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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Power Plant Cost
Recovery Clause

DOCKET NO. 100009-EI
Submitted for Filing: February 18, 2011

COMMISSION
CLERK

**PROGRESS ENERGY FLORIDA, INC.'S RESPONSE TO WHITE SPRINGS
AGRICULTURAL CHEMICALS, INC. d/b/a PCS PHOSPHATE – WHITE SPRINGS'
MOTION FOR RECONSIDERATION OF ORDER NO. PSC-11-0095-FOF-EI**

Progress Energy Florida, Inc. ("PEF or the "Company"), pursuant to Rule 25-22.060(1)(b), Fla. Admin. Code, hereby files its Response to White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs' ("PCS Phosphate") Motion for Reconsideration of Order No. PSC-11-0095-FOF-EI ("the Motion"). As discussed below, the Motion should be denied because it is an improper request for reconsideration that impermissibly reargues issues that the Commission has already considered and expressly ruled upon. Moreover, even if the Commission were to entertain the Motion's substantive arguments, which it should not, PCS Phosphate's Motion should be denied because PCS Phosphate: (1) asks the Commission to ignore the specific Legislative mandate of section 366.93, Florida Statutes, in favor of its general power over utility rates; (2) asks the Commission to enlarge or modify the statute's mandate by creating certain undefined "prerequisites" to the recovery of prudently incurred nuclear costs that are not found in the statute; and (3) seeks to have the Commission "withdraw" an issue that has already been ruled upon so that it may be raised again sometime in the future - essentially seeking a second bite at the apple. In support of the foregoing, PEF

- COM _____
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_____ submits the following:

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1. The Motion should be Denied Because It Does Not Meet The Standard For A Motion For Reconsideration.

PCS Phosphate prefaces its substantive arguments by correctly stating that a motion for reconsideration of a final Commission order should identify a point of fact or law which the Commission overlooked or failed to consider. Motion, at p. 3. Further, PCS Phosphate correctly notes that a motion for reconsideration should not reargue matters that have already been considered. *Id.* PCS Phosphate then summarily concludes that the Motion satisfies the reconsideration standard. However, the mere fact that PCS Phosphate says it meets this standard does not mean that it is so. In fact, PCS Phosphate's Motion fails to meet the applicable standard because PCS Phosphate simply reargues issues in the Motion that were presented to the Commission and which the Commission explicitly rejected in Order PSC-11-0095-FOF-EI ("the Order").

PCS Phosphate's reargument of issues that were presented to and ruled by the Commission is clear from a simple comparison of the Motion to PCS Phosphate's post hearing brief [DN 07608-10] and the Order itself. For example, in its post-hearing brief, PCS Phosphate stated that "[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." *Id.* at p12. PCS Phosphate makes the same argument in the Motion, 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]." Motion, at p. 5.¹ In ruling upon this very issue, the Commission stated

¹ Additionally, the heading for the substantive argument section of the Motion reads "The Commission should reconcile its plenary authority to ensure fair, just and reasonable rates and the specific dictates of the nuclear recovery statute." *Id.* at p. 4. And, PCS Phosphate argues that "[n]othing in [section 366.93] changes the Legislature's standard for approving a utility's rates, i.e., fair, just and reasonable." *Id.* at p. 6. The argument that nothing in section 366.93 changes the standard for approving a utility's rates was considered and rejected by the

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[w]e 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.”

Order, at p. 8. Thus, PCS Phosphate’s argument that the Commission’s general power to ensure fair, just and reasonable rates permits the Commission to create a risk-sharing mechanism notwithstanding the Legislative directive of section 366.93 has clearly been made to, and ruled upon by, the Commission.

PCS Phosphate further claims to interject “additional” issues that it argues the Commission either overlooked or misinterpreted when it issued the Order. PCS Phosphate states in the Motion that “[b]y generally finding insufficient authority to act as it might otherwise to protect customers absent the nuclear cost recovery provisions, the Order does not provide a complete or sufficient legal assessment and misinterprets the Legislature’s plain intent.” Motion, at p. 5. PCS Phosphate argues that the Commission erred in finding that a specific statute always trumps more general provisions, arguing that the rule only applies when there is an irremediable inconsistency between the statutes, and that the Commission should have construed the two statutes to avoid such inconsistencies. This argument too was expressly considered and rejected by the Commission. The Commission determined that the Legislature’s enactment of section 366.93 controlled its actions in the nuclear cost recovery arena. PCS Phosphate is simply arguing that the Commission’s determination was incorrect. Disagreement with the Commission’s Order is not grounds for reconsideration. See In re: Gulf Coast Elec. Coop, Inc., Order No. PSC 97-0098-FOF-EU, *2 (PSC Jan. 27, 1997) (“Reconsideration is not intended as a

PSC. The Commission expressly held that “our authority . . . to set fair, just, and reasonable rates does not control cost recovery, because the Florida Legislature enacted Section 366.93, F.S., to specifically govern nuclear cost recovery in Florida.” Order, at p. 8.

procedure for re-arguing a case merely because the losing party disagrees with the judgment or the order.”) (citing Diamond Cab Co. v. King, 146 So. 2d 889, 891 (Fla. 1962)).

PCS Phosphate further argues that “the [nuclear cost recovery statutory] provision does not guarantee that the utility recover all of its prudently-incurred costs . . .” Motion, at p. 6. Like all the other arguments PCS Phosphates makes in its Motion, this argument was presented, discussed, and decided in the Order.² The Commission expressly held that “Section 366.93 . . . restricts our authority from implementing a risk sharing mechanism that would preclude a utility from recovery of all prudently incurred costs . . .”. Order at p. 8. These arguments are, therefore, simply improper reargument. Gulf Coast Elec. Coop. Inc.

PCS Phosphate’s disagreement with the Commission’s decision on issues raised and decided in the Order and attempted reargument of them in the Motion is underscored by PCS Phosphate in its Motion. No fewer than five times in its Motion PCS Phosphate points out what the Commission “should have” done, how it “should have” construed the applicable statutes, or how it “should” conclude these issues on reconsideration. Motion, pp. 6, 7. PCS Phosphate’s own words demonstrate that PCS Phosphate’s Motion is an impermissible attempt to reargue the same issues that were decided by the Commission’s Order. See Sherwood v. State, 111 So. 2d 96, 98 (Fla. 3d DCA 1959) (per curiam) (“Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed . . . or to request the court to change its mind . . .”). Because the Motion is an improper attempt to reargue issues decided by the Commission, it should be denied.

² Additionally, this issue was decided by the Commission when it promulgated Rule 25-6.0423, Fla. Admin. Code, “which expressly provides for recovery of all prudently incurred costs resulting from the siting, design, licensing, and construction of a nuclear power plant.” See Order, at p. 7.

2. The Motion Should Be Denied Because It Contains Erroneous Legal Conclusions.

PCS Phosphate reargues issues that were raised and decided by the Commission in the Order. For that reason alone, the Motion should be denied. In any event, however, the Commission correctly decided these issues in its Order and, thus, there is no reason for the Commission to otherwise revisit them on reconsideration.

PCS Phosphate argues that the specific nuclear cost recovery statute does not control the Commission's determination of a utility's request for nuclear cost recovery because of the general requirement that the Commission set general rates that are fair, just, and reasonable. Motion, at p. 6. PCS Phosphate argues that the specific nuclear cost recovery statute should only control over the general rate provisions of Chapter 366 when there is an "irremediable inconsistency" between the two statutory provisions. PCS Phosphate asserts there is no "irremediable inconsistency" between the nuclear cost recovery statutory provisions and the general rate provisions of Chapter 366 because the Commission should have tried to "harmonize [the] two related, if potentially conflicting, statutes while giving effect to both." Motion, at p. 6. PCS Phosphate cites People Against Tax Revenue Mismanagement v. County of Leon, 583 So. 2d 1373, 1377 n.5 (Fla. 1991) ("PATRM") and Palm Harbor Special Fire Control District v. Kelly, 516 So. 2d 249 (Fla. 1987) in support of its argument. PCS Phosphate's argument is legally incorrect and nonsensical, the cited cases do not support PCS Phosphate's argument, and the Commission clearly got it right in the Order.

PCS Phosphate cites PATRM for the proposition that "[a] specific statute always prevails over a general statute to the extent of any irremediable inconsistency." This statement does not mean, as PCS Phosphate suggests, that a specific statute will only control over a general statute where the two are wholly incompatible. Indeed, two statutes that are concerned with the same

general topic would rarely be wholly incompatible. Rather, the Court meant by this statement that to the extent that any inconsistencies appear, the specific statute should control. This is common sense. When the Commission is setting a utility's general rates, it is required to set rates that are fair, just, and reasonable, and it is given considerable discretion by the Legislature to do so. However, in the case of the recovery of nuclear costs, the same Legislature has spoken directly to the question, and expressly provided by the nuclear cost recovery statute that all prudently incurred nuclear costs as defined by the statute are to be recovered by the utility. Just as in PATRM, PCS Phosphate's argument that a general statute that gives the Commission discretion in setting general rates controls over the more specific statute that speaks directly to the question at issue is "wholly meritless." 583 So. 2d at 1377. PATRM supports the Commission's Order, not PCS Phosphate's argument on reconsideration in its Motion.

Palm Harbor also supports the Commission's Order, not the Motion. In Palm Harbor, the Department of Labor and Employment Security had determined that one statute was in direct conflict with another and that therefore the former had repealed the latter by implication. In rejecting this agency determination, the Court stated that the agency was obligated to attempt to harmonize and give effect to both statutory provisions "since the legislature is presumed to pass subsequent enactments with full awareness of all prior enactments and an intent that they remain in force." 516 So. 2d at 250. While this is surely a sound pronouncement of law, it is inapplicable here because section 366.93 does not conflict with section 366.06 or any other provision of Chapter 366 to such an extent that the specter of implied revocation is raised, as the Commission found in its Order. Instead, the nuclear cost recovery rule simply applies in a specific situation and the provisions of section 366.06 apply in different, more general situations. The Palm Harbor decision supports this conclusion. There, the Court ruled that the two statutes in question

could both survive and be enforced, holding that “... a statute . . . covering a specific subject, is controlling over a statute . . . that applies to a general class of subjects; in effect the specific statute operates as an exception to the general.” Id. at 251. The Order is therefore entirely consistent with Palm Harbor. The nuclear cost recovery statute covers a specific subject and, therefore, controls over 366.06 and other provisions of Chapter 366 that apply to a general class of subject rates. As a result, the nuclear cost recovery statute operates as an exception to the general rate provisions of Chapter 366 and specifically applies to utility requests for nuclear cost recovery.

Finally, PCS Phosphate takes a single word in section 366.93 out of the context of the entire sentence and argues that it demonstrates recovery under the nuclear cost recovery clause of prudent nuclear costs is permissive not mandatory. No authority supports reading a single word out of context of the statute as a whole and PCS Phosphate cites none for such an aberrant construction. The single word “allow” that PCS Phosphate takes out of context occurs in the following sentence, which, read in its entirety, clearly 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 . . .” § 366.93(2), Fla. Stat. (emphases supplied). The term “shall” informed the Commission that the Legislature was directing it to create such alternative cost recovery mechanisms and the following clause explains the required features thereof, namely that all prudently-incurred costs should be recovered. The statutory analysis is just that simple, as the Order recognized. See Order, at p. 7.

Therefore, PCS Phosphate's regurgitated legal arguments are unavailing as the Commission already determined in the Order. The Motion should be denied.

3. The Motion Should Be Denied Because it Seeks to Require the Commission to Engraft Undefined "Prerequisites" to Cost Recovery on to Section 366.93.

The Motion should further be denied because PCS Phosphate asks the Commission to re-write Section 366.93 by adding additional factors not placed in the statute by the Legislature. This the Commission cannot do. PCS Phosphates states in the Motion that any "risk-sharing mechanism would still 'allow' a utility to recover all of its prudently-incurred costs, albeit upon the satisfaction of **certain prerequisites . . .**" Motion, at p. 7 (emphasis supplied). PCS Phosphate nowhere in its Motion attempts to define what these "certain prerequisites" might entail. Whatever they may be, however, they clearly are not authorized by section 366.93, as the Commission's Order clearly states. The Commission correctly determined that Section 366.93 "expressly provides that a utility shall be allowed to recover all prudently incurred costs. The statute is silent regarding a risk sharing mechanism. . . . we find that the **only** statutory requirement is that the utility prove that its costs in new nuclear power plant capacity were prudently incurred." Order, at p. 7 (emphasis supplied). It is elementary that an agency is powerless to enlarge, modify, or contravene the statutes it is charged with implementing; to do so is an invalid exercise of delegate authority. See Rinella v. Abifaraj, 908 So. 2d 1126, 1129 (Fla. 1st DCA 2005); Moreland ex rel. Moreland v. Agency for Persons with Disabilities, 19 So. 3d 1009, 1012 (Fla. 1st DCA 2009). Therefore, as the Commission found, it is bound by section 366.93 and cannot enlarge, modify, or contravene its language to include unspecified "prerequisites" to the recovery of prudently incurred nuclear costs. For this additional reason, the Motion must be denied.

4. The Motion Should be Denied Because it Seeks A Second-Bite at the Apple.


Finally, this Motion must be denied because its fall-back position is no more than a request for a second bite at the apple at some uncertain date in the future. PCS Phosphate requests in the Motion that the “Commission simply delete item ‘II, Risk Sharing Mechanism’ from the final Order, or determine that the issue is not ripe for determination.” Motion, at pp. 7-8. This is a remarkable request – it was the intervenors that sought to have this issue decided in this docket, yet now that it has been decided against them, one intervenor is essentially asking for a legal “mulligan.” PCS Phosphate’s sole argument to support this unusual request is that PCS Phosphate thought that a decision on the issue would be deferred until it could be considered in light of a specific proposal. If that was the case, PCS Phosphate should have proposed a specific risk-sharing mechanism with this issue and argument or simply not asserted it in the first place. Having failed to do that, PCS Phosphate can hardly be heard to argue that the Commission’s decision was premature on an issue it presented and argued before the Commission. PCS Phosphate’s argument also misses the point of the Commission’s ruling. As the Commission correctly determined, the Commission cannot read into section 366.93 a risk sharing mechanism that does not exist in the statute. It is irrelevant, then, how PCS Phosphate might formulate a risk sharing mechanism in the future given the express statutory requirement in section 366.93 that all prudently-incurred nuclear costs are to be recovered. Delaying a ruling for some as yet still unspecified risk sharing mechanism cannot change that legal conclusion, and therefore, the request that the issue be “simply deleted” from the Order should be denied.

CONCLUSION

WHEREFORE, for the reasons stated herein, PEF respectfully requests that the Commission enter an Order Denying PCS Phosphate’s Motion for Reconsideration of Order No.

PSC-11-0095-FOF-EI, and Granting any other Relief the Commission deems to be just and reasonable.

Respectfully submitted,




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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to counsel and parties of record as indicated below via U.S. Mail this 18th day of February, 2011.



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