the final Order to state that it will continue to reconcile nuclear cost recovery under Section 366.93 with the public interest, and that it will consider such alternative cost recovery mechanisms as may be deemed appropriate to carry out that mission.

## STANDARD FOR RECONSIDERATION

Motions for reconsideration of a Commission final order should identify a point of fact or law which the Commission overlooked or failed to consider in rendering its order. *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146, So. 2d 889 (Fla. 1962); *Pingree v. Quaintance*, 394, So. 2d 161 (Fla. 1st DCA 1981). While a motion for reconsideration should not 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)), it is appropriate for such a motion "to bring to the Commission's attention some material and relevant point of fact that

it overlooked or failed to consider when the order was issued, a mistake of law or fact, or abuse of discretion." *In re: Gulf Coast Elec. Coop., Inc.*, Order No. PSC-97-0098-FOF-EU, 1997 Fla. PUC Lexis 105 (PSC Jan. 27, 1997).

PCS Phosphate's motion satisfies the reconsideration standard.

**THE COMMISSION SHOULD RECONCILE ITS PLENARY AUTHORITY TO ENSURE FAIR, JUST AND REASONABLE RATES AND THE SPECIFIC DICTATES OF THE NUCLEAR RECOVERY STATUTE**

In the NCRC Order, the Commission acknowledged its "broad authority and discretion to set fair, just, and reasonable rates and charges." NCRC Order at 8. Indeed, the Order approvingly quoted the Florida Supreme Court's declaration that "the power of the Commission over privately-owned utilities is omnipotent within the confines of the statutes and the limits of organic law." *Id.* (*quoting Storey v. Mayo*, 217 So. 2d 304, 307 (Fla. 1968)). So that this plenary authority is not under-stated, the Commission correctly noted the District Court of Appeal's admonition that the provisions of Chapter 366, F.S., are to be liberally construed to accomplish the public interest. *Id.* (*quoting Richter v. Florida Power Corporation*, 366 So. 2d 796, 799 (Fla. 2d DCA 1979)).

Chapter 366 does not prescribe any certain form or method for ensuring that rates are fair, just, and reasonable. Consequently, in the normal course of events, the Commission has authority to, among other methods, establish cost, earnings or risk-sharing mechanisms to create an incentive for a utility to control costs, to mitigate consumer impacts, or for other reasons consistent with its statutory mission. The NCRC Order acknowledges this authority with little difficulty.

In moving to its discussion of the nuclear cost recovery statute, Section 366.93, F.S., the analysis begins in the Order, and ends, with the assertion that specific statutory

provisions control over more general ones. NCRC Order at 8-9 (*citing School Board of Palm Beach County v. Survivors Charter Schools, Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009)). According to the Commission's logic, its general authority and discretion to control utility cost recovery is not applicable because the Legislature enacted Section 366.93, F.S. which specifically governs nuclear cost recovery. *Id.*

This exceedingly brief discussion is, to say the least, incomplete. The error in the Order's 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.

Given the recitation of its broad rate-setting power, it must be apparent that the nuclear cost recovery statute does not trump the Commission's over-arching public interest mission under Chapter 366, F.S. To the contrary, the extraordinary risk and cost shifting (from utility to ratepayers) provision of the nuclear cost recovery statute and the evident high cost and schedules 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 (*i.e.*, fit within the parameter of the Commission's basic public interest mandate). This means, in the briefest terms, that the Commission must look to reconcile the nuclear cost recovery statute with that broader rate-setting responsibility. By generally finding insufficient authority to act as it might otherwise to protect consumers absent the nuclear cost recovery provisions, the Order does not provide a complete or sufficient legal assessment and misinterprets the Legislature's plain intent.

First, the Order errs in finding that a specific statute always trumps more general provisions. In Florida, this resolution of apparently conflicting requirements applies only where there is an "irremediable inconsistency" between the two statutes. *See People Against Tax Revenue Mismanagement v. County of Leon*, 583 So. 2d 1373, 1377 n.5 (Fla. 1991). This carries with it the need to attempt to interpret such provisions in a manner that will avoid such inconsistency and to carry out the legislative intent. In this instance, the Legislature expressly aimed to promote new nuclear power plant construction while still ensuring reasonable electric power costs for Florida consumers. The Order does not endeavor to reconcile the specific nuclear provisions with that basic statutory obligation.

The Commission should have attempted to harmonize two related, if potentially conflicting, statutes while giving effect to both, *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So.2d 249, (Fla. 1987). The Legislature should be presumed to have passed any new enactment with full awareness of the existing statutory scheme. Without evidence to the contrary, the Commission should not assume that its entire rate-setting statutory scheme is undermined by the nuclear cost recovery statute.

Accordingly, the Commission should have read Section 366.93, F.S., in such a manner as to avoid or minimize the very conflict upon which the Commission's decision is premised. Based on its literal language, Section 366.93, F.S. is simply intended to establish "alternative cost recovery mechanisms." Nothing in the statute changes the Legislature's standard for approving a utility's rates, i.e., fair, just and reasonable.[2] More importantly, 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

[2] The fact that the legislature has enacted a statute modifying the cost recovery mechanisms available to the Commission does not in itself modify the "fair, just and reasonable standard." *See, e.g.*, Order No. PSC-09-0855-FOF-EG at 25.

stated that the alternative cost recovery mechanism need only "allow" for the recovery of such costs. Because Section 366.93, F.S., can be read so that no conflict exists between it and the Commission's general rate-making authority, the application of the general versus specific statute distinction in the NCRC Order was legal error justifying Commission reconsideration of its Order.

It is possible that in addressing this issue the Commission may have contemplated a particular form of risk-sharing mechanism (*e.g.*, a "hard cap" on recoverable costs) that it considered to be in conflict with recovery of "prudently incurred" costs, but the Commission should not confuse a potentially conflicting scenario with the general authority of the Commission to take action required to safeguard consumer interests.

Certainly, a basic problem with Issue 3A in the 2010 NCRC docket is that it was posed as an abstract legal issue rather than a question concerning the legality of a specific rate-making mechanism. It is for this reason that PCS Phosphate understood that this issue initially was to be deferred to subsequent NCRC dockets in which it may pertain to a specific proposal. If nothing else, the legal finding in the Order is both incomplete and over-broad because it is premature.

On reconsideration, the Commission should conclude that it retains its full complement of powers to oversee and control a utility's recovery of costs, including those costs associated with nuclear construction activities. In regard to Issue 3A, because any risk-sharing mechanism would still "allow" a utility to recover all of its prudently-incurred costs, albeit upon the satisfaction of certain prerequisites, the Commission should have concluded it has the authority to impose such a condition on a utility's recovery of its nuclear costs. Upon reconsideration, PCS Phosphate requests that the Commission simply

delete item "II, Risk Sharing Mechanism" from the final Order, or determine that the issue is not ripe for determination. In the alternative, PCS Phosphate requests that the Commission modify the final Order to state that it will continue to reconcile nuclear cost recovery under Section 366.93 with the public interest, and that it will consider such alternative cost recovery mechanisms as may be deemed appropriate to carry out that mission.

## CONCLUSION

Wherefore, for the above-stated reasons, the Commission should reconsider its decision to abdicate its authority to protect Florida's ratepayers and instead interpret Section 366.93, F.S., in a manner that is consistent with the overall utility regulatory scheme designed by the Florida legislature.

Respectfully submitted,

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Dated: February 11, 2011

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of February 2011 a true copy of the foregoing has been furnished by U.S. and/or electronic mail to the following:

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