IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC11-2465
PSC DOCKET NO. 110009-E-I

SOUTHERN ALLIANCE FOR CLEAN ENERGY,
Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION, FLORIDA POWER AND LIGHT COMPANY, AND PROGRESS ENERGY FLORIDA, INC.,
Appellees.

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE PROGRESS ENERGY FLORIDA, INC.

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PREFACE

In this brief, the parties shall be referenced as follows. Appellee, Progress Energy Florida, Inc., will be referred to as "PEF." Appellee, Florida Public Service Commission, will be referred to as the "PSC." Appellee, Florida Power & Light Company, will be referred to as "FPL." Appellant, Southern Alliance for Clean Energy, will be referred to as "SACE."

References to the testimony at the hearing before the PSC are found in Volumes 9 and 10 of Volume 53 of the Record and Volumes 11 and 12 of Volume 54 of the Record, and shall be referred to as R. Vol. __, Att. __, Tr. p. __. Hearing Exhibits are also found in Volumes 53 and 54 of the Record and shall be referred to as R. Vol. __, Att. __, and Ex. __. Volumes 51 and 62 of the Record are also cited.

The final order on appeal, Order No. PSC-11-0547-FOF-EI (Nov. 23, 2011), will be referred to as the "Final Order."

STATEMENT OF FACTS

In 2006, as part of Chapter 2006-230, Laws of Florida, the Legislature enacted Section 366.93 and amended Section 403.519 of the Florida Statutes to encourage utility investment in the construction of nuclear power plants. Subsection (2) of Section 366.93 directed the PSC to establish by rule alternative cost recovery mechanisms that allow a utility to recover certain prudently incurred nuclear plant development costs prior to commercial operation of the plant. §§ 366.93(2) and 403.519(4)(e), Fla. Stat. Subsection (3) of Section 366.93, along with subsection (4)(e) of Section 403.519, provide that a utility cannot seek cost recovery under Section 366.93 unless and until it first obtains an affirmative determination of need for the nuclear power plant from the PSC.

As directed by the Legislature, in 2007 the PSC implemented these statutes by adopting Rule 25-6.0423, Florida Administrative Code. Subsection (5) of that rule establishes a formal evidentiary process whereby the PSC conducts annual hearings to review the reasonableness and prudence of nuclear power plant development costs and ultimately determines whether such costs are eligible for recovery under Section 366.93.

In 2007, PEF filed for and obtained a need determination from the PSC to construct two advanced nuclear power plants -- Levy Units 1 & 2 -- and associated transmission facilities in Levy County, Florida (the "Levy Nuclear Project" or

"LNP"). In 2008, 2009, 2010, and 2011, PEF made annual filings pursuant to the PSC's rules establishing the reasonableness and prudence of PEF's costs incurred to license, construct and operate the Levy plants. In each year, following thousands of page of testimony and exhibits, numerous hours of public hearings, the PSC issued orders approving the reasonableness and prudence of all of PEF's costs and actions in developing the Levy Nuclear Project.

On March 1 and May 2, 2011, PEF filed petitions with the PSC seeking prudence review and recovery of actual and estimated costs incurred in connection with two nuclear power plant projects: (1) improvements to its existing, Crystal River Unit 3 nuclear power plant ("CR3") to increase the power output of the plant (the "CR3 Uprate" project);[1] and (2) construction of the Levy Nuclear Project.[2] Because the PSC had previously determined that there was a need for the LNP,[3] PEF was eligible to petition for recovery of the costs it prudently incurred in connection with that project pursuant to Section 366.93(3).

[1] The CR3 Uprate project is a multi-phased engineering and construction project to increase the power output at CR3. SACE does not challenge on appeal the Commission's determination that PEF was entitled to recover its costs associated with the CR3 Uprate project. R. Vol. 62, Att. 3, In re: Nuclear Cost Recovery Clause, Order No. PSC-11-0547-FOF-EI, Docket No. 110009-EI (Nov. 23, 2011), p. 3 and Att. B, p. 3.

[2] R. Vol. 62, Att. 3, In re: Nuclear Cost Recovery Clause, Order No. PSC-11-0547-FOF-EI, Docket No. 110009-EI (Nov. 23, 2011), pp. 3, 74-107.

[3] Order No. PSC-08-0518-FOF-EI (Aug. 12, 2008).

In accordance with Sections 366.93 and 403.519, and Rule 25-6.0423, the PSC conducted a two-day evidentiary hearing on August 16-17, 2011 to determine if PEF was entitled to recover prudently incurred costs associated with the siting, design, licensing, or construction of the Levy Nuclear Project. This evidentiary hearing was the fourth annual review of PEF's nuclear power plant project costs. SACE formally intervened and participated as a party in the 2011 nuclear cost recovery hearing, and in the last two cost recovery hearings.[4]

In PEF's 2010 nuclear cost recovery hearing, the PSC held that a utility did not have to engage simultaneously in the siting, design, licensing and construction of a nuclear plant in order to be eligible for cost recovery under Section 366.93. However, the PSC stated that in order to recover its costs a utility's actions must demonstrate that it still intends to build the plant.[5]

During the most recent hearing, PEF introduced into evidence testimony and detailed cost schedules for its prior year actual costs, along with current and future year estimated costs for preconstruction and construction activities relating to the Levy Nuclear Project. R. Vol. 53, Att. 1, Tr. pp. 1388-1412, 1474-1520, 1535-62,

[4] Id., at 4; In re: Nuclear Cost Recovery Clause, Order No. PSC-11-0095-FOF-EI, Docket No. 100009-EI (Feb. 2, 2011), p. 4; In re: Nuclear Cost Recovery Clause, Order No. PSC-09-0783-FOF-EI, Docket No. 090009-EI (Nov. 19, 2009) p. 3.
[5] Order No. PSC-11-0095-FOF-EI, Docket No. 100009-EI (Feb. 2, 2011), p. 9.

and 1654; R. Vol. 54, Att. 2, Exs. 136, 149 and 150.[6] PEF's witnesses testified the costs incurred in 2010 in connection with the LNP preconstruction and construction activities were prudently incurred and necessary, R. Vol. 53, Att. 1, Tr. pp. 1481-91; 1492, and that the LNP preconstruction and construction activity costs in 2011 and projected for 2012 were reasonable and necessary. Id. at 1506-18; R. Vol. 54, Att. 1, Tr. pp. 1689-97.

No evidence was offered that any of PEF's actual and estimated LNP preconstruction and construction activity costs were imprudent or unreasonable,[7] or that any of the LNP preconstruction and construction activity costs were not for the licensing, engineering, design, or construction of the LNP.[8] Furthermore, there was no evidence that such costs were unnecessary to meet PEF's schedule to place the LNP plants in service in 2021 and 2022.[9]

John Elnitsky, former U.S. Navy rear admiral, constructor of two nuclear attack submarines, and former Navy Director of Undersea Technology,[10] and the person responsible for managing PEF's engineering, procurement and construction

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[6] PEF notes that the confidential copies of these exhibits and testimony are included in Att. 3 to the record, specifically in Volume 5 as confidential document 01372-11 and in Volume 11 as document 03023-11. All confidential cost information was made available to the PSC for review.

[7] R. Vol. 62, Att. 3, In re: Nuclear Cost Recovery Clause, Order No. PSC-11-0547-FOF-EI, Docket No. 110009-EI (Nov. 23, 2011), pp. 93, 99, 103.

[8] Id.

[9] Id.

[10] R. Vol. 54, Att. 1, pp. 1662, 1664.

of the LNP, testified at length that PEF intends to build and place the Levy Units 1 and 2 in commercial service by 2021 and 2022, respectively. R. Vol. 54, Att. 1, Tr. pp. 1697, 1734, 2060-61, 2086-87. Mr. Elnitsky sponsored PEF's long-term feasibility analysis for the LNP pursuant to Rule 25-60423(5)(c)5, F.A.C.[11] He explained that PEF is fully capable of obtaining the required Nuclear Regulatory Commission license and permits to build the LNP. He testified that such capability demonstrated the regulatory feasibility for the LNP. Id. at 1684-89, 1700-03. Mr. Elnitsky also explained PEF's capability of building the nuclear reactors on the Levy site, and testified that such capability demonstrated that the LNP is technically feasible. Id. at 1699-1700. He further testified to the economic feasibility of completing the LNP, demonstrating that the LNP was cost-effective. Id. at 1726-30, 1980; R. Vol. 54, Att. 2, Ex. 161. Specifically, Mr. Elnitsky testified to a projected $100 billion in fuel savings over the sixty-year operational lives of the Levy nuclear units. R. Vol. 54, Att. 1, pp. 1891, 1920. Mr. Elnitsky testified to the qualitative analysis of the enterprise risks facing the LNP, demonstrating that those risks beyond the control of PEF were not a reason to either accelerate or cancel PEF's plan to build the LNP in its current Integrated Project Plan. R. Vol. 54, Att. 1, Tr. pp. 1703-26. Mr. Elnitsky acknowledged that

[11] Each year, PEF must submit for PSC review and approval a detailed analysis of the long-term feasibility of completing the nuclear power plants. Rule 25-6.0423(5)(c)5, F.A.C.

while PEF had the present intent to build the LNP, it had not made the final "irreversible" decision to build the LNP because it would be unreasonable and irresponsible management to make an "ironclad" commitment to proceed with the construction of such a massive project "no matter what." Id. at 2087, 2091, 2197. Unlike PEF, SACE did not proffer any witnesses at the hearing. R. Vol. 51, pp. 10161-63.

Based on the evidence in the record, the PSC made the evidentiary finding that PEF's actions did in fact show an intent to build the LNP and that the costs for which PEF sought recovery had been prudently incurred. Final Order at 89. This case involves SACE's appeal from that Final Order.

SUMMARY OF THE ARGUMENT

Utilities are not ordinarily allowed to recover the costs of constructing a new power plant until after the plant has been completed and placed in service. However, in order to encourage a utility to go forward with such a substantial undertaking as building a nuclear plant, the Legislature enacted Section 366.93 and directed the PSC to establish specific alternative mechanisms that would permit a utility developing a nuclear plant to recover certain costs that it "prudently incurred" as the plant is developed rather than after the plant goes on line. In determining whether a utility's nuclear plant development costs are "prudently incurred" and thus eligible for alternative recovery, the PSC annually reviews,

among other things, whether the utility has demonstrated that the project remains feasible.

In the nuclear cost recovery proceeding below, the PSC made express findings that PEF had "prudently incurred" costs in developing its Levy Nuclear Plant, and that those costs qualified for alternative recovery under Section 366.93. SACE argues that these findings were not based on adequate evidentiary support because PEF allegedly failed to demonstrate its intent to build the project. SACE's evidentiary argument is baseless and ignores the volumes of substantial evidence in the record that supports the PSC's findings that PEF's actions continue to meet the Legislature's statutory and the PSC's regulatory requirements and demonstrate the ongoing feasibility of the Levy Nuclear Project, and PEF's intent to construct the project. Indeed, as noted by the PSC, it is irrefutable that the project has been approved by PEF's senior management, is in the midst of licensing proceedings before the Nuclear Regulatory Commission, and is actively moving forward with legitimate project work with the intent of meeting the estimated inservice dates set forth in a formal project schedule.

SACE also argues that Section 366.93 is unconstitutional because it fails to provide adequate standards to guide the PSC in its implementation and thus violates the nondelegation doctrine. However, SACE ignores that Section 366.93 spells out two alternative cost recovery mechanisms that the PSC is required to

adopt, expressly defines those costs that are eligible for alternative recovery, delineates conditions for alternative recovery, and incorporates "prudency" standards, all of which guide the PSC in its administration and implementation of the statute. SACE also conveniently overlooks the many cases where this Court has been careful not to apply the nondelegation doctrine to prohibit delegation of authority to the PSC where, as here, the delegation is accompanied by adequate standards and guidance.

ARGUMENT

I. THE PSC'S DETERMINATION THAT PEF'S COSTS ARE REASONABLE AND PRUDENT IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

Standard of Review

The standard of review for this issue is whether there was competent substantial evidence in the record to support the PSC's finding that PEF qualified for cost recovery. See § 120.68(7)(b) and (10), Fla. Stat. The court is not to substitute its judgment for that of the PSC regarding the weight of the evidence on any disputed finding of fact. Id.; Gulf Power Co. v. Fla. Pub. Serv. Comm'n, 453 So. 2d 799, 803 (Fla. 1984) ("We have repeatedly stated the standard of judicial review by which we are guided when we review PSC orders. We will not overturn an order of the PSC because we would have arrived at a different result had we made the initial decision and we will not re-weigh the evidence. Our task is to determine whether competent substantial evidence supports a PSC order."); Polk County v. Fla. Pub. Serv. Comm'n, 460 So. 2d 370, 373 (Fla. 1984) (in reviewing a PSC order, the Court "will not reweigh or re-evaluate the evidence presented to the [PSC] but should only examine the record to determine whether the order complained of complies with the essential requirements of law and whether the agency had available competent, substantial evidence to support its findings."). Moreover, the PSC's decision is presumed to be correct. GTC, Inc. v. Edgar, 967

So. 2d 781, 790 (Fla. 2007) ("The Commission's factual findings are entitled to a presumption of correctness.") (quotation omitted); W. Fla. Elec. Co-Op Ass'n, Inc. v. Jacobs, 887 So. 2d 1200, 1204 (Fla. 2004) (PSC orders come "clothed with the presumption that they are reasonable and just."). This Court has explained: "While there may be legitimate disagreements as to the weight and credibility of the evidence presented below, this Court's review is limited to a determination of whether evidence exists to support the [PSC's] findings." Crist v. Jaber, 908 So. 2d 426, 432 (Fla. 2005).

SACE'S Argument

SACE argues that the PSC's finding that PEF qualified for cost recovery under Section 366.93 was not supported by competent substantial evidence because PEF allegedly failed to demonstrate its intent to build the Levy Nuclear Project. In particular, SACE argues that PEF has not demonstrated an "intent to build" because it has not stated an irrevocable commitment that the plant will be built, even in the face of potential regulatory restrictions or other contingencies which may render the plant unfeasible. SACE's argument is patently wrong and ignores the volumes of testimony and other evidence in the record that demonstrates PEF's intent to build the project. Moreover, SACE's argument is based on the faulty premise that PEF's intent to build, readily established here, cannot be accompanied by the rational understanding that completion of a nuclear

plant could potentially be impeded or prevented by a myriad of factors beyond PEF's control.

PEF Has Met All Statutory And Regulatory Requirements with Competent and Substantial Evidence

In the Final Order, the PSC devotes substantial attention to the record evidence supporting PEF's intention to build the Levy Nuclear Project. The PSC first points out that in PEF's last cost recovery hearing, it determined that a utility need not engage simultaneously in all the activities of siting, design, licensing and construction of nuclear power plant activities in order to qualify for cost recovery under Section 366.93. Final Order at 8-10. However, the PSC stated that a utility's actions must demonstrate that it continues to intend to build the nuclear power plant to meet the requirements of the statute. Id. at 9. While the "intent to build" is not contained in Section 366.93, the PSC's evaluation of whether a utility's actions reflect a current "intent to build" is an appropriate tool, or shorthand reference, for determining whether the utility has met the express requirements of Section 366.93 that it has prudently incurred costs (as defined in the statute) for actions involving siting, design, licensing, and construction of a nuclear power plant. As demonstrated herein, PEF has met all of those statutory requirements.

In addressing a utility's "intent to build" the PSC looks to whether the actions of the utility demonstrate that the utility intends to construct the nuclear power plant. In this instance, the PSC expressly found that:

> … PEF's actions continue to demonstrate its intent to build the LNP. The project has been approved by PEF's Senior Management Committee and Board of Directors as required by PEF's policy and governing procedures. The LNP is an active project under the existing NRC [Nuclear Regulatory Commission] licensing application and construction contract. The project is controlled according to the project parameters contained in the March 2011 IPP. One of the parameters in this IPP is an in-service date for Unit 1 of 2021 and 2022 for Unit 2. These in-service dates are supported by a project schedules. The project activities identified by PEF that are planned, undertaken or completed during 2011 and 2012 are consistent with this schedule.

Final Order at 89.

In making this finding, the PSC discussed at length the testimony of PEF witness John Elnitsky who testified extensively that PEF had the intent to build and that the company was on schedule to place the Levy Units 1 & 2 in service on 2021 and 2022, respectively. Id. at 83-89. Mr. Elnitsky is PEF's Vice President of New Generation Programs and Projects. R. Vol. 54, Att. 1, Tr. p. 1662. He testified, in no uncertain terms, that PEF is moving forward with work with the intent of meeting the current estimated inservice dates for the Levy Units 1 & 2 in 2021 and 2022, respectively. Id. at 1697, 2053. Mr. Elnitsky repeatedly stated that PEF intended to build the Levy Nuclear Project on this schedule. Id. at 1738, 1743-44, 1747-48, 1764, 1768-71, 1797, 1836, 1930-31, 2086. Mr. Elnitsky testified further

that PEF's senior management committee had approved the March 2011 Integrated Project Plan ("IPP") which was designed to bring Levy Unit 1 in service in 2021 and Unit 2 in service in 2022. Id. at 2196-97. PEF's intent to build was further highlighted by the following colloquy between Mr. Elnitsky and the attorney for the Office of Public Counsel:

> A. . . . What we expect is that, as I testified in my direct testimony, that Levy Unit 1 would come in service in 2021, Levy Unit 2 in 2022.
>
> Q. Okay, and you have absolutely no reason to doubt the 2021 or 2022 in service dates, do you?
>
> A. Not based on our current project plan, no.

Id. at 1743.

SACE cites to PEF's decision to proceed with LNP development on a slower pace as somehow proving that PEF's actions do not support its intention to build. That simply is incorrect. The record shows that PEF's decision to proceed on a slower pace was driven by regulatory events outside of its control, specifically, PEF needed but did not receive a Limited Work Authorization from the NRC prior to obtaining the NRC license (called a Combined Operating License or "COL") to build the LNP by the originally planned commercial in-service dates for Levy Units 1 & 2. [12] In its 2009 annual review proceeding, the PSC determined that, based on the evidence, PEF's actions regarding the Limited Work Authorization

[12] In re: Nuclear Cost Recovery Clause, Order No. PSC-09-0783-FOF-EI, Docket No. 090009-EI, (Nov. 19, 2009), p. 30. No party appealed the Order.

were reasonable and consistent with good business practices. Id. PEF subsequently evaluated whether to continue with or cancel the project and decided to proceed with the LNP on a slower pace by focusing LNP work on obtaining the COL from the NRC. In its 2010 annual review proceeding, the PSC reviewed this decision and, based on the evidence, found PEF's revised project approach reasonable.[13] The current annual review of PEF's LNP costs involve costs necessary to implement PEF's decision to proceed with the project on a slower pace. R. Vol. 54, Att. 1, Tr. pp. 1664-65, 1682-84, 1697.

Mr. Elnitsky acknowledged at the hearing that development of the LNP is proceeding slower than originally planned so that PEF can focus its efforts primarily on obtaining the COL from the Nuclear Regulatory Commission. However, he testified unequivocally that PEF is taking those actions with the present intent to build the LNP on the current project schedule. Id. at 1583-1641, 1680-81, 1734-35, 2028, 2053, 2061. He also explained that PEF's actions to extend the time limits for performance of its engineering, procurement and construction contract did not mean that PEF's intent to build was weakening or lost, rather it reflected PEF's decision to focus its efforts on obtaining the necessary license from the NRC which had the positive effect of reducing the cost of the project in the near term. Id. at 1682.

[13] In re: Nuclear Cost Recovery Clause, Order No. PSC-11-0095-FOF-EI, Docket No. 100009-EI (Feb. 2, 2011), p. 35. No party appealed this Order.

SACE naturally tries to downplay PEF's efforts to obtain the COL and other environmental permits. Yet the record reflects that PEF's efforts in this area are substantial. PEF's licensing and engineering activities for the LNP included responses to NRC requests for additional information ("RAIs") on safety and environmental issues, RAIs for the Offset Boring Program, Roller Compacted Concrete, mixed design and specialty testimony programs, work on the U.S. Army Corps of Engineer Section 404 permit, and the development of a conceptual drill shaft foundation design concept for the Turbine Building, Radwaste Building, and Annex Building. R. Vol. 53, Att. 1, Tr. pp. 1477-80. PEF's engineering and construction activities for the LNP include identification and purchase of strategic land dock acquisitions for the LNP Barge Slip easement and transmission right-of-ways and the disposition of fourteen long lead equipment contracts. Id. at 1484, 1486-87, 1489-90; R. Vol. 54, Att. 1, Tr. pp. 1672, 1691-94.

SACE also misrepresents Mr. Elnitsky's statement that PEF had engaged in the "disposition" of its long-lead equipment purchase orders by claiming that it means that PEF cancelled orders for equipment. Initial Brief, p. 26. This is a blatant misstatement of the facts. Long-lead equipment disposition did not involve cancelling purchase orders for the equipment and there is no evidence to support

SACE's claim.[14] In fact, PEF executed change orders to complete the manufacture of seven of the fourteen long-lead equipment items, and decided to suspend and resume the manufacture of the remaining seven long-lead equipment items in time to place Levy Units 1 & 2 in service in 2021 and 2022. R. Vol. 54, Att. 1, Tr. pp. 1691-94, 1697, 1980, 2087; R. Vol. 54, Att. 2, Ex. 160.

The Final Order also pointed out that the Office of Public Counsel's witness, Dr. Jacobs, agreed that PEF had been implementing its intent to build the LNP.[15] The PSC concluded its evidentiary analysis with the following finding:

> Given the guidance afforded by us in Order No. PSC-11-0095-FOF-EI, and the preponderance of the evidence in the record we find that

[14] SACE improperly refers to a settlement agreement approved by the PSC on March 12, 2012 in another docket and with respect to issues beyond the LNP. This agreement is not in the record because it did not exist at the time of the hearing. In any event, the agreement has no bearing on PEF's intent to build the LNP and it does not, as SACE wrongly asserts, delay the decision to construct the LNP. The agreement also does not allow PEF to obtain its NRC license for the LNP, terminate the EPC agreement without deciding to construct the LNP, and still recover its costs. Initial Brief, p. 7. The agreement does not require the termination of the LNP contract, it does not state that PEF has terminated that contract, and it certainly does not bind the PSC with respect to any future review of the prudence of costs incurred for the LNP.

[15] While Dr. Jacobs gave his opinion that he thought PEF's intent to build was weakening, he stated that he was not testifying that PEF did not have the intent to build the plants. R. Vol. 54, Att. 1, Tr. p. 2029-30. He further testified that he does not believe that PEF should cancel the LPN project. Id. at 2030. Dr. Jacobs said that he thinks that the current timeframe of in-service in 2021 and 2022 is a reasonable schedule. Id. at 2034. He also stated that PEF was "clearly taking the steps needed to achieve receipt of the combined license . . . ." Id. at 2038. When asked directly by a commissioner what other actions PEF could take to demonstrate its intent to build, Jacobs could not identify anything. Id. at 2038-39.

> PEF has satisfied the requirement to demonstrate its intent to build the nuclear power plant for which it seeks recovery of costs. Therefore we find that PEF's activities to date continue to demonstrate PEF's intent to build the LNP as contemplated by section 366.93, F.S.

Final Order at 89. There is no question that ample competent and substantial evidence exists in the record to support the PSC's finding.

Confronted with this overwhelming evidence of PEF's direct actions demonstrating its intent to build, SACE resorts to attacking Mr. Elnitsky's testimony through semantic arguments which the PSC soundly rejected. At the hearing, SACE attempted to trap Mr. Elnitsky into admitting that the PEF cannot show that it intends to build unless PEF irrevocably commits to building the plant regardless of what may occur that would make construction unreasonable or impossible. R. Vol. 54, Att. 1, Tr. pp. 1945-46. SACE's Initial Brief wrongly suggests that Mr. Elnitsky agreed with SACE's argument. In fact, the record shows that Mr. Elnitsky refused to take the bait offered by SACE's counsel. Mr. Elnitsky explained that it would be unreasonable and irresponsible for any utility to make an irreversible commitment to move forward with the construction of a nuclear power plant "no matter what." Id. at 1946, 2197. Mr. Elnitsky went on to explain "the reasonable thing to do from a project management perspective is to continue to review the factors that effect the project each year and adjust as necessary." Id. Mr. Elnitsky also addressed SACE's semantic argument head-on in his rebuttal testimony where he stated that PEF's testimony shows its actions

reflect its intent to develop the project on the current schedule, and that the company should be judged by those actions and not by the words that SACE's counsel attempted to put in his mouth. Id. at 2086-87.

In addition to distorting Mr. Elnitsky's testimony which confirmed PEF's intent to build, SACE improperly asks this Court to re-weigh the credibility of the witness. Credibility issues are properly determined by the fact finder -- in this case the PSC -- and not by the appellate body. See, e.g., Crist v. Jaber, 908 So. 2d at 432; Siewert v. Casey, 80 So. 3d 1114, 1116 (Fla. 4th DCA 2012) ("It is the role of the finder of fact, whether a jury or a trial judge, to resolve conflicts in the evidence and to weigh the credibility of witnesses. Great deference is afforded the finder of fact because it has the first-hand opportunity to see and hear the witnesses testify.") (citation omitted).

In sum, the record is replete with evidence to support the PSC's finding that PEF continues to intend to build the Levy Nuclear Project. SACE may disagree with that evidence but cannot deny that such evidence exists in the record.

II. SECTION 366.93 IS NOT UNCONSTITUTIONAL BECAUSE THE LEGISLATURE PROVIDED ADEQUATE STANDARDS TO GUIDE THE PSC IN ITS IMPLEMENTATION OF THE STATUTE.

Standard of Review

The determination of the constitutionality of a statute is a question of law. Therefore, the standard of review with respect to this argument is de novo. State Dep't of Ins. v. Keys' Title, 441 So. 2d 579 (Fla. 1st DCA 1998).

However, statutes come before the courts clothed with the presumption of constitutionality. Dep't of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879, 881 (Fla. 1983). Thus, it is a fundamental rule of statutory construction that, if at all possible, a statute should be construed to be constitutional. St. Mary's Hosp., Inc. v. Phillipe, 769 So. 2d 961, 972 (Fla. 2000). In addition, statutes must be construed to effectuate the intent of the Legislature. Borden v. E.-European Ins. Co., 921 So. 2d 587, 595 (Fla. 2006).

SACE's Arguments

SACE complains that the Legislature failed to provide adequate standards to guide the PSC in the implementation and administration of the nuclear cost recovery statute -- Section 366.93, Florida Statutes. SACE attempts two arguments to support its position. First, SACE claims that Section 366.93 provides no real guidance as to which "alternative cost recovery mechanisms" should be employed by the PSC to "promote utility investment in nuclear power plants."

Second, SACE claims that Section 366.93 provides no real guidance as to which costs are recoverable under the "alternative cost recovery mechanism." SACE's arguments reflect a fundamental misinterpretation of the nondelegation doctrine and fail to recognize the full extent and thoroughness of the express legislative guidance provided in the statutory framework.

The Nondelegation Doctrine

The law applicable to SACE's arguments is well settled; indeed, leading decisions interpreting the nondelegation doctrine arose in the context of this Court's review of PSC orders. Under the separation of powers principles in Article II, Section 3 of the Florida Constitution, fundamental and primary policy decisions must be made by the Legislature, and agency administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the legislative enactment establishing the program. Microtel, Inc. v. Fla. Pub. Serv. Comm'n, 464 So. 2d 1189 (Fla. 1985) ("Microtel I"). This Court, however, has been careful not to rigidly apply the nondelegation doctrine so as to prohibit the delegation of authority to the PSC to carry out legislative policy when adequate standards and guidance accompany the delegation. The Court explained the proper application of the nondelegation doctrine in Microtel I:

> In implementing this policy decision, the legislature is obliged by the nondelegation doctrine to establish adequate standards and guidelines. Subordinate functions may be transferred by the legislature to permit administration of legislative policy by an agency with the expertise

> and flexibility needed to deal with complex and fluid conditions. State, Department of Citrus v. Griffin, 239 So. 2d 577 (Fla. 1970). Otherwise, the legislature would be forced to remain in perpetual session and devote a large portion of its time to regulation. Id. 'Obviously, the very conditions which may operate to make direct legislative control impractical or ineffective may also, for the same reasons, make the drafting of detailed or specific legislation impractical or undesirable.' Id. at 581.

Id. at 1191.

The Microtel I decision has been applied on numerous occasions to reject challenges to PSC-related legislation based on the nondelegation doctrine. See, e.g., Microtel, Inc. v. Fla. Public Serv. Comm'n, 483 So. 2d 415, 419 (Fla. 1986) ("Microtel II"); AT&T Comms. of the S. States v. Marks, 515 So. 2d 741, 743 (Fla. 1987); see also U.S. Sprint Comms. Co. v. Marks, 509 So. 2d 1107, 1108 (Fla. 1987). Although the nondelegation doctrine precludes legislative delegation that would leave it to the agency "to determine what the law is," this Court has made it clear that separation of powers principles "do not prohibit the legislature from delegating the authority to carry out legislative policy when such delegation is accompanied by proper standards and guidelines." Fla. Gas Transmission Co. v. Pub. Serv. Comm'n, 635 So. 2d 941, 944 (Fla. 1994). A review of the statutory framework at issue here demonstrates that adequate standards and guidelines are expressly incorporated in Section 366.93.

The Statutory Framework

In 2006, as part of Chapter 2006-230, Laws of Florida, the Legislature enacted Section 366.93 and amended Section 403.519 to encourage utility investment in nuclear energy by: (a) streamlining the process whereby the PSC reviews and approves the need for a proposed nuclear plant;[16] (b) requiring the PSC to consider the benefits of reducing Florida's dependence on fuel oil and natural gas, decreasing air emission compliance costs, enhancing the long-term reliability of electric power production, and providing reasonably priced electricity when it evaluates the need for a proposed nuclear plant;[17] (c) creating a presumption of public need and necessity for nuclear plants approved by the PSC;[18] and (d) establishing regulatory mechanisms that would allow a utility to recover certain prudently incurred nuclear plant development costs prior to commercial operation of the plant.[19]

The cost recovery mechanisms[20] established in Section 366.93 -- which SACE challenges here -- were expressly designed by the Legislature to encourage

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[16] Ch. 2006-230, § 43, at 2645-48, Laws of Fla.
[17] Id.
[18] Id.
[19] Id., §§ 43, 44, at 2645-49.
[20] The Legislature's decision to provide regulated public utilities with an alternative cost recovery mechanism to encourage investment in nuclear electric generation is not unique. In fact, the Legislature has authorized several other alternative cost recovery mechanisms to promote other energy policy goals. For example, Section 366.825 provides regulated electric utilities with an alternative

utilities like PEF to seek cleaner and more cost-effective energy solutions through investment in nuclear energy projects.

Ordinarily, public utilities are not allowed to recover their costs of building a power plant until after construction has been completed and the plant is operational. However, this cost recovery model creates obstacles for nuclear power projects because such projects are massive in scope and have longer construction lead-times than other types of power plants. Recognizing that utilities might be reluctant to incur the expenses associated with such massive undertakings without more expedited cost recovery, the Legislature directed the PSC to establish alternative cost recovery mechanisms that would permit a utility engaged in the development of a nuclear plant to recover certain costs that it prudently incurred as the plant is developed rather than after the plant goes on line. Those legislative policies and directives were codified in subsection (4)(e) of Section 403.519 and in Section 366.93. A review of these sections in their entirety demonstrates the

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mechanism to recover costs incurred to comply with the Federal Clean Air Act—42 U.S.C. § 7401, et seq. (the "Clean Air Act"), Section 366.8255 authorizes regulated electric utilities to utilize an alternative cost recovery mechanism to recover environmental compliance costs other than those incurred to comply with the Clean Air Act, and Section 366.8260 provides regulated electric utilities with an alternative mechanism to recover costs incurred in connection with the restoration of service after power outages resulting from hurricanes or tropical storms. Indeed, Section 366.8255 is set up in the same manner as Section 366.93, and is cited by certain of the Appellant's Amici as a model of constitutional delegation notwithstanding that the terms of Section 366.93 are favorably comparable. See Brief of Amicus Curiae Michelle Rehwinkle Vasilinda, et al., at 3-4.

thoroughness of the legislative directives. The relevant statutory provisions at issue in this appeal are quoted below as part of the argument.

A. Section 366.93 provides more than adequate guidance as to which "alternative cost recovery mechanisms" should be utilized to promote nuclear development

SACE claims that while Section 366.93 directed the PSC to adopt "alternative cost recovery mechanisms" by rule, the statute is unconstitutional because the Florida Legislature did not adequately guide the PSC as to what those "mechanisms" should be. A review of the statute shows that this argument is completely unfounded.

Subsection (2) of the statute directs the PSC to establish, by rule, "alternative cost recovery mechanisms" which would permit a utility engaged in the development of a nuclear plant to recover certain costs that it prudently incurred as the plant is being developed rather than after the plant goes on line. § 366.93(2), Fla. Stat. Subsection (2) further directed the PSC to establish two definitive types of "alternative cost recovery mechanisms" to advance the legislative policy of encouraging utility investment in nuclear power plants:

> Such 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 and shall include, but not be limited to:
>
> (a) Recovery through the capacity cost recovery clause of any preconstruction costs.

> (b) Recovery through an incremental increase in the utility's capacity cost recovery clause rates of the carrying costs on the utility's projected construction cost balance associated with the nuclear or integrated gasification combined cycle power plant. 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 shall be equal to the pretax AFUDC in effect upon this act becoming law. For nuclear or integrated gasification combined cycle power plants for which need petitions are submitted after December 31, 2010, the utility's existing pretax AFUDC rate is presumed to be appropriate unless determined otherwise by the commission in the determination of need for the nuclear or integrated gasification combined cycle power plant.

§ 366.93(2), Fla. Stat. (emphasis added).

SACE concedes that the Legislature provided two specific examples of such "mechanisms"—as reflected in subsections 2(a) and 2(b) of Section 366.93—but contends that the Legislature's use of the phrase "shall include but not be limited to" delegates too much discretion to the PSC. SACE is wrong.

SACE ignores the fact that statutory phrases like "shall include but not be limited to" are commonly used in legislative directives without violating the nondelegation doctrine, particularly where the phrase is accompanied by specific guidelines like the ones encompassed in Section 366.93. For instance, this Court in Florida Gas Transmission flatly rejected the claim that Section 403.9422 provided the PSC with unbridled discretion in determining the need for natural gas pipelines in the state. In that case the nondelegation challenge focused on a directive that the PSC's considerations include "other matters within its

jurisdiction deemed relevant to the determination of need." 635 So. 2d at 944 (citing § 403.9422(1)(b), Fla. Stat.).[21] In rejecting the claim that such clause violated Florida's separation of powers doctrine, this Court concluded, "[t]he fact that the statute also allows the [PSC] to consider 'other matters within its jurisdiction' does not represent an attempt by the legislature to abdicate its constitutional lawmaking responsibility. To the contrary, we find that section 403.9422 sets forth very specific and mandatory guidelines for the [PSC] to carry out the purpose of the legislation, and, in doing so, establishes the [PSC] as a body with the appropriate expertise to evaluate the need, complex market conditions, environmental effect and other matters relating to a proposed pipeline, as well as the overall fitness of the applicant." Id. at 944-45.

Likewise, in AT&T Communications of the S. States v. Marks, the challenged statute directed the PSC to consider a list of factors in determining whether licensing a phone company to engage in competition was consistent with the public interest, the last of which was "[a]ny other factors that the [PSC] considers relevant to the public interest." 515 So. 2d at 744 & n.5 (quoting §

[21] In describing the complete list of factors to be considered by the PSC for purposes of that statute, the statute provided that "[i]n the determination of need, the commission shall take into account the need for natural gas delivery reliability, safety, and integrity; the need for abundant, clean-burning natural gas to assure the economic well-being of the public; the appropriate commencement and terminus of the line; and other matters within its jurisdiction deemed relevant to the determination of need." § 403.9422(1)(b), Fla. Stat. (Supp. 1992) (quoted in Fla. Gas Transmission Co., 635 So. 2d at 944).

364.337(2), Fla. Stat. (1985)) (emphasis added).[22] The Court summarily rejected the claim that such statutory framework violated the nondelegation doctrine by giving unbridled discretion to the PSC. 515 So. 2d at 743-44 (citing U.S. Sprint Comms. Co. v. Marks, 509 So. 2d at 1109-10).

There can be no question that the Legislature provided two express examples of the "alternative cost recovery mechanisms" that the PSC was mandated to adopt to accomplish the Legislature's stated goal of promoting utility investment in nuclear energy projects. § 366.93(2)(a) and (b), Fla. Stat. As the Court concluded in Florida Gas Transmission, just because Section 366.93 prefaced those express legislative mandates with the phrase "shall include but not be limited to" cannot be equated with an attempt by the Legislature to "abdicate its constitutional lawmaking responsibility." 635 So. 2d at 944.

It is also noteworthy that the PSC did not attempt to adopt rules that went beyond the specific examples of "alternative cost recovery mechanisms" delineated in Section 366.93(2)(a) and (b). The statute specifically directs the PSC to establish by rule alternative cost recovery mechanisms that would allow utilities to recover costs associated with "siting, design, licensing, and construction of a

[22] The complete list of factors was "(a) The number of firms providing the service; (b) The geographic availability of service from other firms; (c) The quality of service available from alternative providers; (d) The effect on telephone service rates charged to customers of other companies; and (e) Any other factors that the commission considers relevant to the public interest." § 364.337(2), Fla. Stat. (1985).

nuclear power plant, including new, expanded, or relocated electrical transmission lines and facilities that are necessary thereto." The statute goes on to specify that those "recovery mechanisms" are to allow recovery through the capacity cost recovery clause of (a) "preconstruction costs," § 366.93(2)(a); and (b) carrying costs on construction cost balance, § 366.93(2)(b). The PSC precisely followed these legislative directives and adopted Rule 25-6.0423. The PSC's rule closely tracks the statutory directives, standards and guidelines set forth in Section 366.93. Indeed, the stated purpose of the rule "is to establish alternative cost recovery mechanisms for the recovery of costs incurred in the siting, design, licensing and construction of nuclear and integrated gasification combined cycle power plants in order to promote electric utility investment in nuclear or integrated gasification combined cycle power plants and allow for the recovery in rates of all such prudently incurred costs." R. 25-6.0423(1), F.A.C. Moreover, following the Legislature's express direction, the PSC's rule established the two alternative cost recovery mechanisms that are described in the statute: one for recovery of preconstruction cost through the capacity cost recovery clause, R. 25-6.0423(5)(a), and another for the recovery of carrying costs on construction cost balances, R. 25-6.0423(5)(b).[23]

[23] For similar reasons, the Court should reject the nondelegation theory raised by an amicus, The Village of Pinecrest, Florida ("Pinecrest"). Pinecrest asserts that Section 366.93 provides the PSC with unbridled discretion and the ability to

In summary, the contents of the nuclear cost recovery rule and its implementation are entirely consistent with the Legislature's stated policy and further illustrates that there is no improper delegation of the Legislature's powers.

B. Section 366.93 provides more than sufficient standards as to what "costs" are recoverable under the statute's alternative cost recovery mechanisms

SACE also argues that there is no adequate statutory guidance as to which "costs" are to be recoverable under the alternative cost recovery mechanisms referenced in Section 366.93. Again, this argument overlooks the express standards, definitions, and guidelines incorporated in Section 366.93.

In this case, the Legislature provided concrete standards to guide the PSC on which "costs" were eligible for alternative recovery. First, only those costs

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"establish policy" in an unconstitutional manner because it does not make specific reference to the "fair, just and reasonable" standard in Section 366.06. Pinecrest cites to PSC Order No. PSC-11-0095-FOF-EI for the proposition that the standards in Section 366.06 do not govern nuclear cost recovery in Florida, yet notes that the PSC has elsewhere referred to the principle of "fair, just and reasonable" ratemaking in addressing nuclear cost recovery. What Pinecrest fails to note is that the issue in the order it cites was whether the PSC had the authority to impose a "risk sharing" mechanism that would deny the utility recovery of some of its prudently incurred costs in direct contravention of the statute. Far from establishing policy, or exercising unbridled discretion, the PSC followed the explicit legislative guidelines in Section 366.93, finding that its "authority is limited as it relates to implementing a risk sharing mechanism for recovery of the costs associated with nuclear power plants." Id. at 9. While the PSC has permitted a utility to postpone recovery of some nuclear development costs in other contexts, it noted that the utility's voluntary agreement to delay recovery "does not conflict with the ultimate directive of Section 366.93, Florida Statutes." Id. Pinecrest may not like the policy set by the Legislature, but it cannot fairly argue that the PSC itself unconstitutionally established this policy.

associated with nuclear plants that have been granted a need determination under the standards set forth in Section 403.519, are eligible to be considered for alternative recovery. § 366.93(3), Fla. Stat. ("After a petition for determination of need is granted the utility may petition the commission for cost recovery as permitted by this section and commission rules.") (emphasis added). SACE overlooks that this elemental condition for cost recovery is expressly set forth in subsection 366.93(3).[24]

In determining whether a proposed nuclear plant is needed, the Legislature expressly directed the PSC to take into account specific factors, including whether the plant will "(1) Provide needed base load capacity[;] (2) Enhance the reliability of the electric power production within the state by improving the balance of power plant fuel diversity and reducing Florida's dependence on fuel oil and natural gas[; and] (3) Provide the most cost-effective source of power, taking into account the need to improve the balance of fuel diversity, reduce Florida's dependence on fuel oil and natural gas, reduce air emission compliance costs, and contribute to the long-term stability and reliability of the electric grid."

[24] The only mention of Section 403.519 in SACE's brief is a passing reference on page 3 that it was the statute under which FPL and PEF obtained an affirmative determination of need from the PSC. Nowhere in SACE's brief does it acknowledge the fact that when Section 366.93 was enacted in 2006, the Legislature also amended Section 403.519 to refine the process whereby the PSC reviews and approves the need for a proposed nuclear power plant. Ch. 2006-230, § 43 at 2645-48, Laws of Fla.

§ 403.519(4)(b), Fla. Stat. The standards in Section 403.519 are mandated, meaningful and indeed incorporated as part of the nuclear cost recovery framework. Furthermore, the standards in Section 403.519 are very similar to the "determination of need" standards at issue in Florida Gas Transmission -- Section 403.9422 -- which this Court has already upheld in the face of a nondelegation challenge. See Fla. Gas Transmission Co., 635 So. 2d at 944 n.1.[25]

Second, statutory definitions set forth in Section 366.93 clearly guide the PSC on which costs are eligible for cost recovery. Section 366.93(2) explains that those costs eligible for alternative cost recovery are limited to "costs incurred in the siting, design, licensing and construction of a nuclear power plant, including new, expanded or relocated electrical transmission lines and facilities that are necessary thereto, or of an integrated gasification combined cycle power plant." Section 366.93(1)(a) further defines "costs" to mean:

> all capital investments, including rate of return, any applicable taxes, and all expenses, including operation and maintenance expenses, related to or resulting from the siting, licensing, design, construction,

[25] The Florida Gas Transmission case involved the statute governing determination of need for a natural gas transmission pipeline. As the Court noted in that decision,

> The language in section 403.9422 is similar to the language in other sections of the Florida Statutes under which the legislature has empowered the Commission to regulate certain industries. For example, the language in section 403.519, Florida Statutes (1993), governing the determination of need for electrical power plants, provides that the Commission shall be the sole forum for determining electrical power plant need.

635 So. 2d at 944 n.1.

> or operation of the nuclear power plant, including new, expanded, or relocated electrical transmission lines or facilities of any size that are necessary thereto, or of the integrated gasification combined cycle power plant.

For purposes of recovery of preconstruction costs, Section 366.93(1)(f) defines the term "preconstruction" as:

> that period of time after a site, including any related electrical transmission lines or facilities, has been selected through and including the date the utility completes site clearing work. Preconstruction costs shall be afforded deferred accounting treatment and shall accrue a carrying charge equal to the utility's allowance for funds during construction (AFUDC) rate until recovered in rates."

Third, the Legislature gave the PSC clear direction that nuclear cost recovery is only available for those defined costs that are shown to have been "prudently incurred" by the utility. See § 366.93(2), Fla. Stat. (specifying that alternative cost recovery mechanisms are to 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") (emphasis added).[26] SACE acknowledges that the Legislature has included a "prudence" standard in

[26] Pursuant to Section 366.93 and its attendant nuclear cost recovery rule, the PSC conducts annual hearings to review and determine the reasonableness and prudence of pre-construction and construction expenditures by the utility. See R. 25-6.0423(5)(c), F.A.C. To facilitate the prudency determination of actual construction costs, the PSC conducts an ongoing auditing and monitoring program of construction costs and related contracts. See R. 25-6.0423(5), F.A.C.

Section 366.93, but argues that such standard is inadequate to guide the PSC.[27] SACE's claim is disingenuous and blatantly ignores that the "prudence" standard is a bedrock of utility regulatory jurisprudence not just in Florida, but also throughout the national regulatory landscape.

This Court has recognized that the "prudent investment" standard has roots dating back to the United States Supreme Court's 1944 decision in Federal Power Commission v. Hope Natural Gas Co., et al., 320 U.S. 591. See Cooper v. Tampa Elec. Co., 17 So. 2d 785, 787 (Fla. 1944) ("In … Hope Natural Gas Co. et al., … the Supreme Court of the United States approved what is known as the 'prudent investment' method as a means of determining a rate base that would allow a fair return on the cost of production."); see also Verizon Comms., Inc. v. F.C.C., 535 U.S. 467, 483 (2002) ("Justice Brandeis accordingly advocated replacing 'fair

[27] SACE ignores the fact that Section 403.519, Florida Statutes, which is expressly embedded into and underlies Section 366.93, also specifically addresses the prudency standard. For instance, it provides that "[a]fter a petition for determination of need for a nuclear … power plant has been granted, the right of a utility to recover any costs incurred prior to commercial operation, including, but not limited to, costs associated with the siting, design, licensing, or construction of the plant, shall not be subject to challenge unless and only to the extent the commission finds, based on a preponderance of the evidence adduced at a hearing before the commission under s. 120.57, that certain costs were imprudently incurred." It also provides that "[p]roceeding with the construction of the nuclear or integrated gasification combined cycle power plant following an order by the commission approving the need for the nuclear or integrated gasification combined cycle power plant under this act shall not constitute or be evidence of imprudence," and that "[i]mprudence shall not include any cost increases due to events beyond the utility's control."

value' with a calculation of rate base on the cost of capital prudently invested in assets used for the provision of the public good or service, and although he did not live to enjoy success, his campaign against Smyth [v. Ames, 169 U.S. 466 (1898)] came to fruition in … Hope Natural Gas Co…".). As the United States Supreme Court has noted in comprehensively explaining the standard's history, "[t]his formula, commonly called the prudent-investment rule, addressed the natural temptations on the utilities' part to claim a return on outlays producing nothing of value to the public." Verizon Comms., 535 U.S. at 486. "It was meant, on the one hand, to discourage unnecessary investment and the 'fictitious capitalization' feared in Smyth [v. Ames], 169 U.S., at 543–546 [(1898)], … and so to protect ratepayers from supporting excessive capacity, or abandoned, destroyed, or phantom assets." Id. Thus, not only does the "prudence" standard have a deep history to explain its content, but that history also demonstrates that the standard was itself predicated on protecting utility customers from exactly the types of concerns raised here by SACE.

SACE suggests that there is no content beyond the term "prudence" itself to guide the regulator, but this suggestion is belied by plentiful authorities that clearly explain the standard's meaning. In the order on appeal, the PSC articulated the "prudence standard" and explained how it has consistently applied it in the past:

> Our standard for determining prudence is well documented in our past Orders. That standard is ". . . what a reasonable utility manager

> would have done, in light of the conditions and circumstances which were known, or should have been known, at the time the decision was made." (Order No. PSC-08-0749-FOF-EI, p. 28). We reaffirmed this prudence standard in Order No. PSC-09-0783-FOF-EI:
>
> > The applicable standard for determining prudence is consideration of what a reasonable utility manager would have done in light of conditions and circumstances which were known or reasonably should have been known at the time decisions were made.

Final Order at 26. Beyond the decisions cited in the Order, the PSC has been applying the "prudence" standard routinely for decades. See, e.g., In re Petition on behalf of the Citizens of the State of Fla., 07 F.P.S.C. 10:88, 90-91 (2007) ("Prudence has been defined as 'what a reasonable utility manager would have done in light of conditions and circumstances at the time the decision was made' "In Order No. 13452, issued June 22, 1984 … (Maxine Mine Order), we described in detail the type of review we would perform in reviewing prudence.") (citing In re: Investigation of Fuel Cost Recovery Clauses of Elec. Utils. (Gulf Power Company - Maxine Mine), 84 F.P.S.C. 6:295, 304 (1984)).

Moreover, the PSC's application of the "prudence" standard has long been recognized and applied by Florida Courts. See, e.g., Gulf Power v. Pub. Serv. Comm'n, 487 So. 2d 1036, 1037 (Fla. 1986) (Court recognized the power of the PSC to review whether it was "prudent" at the time for utility management not to "terminate a coal purchase contract when prices rose to excessive levels."); S. Fla. Natural Gas Co. v. Pub. Serv. Comm'n, 534 So. 2d 695, 697 (Fla. 1988) ("We find

that, under the commission's rate-setting authority, a utility seeking a change must demonstrate that the present rates are unreasonable, see section 366.06(1), Florida Statutes (1985), and show by a preponderance of the evidence that the rates fail to compensate the utility for its prudently incurred expenses and fail to produce a reasonable return on its investment.") (citing Fla. Power Corp. v. Pub. Serv. Comm'n, 456 So. 2d 451 (Fla. 1984)); Meadowbrook Util. Sys., Inc. v. Fla. Pub. Serv. Comm'n, 518 So. 2d 326, 327 (Fla. 1st DCA 1987) ("While an automatic award of rate case expense in every case, without reference to the prudence of the costs incurred in the rate case proceedings, clearly would constitute an abuse of discretion, we find no such abuse of discretion in the record before us. Here the Commission determined that the rate case expense was prudent and we see nothing that requires us to reverse that determination.").

The prudency standard is also applied by Federal Courts and the Federal Energy Regulatory Commission ("FERC"). Office of the Consumers' Counsel, State of Ohio v. Fed. Energy Regulation Comm'n, 914 F. 2d 290 (D.C. Ct. App. 1990) ("The Commission has established a cost-of-service approach for determining whether a pipeline's rates meet that standard. If it finds that a pipeline's costs of acquiring and transporting gas were prudently incurred, it will allow the pipeline to recover such costs, along with a reasonable return on investment. . . . In Commission practice, costs are deemed to be prudent if they are

those a reasonable utility management . . . would have made, in good faith, under the same circumstances, and at the relevant point in time.").

Furthermore, the Legislature has employed the "prudency" standard throughout Chapter 366 as a mechanism to regulate investor-owned electric and gas utilities,[28] as well as in the PSC's directives for determining rates for other utilities.[29] Acceptance of SACE's argument that a "prudency" standard is unconstitutionally vague would effectively undermine the foundation of Florida's long-standing regulatory system for all electric, gas, water and wastewater utilities which the PSC now regulates. Given the foregoing authorities, it is incomprehensible for SACE to assert that the "prudency" standard in Section 366.93 is insufficient to guide the PSC in determining which costs are eligible for alternative nuclear cost recovery.

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[28] See, e.g., § 366.82(11), Fla. Stat. ("Reasonable and prudent unreimbursed costs projected to be incurred, or any portion of such costs, may be added to the rates which would otherwise be charged by a utility upon approval by the commission"); § 366.8260(2)(b), Fla. Stat. ("Any determination of whether storm-recovery costs are reasonable and prudent shall be made with reference to the general public interest in, and the scope of effort required to provide, the safe and expeditious restoration of electric service."); § 366.92(4), Fla. Stat. ("In order to demonstrate the feasibility and viability of clean energy systems, the commission shall provide for full cost recovery under the environmental cost-recovery clause of all reasonable and prudent costs incurred by a provider for renewable energy projects…".).

[29] See, e.g., § 367.081(3), Fla. Stat. ("The commission, in fixing rates," for water and wastewater utilities, "may determine the prudent cost of providing service…".).

The standards, definitions and guidelines incorporated in Section 366.93 stand in stark contrast to the statutory provisions which the Court reviewed and found deficient in Askew v. Cross Key Waterways, 372 So. 2d 913 (Fla. 1978). In that case, Section 380.05 of the Florida Statutes was drafted so as to give the executive branch unbridled discretion to unilaterally preserve up to 5% of the state's landmass under agency control as Areas of Critical Concern. This Court held the statute unconstitutional, explaining that it did "not establish or provide for establishing priorities or other means for identifying and choosing among the resources the Act is intended to preserve" and provided a number of illustrations of this defect. Id. at 920. There is simply no comparison between the murky and poorly defined statutory standards in the Cross Key Waterways case and the clearly articulated standards, definitions and guidelines in Sections 366.93 and 403.519, which expressly incorporate, among other things, the well-established "prudency" standard.

SACE makes a number of ancillary arguments that are equally without merit. For instance, SACE refers to the PSC's requirement that each utility annually submit a detailed analysis of the long-term feasibility of completing the power plant. R. 25-6.0423(5)(c)5, F.A.C. SACE favors this requirement, yet erroneously suggests that it is without statutory support. Obviously, the long-term feasibility analysis provision was included in the nuclear cost recovery rule in

order for the PSC to fulfill its statutory responsibility of ensuring that only "prudently incurred" costs are eligible for alternative cost recovery. The PSC reasonably determined that its annual review of the utility's nuclear power plant costs required a demonstration of the continuing feasibility of completing the power plant.

In Section II.C. of its brief, SACE advances the bizarre proposition that because the PSC has interpreted and applied the long-term feasibility provisions in Rule 25-6.0423(3)(c)5 in a manner which SACE believes to be inconsistent, this somehow demonstrates that the statutory guidelines in Section 366.93 are inadequate. SACE is wrong for several reasons.

First, determining whether a statute satisfies the non-delegation test is a matter of law which is decided by examining the face of the statute. Microtel I, 464 So. 2d at 1191. The examination of subsequent agency action, or indeed any agency action, is irrelevant with respect to the nondelegation question. See, e.g., United States v. Martinez-Flores, 428 F. 3d 22, 27 n.2 (1st Cir. 2005) ("[A] congressional assignment of power not by its terms violative of the nondelegation doctrine cannot become so because of the breadth with which the agency exercises it. If it is the agency, and not Congress, whose exercise of authority is too broad, the relevant objection would not be that Congress' delegation was unconstitutional, but that the agency had exceeded its statutory authority.").

Furthermore, SACE's claim that the PSC has inconsistently interpreted and applied the rule's long-term feasibility provisions is simply incorrect. This provision was included in Rule 25-6.0423 in order for the PSC to ensure that only "prudently incurred" costs were recovered as the Legislature directed in Section 366.93. Consistent with the requirements in that rule, all utilities seeking to recover costs pursuant to Section 366.93 are required to provide a long-term feasibility analysis of their respective nuclear plant projects. The feasibility analysis is fundamentally the same for all utilities, i.e., as one element all utilities must demonstrate that the completion of the nuclear power plant project is economically feasible or cost-effective over the expected operational lives of the plants. Because there is more than one economic model recognized in the utility industry to test the cost-effectiveness of a power plant, utilities are not bound by rule to any one model. The PSC has accepted unique models from both utilities when they reasonably demonstrated the economic feasibility of completing the nuclear power plant projects. In each case, the PSC determined based on the evidence presented that they were reasonable models to demonstrate feasibility.

SACE also argues that because the PSC has not disapproved any cost recovery requested by PEF that this somehow proves the absence of statutory guidelines. That argument is specious and ignores the facts that PEF's costs related to its nuclear plant projects have been scrutinized in great detail by the

PSC, its staff, the Office of Public Counsel, and other parties including SACE. Pursuant to express legislative directive, the PSC closely evaluated whether PEF's nuclear costs were "prudently incurred" and heard detailed testimony concerning the contracting, accounting and cost oversight controls for the project, and also audited these controls.[30] There have been four exhaustive annual reviews of PEF's nuclear power plant project costs.[31] SACE was a party in three of these evidentiary

[30] The PSC Staff audited PEF's project management and cost control oversight mechanisms for the LNP. R. Vol. 53, Att. 1, Tr. 1521-24. The pertinent witnesses explained their audit and introduced in evidence their Audit Report of the organizations, processes, and controls used by PEF to construct the LNP, including their examination of the key areas of project activity in: planning; management and organization; cost and schedule controls; contractor selection and management; and auditing and quality assurance. R. Vol. 53, Att. 1, Tr. pp. 1520-24; R. Vol. 54, Att. 2, Ex. 171, pp. 7-9 of 48. Based on their audit, the PSC Staff recommended no Commission action for the LNP. R. Vol. 54, Att. 2, Ex. 171, pp. 9-10 of 48. Likewise, PEF's actual costs for LNP preconstruction and construction activities in 2010 were audited by the PSC. R. Vol. 53, Att. 1, Tr. 1525-28; R. Vol. 54, Att. 2, Ex. 172. The audit verified the 2010 actual LNP costs in PEF's Nuclear Filing Requirements and confirmed they were consistent and in compliance with Section 366.93 and Rule 25-6.0423. R. Vol. 54, Att. 2, Ex. 172, p. 2. PEF's Controller testified to the LNP project accounting and cost oversight controls, including internal audits and the external audit by PEF's external auditors to verify that the project accounting and cost oversight controls are effective. R. Vol. 53, Att. 1, Tr. pp. 1407-12. Moreover, the individual accountable in 2010 for the LNP financial reporting, business, and project controls, testified to the reasonableness of PEF's project management and cost control oversight mechanisms for the LNP. R. Vol. 53, Att. 1, Tr. pp. 1492-1500.

[31] See (1) Final Order, pp. 74-107; (2) In re: Nuclear Cost Recovery Clause, Order No. PSC-11-0095-FOF-EI, Docket No. 100009-EI, pp. 9-47 (Feb. 2, 2011); (3) In re: Nuclear Cost Recovery Clause, Order No. PSC-09-0783-FOF-EI, Docket No. 090009-EI, pp. 23-39 (Nov. 19, 2009); (4) In Re: Nuclear cost recovery clause, Order No. PSC-08-0749-FOF-EI, Docket No. 090009-EI, pp. 8-22 (Nov. 12, 2008).

hearings including the two previous hearings.[32] Neither SACE nor any other party appealed the PSC's orders in the three previous nuclear cost recovery hearings. Furthermore, in the hearing culminating in this appeal, neither SACE nor any other party challenged any specific cost as being imprudent or unrelated to the activity necessary to build nuclear power plants. Likewise, in this appeal, SACE points to no approved cost which it contends was not prudently spent. While SACE can disagree with the PSC's conclusions regarding whether PEF's nuclear costs were "prudently incurred," it is spurious for SACE to suggest that those conclusions are proof of a rogue agency acting in the absence of statutory guidelines.

In Microtel I, this Court confirmed that the Legislature could not be expected to monitor and control all of the fluid and complex conditions associated with the regulated telecommunications industry. Indeed, the Court recognized that if called upon to perform those duties, "the legislature would be forced to remain in perpetual session and devote a large portion of its time to regulation." 464 So. 2d at 1191. Likewise, it is beyond question that the Legislature cannot monitor the development and construction of a nuclear power plant. The most it can do is to announce a policy favoring the construction of a nuclear power plant and provide the PSC -- the agency having the expertise in these matters -- with appropriate

[32] See Final Order, p. 4; In re: Nuclear Cost Recovery Clause, Order No. PSC-11-0095-FOF-EI, Docket No. 100009-EI, p. 4 (Feb. 2, 2011); In re: Nuclear Cost Recovery Clause, Order No. PSC-09-0783-FOF-EI, Docket No. 090009-EI, p. 3 (Nov. 19, 2009).

guidance on what should be considered in overseeing and authorizing the recovery of costs prudently incurred in the development of such a plant. By the enactment of Sections 366.93 and the amendment to 403.519, the Legislature has done just that.

CONCLUSION

SACE's hollow arguments are a thinly veiled attempt to make this case a referendum on the wisdom of nuclear power. The Legislature has already made that choice. The PSC has carefully followed the Legislature's directions on how to implement the statutes. The PSC's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210, Florida Rules of Appellate Procedure.

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