IN THE SUPREME COURT OF THE STATE OF FLORIDA

SOUTHERN ALLIANCE FOR
CLEAN ENERGY,

Appellant,

vs.

ART GRAHAM, ETC., ET
AL.,

Appellees.
_____/

CASE NO. SC11-2465
PSC Docket No.: 110009-EI

BRIEF OF AMICUS CURIAE
REPRESENTATIVE MICHELLE REHWINKEL VASILINDA, SENATOR MICHAEL FASANO, SENATOR CHARLES DEAN, SR., AND REPRESENTATIVE MARK PAFFORD
ON BEHALF OF APPELLANT

JACOB A. BRAINARD
Fla. Bar No. 92278
402 South Monroe Street
Room 1001
Tallahassee, Florida 32399
(850) 488-0965
jacob.brainard@myfloridahouse.gov
Attorney for *Amici Curiae*
Representative Michelle Rehwinkel Vasilinda
Senator Michael Fasano
Senator Charles Dean
Representative Mark Pafford

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SUMMARY OF ARGUMENT

Advanced nuclear cost recovery as authorized by section 366.93, Florida Statutes (2008) is an unconstitutional delegation of an essential legislative function from the Legislature to the Florida Public Service Commission (PSC). The statute, as written, constitutes an overly broad delegation of power and allows the PSC too much discretion in creating and implementing section 366.93.

STATEMENT OF INTEREST

Representative Rehwinkel Vasilinda, Senator Fasano, Senator Dean, and Representative Pafford have an interest in this case as legislators who have extensive knowledge of energy issues as well as representing constituents affected by section 366.93. These Members can assist the court with their knowledge of the legislative process as well as the impact that advanced nuclear cost recovery has on Floridia

ARGUMENT

I. § 366.93 is an unconstitutional delegation of power to the Public Service Commssion

The issue in this case is whether section 366.93, allowing advanced nuclear cost recovery (ANCR), is an unconstitutional delegation of power to the Florida Public Service Commission (hereinafter PSC).

Our government operates in an increasingly complicated world. The Legislature cannot possibly make every policy implementation that occurs. Administrative agencies are the Legislature's necessary companions that seek to ably perform policy implementation. The court has consistently held that the Legislature may transfer *subordinate* functions to effectuate administration of legislative policy by a particular agency with "the expertise and flexibility to deal with complex and fluid conditions."[1] In *Askew v. Cross Key Waterways*, the court gave a clear roadmap for the Legislature to follow: "Consequently, where the Legislature makes the fundamental policy decision and delegates to some other body the task of implementing that policy under adequate safeguards, there is no violation of [the nondelegation] doctrine."[2] Had the Legislature provided more

[1] *Dep't of State, Div. of Elec. v. Martin*, 916 So. 2d 763 (Fla. 2005) (quoting *Microtel, Inc. v. Fla. Pub. Serv. Comm'n*, 464 So. 2d 1189, 1191 (Fla. 1985)); *Bush v. Shiavo,* 885 So. 2d 36 (Fla. 2004).
[2] *Askew v. Cross Key Waterways, et al.*, 372 So. 2d 913, 921 (Fla. 1978).

definition, more clarity, the statute at issue would pass constitutional muster. However, the statute is all but devoid of clarity and specificity and should, therefore, be found unconstitutional.

The Florida Legislature and the PSC developed a concept of ANCR that allows utility companies to recover *any* costs related to the construction of new nuclear power plants.[3] The alleged purpose of the statute is to "promote utility investment in nuclear . . . power plants."[4] All costs that are "prudently incurred" are allowed to be recovered.[5] Beyond those two generalities, the statute is silent on the ANCR process. It does not delineate what is a prudent cost, nor does it put any limit on recoverable costs.[6] The statute simply directs the PSC to adopt rules that create "alternative cost recovery mechanisms" without specifying any parameters.[7]

The Florida Constitution requires strict separation of powers.[8] Article II, Section 3 lays out Florida's nondelegation doctrine:

> **Branches of government -** The powers of the state shall be divided into the legislative, executive, and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.[9]

[3] § 366.93, Fla. Stat. (2008).
[4] § 366.93(2), Fla. Stat. (2008).
[5] *Id.*
[6] Fla. Stat., *supra* note 3.
[7] *Id.*
[8] Art. II, § 3, Fla. Const.
[9] *Id.*

This Court has consistently held that this doctrine is an essential part of our democracy.[10] The nondelegation doctrine holds that the Legislature cannot delegate "fundamental and primary policy decisions" to an administrative agency.[11]

The first duty of our elected representatives is to make policy decisions for the state of Florida. The Legislature cannot simply shirk its responsibility to develop coherent policy to an agency by making a broad, shapeless "policy" statement. Yet, the Legislature did exactly that in section 366.93, directing the PSC to create the entire ANCR policy on its own. The statute instructs the PSC to develop "alternative cost recovery mechanisms" without giving any guidance as to what those mechanisms should look like.[12] In *Askew,* the court said that ". . . administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program."[13] Here, the Legislature tried to pass a general idea off as a policy standard, but an idea so general is no standard at all.

The Legislature is certainly not without experience developing more defined statutory energy policy programs. Just four years before ANCR became reality, the Legislature passed environmental cost recovery in section 366.8255, Florida

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[10] *See e.g. Bailey v. Van Pelt*, 82 So. 789 (Fla. 1919); *Mahon v. County of Sarasota*, 177 So. 2d 665 (Fla. 1965); *Askew, supra* note 2; *Dep't of State, supra* note 1.
[11] *Askew*, *supra* note 2, at 925.
[12] Fla. Stat., *supra* note 4.
[13] *Askew*, *supra* note 11.

Statutes (2002).[14] In that section, the Legislature clearly outlined the parameters for the environmental cost recovery process, giving the PSC the task of *implementing* that policy, not creating it. Conversely to section 366.93, this statute did not simply direct the PSC to "promote the environment," leaving all of the policy work to the agency.

Similar to ANCR, section 366.8255 contains a "but not limited to" clause where it defines recoverable costs.[15] In contrast, however, section 366.8255 includes a clearly itemized list of recoverable costs, whereas the statute at issue here contains no such list, no such clarity. By listing several activities that qualify for recovering environmental costs, the Legislature set an unambiguous, specific policy direction. Moreover, the environmental cost recovery process in section 366.8255 puts parameters on the process that the Commission would eventually adopt to implement the environmental cost recovery process. The ANCR process in section 366.93 leaves the PSC unencumbered in its creation of that cost recovery process. The environmental cost recovery clause in section 366.8255 is but one example showing that the Legislature knows how to avoid sweeping generalities that attempt to masquerade as policy.

Going back to 1919 in *Bailey v. Van Pelt*, this Court has been careful to confine the functions of the Legislature in the legislative branch. In *Bailey*, the

[14] § 366.8255, Fla. Stat. (2002).
[15] *Id.* at § 366.8255(d).

court prohibited the delegation of "the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law."[16] Again in *Bush v. Shiavo*, the court reaffirmed our nondelegation doctrine, holding that the "statute must so clearly define the power delegated that the [executive or agency] is precluded from acting through whim, showing favoritism, or exercising unbridled discretion."[17]

Another case that speaks directly to the issue here is *Orr v. Trask.*[18] In *Orr,* the Legislature passed the General Appropriations Act with proviso language that called for the elimination of certain deputy commissioner positions in the Department of Labor and Employment Security by stating that the budget numbers for that line item relied on the removal of those positions.[19] In the Act, however, the Legislature did not specify any criteria for removing the deputies nor any factors, outside of location, to turn to in considering which deputies to eliminate.[20] Governor Graham subsequently acted with unchecked, undefined power to remove the four deputy commissioners according to his own policy prerogatives.[21] The court did not mandate that the proviso language contain the exact deputies to

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[16] *Bailey, supra* note 9, at 350; *see also State Dep't of Citrus v. Griffin*, 239 So. 2d 577, 580 (Fla. 1970).
[17] *Bush, supra* note 9, at 332 (quoting *Lewis v. Bank of Pasco County*, 346 So. 2d 53, 55-56 (Fla. 1976)).
[18] *Orr v. Trask*, 464 So. 2d 131 (Fla. 1985).
[19] *Id.* at 132-33.
[20] *Id.*
[21] *See generally Orr, supra* note 18.

eliminate, but is must "furnish ascertainable minimal criteria and guidelines on how the selection was to be made."[22]

Section 366.93 acts in much the same way as the proviso language at issue in *Orr.* It leaves to the PSC the ability to act on its own policy prerogatives, just as Governor Graham did. Under the standard elucidated in *Orr,* the Legislature did not fail because it did not write the exact mechanics of the ANCR process into statute; it failed because it did not give the PSC even "minimal criteria and guidelines" to follow in implementing the statute.[23]

One need only look to the inconsistency of the PSC itself to understand how incomplete and ambiguous section 366.93 is. In February 2011, the PSC issued an order reaffirming that "a utility must continue to demonstrate its intent to build the nuclear power plant for which it seeks advance recovery of costs . . . ."[24] However, just under nine months later, the PSC changed the meaning of the standard when it determined that FPL's "creating an option to build" approach was the same as showing a continued intent to build.[25] In the span of nine months, the standard

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[22] *Orr, supra* note 18, at 134-35.
[23] *Id.*
[24] PSC Order No. PSC-11-0095-FOF-EI issued on February 2, 2011 on Docket No. 11-00009-EI, *In re Nuclear cost recovery clause,* at 9.
[25] PSC Order No. PSC-11-0547-FOF-EI issued November 23, 2011 from Docket No. 11-0009-EI, *In re Nuclear cost recovery clause,* at 10 [hereinafter PSC]; *see also* PSC, at 8 (quoting witness Olivera's testimony): "Our intentions are to go through the licensing process. When (we) have the COLA application approved, I think we will look at, you know, what is happening, what do we think is the most

changed from actually having to demonstrate a continued intent to build to simply showing a continued *desire* to have the *option* to build. The change, which appears to be at worst "whim" or "showing favoritism" and at best a grant of "unbridled discretion," can be attributed to the complete lack of definition in section 366.93.[26] When the PSC cannot even be consistent within itself within the same year, it speaks volumes about the total failure of the Legislature to draft a workable statute.

The PSC would argue that the Legislature did draft section 366.93 with a standard for recovering costs: prudence.[27] The Legislature was consistent in abrogating the duty to define *prudence* to the PSC in that it also abrogated its duty to define the policy while also avoiding the political, practical, and economic realities of properly defining Florida's participation in the apparent resurgence of nuclear power.[28]

The lack of policy direction in section 366.93 has resulted in an ANCR that has cost ratepayers hundreds of millions of dollars each year.[29] In the order at issue in this case, Florida Power & Light Company (FPL) was granted $196

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likely demand outlook for the state. You know, does this project - is the project needed?".

[26] *Bush*, *supra* note 17.

[27] Fla. Stat., *supra* note 4 (§ 366.93(2) allows for recovery of all "prudently incurred" costs).

[28] Amory B. Lovins, *A Farwell to Fossil Fuels: Answering the Energy Challenge*, FOREIGN AFFAIRS, Mar.-Apr. 2012, at 140-41 (Nuclear power plant construction halted by 1978 and has only recently begun again).

[29] *See e.g.* PSC, *supra* note 25, at 107.

million in nuclear cost recovery funds and Progress Energy Florida, Inc. (PEF) granted almost $86 million.[30] Those very large sums represent significant monthly increases in utility bills to millions of Floridians. Those very large sums represent cost recovery for projects that have no timeline for completion, no benchmarks to meet, no limits on the ever-increasing expenses, and no guarantee or requirement that they even be completed.[31] Utility companies pursuing new nuclear power plants, like FPL and PEF, may do so virtually risk free, unlike any other sector in any other industry, even being allowed to recoup costs related to preparing for ANCR proceedings.[32]

A recent *Tampa Bay Times* article put the unbelievably unfair burden of providing recovery costs on ratepayers in perspective. Using various documents from both the PSC and the Office of Public Counsel, one finds that if PEF stopped building its Levy nuclear project today, the company would take $150 million in *income* on top of the already $1.1 billion it has recovered from customers.[33] If the plant comes online in 2021, PEF would take approximately $3.5 billion in *income*

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[30] *Id.*
[31] Fla. Stat., *supra* note 3.
[32] PSC, *supra* note 25 at 7.
[33] Ivan Penn, *Progress Energy Customers on Hook for $1.1B for Nuclear Plant That May Never Be Built*, TAMPA BAY TIMES, Mar. 11, 2012, at D1; *See also* PSC Document No. 05715, submitted August 12, 2011 on Docket No. 110009-EI *In re Nuclear Power Plant Cost Recovery Clause* (Exhibit TGF-2 at 5-6 and Exhibit TGF-3 at 5-6).

before a single megawatt is generated.[34] To top it all off, with further delays and cost overruns come larger income figures for PEF, in essence creating an incentive *not* to complete the projects.[35] The formula would hold true for FPL's Turkey Point project as well. There is no other industry that is both heavily subsidized and entirely insulated from all free market forces. This reality is diametrically opposed to the purported legislative intent of section 366.93. The legislature could not possibly have intended to allow utilities to start nuclear projects with the intent to make money on the preconstruction costs and not to complete the plant at all; yet that is exactly what happens now.

As part of an omnibus energy bill, section 366.93 went largely unnoticed.[36] The lone dissenter on the bill was Representative Susan Bucher,[37] known by her colleagues as someone who worked to understand every provision in every bill.[38] Since the first nuclear cost recovery request in 2008,[39] legislators from both parties have attempted to reform the ANCR process.[40] These bills have tried to add more

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[34] *Id.*
[35] *Id.*
[36] Fla. Committee Substitute for SB 888 (2006).
[37] Dem., West Palm Beach 2000-2008; Fla. H.R. 1200 (Reg. Sess. 2006).
[38] Fl. H.R., recording of proceedings (March 7, 2012) (on file with the Clerk) (Representative Gary Aubuchon).
[39] PSC Docket No. 080119-EI, submitted February 29, 2008, *In re: Petition by Progress Energy Florida, Inc. to recover costs of the Crystal River Unit 3 uprate as provided in Section 366.93, Florida Statutes, and Rule 25-6.0423, F.A.C.*
[40] *See e.g.* Fla. HB 1101 (2009) (sponsored by Representative Peter Nehr, Rep., Palm Harbor; Fla. SB 1830 (2009) (Sponsored by Senator Michael Fasano, Rep.,

depth and clarity to the statute or simply repeal it outright.[41] For six years, however, unyielding political forces have kept the statute intact.[42] Some legislators, such as *amici*, understand that section 366.93 is a shapeless ball of clay waiting to be molded solely by the PSC.

We cannot know whether the Legislature intended to give such unchecked and unrestricted discretion to the PSC in section 366.93. What we do know is that that delegation was unconstitutionally broad. We know that this statute has resulted in hundreds of millions of dollars of extra fees for ratepayers.[43] We know that the

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New Port Richey); Fla. HB 4161 (2010) (sponsored by Representative Michelle Rehwinkel Vasilinda, Dem., Tallahassee); Fla. SB 740 (2011) (sponsored by Senator Fasano).

[41] *See* Fla. HB 1101 (2009) (requiring utilities refund cost recovery funds if the plant is not completed); *see e.g.* Fla. HB 4161 (2010) (repealing § 366.93).

[42] Department of State, Division of Elections, http://election.dos.state.fl.us/campaign-finance/contrib.asp (Query Contributor records of "Progress Energy" and "Florida Power and Light" to "Republican Party of Florida" and "Florida Democratic Party" in each general election from 2004 to 2012). The 2004 election was the last before section 366.93 went into effect; therefore, the contribution numbers begin for that cycle. The contribution totals represent all contributions to the Republican Party of Florida and the Florida Democratic Party from the general election cycle of 2004 and the general election cycle of 2012. PEF has contributed $2,236,680.06 ($571,332 in 2012 cycle) to the Republican Party, and FPL has contributed $3,267,353 ($400,000 in 2012 cycle). PEF has contributed $250,576.50 ($0 in 2012 cycle, none since 2008) to the Florida Democratic Party, and FPL has contributed $45,000 ($0 in 2012 cycle, only contribution was in 2006).

[43] Penn, *supra* note 33; *see* Ellen Vancko, *Nuclear Power is Wrong Path for Florida*, TALLAHASSEE DEMOCRAT, Mar. 11, 2012, at Opinion 1 (Ellen Vancko is the nuclear energy and climate change project manager at the Union of Concerned Scientists); *see generally* Lovins, *supra* note 28 (Amory Lovins is the Chair of the Rocky Mountain Institute).

PSC has not refused to grant either PEF or FPL cost recovery money since the process began in 2008.[44] The ANCR process has become little more than a *pro forma* session allowing the PSC to agree to the utilities requests for more funds. The process amounts to issuing a blank check to PEF and FPL allowing them to remain in a perpetual state of preconstruction. The interpretation that the PSC has given the ANCR statute cannot comport with the purported legislative intent, and to suggest otherwise leads to an argument *ab absurdo.* We may not know the precise legislative intent in drafting section 366.93, but we can say that the result of that section cannot be what the Legislature intended.

CONCLUSION

Section 366.93 is an unconstitutional delegation of power by the Legislature to the PSC under both Article II, section 3 of the Florida Constitution and this Court's long line of precedents. We ask the court to hold the statute unconstitutional.

[44] *See* PSC Docket No. 080009-EI; *see also* PSC Docket No. 090009-EI; *see also* PSC Docket No. 100009; *see also* PSC Docket No. 110009.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ***AMENDED BRIEF AMICUS CURIAE*** has been furnished by electronic mail (e-mail) and U.S. mail on this 17th day of April, 2012.

Keino Young, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd
Tallahassee, FL 32399-0850
kyoung@psc.state.fl.us

D. Bruce May, Esq.
Holland & Knight
315 South Calhoun Street
Suite 600
Tallahassee, FL 32301
bruce.may@hklaw.com

Raoul Cantero, Esq.
White & Case
Southeast Financial Center
200 South Biscayne Boulevard, Suite 4900
Miami, FL 33131
rcantero@whitecase.com

Stephen Grimes, Esq.
Holland & Knight
315 South Calhoun Street
Suite 600
Tallahassee, FL 32301
stephen.grimes@hklaw.com

James Whitlock, Esq.
Gary A. Davis & Associates
61 North Andrews Avenue
Hot Springs, NC 28743
jwhitlock@enviroattorney.com

Charles Rehwinkel, Esq.
Office of Public Counsel
c/o The Florida Legislature
11 West Madison Street, Room 812
Tallahassee, FL 32399
rehwinkel.charles@leg.state.fl.us

William Garner, Esq.
Nabors, Giblin, & Nickerson, P.A.
1500 Mahan Drive, Suite 200
Tallahassee, FL 32308
bgarner@ngnlaw.com

_____

Counsel for *Amici*

CERTIFICATE OF COMPLIANCE

I certify that this brief is written in 14-point Times New Roman font as required by the Florida Rules of Appellate Procedure.

_____

Jacob A. Brainard
Counsel for *Amici*