IN THE SUPREME COURT
STATE OF FLORIDA

SOUTHERN ALLIANCE FOR CLEAN ENERGY, Appellant, v. FLORIDA PUBLIC SERVICE COMMISSION, FLORIDA POWER AND LIGHT COMPANY, and PROGRESS ENERGY FLORIDA, INC., Appellees.	)	SC Case No.: SC11-2465 PSC Docket No.: 110009-EI

ON APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

INITIAL BRIEF OF APPELLANT SOUTHERN ALLIANCE FOR CLEAN ENERGY

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SYMBOLS AND REFERENCES

For the purposes of this Brief, references to the Record will be according to the Index of the Record provided the Commission Clerk to the parties. More specifically:

References to the Record will be "R." followed by the applicable page number.

References to the Hearing Transcript will be "R., Attachment 1, TR Vol." and the applicable volume number and page number.

References to Hearing Exhibits will be "R, Attachment 2, Ex." and the applicable exhibit number.

STATEMENT OF CASE AND FACTS

NATURE OF THE CASE

This appeal challenges the Florida Public Service Commission's approval of cost recovery in Docket 110009-EI related to the proposed new nuclear reactors of both Florida Power and Light Company and Progress Energy Florida, Inc. Both Florida Power and Light and Progress Energy Florida failed to demonstrate in Docket 110009-EI that they intend to build the utilities' respective proposed new nuclear reactors, which is required in order to be eligible for cost recovery pursuant to § 366.93, Fla. Stat. Therefore, the Commission's finding that this intent to build was demonstrated, and its resulting approval of cost recovery related to Florida Power and Light's proposed Turkey Point 6 & 7 reactors and Progress Energy Florida's proposed Levy Nuclear Project, was arbitrary and unsupported by substantial competent evidence and should be reversed.

This appeal also challenges the constitutionality of § 366.93, Fla. Stat., the nuclear cost recovery statute, which was enacted in 2006 by the Florida Legislature in order to promote utility investment in new nuclear power generation. Section 366.93, Fla. Stat., constitutes an unconstitutional delegation of legislative authority in violation of the separation of powers doctrine codified at Art. II, § 3, of the Florida Constitution because it does not contain adequate standards to guide the Public Service Commission in its implementation and administration of the statute,

thereby leaving the Commission unbridled discretion in violation of Florida's strict nondelegation doctrine. Section 366.93 required the Florida Public Service Commission to establish, by rule, "alternative cost recovery mechanisms" for the recovery of certain costs, through rates, for utilities engaged in the "siting, design, licensing, and construction of nuclear" power plants. Because it is devoid of standards, § 366.93, Fla. Stat., has had the dramatic effect of transferring all risk for proposed nuclear projects of Florida utilities away from utility shareholders and onto the utility's ratepayers, giving the utilities a blank check to risk billions of dollars of the ratepayers' money on speculative projects that would not be financed by the private sector. Due to the lack of standards, the Commission, an administrative agency, has been granted the authority to declare what the law is regards to nuclear cost recovery in the State of Florida.

STATEMENT OF FACTS

In 2006, the Florida Legislature passed § 366.93, Fla. Stat. R., at Vol. 62, p. 12257 (Final Order, at 11). Although Florida utilities claim that nuclear generated electricity is competitively priced, even taking into account the high capital costs and long lead times, no new nuclear power plant has been built in the United States in more than 30 years, despite federal regulatory reform to streamline permitting processes. R., Attachment 2, Exs. 169, 196. Despite this claim, Progress Energy Florida, Inc. ("PEF") and Florida Power and Light Company ("FPL") both concede

that they would not even consider building the utilities' proposed new nuclear reactors without being able to shift the risks from their shareholders to their ratepayers through the nuclear cost recovery statute adopted by the legislature in 2006. R., at Vol. 14, p. 2651 (FPL May 2, 2011 Petition at 3); R., Attachment 1, TR Vol. 12 at 2095.

The Commission created both the procedures and standards for implementing and administering the nuclear cost recovery statute by adopting Rule 25-6.0423, F.A.C., in 2007.[1] Once a utility obtains an affirmative need determination for a power plant covered by § 366.93, the utility may petition for cost recovery pursuant to § 366.93 and Rule 25-6.0423, F.A.C. In April of 2008, FPL obtained an affirmative determination of need from the Florida Public Service Commission ("Commission"), pursuant to § 403.519, Fla. Stat., for its proposed new Turkey Point 6 & 7 nuclear reactors ("TP 6 & 7").[2] Similarly, in August of 2008, PEF obtained an affirmative determination of need for its proposed Levy Nuclear Project ("LNP").[3] Following these determinations, both PEF and FPL, pursuant to § 366.93 and Rule 25-0423, F.A.C., petitioned the Commission for the recovery of costs related to these proposed new nuclear projects in Docket 080008-

[1] Order No. PSC-07-0240-FOF-EI, Issued March 20, 2007, Docket No. 060508-EI, *In re: Proposed adoption of new rule regarding nuclear power plant cost recovery.*
[2] Order No. PSC-08-0237-FOF-EI, Issued April 11, 2008, Docket 070650-EI, *In re: Petition to determine need for Turkey Point Nuclear Units 6 and 7.*
[3] Order No. PSC-08-0518-FOF-EI, Issued August 12, 2008, Docket 080148-EI, *In re: Petition for determination of need for Levy Units 1 & 2.*

EI, in addition to costs the utilities were already seeking to recover related to nuclear power uprate projects.[4]

Rule 25-6.0423(5), F.A.C., sets out the process by which the Commission conducts its annual review to determine the amount of recoverable costs that will be included in the utility's capacity cost recovery clause ("CCRC"). This annual review, styled as *In re: Nuclear Cost Recovery Clause,* is a roll-over docket that began in 2008 and has continued yearly since. In these four successive nuclear cost recovery dockets, the Commission has approved every penny of cost recovery requested by FPL and PEF for the utilities' nuclear projects.[5] In fact, to date, the Commission has approved cost recovery well in excess of $1 billion for the nuclear projects of FPL and PEF, a substantial portion of which is recovery for costs relating to the utilities' proposed new nuclear reactors.[6] This approval of all costs, including all costs related to TP 6 & 7 and the LNP, has been granted by the Commission despite the fact that neither FPL nor PEF has actually made the

[4] Order No. PSC-08-0749-FOF-EI, Issued November 12, 2008, Docket 080008-EI, *In re: Nuclear cost recovery clause.* Uprate projects are modifications to existing nuclear reactors to increase their generating capacity. While Section I, *infra,* does not challenge cost recovery awarded in 2011 for the uprate projects of PEF or FPL, the issue of the constitutionality of § 366.93, Fla. Stat. does implicate these uprate projects.

[5] *In re: Nuclear cost recovery clause:* Docket 080008-EI, Order No. PSC-08-0749-FOF-EI, Issued November 12, 2008; Docket 090009-EI, Order No. PSC-09-0783-FOF-EI, Issued November 19, 2009; Docket 100009-EI, Order No. PSC-11-0095-FOF-EI, Issued February 2, 2011; Docket 110009-EI, Order No. PSC-11-0547-FOF-EI, Issued November 23, 2011.

[6] *Id.*

decision to build these proposed new reactors. R., Attachment 1, TR Vol. 3 at 294; R., Attachment 1, TR Vol. 11 at 1944; TR Vol. 12 at 2088, 2091.

Moreover, the Commission's approval of all requested nuclear cost recovery for FPL and PEF has been done in the face of growing evidence that development and construction of new nuclear generation in the United States is not economically feasible. FPL and PEF have been forced to acknowledge this evidence, including declining demand due to the economic downturn,[7] dramatically lower natural gas prices, which make electricity generation with natural gas cheaper, and the failure of the U.S. Congress to place a cost on carbon dioxide emissions to address global warming. R., Attachment 1, TR Vol. 3 at 313; Attachment 1, TR Vol. 11 at 1724, 1873, 1953.[8] As admitted by both FPL and PEF witnesses, natural gas prices and carbon costs are the two key drivers in determining whether or not nuclear power is cost effective as opposed to other types of generation. R., Attachment 1, TR Vol. 3 at 313; TR Vol. 11 at 1724, 1953. This economic uncertainty and risk was significantly exacerbated by the 2011 Fukushima nuclear disaster in Japan, which called into question the safety of

[7] R., Attachment 1, TR Vol. 3 at 312; R., Attachment 1, TR Vol. 11 at 1712. In fact, as discussed in more detail *infra,* FPL Chairman and CEO Olivera testified that FPL would, assuming it obtains a COL for TP 6 & 7, reevaluate conditions and see if TP 6 & 7 was even <u>needed.</u> R., Attachment 1, TR Vol. 4 at 528.

[8] PEF witness Elnitsky admitted that natural gas prices have been trending downward since the need determination was made for the LNP in 2008. Attachment 1, TR Vol. 11 at 1954.

nuclear reactors, and also created the likelihood of increasingly stringent and costly regulations. R., Attachment 1, TR Vol. 2 at 230; R., Attachment 1, TR Vol. 11 at 1688-1689; R., Attachment 2, Ex. 195.

In 2010, as a result of the growing economic uncertainty and risk surrounding new nuclear generation, both FPL and PEF abandoned construction-related activities and instead chose to focus resources on attempting to secure federal licenses for these proposed new nuclear reactors. FPL resorted to what it calls its "option creation" approach, whereby FPL hopes to obtain a Combined Operating License ("COL") from the U.S. Nuclear Regulatory Commission ("NRC") for TP 6 & 7, and then later make the final decision on whether or not to actually build the reactors. R., Attachment 1, TR Vol. 2 at 146, 277; TR Vol. 3 at 294; R., Attachment 1, TR Vol. 4 at 528. Similarly, after prematurely jumping into an Engineering Procurement and Construction ("EPC") Contract, PEF negotiated a partial suspension of the EPC and resorted to its "COL-focused" approach, with the same goal as FPL, *i.e.*, obtaining a COL from the NRC and preserving the option to build the LNP if it later makes the decision to build. R., Attachment 1, TR Vol. 11, at 1682, 1948.

Of course, this focus on licensing while delaying the construction decision has resulted in significant scheduling delays and corresponding cost increases for both FPL and PEF's proposed new nuclear reactors. Specifically, in 2010 PEF

pushed out the projected in-service date of the LNP from 2016 to 2021, a delay of five years.[9] This resulted in a $5 billion dollar increase in the estimated cost for the LNP.[10] In fact, since PEF's determination of need, the price for the LNP has increased from $14.1 billion to $22.5 billion, an increase of over $8 billion dollars.[11] Moreover, PEF witness Elnitsky testified at the hearing that PEF could not rule out additional schedule delays and increasing cost estimates. R., Attachment 1, TR Vol. 11 at 1939. This testimony was proven true when the schedule for the LNP was pushed out further when the Commission approved a Stipulation and Settlement Agreement proffered by PEF on February 27, 2012. [12] Pursuant to this Agreement, PEF has delayed the decision whether to construct LNP even further, and the Commission's approval of the agreement will allow PEF to obtain its COL for the LNP, terminate its EPC contract, without deciding to construct, and still recover the costs associated with these activities.[13]

Similarly, in 2010 FPL pushed out the projected in-service dates of TP 6 & 7 from 2018 to 2022, a delay of four years from what FPL represented to the

[9] Order No. PSC-11-0095-FOF-EI, at 22, Issued February 2, 2011, Docket 100009-EI, *In re: Nuclear cost recovery clause*.
[10] *Id.*
[11] *Id.;see also* Order No. PSC-08-0518-FOF-EI, at 10, Issued August 12, 2008, Docket 080148-EI, *In re: Petition for determination of need for Levy Units 1 & 2.*
[12] Order No. PSC-12-0104-FOF-EI, March 8, 2012, Docket 120022-EI, *In re: Petition for limited proceeding to approve stipulation and settlement agreement by Progress Energy Florida, Inc.*
[13] *Id.*

Commission during its need determination. R., Attachment 1, TR Vol. 2 at 272. The projected cost of TP 6 & 7 has also increased by approximately $1 billion dollars, from $18 billion to $19 billion, since FPL's need determination. R., Attachment 1, TR Vol. 2 at 273. Furthermore, like PEF witness Elnitsky, FPL witness Scroggs conceded at the hearing that FPL could not rule out the potential for further delay and corresponding cost increases. *Id.*

These delays, escalating costs, and other mounting evidence of the bad bet the utilities have made with the ratepayers money have not prevented the Commission from approving over $1 billion dollars in nuclear costs recovery for FPL and PEF.[14] In approving this cost recovery, year after year, the Commission has tailored its interpretation of the statutory requirement that the utilities must be engaged in the "siting, design, licensing, and construction" of nuclear power plants in order to fit the evidence provided by the utilities. Despite these uncertainties the Commission has also found, year after year, under Rule 25-6.0423, F.A.C., that the utilities have continued to demonstrate the "long-term feasibility" of completing these proposed new nuclear reactors.[15] The Commission has done this by changing

[14]See FN 5, *supra.*
[15] See FN 5, *supra.* The Commission has so found even though the utilities have not made the decision to complete the proposed new reactors.

its definition and approach to determining long-term feasibility each year and for each utility separately to fit the information provided by the utility.[16]

COURSE OF PROCEEDINGS

On January 3, 2011, the Commission entered Order No. PSC-11-0009-PCO-EI establishing Docket 110009-EI. R., at Vol. 1, pp. 44-45. On March 1, 2011, FPL and PEF, pursuant to § 366.93, Fla. Stat., and Rule 25-6.0423, F.A.C., filed petitions seeking final true-up of 2009 and 2010 costs related to their respective nuclear projects. R., at Vol. 2, pp. 227-224; Vol. 7, pp. 1280-1290. On May 2, 2011, FPL and PEF, also pursuant to pursuant to § 366.93, Fla. Stat. and Rule 25-6.0423, F.A.C., filed petitions seeking approval of 2011 and 2012 costs. R., at Vol. 14, pp. 2650-2664; Vol. 18, pp. 3527-3540. FPL's May 2, 2011 Petition sought cost recovery in the amount of $196,004,292 for 2011 and 2012 costs related to its nuclear projects. R., at Vol. 14, pp. 2650-2664. PEF's May 2, 2011 Petition requested Commission approval of cost recovery in the amount of $157,677,807 for PEF's 2011 and 2012 costs related to its nuclear projects. Vol. 18, pp. 3527-3540.

On June 23, 2011, Appellant Southern Alliance for Clean Energy filed its notice reaffirming party status in Docket 110009-EI. R., at Vol. 30, pp. 5844-5846. Intervention was also granted to the Office of Public Counsel, Florida

[16] *Id.*

Industrial Power Users Group, White Springs (PCS Phosphate), and the Federal Executive Agencies. R., at Vol. 62, p. 12250 (Final Order, at 4). The evidentiary hearing for the FPL portion of Docket 110009-EI was held on August 10-11, 2011. *Id.* The PEF portion of the evidentiary hearing was held on August 16-17, 2011. *Id.*

DISPOSITION IN LOWER TRIBUNAL

On November 23, 2011, the Commission issued Order No. PSC-11-0547-FOF-EI, which approved cost recovery in the amount of $196,088,824 for FPL and 85,951,036[17] for PEF. R., TR Vol. 62, at 12247-12360; Attachment 3. In the Order, the Commission found that both FPL and PEF had demonstrated the intent to build the utilities' respective proposed new nuclear reactors as required by the Commission's interpretation of § 366.93, Fla. Stat., and thus costs related to these projects were approved for recovery. R., TR Vol. 62 at 12256; 12335. Appellant timely filed a Notice of Administrative Appeal with the Commission and this Court on December 21, 2011. R., at Vol. 62-63, pp. 12361-12477.

SUMMARY OF ARGUMENT

In order to be in compliance with § 366.93, Fla. Stat., and eligible for cost recovery, a utility must demonstrate that it intends to build the nuclear power plant

[17] It is important to note that the Commission did not deny PEF any of its requested cost recovery; rather, it simply continued to defer recovery of certain costs that PEF was awarded in 2009 and deferred over a five year period ("rate management plan"). R., TR Vol. 62, at 12349 (Final Order, at 103).

for which it seeks advance recovery of costs. In Docket 110009-EI, both FPL and PEF failed to demonstrate that the utilities intend to build their respective proposed new nuclear reactors, and the Commission's finding to the contrary is arbitrary and unsupported by substantial evidence. As plainly evidenced by both their activities and testimony, FPL and PEF have resorted to "option creation" approaches, where the only intent on the part of the utilities is to attempt to obtain the necessary licenses and approvals to operate these proposed new nuclear reactors, in order to create or preserve the option to construct if it becomes economically feasible at some point in the future. All construction related activities have been pushed out into the future, and the only activities that FPL and PEF are engaged in relate solely to licensing. Intending to actually build these proposed new nuclear reactors, as opposed to simply intending to obtain licenses to keep the possibility of construction open, are markedly different, and the Commission's finding that FPL and PEF had demonstrated the requisite intent to build in Docket 110009-EI should be overturned. This Court should remand the decisions to the Commission with the direction that both FPL and PEF refund to their ratepayers all cost recovery which was approved by the Commission in Docket 110009-EI relating to the FPL's TP 6 & 7 project and PEF's LNP project.

More fundamentally, the nuclear cost recovery statute, adopted as a last minute amendment to a comprehensive energy bill during the 2006 legislative

session, violates the Florida Constitution. The constitutional doctrine of separation of powers, codified at Art. II, § 3 of the Florida Constitution, and more specifically the nondelegation doctrine contained therein, prohibits the Legislature from delegating the power to enact a law or the right to exercise unbridled discretion in applying the law to an administrative agency. The nuclear cost recovery statute violates the nondelegation doctrine, and thus the separation of powers doctrine, because the Legislature has failed to include adequate standards and guidelines in the statute to guide the Commission in its execution of the powers delegated. Due to the lack of standards in § 366.93, Fla. Stat., the Legislature has allowed the Commission to exercise unbridled discretion in its implementation and administration of the statute, and moreover has allowed the Commission the power to declare what the law shall be. It is one thing for the Legislature to ask an administrative agency to flesh out an articulated legislative policy; however, it is far different to allow the agency to make the initial determination of what the policy should be, which is what has happened in the case at hand. Thus, due to the lack of standards in the statute, the Legislature has converted the Commission's role from an administrative entity into a lawmaker, which has allowed the Commission to treat the nuclear cost recovery statute as a blank check for utilities claiming to be engaged in the siting, design, licensing and construction of nuclear power plants. This is evidenced by the undisputed fact that, to date, the

Commission has not disapproved any requested cost recovery for FPL and PEF, despite serious questions as to the feasibility of these proposed new reactors ever being completed and moreover the utilities' true intentions in regards to the proposed new nuclear reactors. This Court should hold that § 366.93, Fla. Stat., constitutes a prohibited delegation of legislative authority in violation of the nondelegation doctrine and the separation of powers.

ARGUMENT

I. THE COMMISSION'S 2011 NUCLEAR COST RECOVERY ORDER IS ARBITRARY AND UNSUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

The standard of review for an order of the Commission is whether the order is supported by competent, substantial evidence. *Citizens v. Public Service Commission*, 448 So.2d 1024, 1026 (Fla. 1984) (internal citations omitted). The burden is on the party claiming the Commission order to be invalid, arbitrary, or unsupported by the evidence. *Shevin v. Yarborough*, 274 So.2d 505, 508 (Fla. 1973). This Court stated further in *Shevin:*

> In summary, we will not overturn an order of the Commission because we would have arrived at a different result had we made the initial decision; something more is needed. However, we will not affirm a decision of the Commission if it is arbitrary and unsupported by substantial competent evidence, or in violation of a statute or a constitutionally guaranteed right.

Id. At 509 (emphasis added). In the instant matter, the Court should overturn Order No. PSC-11-0547-FOF-EI because it is arbitrary and unsupported by

substantial competent evidence. Specifically, this Court should overturn the Commission's finding that FPL and PEF demonstrated the intent to build the utilities' proposed new nuclear reactors, which demonstration is necessary in order to be eligible for cost recovery under § 366.93, Fla. Stat. Because neither FPL nor PEF demonstrated this intent to build, they are not in compliance with § 366.93, and should not have been approved for recovery of costs related to the utilities' proposed new nuclear reactors in Docket 110009-EI.

A. FPL AND PEF DID NOT QUALIFY FOR COST RECOVERY IN DOCKET 110009-EI UNDER SECTION 366.93, FLA. STAT., BECAUSE THEY DID NOT DEMONSTRATE "INTENT TO BUILD."

Section 366.93(2), Fla. Stat., authorizes the Commission to permit recovery of certain costs for utilities engaged in the "siting, design, licensing, and construction" of nuclear power plants, including new nuclear power plants. In its 2010 Final Order issued at the conclusion of Docket 100009-EI, the Commission interpreted this provision to require that a utility "must continue to demonstrate <u>its intent to build the nuclear power plant</u> for which it seeks advance recovery of costs to be in compliance with Section 366.93, F.S."[18]

In Docket 110009-EI, both FPL and PEF failed to demonstrate this requisite intent to build; in sharp contrast, the activities of the utilities, as well as the prefiled

[18] Order No. PSC-11-0095-FOF-EI, at 9 (emphasis added), Issued February 2, 2011, Docket 100009-EI, *In re: Nuclear cost recovery clause*.

testimony and the evidence adduced at the evidentiary hearing, demonstrate that both utilities, by their own admission, merely intend to pursue a license from the NRC for these proposed new reactors, thereby "creating the option" to build. This "option creation" approach does not satisfy the Commission's "intent to build" requirement, as neither utility has made a final decision as to whether or not it will actually build these proposed new reactors. As a result, the Commission's finding in Order No. PSC-11-0547-FOF-EI that FPL and PEF demonstrated the intent to build is arbitrary and unsupported by substantial competent evidence in the record.

1. FPL Failed to Demonstrate in Docket 110009-EI that it Intends to Build the Proposed Turkey Point 6 & 7 Nuclear Reactors.

a. FPL's Activities and Testimony Demonstrate that FPL Only Intends to Create an Option to Build the Proposed Turkey Point 6 & 7 Reactors by Obtaining a Combined Operating License from the Nuclear Regulatory Commission.

In 2010, FPL, faced with increasing uncertainty and risk surrounding its proposed TP 6 & 7 project (and new nuclear generation in general), announced a schedule revision for the TP 6 & 7 project and made its decision to embark on an "option creation" approach relating to TP 6 & 7. R., Attachment 2, Ex. 12, at 15 of 21. Due to this fact, FPL's activities through 2010, and up to the present, fail to demonstrate that FPL intends to build TP 6 & 7. FPL has not to date entered into an EPC or EP & C agreement, which will be necessary before any type of engineering, procurement, or construction related activities can be commenced.

R., Attachment 1, TR Vol. 3, at 295. FPL has also deferred procurement of long lead construction materials, which are, according to FPL witness Scroggs, the "key components" to construction of the proposed new nuclear reactors. R., Attachment 1, TR Vol. 3 at 295-296. Mr. Scroggs also testified that FPL will have to initiate procurement of these long lead materials "significantly in advance" of construction, but has not done so to date. R., Attachment 1, TR Vol. 3 at 298. Similarly, FPL has negotiated no fewer than four extensions to the forging reservation agreement it has with Westinghouse, whereby it reserved manufacturing space for these key components of construction. R., Attachment 1, TR Vol. 3 at 296. Additionally, in 2010, FPL withdrew its Limited Work Authorization ("LWA") request with the NRC, which, had it been granted, would have allowed for certain limited construction activity prior to receipt of a COL from the NRC. R., Attachment 1, TR Vol. 3 at 299. Viewed in totality, FPL's activities through 2010, and up to the present, plainly fail to demonstrate the intent to build TP 6 & 7. In sharp contrast, FPL's activities demonstrate that FPL merely intends to attempt and obtain a COL from the NRC in order to "create an option" to build TP 6 & 7, should construction of the units become feasible and necessary at some point in the future.

The testimony of FPL witnesses confirms that FPL did not demonstrate the requisite intent to build TP 6 & 7 in order to be eligible for cost recovery. FPL

witness Scroggs, FPL's Senior Director of Project Development, admitted during the evidentiary hearing that FPL has not made a final decision as to whether or not it will actually build TP 6 & 7. R., Attachment 1, TR Vol. 3 at 294. In fact, Mr. Scroggs testified that the "decision [of whether or not to construct TP 6 & 7] is going to be based on the economics and the events as they unfold over the next several years." R., Attachment 1, TR Vol. 3 at 294.[19] Moreover, the prefiled testimony of Mr. Scroggs in Docket 110009-EI is replete with references to the TP 6 & 7 project being intended to "create an option" for new nuclear generation. In his March 1, 2011, prefiled testimony, Mr. Scroggs testified, when asked about the purpose of his testimony:

> The purpose of my testimony is to describe the activities involved in the Turkey Point 6 & 7 project throughout 2009 and 2010. Specifically, my testimony will describe the …process FPL is employing to <u>create an option</u> to provide new nuclear generation for our customers …. (emphasis added).

R., at Attachment 1, TR Vol. 2 at 146, 277. Similarly, in his May 2, 2011, prefiled testimony, Mr. Scroggs stated, when asked about the purpose of his testimony:

> The purpose of my testimony is to provide a description of how the Turkey Point 6 & 7 project is being developed, managed, and controlled <u>to create the option</u> for more reliable, cost-effective, and fuel diverse nuclear generation …. (emphasis added).

[19] Despite this testimony, Mr. Scroggs did testify at the evidentiary hearing that FPL does in fact intend to build TP 6 & 7. R., Attachment 1, TR Vol. 2 at 273. In light of his other testimony discussed herein, this testimony was disingenuous and not credible.

R., at Attachment 1, TR Vol. 2 at 218, 278. In fact, in the April 15, 2010, TP 6 & 7 Schedule Revision Memorandum announcing FPL's "option creation" approach, Mr. Scroggs wrote that:

> The PTN 6 & 7 project was <u>developed to create the option</u> for new nuclear generation so that FPL customers would benefit from unique economic, environmental, reliability, fuel diversity and energy security attributes offered by nuclear generation.

R., Attachment 2, Ex. 12, at 15 of 21. (emphasis added). Thus, the purpose of the TP 6 & 7 project, at least since 2010, has been, and continues to be, nothing more than an attempt to create an option that may, <u>or may not</u>, be exercised in the future. Under the Commission's interpretation of § 366.93, this uncontroverted evidence mandates a finding that FPL lacks the intent to build TP 6 & 7, and thus should not have been awarded cost recovery related to TP 6 & 7 in Docket 110009-EI.

The above testimony notwithstanding, Mr. Scroggs did attempt at the evidentiary hearing to characterize FPL's purported intent to construct TP 6 & 7 as a question of "when" as opposed to a question of "if." R., Attachment 1, TR Vol. 2 at 279. However, on cross-examination this statement was shown to be wholly inconsistent with Mr. Scroggs' May 2, 2011, prefiled testimony.

> Q And if you would, starting on line 11, if you would just read the sentence following the sentence I just asked you to read, starting with "In doing."
>
> A "In doing so, FPL is creating a valuable option that <u>can</u> be exercised at the most opportune time for the benefit of FPL customers."

Q And that says "that can be exercised." Correct?
A That's what is says.
Q It doesn't say that it will be exercised, does it?
A No. It says can.

R., Attachment 1, TR Vol. 2 at 280. (emphasis added). Mr. Scroggs further conceded that the intent to create an option (*i.e.*, obtain a COL) is much different that the intent to actually exercise that option (*i.e.*, build TP 6 & 7). R., Attachment 1, TR Vol. 3 at 316. All of Mr. Scroggs' attempts in his live testimony to demonstrate that FPL possesses the requisite intent to build TP 6 & 7 were shown to be inconsistent with his prefiled testimony and lacking in credibility.

The testimony of other FPL witnesses, as well as Commission staff, further confirmed that FPL's intent is limited to attempting to create an option to build TP 6 & 7 through obtaining a COL from the NRC, as opposed to the intent to actually build. The March 1, 2011, prefiled testimony of John Reed, an FPL consultant, states, in regard to TP 6 & 7, that "PTN 6 & 7 is currently focused on obtaining the necessary licenses and permits so as to provide FPL and its customers the option to construct two nuclear units at the existing PTN site." R., Attachment 1, TR Vol. 4 at 604, 645 (emphasis added). Moreover, Mr. Reed testified at the evidentiary hearing on cross-examination:

Q And I believe I heard you, and correct me if I'm wrong, in your summary also reference FPL's activities related to Turkey 6 & 7 as pursuing an option, is that correct?

A Yes. At this time I think that's the best description.

R., Attachment 1, TR Vol. 4 at 645. Thus, FPL's own consultant characterizes FPL's activities relating to TP 6 & 7 in terms of creating or pursuing an option. Similarly, in its July 2011 Review of FPL's nuclear projects, Commission audit staff concluded that " FPL is committed to pursuing an option to build two new AP1000 reactors …." R., Attachment 2, Ex. 115, at 3 (emphasis added). This commitment to pursuing an option simply does not meet the Commission's intent to build standard, which requires that FPL continue to demonstrate the intent to actually construct TP 6 & 7 in order to be eligible for cost recovery pursuant to § 366.93, Fla. Stat.

Perhaps the most significant testimony at the evidentiary hearing concerning FPL's intent was that of FPL CEO and President Armando Olivera. Mr. Olivera, when asked by PSC Commissioner Edgar about FPL's intent to construct, testified:

> A …. And if I may just hit quickly this issue of, you know, what our intentions are. 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 likely demand outlook for the state. You know, does this project – is the project needed?

R., Attachment 1, TR Vol. 4 at 528 (emphasis added). Mr. Olivera was clear as to what FPL's intent is – FPL intends to go through the licensing process in the hopes of obtaining a COL from the NRC, and then re-evaluate the need for TP 6 & 7. He was also clear that there is still a question as to whether the project is even needed.

This testimony is consistent with Mr. Scroggs' testimony referenced *supra* that the decision of whether or not to be build will be based on the economics and other events that unfold over the next several years. It is extremely probative of FPL's intent with regard to TP 6 & 7 that Mr. Olivera, the President and CEO of the utility, when given the opportunity, did not testify that FPL intends to build TP 6 & 7. This Court should not, as the Commission did, simply disregard this testimony from FPL's highest-ranking corporate official.

FPL's activities in regards to TP 6 & 7, as well as its testimony, do not suffice to meet the intent to build requirement established by the Commission. All activities directly related to construction have been cancelled and/or delayed, and the only common thread contained throughout FPL's testimony is that FPL is "creating an option" to allow FPL to decide whether to build TP 6 & 7 at some point in the future. As discussed in more detail *infra*, it may be true that FPL does not have to simultaneously engage in the "siting, design, licensing, and construction" of TP 6 & 7 to be eligible for cost recovery under § 366.93, Fla. Stat. However, FPL does have to demonstrate the intent to build, and simply pursuing a COL from the NRC does not meet this requirement.[20] For these reasons, the

[20] This is especially true when FPL witnesses, including its President and CEO, admit that, assuming a COL is obtained, the utility will then reevaluate the need for TP 6 & 7, and that no final decision to construct has been made.

Commission's approval of cost recovery related to TP 6 & 7 in Docket 110009-EI was improper and should be reversed.

b. The Commission's Finding that FPL Demonstrated the Intent to Build was Arbitrary and Unsupported by the Evidence.

Despite the overwhelming evidence plainly demonstrating that FPL does not have the intent to build TP 6 & 7, the Commission nevertheless found that FPL satisfied the intent to build requirement, and thus qualified for cost recovery relating to the TP 6 & 7 project pursuant to § 366.93, Fla. Stat. R., at Vol. 62, pp. 12253-12257 (Final Order, at 7-11). However, the activities relied on by the Commission to support a finding of intent to build in Order No. PSC-11-0547-FOF-EI on the part of FPL are manifestly insufficient to support such a finding. Therefore, the Commission's finding is arbitrary and unsupported by the evidence, and should be reversed.

In Docket 100009-EI, the Commission was asked to consider whether PEF was, in light of its activities related to the LNP, actually engaged in the "siting, design, licensing and construction" of a nuclear power plant as contemplated by § 366.93. The Commission stated:

> [B]ased upon our analysis of the applicable statute, our prior decisions, and prior Florida case law, we do not find that a utility must engage in the siting, design, licensing and construction of nuclear power plant activities simultaneously in order to meet the statutory requirements of Section 366.93, F.S. We find that a utility must continue to demonstrate its intent to build the nuclear power plant for

> which it seeks advance recovery of costs to be in compliance with Section 366.93, F.S.[21]

Thus, in its interpretation of § 366.93, Fla. Stat., the Commission made two distinct findings: (1) that a utility does not have to simultaneously engage in the "siting, design, licensing and construction" of a nuclear power plant to meet the requirements of § 366.93, Fla. Stat.; and (2) that while a utility does not have to simultaneously engage in all of these activities, it does have to continue to demonstrate its intent to build the nuclear power plant in order to be in compliance with § 366.93, Fla. Stat. and eligible for cost recovery.

In its 2011 Final Order in Docket 110009-EI, the Commission reaffirmed its 2010 interpretation that a utility does not have to simultaneously engage in the siting, design, licensing, and construction of a nuclear power plant in order to meet the statutory requirements of § 366.93, Fla. Stat. R., at Vol. 62, p. 12255 (Final Order, at 9). Similarly, the Commission reaffirmed its interpretation that a utility must continue to demonstrate its intent to build the nuclear power plant for which it seeks recovery of costs to be in compliance with § 366.93, Fla. Stat. *Id.* However, instead of determining that FPL demonstrated its intent to build in order for FPL to be eligible for cost recovery related to TP 6 & 7, all the Commission

[21] Order No. PSC-11-0095-FOF-EI, at 9 (emphasis added), Issued February 2, 2011, Docket 100009-EI, *In re: Nuclear cost recovery clause*.

found was that licensing costs are within the statutory definition of preconstruction costs. R., at Vol. 62, p. 12256 (Final Order, at 10).

In an attempt to support its finding that FPL demonstrated intent to build, the Commission relied generally on the fact that FPL incurred costs "associated with its continued pursuit of the licenses and approvals necessary to construct and operate a nuclear power plant." R., at Vol. 62, p. 12256 (Final Order, at 10). Specifically, the Commission relied solely upon the following three (3) activities of FPL related to TP 6 & 7 in order to support its finding:

> In 2009 and 2010, FPL continued negotiations for a land exchange agreement with the Everglades National Park and approval of a Comprehensive Development Master Plan amendment for roadway improvements needed for construction activities. Also during that time, FPL sought approval and execution of a Joint Participation Agreement for reclaimed water from Miami-Dade County for the TP 6 & 7 project's cooling water needs. [22]

R., Vol. 62, at pp. 12254, 12256, 12257 (Final Order at 8, 10, 11). These three activities are patently insufficient to support a finding of intent on the part of FPL to construct the TP 6 & 7 reactors. This is especially true given that, as discussed *supra*, FPL has cancelled and/or delayed all activities directly related to construction that would demonstrate intent to build TP 6 & 7, and that FPL's testimony in Docket 110009-EI demonstrated that the only intent on the part of

[22] The PSC lists the above referenced activities no fewer than three times in the Final Order, as if repetition of these activities will somehow make them more probative of FPL's intent to build.

FPL in regards to TP 6 & 7 is to attempt and obtain a COL from the NRC in order to "create an option" to build TP 6 & 7. In fact, the Commission acknowledged as much:

> We acknowledge FIPUG's and SACE's concerns that FPL's 'create an option' approach and FPL's primary focus on pursuing a COL from the NRC before moving forward with other phases of the project could be interpreted as FPL not intending to actually construct TP 6 & 7. We also recognize the potential pitfalls that might result from FPL's 'option creation' approach.

R., at Vol. 62, p. 12256 (Final Order at 10). Nevertheless, without stating the pitfalls, which include the waste of billions of dollars of ratepayer money without one kilowatt of electricity being generated, the Commission found that FPL had continued to demonstrate its intent to build TP 6 & 7, based solely on the above-referenced three activities. This finding was arbitrary and unsupported by substantial competent evidence, and should be reversed.

2. PEF Failed to Demonstrate in Docket 110009-EI that it Intends to Build the Proposed Levy Nuclear Project.

a. <u>PEF's Activities and Testimony Demonstrate that PEF Only Intends to Create an Option to Build the Proposed Levy Nuclear Project by Obtaining a Combined Operating License from the Nuclear Regulatory Commission.</u>

In 2010, PEF, like FPL, decided to proceed with the LNP on a slower pace and implemented what the utility refers to as the "COL-focused option," which was referred to in Docket 110009-EI as the "program of record" for the LNP. R., Attachment 1, TR Vol. 11, at 1682, 1948. Under this approach, which is identical

to FPL's "option creation" approach, PEF extended the partial suspension of its EPC contract and is focusing all near-term activities related to the LNP on obtaining a COL from the NRC. R., Attachment 1, TR Vol. 11, at TR 1682. Due to this decision, PEF's current activities, like FPL's, fail to demonstrate that PEF intends to build the LNP.

In its prefiled testimony filed in Docket 110009-EI, as a result of its implementation of the COL-focused approach, the only 2011 and 2012 activities that PEF could identify relating to the LNP were: (1) activities needed to support environmental permitting; (2) continued disposition of long lead equipment purchase orders (*i.e.*, canceling orders for equipment); (3) commencement of work on an updated transmission study; (4) preparations for a Final Notice to Proceed amendment to the EPC agreement; (5) participation in industry work groups; and (6) continued joint owner discussions. R., Attachment 1, TR Vol. 11, at 1683 (emphasis added). Most significant is the fact that PEF is disposing of long lead equipment purchase orders. A utility who intends to build a nuclear plant would not be disposing of orders for the key components of construction, which have to be procured significantly in advance of construction. These activities fail to demonstrate that PEF intends to build the LNP; in contrast, these activities are more accurately characterized as activities being undertaken by PEF so that the

NRC will continue to prioritize its COLA application request, and thus "create an option" to build the LNP.[23]

Although these actions speak louder than words, the testimony of PEF's witnesses at the evidentiary hearing substantiated what PEF's LNP related activities demonstrate – that the only intent on the part of PEF in regards to the LNP is the intent to obtain a COL from the NRC. PEF witness Elnitsky testified on numerous occasions at the evidentiary hearing that PEF has not made a final decision to build the LNP.[24] R., Attachment 1, TR Vol. 11 at 1944; TR Vol. 12 at 2088, 2091. On cross-examination at the evidentiary hearing, Mr. Elnitsky made the following admission:

> Q It would be illogical, would it not, to say that you intend to do something when you have not made the final decision to do that thing? That would be illogical, would it not?
> A Yes ….

R., Attachment 1, TR Vol. 11 at 1946. In fact, PEF has publicly stated that it has not made a final decision whether or not to build the LNP. R., Attachment 2, Ex. 169 at 2 (noting that decision of whether to build the LNP is "still a few years

[23] PEF witness Elnitsky testified that if PEF fails to continue to demonstrate that it has a "plan" as to the LNP, the NRC might not continue to process its COLA. R., Attachment 1, TR Vol. 11, at 1753-1754.

[24] PEF witness Elnitsky's statement in his prefiled rebuttal testimony that PEF does in fact intend to build the LNP (R., at Attachment 1, TR Vol. 12 at 2053) was completely inconsistent with his above-referenced testimony on cross-examination at the evidentiary hearing, and thus not credible.

away"). OPC expert witness Jacobs properly summarized the issue of PEF's intent:

> Specifically, I believe that they have an intent to pursue the COLA and receive the COL from the Nuclear Regulatory Commission. At that time its my understanding the company will make a decision as to whether or not to proceed with the project. So it's difficult to say they have an intent to proceed with the project when they have publicly admitted that they haven't decided to proceed with the project.

R., Attachment 1, TR Vol. 12 at 2029 (emphasis added).

SEC filings[25] of PEF introduced as evidence at the hearing further substantiated the fact that PEF does not have an intent to build the LNP, and that, in sharp contrast, it merely is doing what is necessary to create the option to build the LNP:

> "[W]hile we have not made a final determination on new nuclear construction, we continue to take steps to keep open the option of building one or more nuclear plants."

R., Attachment 2, Ex. 206, at 16 (emphasis added).[26] Similarly, Mr. Elnitsky conceded in regards to PEF's option creation approach:

> Q Okay. And you would agree with me, in addition to the fact that it would be illogical to intend to do something before you have actually decided to do it, that there is a difference in

[25] PEF witness Elnitsky testified at the hearing that the information contained in the SEC filings is true and accurate. R., Attachment 1, TR Vol. 11 at 1915.

[26] Ex. 206 is replete with references to the fact that PEF has not made a final decision to build the LNP, but rather has merely taken steps to create an option to build, and repeatedly references the decision to build as a question of "if," not when, as Mr. Elnitsky attempted to testify. *See* R., Attachment 2, Ex. 206 at 4, 9, 15, 17 ("if the decision to build is made….").

intending to create an option and intending to exercise that option, would you not?

***

Q A difference in intending to create or preserve an option and intending to exercise that same option. There's a difference in those two things, is there not?

A Yes.

R., Attachment 1, TR Vol. 11 at 1947.

PEF's activities to date, coupled with the evidence adduced at the evidentiary hearing, fail to demonstrate that PEF intends to build the LNP as is required by the Commission to be eligible for cost recovery pursuant to § 366.93, Fla. Stat. Rather, the evidence demonstrates that PEF merely intends to attempt to obtain a COL for the LNP in order to create the option to build. Mr. Elnitsky admitted that it would be illogical to say you intend to do something when you haven't made the final decision to actually do it, and that there is a difference in intending to create an option (*i.e.*, obtaining a COL) and intending to exercise that option (*i.e.*, build the LNP).[27] PEF's COL-focused approach does not meet the Commission's intent to build requirement, and thus the Commission's approval of cost recovery for the LNP in Docket 110009-EI should be reversed.

[27] It goes without saying that these are crucial distinctions given the Commission's decision last year requiring the intent to build in order to be in compliance with § 366.93, Fla. Stat. and eligible for cost recovery. Furthermore, PEF's true intent, *i.e.*, to simply obtain a COL to preserve the option to build the LNP, is clearly articulated in its approved Stipulation and Settlement Agreement in Docket 120002-EI.

b. The Commission's Finding that PEF Demonstrated Intent to Build was Arbitrary and Unsupported by the Evidence.

As discussed in more detail *supra*, the Commission, in Order No. PSC-11-0095-FOF-EI, interpreted § 366.93, Fla. Stat. and made two distinct findings: (1) that a utility does not have to simultaneously engage in the "siting, design, licensing and construction" of a nuclear power plant to meet the requirements of § 366.93, F.S.; and (2) that while a utility does not have to simultaneously engage in all of these activities, it does have to continue to demonstrate its intent to build the nuclear power plant in order to be in compliance with § 366.93, Fla. Stat. and eligible for cost recovery. In the Final Order in Docket 110009-EI, the Commission, as it did with FPL, found that PEF satisfied the intent to build requirement. R., Vol. 62, at 12334 (Final Order, at 88). However, this finding completely disregarded the overwhelming and uncontroverted evidence from the evidentiary hearing demonstrating that PEF's only intent in regards to the LNP was to obtain a COL in order to create an option to build the LNP. Therefore, the Commission's finding was arbitrary and unsupported by the evidence and should be reversed.

In its Final Order, the Commission found that PEF's activities undertaken in 2011 and planned for 2012 were recoverable preconstruction or construction[28]

[28] Appellant fails to see how any of PEF's costs for 2011-2012 related to the LNP could possibly be characterized as "construction" costs.

costs. R., Vol. 62, at 12334 (Final Order, at 88). In regards to PEF's demonstration of intent to build, the Commission relied on the following activities, which, as discussed *supra,* are insufficient to support a finding of intent to build: (1) activities needed to support environmental permitting; (2) continued disposition of long lead equipment purchase orders; (3) commencement of work on an updated transmission study; (4) preparations for a Final Notice to Proceed amendment to the EPC agreement; (5) participation in industry work groups; and (6) continued joint owner discussions R., Vol. 62, at 12334 (Final Order, at 88) (emphasis added). These activities, when considered in light of the testimony and evidence at the evidentiary hearing, are plainly insufficient upon which to find intent to build.[29] The foregoing is even more apparent given PEF's recent decision to further delay the LNP schedule, to cancel the EPC Contract altogether, and, instead seek (and obtain) Commission approval to simply obtain a COL.[30]

[29] The Commission also relies on the testimony of PEF witness Elnitsky stating that PEF intends to build the LNP. However, as referenced *supra,* the Commission completely ignored the fact that Mr. Elnitsky's testimony in this regard was shown on cross-examination to be inconsistent and not credible.

[30] Petition for limited proceeding to approval stipulation and settlement agreement, January 20, 2012, Docket 120022-EI, *In re: Petition for limited proceeding to approve stipulation and settlement agreement by Progress Energy Florida, Inc.*

J. SECTION 366.93, FLA. STAT. IS UNCONSTITUTIONAL BECAUSE IT CONSTITUTES AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY IN VIOLATION OF THE SEPARATION OF POWERS CLAUSE OF THE FLORIDA CONSTITUTION.

Fundamentally, the Commission's ability to approve nuclear cost recovery for FPL and PEF, despite the lack of supporting competent evidence, results from the unconstitutionally broad delegation of authority in the nuclear cost recovery statute. This Court should invalidate this statutory provision as an unconstitutional delegation of legislative power to the Commission in violation of the separation of powers doctrine contained in Article II, Section 3 of the Florida Constitution. Section 366.93, Fla. Stat. does not provide adequate standards and guidelines and thus has impermissibly allowed the Commission, through its implementation and administration of the statute, to provide a blank check for utilities who claim to be eligible for cost recovery under the statute. Moreover, the Legislature's failure to provide adequate standards and guidelines has left the Commission with unbridled discretion in administering the law in four successive Nuclear Cost Recovery Dockets. The lack of standards or guidelines is evident from the plain language of the statute, and is further evidenced by the Commission's administration of the Nuclear Cost Recovery Dockets over the past four years.[31]

[31] The Commission, due to the lack of standards in the statute, has been all over the map in its interpretations of the statute, the standards applied to its decisions, and

A. THE FLORIDA SUPREME COURT APPLIES A STRICT SEPARATION OF POWERS DOCTRINE.

The constitutional doctrine of separation of powers is expressly codified at Article II, § 3 of the Florida Constitution, which provides:

> The powers of the state government shall be divided into 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.

The Florida Supreme Court has traditionally applied a strict separation of powers doctrine. *Bush v. Schiavo,* 885 So.2d 321, 329 (Fla. 2004) (internal citations omitted); *see also State v. Avatar Development Corporation*, 697 So.2d 561, 564 (1997) (stating that "[t]his Court has stated repeatedly and without exception that Florida's Constitution absolutely requires a strict separation of powers") (emphasis in original). Under this doctrine, there are two fundamental prohibitions: first, that no branch may encroach upon the powers of another; and second, that no branch may delegate to another branch its constitutionally assigned power. *Bush v. Schiavo,* 885 So.2d at 329. The second of these fundamental prohibitions, which is at issue in the instant matter, is known as the "nondelegation doctrine" and prohibits the Legislature from delegating "the power to enact a law or the right to exercise unbridled discretion in applying the law." *Department of State v. Martin,*

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moreover to the eligibility of utilities to recover costs pertaining to nuclear projects. *See* Section I, *supra*, and Section II C, *infra*.

885 So.2d 453, 456 (Fla. 2004); *see also Sims v. State*, 754 So.2d 657, 668 (Fla. 2000). This constitutional doctrine rests on the premise that the Legislature may not abdicate its responsibility to resolve the "truly fundamental issues" by delegating that function to others by failing to provide adequate directions for the implementation of its declared policies. *Askew v. Cross Keys Waterways*, 372 So.2d 913, 920-921 (Fla. 1978) (internal citations omitted).

This Court has clearly articulated the bases underlying its strict application of the separation of powers doctrine generally and the nondelegation doctrine in particular. In *Lewis v. Bank of Pasco County*, 346 So.2d 53 (Fla. 1977), the Court stated:

> This Court has held in a long and unvaried line of cases that statutes granting power to administrative agencies must clearly announce adequate standards to guide the agencies in the execution of the powers delegated. The statute must so clearly define the power delegated that the administrative agency is precluded from acting through whim, showing favoritism, or exercising unbridled discretion.

Id. at 55-56 (internal citations omitted). Similarly, in *Sarasota County v. Berg*, 302 So.2d 737, 742 (Fla. 1974), this Court held:

> When [a] statute is couched in vague and uncertain terms or is so broad that no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law, it must be held unconstitutional as attempting to grant to the administrative body the power to say what the law shall be ….

Id. at 742 (internal citations omitted). Moreover, as noted by this Court in *Smith v. Portante*, 212 So.2d 298 (Fla. 1968):

> No matter how laudable a piece of legislation may be in the minds of its sponsors, objective guidelines and standards should appear expressly in the act or be within the realm of reasonable inference from the language of the act where a delegation of power is involved ….

Id. at 299 (emphasis added). Therefore, at a minimum, the nondelegation doctrine requires that fundamental policy decisions be made by members of the legislature who are elected to perform those tasks, and that the administration of legislative programs must be pursuant to standards and guidelines ascertainable by reference to the enactment in question. *Askew, supra* at 925.

Appellant recognizes that the Legislature is permitted to transfer subordinate functions "to permit administration of legislative policy by an agency with the expertise and flexibility to deal with complex and fluid conditions." *Bush v. Schiavo,* 885 So.2d at 332 (*quoting Microtel, Inc. v. Florida Public Service Comm'n*, 464 So.2d 1189, 1191 (Fla. 1985)). As this Court has recognized, the "specificity of the guidelines [set forth in the legislation] will depend on the complexity of the subject and the 'degree of difficulty involved in articulating finite standards.'" *Bush v. Schiavo,* 885 So.2d 332-333 (*quoting Askew v. Cross Keys Waterways*, 372 So.2d 913, 918 (Fla. 1978)). However, this Court has also made clear that:

> Even where a general approach would be more practical than a detailed scheme of legislation, enactments may not be drafted in terms so general and unrestrictive that administrators are left without standards for the guidance of their official acts.

State Dep't of Citrus v. Griffin, 239 So.2d 577, 581 (Fla.1970); *see also Bush v. Schiavo, supra* at 333.

Thus, even if the Court determines that the case of cost recovery for new nuclear plants presents a situation where a general approach is more practical than a more detailed scheme of legislation, § 366.93, Fla. Stat. still violates the separation of powers doctrine, because the statute is drafted in such broad, general and unrestrictive terms that the Commission has been left without any real standards to guide it in its implementation and administration of the statute.

This Court in *Askew* could have been describing the basic problem with § 366.93:

> In the final analysis it is the courts, upon a challenge to the exercise or nonexercise of administrative action, which must determine whether the administrative agency has performed consistently with the mandate of the legislature. When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.

Id. at 918-919 (emphasis added). In the instant matter, as discussed in more detail *infra,* due to the failure of the Legislature to include adequate standards and guidelines in § 366.93, Fla. Stat., the Commission has, in fact, become the lawmaker rather than the administrator of the nuclear cost recovery statute and has been allowed to exercise unbridled discretion in its administration of the statute.

B. SECTION 366.93, FLA. STAT., VIOLATES THE NONDELEGATION DOCTRINE BECAUSE IT DOES NOT CONTAIN ADEQUATE STANDARDS TO GUIDE THE COMMISSION IN ITS IMPLEMENTATION AND ADMINISTRATION OF THE NUCLEAR COST RECOVERY STATUTE.

The Legislature has abdicated its responsibility to resolve fundamental issues pertaining to nuclear cost recovery by failing to provide the Commission with adequate standards in § 366.93, Fla. Stat., to guide the Commission in the implementation and administration of the nuclear cost recovery statute. Due to the lack of standards in the statute, the Commission has allowed § 366.93, Fla. Stat., to become nothing less than a blank check for Florida utilities like FPL and PEF who can collect billions of dollars from the rate payers without committing to actually construct nuclear power plants to generate electricity.

Section 366.93, Fla. Stat., the nuclear cost recovery statute, provides, in pertinent part:

> (2) Within 6 months after the enactment of this act, the commission shall establish, by rule, alternative cost recovery mechanisms for the recovery of 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. 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: .... [emphasis added].

Thus, § 366.93, Fla. Stat., as enacted, contains two general policies - that "alternative cost recovery mechanisms" should be: (1) designed to promote utility investment in nuclear power plants; and (2) designed to allow for recovery of "all prudently incurred costs." However, § 366.93, Fla. Stat., contains no standards whatsoever to guide the Commission in implementing and administering these general policies; rather, the only "standard" is the broad policy statement to "promote utility investment in nuclear power plants." Furthermore, § 366.93 does not, nor does any other provision of Chapter 366 of the Florida Statutes, define "alternative cost recovery mechanism(s)." The statute does contain two examples of potential mechanisms, but then simply refers the Commission to a broad, "include, but not limited to," clause.

Due to the lack of standards or guidelines, § 366.93, Fla. Stat., places in the hands of the Commission, without even a definition to guide it, the fundamental legislative task of determining which "alternative cost recovery mechanisms," beyond the two examples, to consider utilizing in order to implement the broad policy of promoting "utility investment in nuclear power plants." The Commission is directed to make legislative policy through rulemaking. The Legislature did not give the Commission any guidance as to how far it is to go in promoting utility investment in nuclear power plants, so "alternative cost recovery mechanisms" could be any and all manner of financial incentives to the utilities paid for by the

ratepayers. For instance, it certainly would promote investment in nuclear power plants if the Commission allowed utilities to recover double their actual costs, and, as absurd as it sounds, the statute leaves this option open to the Commission.

Similarly, the Legislature left the Commission without any standard for how to apply these undefined "alternative cost recovery mechanisms."[32] No procedure was outlined, no criteria were provided as to how utilities would establish their ongoing eligibility for cost recovery, and no thought was given as to when a nuclear project might become such a boondoggle that the Commission should pull the plug. The Commission has attempted to fill the void left by the Legislature's failure through the adoption of Rule 25-6.0423. The Rule requires, among other things, the approval by the Commission of an annual "detailed analysis of the long-term feasibility of completing the power plant." Rule 25-6.0423(5)(c)5, F.A.C. This rule provision would, in theory, permit the Commission to take some action whenever it becomes apparent that a nuclear power plant is no longer feasible. Although SACE has argued that this provision is an important safeguard added by the Commission to prevent the abuse of nuclear cost recovery, there is really no support for this provision in the statute. Perhaps because of the lack of support for this approach in the statute, the Commission has been unwilling to make the long-

[32] All the statute says is "(3) After a petition for determination of need is granted, a utility may petition the commission for cost recovery as permitted by this section and commission rules."

term feasibility analysis anything more than a *pro forma* exercise. Without some provision like this in the statute, however, the Commission is left rudderless in deciding how far to go in promoting utility investment in nuclear power plants and how to prevent the potential abuse engendered by such a blank check.

Moreover, the general policy in the statute for recovery of "prudently incurred" costs is not an objective standard which provides any real guidance for, and/or restrictions on, the Commission's authority to determine how far it should go in promoting utility investment in nuclear power. Without any objective guidelines in § 366.93, Fla. Stat., to guide the Commission in determining what costs are recoverable, except for the broad policy "to promote utility investment in nuclear power plants," the Commission has exercised unbridled discretion in finding that all costs to date have been "prudently incurred." While the Commission may have developed its own meaning of the term "prudence" in the context of Commission review of utility decision-making,[33] it is not enough to pass constitutional muster for the Legislature to incorporate a "reasonable person" standard into a statute, thereby delegating the Commission the authority to give meaning to this subjective, statutory term on a case-by-case basis. *See Smith v.*

[33] *See, e.g.*, Order No. PSC-08-0749-FOF-EI, at 28 (noting that the Commission's 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 the decision was made.")

Portante, 212 So.2d at 299 (holding that objective guidelines and standards should appear expressly in the act where a delegation of power is involved). For example, is there a cap on the total amount of recoverable costs for a particular nuclear project? Should a utility continue to be eligible for cost recovery if the cost estimate of a nuclear project has increased ten-fold? Should a utility be able to continue to recover costs if it is not adhering to its construction timeline? Are costs "prudently incurred" if they are incurred in the face of declining demand for the plant, declining costs of competing fuels, and lack of national policies that shift the economics for nuclear plants? By failing to even attempt to delineate such objective standards in § 366.93, Fla. Stat., the Legislature has impermissibly delegated that function to the Commission, which has led to the Commission's whimsical approval of over $1 billion dollars in cost recovery to date, a substantial portion of which is for the proposed new nuclear reactors of FPL and PEF that are unlikely to ever be constructed.

The instant matter is analogous to *Askew v. Cross Keys Waterways*, *supra*. In *Askew*, the Court was faced with a constitutional challenge to a statute delegating to the Department of Administration the authority to classify areas and resources as being "of critical state concern." The Court held that the statute was unconstitutional because it violated the nondelegation doctrine:

> The criteria for designation of an area of critical state concern … are constitutionally defective because they reposit in the Administrative

> Commission the fundamental legislative task of determining which geographic areas and resources are in greatest need of protection.

Id. at 919. Likewise, in the case at hand, § 366.93, Fla. Stat., places in the Commission the fundamental legislative task of determining which "alternative cost recovery mechanisms" to consider utilizing in order to "promote utility investment in nuclear power plants." Furthermore, by failing to include any objective standards to serve as guidance for the Commission in determining what utilities are eligible for cost recovery, or what costs are in fact recoverable, this fundamental legislative task too has been improperly delegated to the Commission. *See Department of State v. Martin*, 885 So.2d 458 (holding that phrase "in its discretion" vested unbridled discretion in the Department of State). Ultimately, this failure has impermissibly given the Commission to power to declare what the law is in the State of Florida in regards to nuclear cost recovery, *i.e.*, that the nuclear cost recovery statute is nothing less than a blank check for utilities who claim to be engaged in the activities contemplated by the statute. *See Florida Gas Transmission Co. v. Public Service Comm'n,* 635 So.2d 941, 944 (Fla. 1994) (holding that allowing a legislative agency to declare what the law is violates Florida's separation of powers doctrine); *see also Sarasota County v. Berg, supra* at 742; *Lewis v. Bank of Pasco County, supra* at 55 (holding that statute was couched in such vague and uncertain terms as to amount to a grant to the Comptroller to say what the law shall be); *Florida Home Builders Ass'n v.*

Division of Labor, 367 So.2d 219, 220 (Fla. 1979) (holding that the legislature unconstitutionally delegated the power to make law because the statute granted the agency the ability to choose between different possible meanings of statute's requirement without guides of accountability); *Sloban v. Florida Board of Pharmacy*, 982 So.2d 26, 30 (Fla. 1st DCA 2008) (holding unconstitutional statute that gave Board discretion to enact reapplication rules for formerly licensed pharmacists because statute gave the Board the power to declare what the law shall be).

As noted by the *Askew* Court, it is far different for an administrative agency to "flesh out" an articulated legislative policy as opposed to the agency making the initial determination of what the policy should be. *Askew, supra* at 920. The Legislature could not have intended that the Commission promote utility investment in nuclear power by any means, no matter how unfair to ratepayers. However, the Legislature simply skipped the fundamental legislative task of including appropriate standards and guidelines in § 366.93, Fla. Stat., to guide the Commission as to how far to go in promoting nuclear investment. By failing to provide adequate standards in § 366.93, Fla. Stat., the Legislature has changed the Commission's role from an administrative entity to a lawmaker, and the statute thus violates the nondelegation doctrine and the separation of powers doctrine, and should be held unconstitutional.

C. THE LEGISLATURE'S FAILURE TO INCLUDE ADEQUATE STANDARDS IN SECTION 366.93, FLA. STAT., IS EVIDENCED BY THE COMMISSION'S EXERCISE OF UNBRIDLED DISCRETION IN ADMINISTRATION OF THE NUCLEAR COST RECOVERY STATUTE.

Further evidencing the fact that the Legislature failed to provide adequate standards and guidelines in § 366.93, Fla. Stat., is the unbridled discretion which the Commission has exercised in its administration of the statute in four successive nuclear cost recovery dockets. Specifically, due to the lack of any standards in the statute to serve as guidance for the Commission, or to limit the Commission's unfettered authority, the Commission's interpretations of the statute have been all over the map on numerous issues, including, but not limited to, the eligibility of utilities to recover costs and the standards applied to its decisions. This lack of standards has resulted in the Commission awarding the utilities every penny of requested nuclear cost recovery to date.[34]

For example, in successive cost recovery dockets, the Commission has changed its interpretation of what activities a utility must be conducting in order to be eligible for cost recovery under § 366.93, Fla. Stat. As discussed in more detail in Section I, *infra*, following the 2010 docket the Commission found that a utility must demonstrate that it intends to build a nuclear power plant for which it seeks

[34] As discussed *supra*, this amount is in excess of $1 billion dollars, a significant portion of which is for proposed new reactors that neither FPL nor PEF have made the actual decision to build.

recovery of costs.[35] However, at the conclusion of the 2011 docket, the Commission has seemingly said that all is required is that a utility intend to obtain a license for the nuclear power plant in question. It goes without saying that these are far different standards for a utility to meet in order to be eligible for cost recovery, and the lack of guidelines in the statute has allowed the Commission to act in this whimsical manner.

As another example, the Commission has applied its long-term feasibility rule contained in Rule 25-6.0423, F.A.C., differently each year, and differently for PEF and FPL, in the nuclear cost recovery dockets. For example, in regards to FPL, the Commission has stated:

> FPL shall provide a long-term feasibility analysis as part of its annual cost recovery process, which, in this case, also include updated fuel forecasts, environmental forecasts, breakeven costs, and capital cost estimates. In addition, FPL should account for sunk costs.

R., Vol. 62, at p. 12257 (Final Order, at 11) (internal citations omitted). In regards to PEF, the Commission has stated:

> Progress Energy Florida, Inc. shall provide a long-term feasibility analysis as part of its annual cost recovery process which, in this case, shall also include updated fuel forecasts, environmental forecasts, non-binding capital cost estimates, and information regarding discussions pertaining to joint ownership.

[35] Order No. PSC-11-0095-FOF-EI, at 9 (emphasis added), Issued February 2, 2011, Docket 100009-EI, *In re: Nuclear cost recovery clause*.

Id. at 12320 (Final Order, at 74). Thus, while FPL has to provide breakeven costs and account for sunk costs, PEF does not. Similarly, PEF has to provide information pertaining to joint ownership, and FPL does not. This has led to confusion amongst all parties, including FPL and PEF, as to what exactly needs to be submitted to satisfy this feasibility requirement. *See*, *e.g.*, Order No. PSC-09-0783-FOF-EI, at 13-16; 30-34. PEF, over its own objections, submits a cumulative present value revenue requirement ("CPVRR") analysis to demonstrate long-term feasibility, and FPL submits a "breakeven" analysis to satisfy the same requirement. *Id*. Other aberrations pertaining to the long-term feasibility requirement which result from the lack of standards in the statute include, but certainly are not limited to: (1) the Commission's failure to require FPL to submit, despite objections from numerous intervenors, an updated capital cost estimate in Docket 090009-EI as part of its economic feasibility analysis;[36] and (2) allowing PEF in the same docket to meet its burden to demonstrate economic feasibility in through an answer to a Commission discovery response, after PEF refused to provide such analysis in its direct testimony.[37] Ultimately, the only constant in regards to the long-term feasibility requirement is that the Commission has continued to find, despite substantial and mounting evidence demonstrating

[36] Order No. PSC-09-0783-FOF-EI, at 13-14.
[37] *Id.*, at 30-32.

otherwise, that FPL and PEF have satisfied the requirement in regards to the utilities' proposed new nuclear reactors.

Section 366.93, Fla. Stat., is analogous to other statutes which have been found to violate the nondelegation doctrine because the statutes failed to contain adequate standards to guide the agencies charged with implementation of the statutes. In *Bush v. Schiavo*, this Court held that "Teri's law" constituted an unconstitutional delegation of legislative authority because the statute failed to provide any standards or guidelines to prevent the Governor from exercising "unfettered discretion" to those who fell within its terms. *Id.* at 334. In *High Ridge Management Corp. v. State of Florida*, 354 So.2d 377 (Fla. 1978), this Court found that statutory provisions pertaining to the rating of nursing homes constituted unconstitutional delegations of legislative authority, because the provisions did not contain objective guidelines and standards for enforcement. *Id.* at 380. Similarly, in *Department of State v. Martin*, this Court found that an election statute governing the withdrawal of candidates was an unconstitutional delegation of legislative authority because it vested unbridled discretion in the Department of State. 885 So.2d at 458.

D. SECTION 366.93, FLA. STAT. IS DIFFERENT THAN OTHER STATUTES ADMINISTERED BY THE COMMISSION WHICH HAVE BEEN SUBJECT TO UNCONSTITUTIONAL DELEGATION CHALLENGES.

In attempting to persuade the Court that § 366.93, Fla. Stat., does not amount to an unconstitutional delegation of legislative authority, Appellees are likely to point to instances in which this Court has rejected constitutional challenges based on the nondelegation doctrine to statutes administered by the Commission. However, these cases are inapposite to the instant matter as the challenged statutes contained adequate standards to guide the Commission and thus did not violate the separation of powers.

In *Florida Gas Transmission Company v. Public Service Commission*, 635 So.2d 941 (Fla. 1994), the appellant challenged the constitutionality of a Florida statute which granted the Commission the authority to determine the need for, and location of, natural gas pipelines. *Id.* at 943. The Supreme Court found that the statutory provision did not violate the nondelegation doctrine, as it provided sufficient guidelines to overcome such a challenge. Specifically, the Court noted:

> Under the express direction of the statute, the Commission must evaluate the need for natural gas pipelines and must consider the reliability, safety, delivery, and integrity of the proposed pipeline. The Commission must also determine the economic well-being of the public, the proposed pipeline's commencement and terminus points, and its effect on the environment of the state.

Id. at 944. In sharp contrast, § 366.93, Fla. Stat., contains absolutely no such criteria which must be considered by the Commission in the administration of the nuclear cost recovery statute, other than the overall policy of promoting utility investment in nuclear plants.

Similarly, in *Microtel, Inc. v. Florida Public Service Commission*, 464 So.2d 1189 (Fla. 1985), this Court rejected a constitutional challenge based on the nondelegation doctrine to statutory provisions governing competition in the provision of long distance telephone services. The Court found that the Legislature had provided adequate standards and guidelines in the challenged provisions:

> It is fairly obvious from the language … that the legislature wanted to make certain that competition in the long distance telephone service would be conducted by one who has the technical and financial ability to provide such service, and to know what territory the applicant proposed to operate in and the facilities that would be provided, and to ascertain what service, if any, was currently being provided by others in geographical proximity

Id. at 1191. In the instant matter, § 366.93, Fla. Stat., contains no such guidelines or requirements for utilities applying for nuclear cost recovery.

CONCLUSION

For the reasons set forth above, Appellant Southern Alliance for Clean Energy respectfully asks that this Court find the following: (1) that the Commission's 2011 Nuclear Cost Recovery Order, Order No. PSC-11-0547-FOF-EI, is arbitrary and unsupported by substantial competent evidence in that FPL and

PEF failed to demonstrate in Docket 110009-EI that the utilities intend to build their respective proposed new nuclear reactors, as required in order to eligible for cost recovery, and remand this decision to the Commission with the direction for FPL and PEF to refund their ratepayers all cost recovery relating to their proposed new nuclear reactors; and (2) that § 366.93, Fla. Stat., is unconstitutional because it constitutes an unconstitutional delegation of legislative authority in violation of the separation of powers doctrine of the Florida Constitution.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and eight copies of the **INITIAL BRIEF OF APPELLANT SOUTHERN ALLIANCE FOR CLEAN ENERGY** was sent for filing with the Clerk of the Florida Supreme Court by federal express and electronic filing on March 30, 2011, and served by electronic and/or US Mail to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Initial Brief of Appellant Southern Alliance for Clean Energy is submitted in 14 point Times New Roman font in Microsoft Word Format.

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