

SC22-94

IN THE SUPREME COURT OF FLORIDA

**CITIZENS OF THE STATE OF FLORIDA,
by and through the Office of Public Counsel,**

Appellant,

v.

GARY F. CLARK, et al.,

Appellees.

ANSWER BRIEF OF DUKE ENERGY FLORIDA, LLC

On Appeal from a Final Order of the Public Service Commission
PSC Docket No. 20210001-EI

DUKE ENERGY FLORIDA, LLC

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STATEMENT OF THE CASE AND OF THE FACTS

The Office of Public Counsel (“OPC”) appeals a final order of the Florida Public Service Commission (“PSC” or “Commission”) approving recovery of \$7.2 million in replacement power costs that Duke Energy Florida, LLC (“DEF”) incurred in connection with an unplanned outage at Crystal River Unit No. 4 (“CR4”) from January to April 2021. R.45. In the administrative proceeding below, the Commission was asked to determine whether DEF’s actions were “reasonable and prudent” with respect to the factors leading to the forced outage of CR4 and whether the associated replacement power costs were recoverable by DEF. *Id.*

The Commission’s final order evaluated the competing evidence on prudence presented at the final hearing and, in this “highly fact-specific” replacement-power case involving a convergence of two independent factors leading to the outage at CR4, concluded that DEF had demonstrated an entitlement to recovery of \$7.2 million of the \$14.4 million total replacement power costs sought in its petition. R.46-49. The final order directed DEF to make an appropriate adjustment to credit its retail ratepayers in the amount of the other \$7.2 million. R.49.

I. STATEMENT OF THE FACTS

A. Outage at the CR4 Plant

The CR4 plant is a 715-megawatt coal-fired steam unit in Citrus County, Florida. R.45. On December 17, 2020, the operators at CR4 were in the process of returning the unit to service after a planned outage. R.1865. To accomplish this task, the plant's generator must be connected to the 230kV transmission or power system by matching the generator and power system's electrical parameters, a process known as generator synchronization. *Id.*

During synchronization, the generator voltage and frequency are adjusted to match the system voltage and frequency, and the phase angle is monitored to ensure the breaker close circuit is completed when the angle "matches." *Id.* At CR4, synchronization of the unit to the electrical grid can be done either (1) automatically, using a breaker control relay to give the command to close the generator breaker when the synchronization parameters are met, or (2) manually, by an operator. R.1865-66.

Prior to the out-of-phase synchronization, the CR4 plant operator attempted automatic synchronization three times. R.1866. Because those attempts were unsuccessful, the CR4 operator

attempted to perform a synchronization re-set to allow for another automatic synchronization attempt. *Id.* In doing so, the CR4 operator expected a failed synchronization attempt would occur because the Beckwith Manual Sync Check Relay (“Manual Sync Check Relay”) would prevent synchronization, and the unit would reset back to automatic sync mode. R.1868. The CR4 operator did not know that the Manual Sync Check Relay, which was located in the substation about a mile-and-a-half from the control room, had failed. R.1866, 1883, 1891, 1905. This failure allowed the breaker close circuit to be completed, resulting in an out-of-phase synchronization attempt of CR4 to the grid. *Id.* This caused damage to the generator and, in turn, the forced outage. R. 1865-66.

B. Evaluating the CR4 Outage

Following the outage event, and in accordance with industry practice, DEF performed a root cause analysis (“RCA”). R.338-46, 1866. The RCA identified two root causes and seven contributing causes of the out-of-phase synchronization leading to the outage at CR4. R.342-43. Specifically, the two identified root causes were: (1) the failure of an equipment component, specifically the Manual Sync Check Relay; and (2) the operator’s reliance on previous success in

resetting the unit to sync in automatic mode in the manner attempted without adverse consequences because of the Manual Sync Check Relay. R.342, 1867.

II. STATEMENT OF THE CASE

A. DEF Petitions for Fuel Replacement Cost Recovery Connected with January 2021 CR4 Plant Outage

The Fuel Clause is a perennial docket in which the PSC processes petitions filed by investor-owned utilities seeking to recover the cost of fuel and fuel-related activities needed to generate electricity. R.37, 3011. On July 27, 2021, DEF petitioned for approval of its fuel and capacity cost recovery for its 2021 costs and sought a prudence review for recovery of replacement power costs in connection with CR4. R.3012-69. In support of its petition, DEF included the testimony of Joseph Simpson to support its contention that DEF acted reasonably and prudently with respect to the events leading up to the outage at CR4. R.3049-58, 3059-67.

In response to DEF's petition, the PSC designated the recoverability of replacement fuel costs for the CR4 outage as Issue 1C: "[h]as DEF made appropriate adjustments, if any are needed, to account for replacement power costs associated with the January

2021 to April 2021 Crystal River Unit No. 4 outage? If appropriate adjustments are needed and have not been made, what adjustments should be performed?” R.2301.

DEF’s prehearing statement argued DEF’s actions relating to the outage were reasonable and prudent. R.2518. OPC¹ and the Florida Retail Federation (“FRF”) took the position that DEF did not demonstrate its actions relating to the outage were reasonable and prudent. R.2441, 2461.

B. Fuel Clause Hearing before the PSC

On November 2, 2021, the PSC conducted an evidentiary hearing to resolve Issue 1C—the prudence of DEF’s operation of CR4 in relation to recovery of replacement power costs. R.1849-93. The principal dispute discussed at the hearing centered on the actions of a CR4 operator in returning the unit to service. *Id.*

DEF presented evidence through the testimony of Joseph Simpson, a DEF engineer with 15 years of experience in power

¹ Florida Industrial Power Users Group (“FIPUG”), an association representing the interests of utility customers who purchase electricity from DEF, and White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate-White Springs (“White Springs”), a fertilizer company and one of DEF’s largest industrial customers, adopted the position of OPC. R.2533; 2559.

generation, to aid in the PSC's evaluation of DEF's actions. R.1863-1983.

Simpson testified as to the first identified root cause, the failure of the Manual Sync Check Relay and how it factored into the out-of-phase synchronization. R.1873-74. The Manual Sync Check Relay is "a high pedigree device with an exceedingly low failure rate." R.1981. Moreover, DEF had tested the Manual Sync Check Relay in 2020, not long before the outage at issue. R.1884. As Simpson explained, "[h]ad the [Manual] Sync Check Relay not failed, the machine would not have been permitted to sync to the grid." *Id.*

Simpson also testified regarding the second identified root cause of the outage: the timing of the CR4 operator's attempt to reset the synchronization circuit to allow for an attempt at auto synchronization. R.1900. The CR4 operator had been working in the utility plant industry since 2001 and had been a power plant operator since 2006. R.1902-03. Simpson explained how the CR4 operator relied on the Manual Sync Check Relay, which (when properly functioning) would not allow the breaker to close until the electrical parameters are met. R.1905-05. "Had [the operator] closed prematurely and the device been good, this event wouldn't have

happened. So when [the operator] closed early, the protective device failed to do its job, and that's what led to the event." R.1926-27. Simpson acknowledged there was no written procedure for the troubleshooting actions the operator took (R.1975), but explained that the operator is highly regarded with 15 years of experience R.1982. Further, the troubleshooting process in this scenario typically involves systematic elimination until the problem resolves. R.1983.

Ultimately, Simpson concluded that "[t]he operator action of red-flagging plus the failed sync check relay led to the out of phase event." R.1968. The PSC deferred ruling on Issue 1C to allow for post-hearing briefing.² R.95.

C. PSC Evaluates Competing Evidence on Prudence to Establish DEF's Recovery of Replacement Power Costs

In the post-hearing agenda conference, the Commission discussed the combination of equipment failure and the operator's actions as contributing factors to the CR4 outage. R.51-65. Commissioner La Rosa noted that he found DEF witness Simpson

² DEF filed a post-hearing brief arguing its actions were prudent. R.195-208. OPC, FIPUG, White Springs, and FRF filed a joint post-hearing brief arguing DEF's actions were imprudent. R.209-27.

“very credible” and that he thought the equipment failure was “significant” to the forced outage. R.53. Other Commissioners likewise noted the presence of competing factual evidence as to prudence. See R.53-54 (Chairman Clark noting evidence was not “completely conclusive in either direction” because “there’s equipment failure that happens and occurs”); R.56-57 (Commissioner Fay agreeing that disputes regarding both operator conduct and equipment failure were “very fact intensive”); R.57-58 (Commissioner Graham, acknowledging experience of CR4 operator and finding it “problematic” to “say that [the operator] did something wrong, because I don’t think he did. I just think that the equipment failed.”).

Relying on advice from legal counsel regarding its discretion to award a percentage of the total recovery sought by DEF based on the record evidence of prudence (R.55-56), the Commission voted unanimously to approve DEF’s recovery of fifty percent of the replacement power costs associated with the CR4 outage. R.61-63.

On December 21, 2021, the PSC entered a final order approving DEF’s recovery of \$7.2 million of the \$14.4 million total replacement power costs for the CR4 outage. R.45-50. The final order identified

the standard of review for prudence and the competing arguments of the parties as to whether DEF's actions leading up to the CR4 outage were prudent and reasonable R.46-49.

In evaluating prudence, the Final Order analyzed the two root causes of the CR4 outage identified in DEF's RCA: (1) the unexpected failure of the Manual Sync Check Relay; and (2) the operator's failure to follow proper operational procedures leading to an out-of-phase synchronization attempt. As to the failure of the protective relay, the PSC determined "[t]he evidence in the record reflects that the equipment was reasonably maintained and the failure of the relay was reasonably unforeseen by the Company." R.47. The final order noted the un rebutted testimony of DEF witness Simpson that the relay was a highly reliable protective device, with an exceedingly low failure rate. *Id.* The final order also acknowledged Simpson's testimony that, had the relay performed as designed, the outage would not have occurred. *Id.*

As to the CR4 operator's failure to follow written operational procedures when attempting to reset the synchronization circuit, the PSC determined that "[t]he operator's understanding of the relay was based on past experience and training" and that "the evidence in the

record does not suggest the operator acted with malice or intentional disregard for safety.” R.47-48. Although the CR4 operator had successfully used the same procedure to reset the synchronization at CR4 in the past, there was no approved written procedure in place for that method of resetting the synchronization. *Id.*

The PSC’s final order concluded with several “highly fact-specific” findings:

- “[I]f the operator had followed written procedures for either automatic or manual synchronization, the outage would not have occurred and the failed relay would have gone undetected until DEF performed an inspection.”
- “[I]f the relay had not failed, then the operator’s disregard of written procedures and use of an unapproved procedure would not have resulted in an outage.”

R.49. The PSC also “recognize[d] that the operator, highly trained and with many years of experience, was relying on a procedure he had used successfully before” and “that there was no device attached to the Beckwith Manual Sync Check Relay that would indicate the relay had failed since the last time the operator had used his unapproved procedure.” R.49.

Although it found that the “failure of the plant operator to follow written procedures, without supervisory approval, directly led to the outage at Crystal River Unit 4,” the PSC’s evaluation of the evidence also took into account “the operator’s reliance on an unapproved procedure that had been successful at CR4 in the past, coupled with repeated testing establishing the reliability of the relay” as competing factors in determining whether DEF’s actions were prudent. R.49. The PSC concluded that DEF was entitled to recovery of \$7.2 million of the \$14.4 million in replacement power costs for the CR4 outage, with the remaining \$7.2 million to be credited to DEF’s retail ratepayers. *Id.*

The Commission’s final order was issued on December 21, 2021. R.45, 50. Consistent with section 120.569(1) of the Florida Statutes, the final order provided notice regarding the rights of adversely affected parties to request reconsideration of the decision by the Commission, the availability of judicial review, and the applicable procedures and time limits. R.50.

D. OPC Seeks Reconsideration of Final Order, then Voluntarily Withdraws Motion for Reconsideration without Obtaining a Ruling from the Commission

On January 5, 2022, OPC filed a timely and authorized motion for reconsideration of the Commission’s final order.³ DEF.Appx.6-13 The motion for reconsideration asserted that the Commission had erred by considering “mitigating factors” because “[m]itigation’ is not a relevant factor in a prudence determination.” DEF.Appx.6-8. *See also id.* at 8. (requesting Commission to reconsider its order and find that “there are no mitigating factors”).

The motion for reconsideration also faulted the Commission for “apportioning” financial responsibility by reducing DEF’s replacement fuel cost recovery from \$14.4 million to \$7.2 million. DEF.Appx.8-10. OPC alleged that the Commission had departed from “established agency policy” in doing so and that its actions were “whimsical” and “arbitrary and capricious.” DEF.Appx.10.

DEF filed a timely response in opposition to OPC’s motion for reconsideration. DEF.Appx.14-23. In its response, DEF noted that

³ Although the motion states that it was filed pursuant to Rules 25-22.0376 and 25-22.060 of the *Florida Administrative Code* (DEF.Appx.6), only the latter of these rules applies to motions for reconsideration of final orders such as the PSC’s order here.

OPC had not identified any overlooked points of law, that the Commission had acted in accordance with its delegated authority and precedent, and that OPC was improperly requesting that the Commission reach different conclusions by reweighing the evidence. *Id.*

OPC timely appealed the Commission's final order on January 20, 2022. R.21-22. In accordance with Rule 9.110(d), the notice of administrative appeal informed this Court of the pendency of OPC's pending motion for reconsideration, which was postponing rendition of the final order. R.22.

Five days later, on January 25, 2022, OPC filed a notice with the Commission voluntarily withdrawing its motion for reconsideration of the final order. DEF.Appx.24-26. On the same day, OPC notified this Court that it had withdrawn its motion seeking reconsideration of the Commission's final order.

SUMMARY OF THE ARGUMENT

This Court should affirm the Commission's final order approving replacement power costs for DEF in connection with the CR4 forced outage. The Office of Public Counsel's initial brief fails to establish any legal basis to reverse the final order.

As a threshold matter, OPC failed to preserve nearly all of the arguments raised in its initial brief. A party seeking to preserve an issue for review by an appellate court must first present that issue to the lower tribunal along with the specific legal arguments or grounds to be argued on appeal. When the alleged error first arises in a final order, a motion for rehearing must be filed to preserve the error for review. Finally, a party seeking to preserve an issue for appeal must obtain a ruling from the lower tribunal on its objections. Although OPC filed a timely motion for reconsideration of the final order raising the issues it now seeks to argue before this Court, it withdrew that motion without obtaining a ruling from the Commission on its objections. The initial brief's arguments faulting the Commission for "apportionment" of replacement power costs and consideration of "mitigating factors" were not preserved for review by this Court and have therefore been waived.

OPC's preservation issues aside, the Commission applied the correct burden of proof in evaluating whether DEF's actions and decisions leading up the CR4 outage were prudent. The Commission's final order accurately identifies the standard of review for prudence and correctly states that DEF bore the burden of proof

to meet this standard. The final order analyzes all of the evidence and arguments of the parties bearing on the prudence determination—both evidence that the Commission found to demonstrate prudence and evidence that could suggest a contrary finding. By approving replacement power costs, the final order necessarily concluded that DEF had satisfied its burden of proof to demonstrate prudence. OPC’s argument that the Commission “erroneously applied” the burden of proof and should have denied recovery to DEF is simply a call for this Court to reweigh the evidence and reach a different conclusion.

OPC’s assertion that the Commission acted outside the range of discretion delegated by the Legislature by approving DEF’s replacement power costs likewise finds no support in the record. OPC acknowledges that the Commission’s statutory authority to approve cost recovery through the fuel clause is derived from a broad grant of legislative ratemaking authority that must be “liberally construed.” But OPC then argues that the Legislature “has not delegated to the Commission the authority to eliminate a party’s obligation to satisfy the burden of proof.” The Commission’s final order claimed no such authority and accurately identifies the

applicable burden of proof. OPC's request that this Court enter an order directing the Commission to find that DEF failed to meet its burden of proof is yet another improper request for a judicial reweighing of the evidence.

The Commission's determination that DEF's prudence in connection with the CR4 outage justified recovery of replacement power costs is well supported by competent substantial record evidence. As to the first root cause of the CR4 outage, DEF presented evidence that the Manual Sync Check Relay was a highly reliable protective device, with an exceedingly low failure rate. The Commission found that the relay had been reasonably maintained and its failure was reasonably unforeseen by DEF. Had the relay performed as designed, the outage would not have occurred. As to the second root cause of the CR4 outage, DEF presented evidence that the CR4 operator was highly trained, with many years of experience, and had relied in this instance on a synchronization reset procedure that he had used successfully before based on his expectation that the Manual Sync Check Relay would perform as designed. This record evidence as to prudence readily satisfies the low burden of competent, substantial evidence.

Contrary to OPC's contention, the Commission's approval of cost recovery for the CR4 outage under the unique factual circumstances of this case does not represent an unexplained departure from "officially stated agency policy or practice." The analysis of DEF's prudence contained in the final order is consistent with the fact-intensive nature of PSC's prior orders; and even if it were not, the order explains the PSC's reasoning as required by law.

Finally, the Commission committed no material error impairing the fairness of the proceeding below or the correctness of its decision. The Commission provided all parties the extensive procedural protections afforded by the Florida Administrative Procedure Act, an opportunity for post-hearing briefing, and an additional opportunity to file a motion seeking reconsideration of the final order. OPC either availed itself of these procedural protections or—in the case of its withdrawn motion for reconsideration—voluntarily declined the opportunity to present its arguments and receive a ruling from the Commission on its objections.

The final order should be affirmed.

STANDARD OF REVIEW

Under the Florida Administrative Procedure Act, a reviewing court “shall remand a case to the agency for further proceedings consistent with the court’s decision or set aside agency action, as appropriate” when it finds that: 1) the agency’s action “depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing”; or 2) the agency “has erroneously interpreted a provision of law and a correct interpretation compels a particular action.” § 120.68(7), Fla. Stat.

In interpreting a state statute or rule, the Court “may not defer to an administrative agency’s interpretation of such statute or rule, and must instead interpret such statute or rule de novo.” Art. V, § 21, Fla. Const.

ARGUMENT

I. THE OFFICE OF PUBLIC COUNSEL FAILED TO PRESERVE ITS ARGUMENTS REGARDING THE COMMISSION’S “APPORTIONMENT” OF REPLACEMENT POWER COSTS AND ITS CONSIDERATION OF “MITIGATING FACTORS.”

As a threshold matter, nearly all of the arguments in OPC’s initial brief were not properly preserved in the proceedings before the Commission below and have therefore been waived. This Court has noted that it is “not appropriate for a party to raise an issue for the

first time on appeal.” *Sunset Harbour Condo. Ass’n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005). The preservation requirement is strictly construed, and requires the “specific legal argument or ground to be argued on appeal [to] be part of that presentation [below] if it is to be considered preserved.” *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985). The initial brief’s arguments faulting the Commission for “apportionment” of replacement power costs and consideration of “mitigating factors” were not preserved before the Commission for review by this Court and have therefore been waived.⁴

“It is well-established that for an issue to be preserved for appeal, it must be raised in the administrative proceeding of the alleged error.” *Dep’t of Bus. & Pro. Regul., Constr. Indus. Licensing Bd. v Harden*, 10 So. 3d 647, 649 (Fla. 1st DCA 2009).⁵ When the alleged error first appears in the final order, “an objection must be preserved by filing a motion for rehearing on the issue.” *Holland v. Cheney Bros., Inc.*, 22 So. 3d 648, 650 (Fla. 1st DCA 2009); *see also*

⁴ OPC makes variations of these unpreserved arguments throughout each of the initial brief’s five argument headings.

⁵ “Unpreserved arguments are reviewed only for fundamental error.” *O.H. v. Agency for Persons with Disabilities*, 332 So. 3d 27, 29 (Fla. 3d DCA 2021).

Pisano v. Mayo Clinic Fla., 333 So. 3d 782, 788 (Fla. 1st DCA 2022) (“A motion for rehearing may be required to preserve errors that appear for the first time in a written order, such as a failure to make statutorily required written findings”); *Williams v. Williams*, 152 So. 3d 702, 704 (Fla. 1st DCA 2014) (“where an error by the court appears for the first time on the face of a final order, a party must alert the court of the error via a motion for rehearing or some other appropriate motion in order to preserve it for appeal.”).

Throughout its initial brief, OPC faults the Commission for “apportioning” the replacement power costs between DEF and its ratepayers and for characterizing certain evidence of prudence as “mitigating factors” in its prudence determination. The Commission’s discussion of these topics first arose at the post-hearing agenda conference on November 23, 2021. R.51-63. The final order on appeal reflects the Commission’s vote at the agenda conference, including the approval of \$7.2 million in replacement power costs for DEF, the adjustment requiring DEF to credit its retail ratepayers in the amount of the remaining \$7.2 million, and the Commission’s discussion of certain evidence as “mitigating factors” in the prudence determination. R.49.

The final order also advised adversely affected parties of their right to request reconsideration of the Commission’s final action. R.50. OPC did so, filing a timely motion for reconsideration under Rule 25-22.060 of the Florida Administrative Code.⁶ DEF.Appx.6-13. But less than three weeks later, without receiving a ruling, OPC withdrew its motion for reconsideration. DEF.Appx.24-26. Because OPC abandoned the only motion it ever filed in the lower tribunal presenting the arguments it now seeks to address before this Court, those issues have not been preserved for appellate review. See *Pisano*, 333 So. 3d at 788 (noting that where appellants “withdrew their motion for rehearing, the issues raised therein are not before [the appellate court]”); *GEICO General Ins. Co. v. Williams*, 111 So. 3d 240, 246 (Fla. 4th DCA 2013) (declining to address unpreserved arguments and noting that “[t]here is no authority allowing

⁶ Because the Commission’s rules expressly authorize a motion for reconsideration of a final order, OPC’s filing of a timely motion tolled rendition of the final order under Florida Rule of Appellate Procedure 9.020(h)(1)(b). Cf. *Suelter v. State, Dept. of Mgmt. Servs., Div. of Ret.*, 977 So. 2d 697 (Fla. 1st DCA 2008) (noting that Division of Retirement, unlike the Public Service Commission, does not have a rule authorizing motions that delay rendition of its orders).

preservation of issues raised solely within an abandoned motion for rehearing.”).

Although OPC now seeks to argue before this Court that the Commission “committed reversible error when it introduced the concept of ‘mitigating factors’ into a Fuel Clause prudence determination case” (IB 32), OPC never provided the Commission an opportunity to address that alleged error by obtaining a ruling on its motion for reconsideration. All of OPC’s arguments regarding the “apportionment” of replacement power costs between DEF and its customers and the Commission’s consideration of “mitigating factors” have been waived by its failure to first obtain a ruling from the Commission on those arguments presented solely in OPC’s abandoned motion for reconsideration.

“It is difficult to overemphasize the importance, absent fundamental error, of preserving issues and arguments before asking an appellate court to reverse” a lower tribunal’s final order. *Pensacola Beach Pier, Inc. v. King*, 66 So. 3d 321, 326 (Fla. 1st DCA 2011). OPC failed to preserve the legal arguments it now seeks to argue on appeal, and those arguments have therefore been waived.

II. THE COMMISSION APPLIED THE CORRECT BURDEN OF PROOF, CONSISTENT WITH ITS STATUTORY AUTHORITY, IN EVALUATING EVIDENCE OF DEF'S PRUDENCE, AND ITS FINDINGS ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

OPC's preservation issues aside, the initial brief fails to demonstrate any reversible error in the Commission's application of the burden of proof or any manner in which the Commission's actions exceeded the scope of its statutory authority. To the contrary, the final order accurately identifies the correct standard of review and burden of proof in a prudence determination and applies that standard to the evidence presented at the final hearing. OPC's disagreement with the Commission's evaluation of the evidence is neither an "abrogat[ion]" of the burden of proof (IB 11) or an "eliminat[ion]" of a party's obligation to satisfy the burden of proof (IB 18) as argued in Sections I and II of the initial brief. And, contrary to the arguments set forth in Section IV of the initial brief, the Commission's findings reflected in the final order are well-supported by competent substantial evidence.

A. The final order applies the correct burden of proof.

It is well settled that the regulatory duty of the PSC requires the evaluation of evidence presented by the utility in support of fuel

costs, and authorizes recovery of costs reasonably and prudently incurred. *Florida Power Corp. v. Cresse*, 413 So. 2d 1187 (Fla. 1982). The PSC applies an objective standard to analyze prudence: “what a reasonable utility manager would have done, in light of the conditions and circumstances that were known, or should have been known, at the time the decision was made.” *S. All. for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013); accord *Duke Energy Fla., LLC v. Clark*, 47 Fla. L. Weekly S183, 2022 WL 2517162 (Fla. July 7, 2022). The utility bears the burden of proof to demonstrate reasonableness and prudence by a preponderance of the evidence. *Cresse*, 413 So. 2d at 1191.

To prevail below, DEF therefore had to prove by a preponderance of the evidence that its actions and decisions leading up to the CR4 outage were “prudent.” The Commission’s final order correctly stated and applied this burden of proof, consistent with its statutory authority, in evaluating the evidence of DEF’s prudence. The final order acknowledges the parties’ agreement that the “reasonable utility manager” standard applies to a prudence review. R.47. The final order also properly places the burden to meet this standard on DEF. *See id.* (“It is also clear that DEF has the burden

of proof to meet this [reasonably utility manager] standard by providing credible evidence in the record.”).

After correctly identifying the standard of review and burden of proof, the final order then analyzes the record evidence before the Commission regarding the two independent root causes of the outage identified in DEF’s RCA. R.46-49. The Commission summarized testimony from DEF’s witness regarding the regular maintenance and calibration of the Manual Sync Check Relay, concluding that the equipment was “reasonably maintained” and that the failure of the relay “was reasonably unforeseen by the Company.” R.47. The Commission also recognized that no device attached to the Relay would have indicated its failure to the operator in advance of the outage. R.49. Had the Manual Sync Check Relay performed as designed, the outage would not have occurred. R.47.

As to the second root cause—the “operator’s failure to follow proper operational procedures” (R.47)—the Commission found that the operator was “highly trained and with many years of experience” and had “rel[ied] on a procedure he had used successfully before.” R.49. The evidence did not “suggest the operator acted with malice or intentional disregard for safety.” R.48. Although the operator had

successfully used the same procedure in the past to reset the synchronization, DEF had no approved written procedure in place for the procedure. R.48.

The Commission's ultimate conclusion as to prudence echoed the testimony of DEF's witness that the outage could only have occurred because of the confluence of the two independent root causes:

If [the operator] closed it at the correct time and the device was failed, we never would have known. Had he closed prematurely and the device had been good, this event wouldn't have happened. So when he closed early [and] the protective device failed to do its job, [] that's what led to the event.

R.47 (quoting Tr. 396-97). The Commission found that the failure of the plant operator to follow written procedures, without supervisory approval, directly led to the outage at CR4. R.49. But, as noted above, the Commission also acknowledged other evidence relevant to the outage and to the ultimate evaluation of prudence: the unforeseeable failure of the Manual Sync Check Relay that had been repeatedly tested and established to be reliable. R.49.

Under these unusual and highly fact-specific circumstances, the Commission concluded that the replacement power costs should

be “shared equally by retail ratepayers and DEF.” R.49. The Commission’s approval of \$7.2 million in replacement power costs for DEF necessarily amounts to an ultimate conclusion that DEF had carried its burden of proof as to prudence under the standard of review recited in the order. Had the Commission found the greater weight of the competing evidence to demonstrate imprudence, it would have denied recovery.

OPC errs in claiming that the Commission “abrogated the burden of proof” in its final order. IB 11. What the final order describes as “mitigating factors” is nothing more than the evidence of prudent conduct by DEF that the Commission weighed against competing evidence in arriving at its conclusion that DEF was entitled to approval of CR4 replacement power costs. The record does not reflect any conclusion by the Commission that “DEF’s imprudence caused the outage.” IB 13. OPC effectively asks this Court to evaluate the record evidence in the first instance and arrive at a different conclusion as to whether DEF had carried its burden of proof to demonstrate prudence. But this Court, of course, “will not reweigh the evidence or overturn an order of the PSC because the

Court might have arrived at a different result.” *GTC, Inc. v. Edgar*, 967 So. 2d 781 (Fla. 2007).

B. The final order is consistent with the Commission’s delegated legislative authority.

OPC also claims that the Commission “acted outside of the range of discretion delegated to it by the Legislature” and asks this Court to “stop the Commission’s efforts to adjudicate outside of its authority” by issuing the final order here.⁷ IB 14, 18. OPC specifically argues that the Legislature “has not delegated to the Commission the authority to eliminate a party’s obligation to satisfy the burden of proof” in fuel clause proceedings. IB 18. These arguments are unsupported both legally and factually and should be rejected.

⁷ OPC acknowledges this Court’s longstanding recognition of the Commission’s jurisdiction over the Fuel Clause as a valid exercise of its statutory ratemaking authority. *Citizens of State v. Graham*, 191 So. 3d 897, 901 (Fla. 2016). IB 14-17. *See also Citizens v. Pub. Serv. Comm’n*, 425 So. 2d 534, 540 (Fla. 1982) (“This Court has consistently recognized the broad legislative grant of authority which these statutes confer and the considerable license the Commission enjoys as a result of this delegation.”). OPC also recognizes that “all provisions of Chapter 366 shall be ‘liberally construed.’ ” IB 15; § 366.01, Fla. Stat. (“this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose.”).

Given the complex nature of utility rate-making, the Commission exercises delegated authority “to permit administration of legislative policy by an agency with the expertise and flexibility needed to deal with complex and fluid conditions.” *Microtel, Inc. v. Fla. Pub. Serv. Comm’n*, 464 So. 2d 1189, 1191 (Fla. 1985); *see also Fla. Power & Light Co. v. Albert Litter Studios, Inc.*, 896 So. 2d 891, 896 (Fla. 3d DCA 2005) (“Given the arcane complexities of utility rate-making, the legislature’s decision to vest supervision of rates and service exclusively in the Commission must be respected.”). The final order here is an exercise of delegated authority entirely consistent with the statutory framework.

Nothing in the final order purports to “eliminate a party’s obligation to satisfy the burden of proof,” as claimed by OPC. IB 18. OPC does not even attempt to demonstrate through citation to record evidence that the Commission “eliminate[d]” DEF’s burden of proof. Instead, the initial brief summarizes the statutory and decisional authority describing the Commission’s fuel clause jurisdiction (IB 14-18) and then asks this Court to “require the Commission to enter a new order finding that DEF failed to meet DEF’s burden of proof” and to “adjust DEF’s replacement fuel costs by \$14.4 million” rather

than \$7.2 million. IB 19. Stripped of its rhetoric, OPC's arguments in Section II of the initial brief are simply another improper call for this Court to reweigh the evidence and arrive at a different conclusion than the Commission.

C. Competent, substantial evidence supports the Commission's findings in the final order.

As described in Section II(A) above, the Commission's findings as to prudence are well supported by competent substantial evidence in the record. OPC nevertheless argues in Section IV of its initial brief that the Commission's findings regarding the "mitigating factors" described in the final order are unsupported by competent substantial evidence. IB 23-28. OPC's arguments, once again, amount to nothing more than a request that this Court reweigh the evidence to reach an alternate conclusion. *See Crist v. Jaber*, 908 So. 2d 426 (Fla. 2005) ("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 Commission's findings."); § 120.68(7)(b), Fla. Stat. ("[T]he court shall not substitute its judgment for that of the

agency as to the weight of the evidence on any disputed finding of fact”).

Competent, substantial evidence is evidence that is “sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.” *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). “Competent substantial evidence is a low threshold.” *O.H. v. Agency for Persons with Disabilities*, 332 So. 3d 27, 33 (Fla. 3d DCA 2021).

The “mitigating factors” discussed in the final order are supported by competent substantial record evidence, principally the testimony of DEF’s witness and the RCA. OPC’s claim that the findings based on this evidence are “nonsensical” (IB 24) or “simply illogical” (IB 28) substitutes rhetoric for argument and fails to adequately acknowledge the considerable record evidence before the PSC. DEF witness Simpson testified extensively about the different synchronization methods utilized at CR4 (R.1865-66; 1943-44), the troubleshooting process employed by the CR4 operator (R.1866; 1868-70; 1900; 1903-04; 1929; 1967-69; 1983), the failure of a highly reliable device intended to prevent the exact scenario that led to the out-of-phase synchronization (R.1868; 1904-05; 1926-27;

1981-82), how the Manual Sync Check Relay operates (R.1881; 1980), the maintenance performed by DEF on the Manual Sync Check Relay (R.1882; 1884), and the experience of the CR4 operator (R.1909; 1930; 1982). This record evidence refutes OPC's claim that the final order relies on findings of fact that are not supported by competent, substantial evidence.

OPC also complains that no evidence was presented separately assigning a proportion of the replacement power costs to each of the two independent factors contributing to the outage. IB 27-28. This argument ignores the record evidence that only the unforeseen *combination* of the two root causes would have caused the CR4 outage. Had the Manual Sync Check Relay worked as designed and anticipated, the operator's failure to employ the standard synchronization method would not have caused an outage. R.47. Had the operator attempted synchronization at the correct time, the failure of the Relay would not have caused the outage. *Id.* Under these highly fact-specific circumstances, with two independent factors at issue, the Commission's determination that a 50% adjustment was appropriate represents a permissible exercise of

discretion in evaluating whether any adjustments were required as to DEF's recovery of replacement power costs.

Ultimately, OPC's argument rests on its disagreement with the PSC's evaluation of the evidence and the "threat" the Commission's conclusions in this case allegedly poses to future agency decision making. *See* IB 26. This is not the relevant inquiry for reversal under section 120.68(7)(b), as this Court is not free to substitute its judgment for that of the PSC to reach alternative conclusions.

* * *

The final order applies the correct burden of proof and is fully consistent with the Commission's statutory authority over the fuel clause. The Commission's findings are supported by competent, substantial evidence in the record. The final order should be affirmed.

III. THE COMMISSION'S FINAL ORDER DOES NOT REPRESENT AN UNEXPLAINED DEPARTURE FROM PRIOR AGENCY PRACTICE.

OPC next argues, in Section III of the initial brief, that the PSC's approval of cost recovery for the CR4 outage is inconsistent with "prior agency practice and established policy" and that the PSC did not explain the deviation. IB 19. The analysis of DEF's prudence

contained in the final order is consistent with the fact-intensive nature of PSC's prior orders; and even if it were not, the order explains the PSC's reasoning as required by section 120.68(7)(e)(3).

OPC points to no comparable factual circumstances in any other PSC rate proceeding where the agency either approved or disapproved recovery. Although agency action reaching inconsistent results based on similar facts is improper, *Fla. Cities Water Co. v. State, Public Service Commission*, 705 So. 2d 620, 626 (Fla. 1998), OPC fails to provide an appropriate point of comparison.

The initial brief's reliance on *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, Order No. PSC-2009-0024-FOF-EI (January 7, 2009) fails to provide comparable facts to the events preceding the CR4 outage. As described by OPC, the case involved a temporary employee who "vandalized" the plant "by drilling a hold in pressurized piping." IB 20. In contrast, the CR4 operator here was a highly trained and well-respected employee of DEF who relied on a troubleshooting method that had previously been successful. R.49. *See also id.* ("We also find that if the relay had not failed, then the operator's disregard of written procedures and use of an unapproved procedure would not

have resulted in an outage” and “we recognize that the operator, highly trained and with many years of experience, was relying on a procedure he had used successfully before.”). Moreover, the Final Order highlights that “[t]he operator’s understanding of the relay was based on past experience and training. Therefore, the evidence in the record does not suggest the operator acted with malice or intentional disregard for safety.” R.48.

This Court “will not substitute its judgment for that of an agency on an issue of discretion.” *Orlando Pro. Fire Fighters, Local 1365, IAFF v. City of Orlando*, 317 So. 3d 276, 278 (Fla. 1st DCA 2021). OPC has not demonstrated that the detailed and fact-intensive analysis contained in the final order here represents a departure from prior agency practice on similar facts or that the final order is inconsistent with the governing statute. *See* § 366.06(1), Fla. Stat. (criteria for cost recovery includes showing that costs were reasonably and prudently incurred). The final order explicitly considers the statutory criteria and applies the “reasonable utility manager” standard (R.47) repeatedly articulated as the PSC’s policy. The final order’s use of the term “mitigating factors” to describe evidence tending to demonstrate prudence does not amount to use

of a new method for calculating prudence or a deviation from the well-established standard. The mere fact that the agency may not have previously adjusted approved recovery costs by 50% does not mean that its decision to do so under the facts here amounts to a departure from agency practice or policy.

OPC also provides no basis for its apparent presumption that the adjustment reflected in the final order reflects a \$7.2 million dollar *increase* in approved replacement power costs (compared to \$0 if the Commission had found DEF imprudent), as opposed to a \$7.2 million dollar *decrease* in approved replacement power costs (compared to \$14.4 million if the Commission had not made the adjustment and required DEF to credit half of the replacement power costs to its retail ratepayers). IB 19-23. If this Court were to agree with OPC that the 50% adjustment was improper, it should remand to the PSC for further proceedings rather than deciding that question in the first instance. § 120.68(6)(a)1., Fla. Stat.

Even if the Commission's decision were considered a deviation from established agency practices, the final order provides an adequate explanation under section 120.68(7)(e). As the final order acknowledges, each analysis of prudence and reasonableness is

overwhelmingly fact specific. R.48. The final order analyzes the competing evidence regarding DEF's prudence in returning CR4 to service through synchronization of the unit to the grid, and relies on the conclusions drawn from that evidence to determine that a 50% adjustment of DEF's approved replacement power costs was appropriate here. R.47-49. To the extent section 120.68(7)(e) applies, the final order therefore complies with the statutory requirement for the Commission to explain any deviation from officially stated agency policy or a prior agency practice.

IV. THE COMMISSION DID NOT COMMIT ANY MATERIAL ERROR IMPAIRING THE FAIRNESS OF THE PROCEEDING BELOW OR THE CORRECTNESS OF THE COMMISSION'S ACTION.

OPC fails to identify any actual error—let alone a material error—in the Commission's proceedings below. OPC argues that the Commission committed material error when it “failed to establish a procedure before hearing that would allow it to make a finding regarding whether DEF satisfied the burden of proof or to depart from its established policy and practice that would require such a determination.” IB 29. Because the PSC's actions in reviewing DEF's petition for recovery of replacement power costs is the product of due

process, and the PSC afforded OPC all the process to which it was entitled under the law, there is no material error.

Procedural due process “serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue.” *Dep’t of Law Enf’t v. Real Prop.*, 588 So. 2d 957, 960 (Fla. 1991). OPC was entitled to a formal hearing under section 120.57(1) where “[a]ll parties shall have an opportunity to respond, to present evidence and argument on all issues involved” and “[f]indings of fact shall be based upon a preponderance of the evidence. . .and shall be based exclusively on the evidence of record and on matters officially recognized.” § 120.57(1)(b), (j), Fla. Stat.

Section 120.68(7)(c), Florida Statutes, requires this Court to remand a case to an agency for further proceedings when it finds, “[t]he fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure.” In reviewing DEF’s petition, the PSC afforded due process through a formal administrative hearing, giving DEF the opportunity to carry its burden by presenting evidence of the prudence of its actions. In the course of the PSC proceeding, the

PSC identified the substantive issue to be addressed in Issue 1C. The PSC held an evidentiary hearing where DEF presented the direct and rebuttal testimony of Simpson, who was the subject of extensive cross examination by OPC and other parties. R.1863-1983. Then, the PSC deferred ruling on Issue 1C, allowing the parties to file post-hearing briefs. R.1986.

The limitation of discussion at the agenda conference to the PSC commissioners does not erase the procedure afforded at the evidentiary hearing and did not amount to material error. Even so, the PSC *provided* OPC a procedure for “formal objection” (IB 30) to the decision of the PSC articulated in the final order through a timely motion for reconsideration. R.50. And OPC took advantage of that opportunity by *filing* a motion for reconsideration—before voluntarily withdrawing that motion and abandoning its arguments instead of obtaining a ruling from the Commission on its objections. DEF.Appx.6-13, 24-26. To the extent OPC now complains that it was unable to articulate its position on these issues, that circumstance is a product of OPC’s own litigation strategy.

OPC’s claim that the process afforded to it constitutes a violation of section 120.57(1)(b) (IB 30) and section 120.57(1)(j) (IB

31) ignores the extensive evidence presented to and evaluated by the PSC in the final order. OPC's argument that the PSC "ma[de] a decision based on anything other than the evidence presented at the hearing" in an effort to "cut DEF a break" is also unsupported by the record. IB 31. DEF presented extensive evidence as to the factors leading to the out-of-phase synchronization that would allow the PSC to reach the factual and legal conclusions as to prudence contained in the final order. The record in this appeal demonstrates that OPC was afforded all the process to which it was entitled under the law.

Finally, OPC claims that an absence of evidence regarding how much of the replacement power costs were attributable to each of the two identified root causes "violates the customers' due process right to a fair hearing." IB 31. As explained above in Section III, however, the adjustment to DEF's replacement power costs reflected in the final order is consistent with the fact-specific, two-independent-cause nature of the specific dispute here. The potential for an adjustment was also communicated to all parties in advance by the wording of Issue 1C. *See* R. 2301 ("If appropriate adjustments

are needed and have not been made, what adjustments should be performed?”).

The Commission did not commit any material error impairing the fairness of the proceeding or the correctness of the decision reflected in the final order. The final order should be affirmed.

CONCLUSION

This Court should affirm the Commission’s final order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this document was filed with the Florida Courts E-Filing Portal and served by email on July 27, 2022 to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Rule 9.045(b), Florida Rules of Appellate Procedure because it was prepared in a proportionally spaced typeface using 14-point font Bookman Old type style. This brief complies with the type volume limitations set for in Rule 9.210(a)(2)(B), Florida Rules of Appellate Procedure. This brief contains 7,852 words, excluding the parts of the brief exempted by Rule 9.045(e).

/s/ Daniel Nordby