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IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, ETC.,

Appellant,

vs.

GARY F. CLARK, ETC., ET AL.,

Appellees.
_____/

Case No.: SC22-94
L.T. No.: 20210001-EI

APPEAL FROM THE FLORIDA PUBLIC SERVICE COMMISSION

ANSWER BRIEF OF APPELLEE FLORIDA PUBLIC SERVICE COMMISSION

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SYMBOLS AND REFERENCES

In this Answer Brief, Appellant, Citizens of the State of Florida, through the Office of Public Counsel, will be referred to as "Office of Public Counsel" or "OPC." Appellee Duke Energy Florida, LLC, will be referred to as "DEF." Appellee Florida Public Service Commission will be referred to as "the Commission."

The final order on review, Order No. PSC-2021-0466-FOF-EI, issued December 21, 2021, in Docket No. 20210001-EI, Order Approving Crystal River Unit 4 Replacement Power Costs for Duke Energy Florida, LLC, will be referred to as "the Final Order."

The following symbols will be used:

(R. [Page #]) – Record on Appeal; and

(OPC B. [Page #]) – OPC's Initial Brief, filed on April 27, 2022.

All references to statutes, rules, and the Florida Constitution are to the 2021 versions.

STATEMENT OF THE CASE AND OF THE FACTS

This case is a direct appeal by OPC of the Commission's Final Order, which granted in part DEF's request to recover its replacement power costs incurred as a result of an extended outage of its Crystal River Unit 4 (CR4) power plant. (R. 45) This Court has mandatory jurisdiction pursuant to article V, section 3(b)(2), Florida Constitution, and sections 350.128(1) and 366.10, Florida Statutes, because the Final Order is an action related to the rates of a public utility providing electric service.

DEF's Petition for Cost Recovery

The case below arose when DEF filed a petition in the Commission's 2021 Fuel Clause proceeding[1] requesting cost recovery for fuel costs, including the recovery of replacement power costs resulting from the aforementioned CR4 outage. (R. 3012-69) OPC had previously filed a Notice of Reaffirming Party Status to participate in the Commission's 2021 Fuel Clause proceeding. (R. 6277-79) All parties agreed that DEF's replacement power costs

[1] The Fuel Clause proceeding is a long-established regulatory tool used by the Commission to permit utilities to pass fluctuating fuel costs and savings through to customers between formal ratemaking proceedings.

related to the CR4 outage totaled $14.4 million. (R. 46, 1642-43, 1898-99) There was also no dispute that DEF's costs from the CR4 outage were the type of costs ordinarily considered for recovery in the Commission's Fuel Clause proceedings.

Discovery related to the CR4 outage took place in the months leading up to an administrative hearing.[2] In a prehearing order, the prehearing officer determined that the issue of DEF's replacement power costs was ripe for litigation, noting that no party had requested additional discovery or time to consider the issue. (R. 2353-54) The prehearing order also detailed procedural matters for conducting the hearing, such as the identification of the issues under consideration, including the issue of the CR4 outage.[3] (R. 2301)

The Administrative Hearing

The central issue considered by the Commission at the hearing and argued by the parties was whether DEF acted

[2] Discovery matters were handled in accordance with the procedures set forth in the Commission's Order Establishing Procedure (R. 6163-75) and subsequent amendatory orders.

[3] Most of the issues in the Commission's 2021 Fuel Clause proceeding were resolved by stipulation of the parties or bench decision and are unrelated to the present case. (R. 45)

prudently in its operations related to the CR4 outage so as to allow cost recovery for the replacement power costs. (R. 1850-51, 1853, 1855-57)

DEF called as a witness Joseph Simpson, the Generation Engineering Manager who leads DEF's Regional Engineering Organization for the Florida Generating Fleet with fifteen years of power generation experience, to address the issue at the hearing. (R. 1863-64)[4] Witness Simpson's testimony focused on matters related to the cause of the CR4 outage and the prudence of DEF's actions. (R. 1860-983) Witness Simpson also sponsored DEF's Root Cause Analysis (RCA) exhibit and its Repair Evaluation Report exhibit at the administrative hearing. (R. 1864-65) Witness Simpson further testified on the qualifications and experience of the DEF employees who prepared the RCA. (R. 1879-80)

OPC and other parties to the proceeding cross-examined witness Simpson but no other witnesses were called at the administrative hearing to counter witness Simpson's testimony.

[4] The Commission also received into the record the prefiled testimony of DEF witness Gary P. Dean that was stipulated to by the parties. (R. 1997-2029) Witness Dean's testimony focused on DEF's calculations of cost recovery amounts, which were not disputed as it relates to the CR4 outage event. *Id.*

After the hearing, DEF and OPC filed post-hearing briefs, containing their arguments based on the evidence from the hearing. (R. 195-208, 209-27)

The CR4 Outage Event

On December 16, 2020, DEF returned CR4 to service after a planned outage.[5] The following day, the generator tripped and went offline again due to a boiler feed water pump control issue, necessitating a response from the operator to bring the unit back online. (R. 339, 1876) The operator working at CR4 on that occasion was highly trained and had fifteen years of experience as a plant operator (R. 1345, 1903); however, evidence indicated that the supervisor on duty at CR4 was not yet fully trained (R. 341, 1915-16).

In order to return CR4 to service and reconnect it to the grid, the operator needed to perform a synchronization to align the generator's electrical parameters to those of the grid. (R. 339, 1865) If a synchronization is attempted when those parameters are not aligned properly, an "out-of-phase" event can occur. (R. 1865-66) A

[5] DEF's RCA stated that on December 16, 2020, CR4 was returned to service after an extended outage related to boiler feed pump repair. (R. 339)

synchronization can be performed using either an automatic or a manual procedure. *Id.* DEF's standard operating procedure at CR4 is to synchronize the unit using the automatic procedure, and the plant operator attempted three times to do so without success. (R. 339, 1865-66) After a failed synchronization attempt, standard operating procedure is to perform a "walkdown," a troubleshooting procedure in which an operator inspects various failure modes in turn, corrects discovered issues, and attempts synchronization again after resetting the system. (R. 1346) In this case, there was evidence suggesting that the operator performed a walkdown after the three failed attempts and corrected issues after each one, but the evidence was unclear as to whether those walkdowns were thoroughly completed or whether a walkdown was in fact performed after the third failed attempt, and the operator did not consult with a supervisor after the failed attempts. (R. 339, 341, 1938)

After the third unsuccessful attempt to synchronize the unit using the automatic procedure, the operator attempted to reset the synchronization circuit so that it would allow an automatic synchronization. (R. 204-05, 339, 1974-75) In order to do so, the operator "green flagged" the breaker in automatic, placed the

synchronization switch in manual, and then "red flagged" the breaker; a procedure that was neither a manual nor an automatic synchronization attempt but that the operator expected to produce a failed synchronization that would reset the circuit. (R. 339, 1866, 1975) The operator had successfully performed this circuit reset procedure in the past, although DEF's standard operating procedure would have been to attempt a fully manual synchronization after the automatic attempts failed. (R. 341, 345, 1976)

On this occasion, however, unbeknownst to the operator, the Beckwith Manual Sync Check Relay ("relay") had failed. (R. 339) Thus, when the plant operator red flagged the breaker, the generator attempted to synchronize to the grid in an out-of-phase position, an outcome the relay would have prevented had it been functioning properly. (R. 339, 1868) The generator's rotor was damaged as a result of the event, and subsequent repairs and testing kept CR4 in a forced outage from January 2021 through April 2021. (R. 339-40)

The relay model used in CR4 had a track record of reliability and an "exceedingly low failure rate." (R. 340, 1981) Additionally, in

the years prior to the CR4 outage, DEF conducted testing on the relay more frequently than recommended by industry experts. (R. 1348, 1881-84)

DEF's Root Cause Analysis (RCA)

Following the CR4 outage, DEF prepared a RCA, in keeping with industry practice when such an event occurs. (R. 338-46) The RCA identified as the two root causes of the CR4 outage event (1) the failure of the relay, and (2) the operator's reliance on his own past experience and failure to follow proper operational procedures. (R. 341) The RCA also identified seven "contributing causes" that related to issues with training or communication. (R. 341-42) The RCA also stated that the Beckwith Manual Sync Check Relay model used in the CR4 unit had "little to no history of failure in decades of operation" and that it had passed its most recent functional test in April 2020. (R. 340)

Additionally, the RCA identified a "Five (5) Why Staircase," summarizing how the out-of-phase synchronization occurred due to the operator's reliance on his past experience successfully using the red flagging circuit reset procedure. (R. 344)

The Commission Agenda Conference and Vote

After the evidentiary record was closed and the parties submitted post-hearing briefs, the Commission considered DEF's petition to recover replacement power costs at a public meeting, referred to as an "Agenda Conference." Commission staff submitted a recommendation for the Commission's consideration at the Agenda Conference. (R. 143-50) Staff's recommendation concluded that DEF's customers should not bear the replacement power costs.[6] (R. 149)

The underlying issue considered by the Commission was whether DEF's conduct conformed to the reasonable utility manager prudence standard—"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." (R. 47, 55)[7] Much of the discussion by and among the

[6] The matter of DEF's recovery of replacement power costs through Fuel Clause ratemaking was labeled as Item 4B for the December 7, 2021, Agenda Conference. (R. 51)

[7] Staff's recommendation framed the issue for decision identically to Issue 1C from the evidentiary hearing as whether "DEF made appropriate adjustments, if any are needed, to account for replacement power costs associated with" the CR4 outage and, if not, "what adjustments should be performed." (R. 145, 2301)

Commissioners centered on their general agreement that, contrary to staff's recommendation, the failure of the relay was an important factor in the events leading to the CR4 outage. Commissioner La Rosa stated that he didn't "necessarily feel that [staff is] pointing to the exact cause" and that he thought "the equipment failure [of the relay] is a massive problem that was significant." (R. 53) Chairman Clark agreed with Commissioner La Rosa's statements, saying that "it's not a hundred percent conclusive in either direction" and that "I can assign some blame and some responsibility [to DEF] and I can understand that there's equipment failure that happens and occurs." (R. 54) Commissioner Fay and Commissioner Graham also expressed their agreement. (R. 56-57)

Facts mentioned by the Commissioners as important to their decision included the failure of the relay (R. 53); the credibility of DEF witness Simpson in testimony and under cross-examination (R. 53); whether DEF's standard procedures were followed (R. 56); whether the condition of the relay could have been known at the

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"Adjustment" refers to the Commission's process in Fuel Clause proceedings of setting and adjusting "fuel factors." If the Commission found DEF's costs to be prudently incurred, no "adjustments" would be required.

time the operator attempted to reset the synchronization circuit (R. 55-57); the lack of written procedure for troubleshooting after failed attempts to synchronize (R. 57); the operator's reliance on his extensive experience, and his performing as he normally would under the circumstances (R. 57); and that the operator's choice of action would have been effective apart from the failed relay (R. 57).

Additionally, Commissioner Passidomo asked Commission staff whether the outage would have occurred had the relay not failed. (R. 58-59) Staff answered that had "everything happened the way it was and the relay had not failed, we would not be here. There would be no outage." (R. 59) Furthermore, Commissioner Graham stated his opinion that the operator did not do anything wrong under the circumstances. (R. 57-58)

The Commission also discussed whether and to what extent DEF's replacement power costs should be recovered by the utility through increased rates. Commissioner Clark stated his opinion that "we don't have to assign a hundred percent responsibility in either direction" and that "maybe there is an equitable split here that [the Commission] should consider." (R. 54) Commissioner Fay asked Staff whether allocating responsibility was a possibility, and

Staff stated its opinion that the Commission had discretion to "look at the record and determine . . . that [DEF] wasn't wholly imprudent" and could allocate a percentage based on the record. (R. 55) Additional support for allocating the replacement power costs was then expressed by other Commissioners (R. 56, 58), and although the Commission expressed the imprecision of pinpointing a precise percentage of responsibility for the outage under the facts of this case (R. 58, 60-61), the Commission ultimately unanimously voted to reject Staff's recommendation and to "split [the] responsibility" equally, allowing DEF to recover fifty percent of its replacement power costs. (R. 62-63, 91)

The Final Order

The Final Order memorialized the Commission's vote and focused on the issues of whether DEF's actions conformed to the reasonable utility manager prudence standard and what replacement power costs DEF should be allowed to recover. (R. 45-50) In the Final Order, the Commission summarized the positions of the parties and summarized the record evidence—DEF's RCA and the testimony of DEF witness Simpson, who was the only witness to testify on the CR4 outage at the administrative hearing. (R. 46-48,

201) The Commission also stated that DEF bore the burden to prove with credible evidence that its conduct conformed to the prudence standard. (R. 47)

The Commission then emphasized the fact-specific nature of replacement power cases and made the following findings of fact on the causal factors of the CR4 forced outage:

> We find that the record is clear that if 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. 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.

(R. 48-49) The Commission then discussed issues related to the weight it gave DEF's evidence, summarizing its analysis by stating:

> In sum, failure of the plant operator to follow written procedures, without supervisory approval, directly led to the outage at Crystal River Unit 4. However, 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, are mitigating factors that must be taken into account.

(R. 49) The Commission then reached its ultimate conclusion, stating that "replacement power costs shall be shared equally by retail ratepayers and DEF." (R. 49) Accordingly, the Commission

ordered that DEF could recover half its replacement power costs through its rates and that DEF, not its customers, should bear the other half. (R. 49)[8] This appeal followed.

SUMMARY OF THE ARGUMENT

It is undisputed that the Commission may approve recovery for utilities' fuel expenses under its ratemaking authority. The Commission correctly applied the undisputed burden of proof to DEF and weighed all of the evidence before making the factual determination that DEF acted prudently in part, and the Commission therefore allowed partial recovery of only DEF's prudently incurred costs rather than the entire amount requested in DEF's petition.

The Commission's Final Order as well as the Commission's process in reaching its decision comports with other ratemaking decisions and does not deviate from prior agency practice or established Commission policy. OPC's allegation that its due process rights were violated should be rejected because the Commission satisfied the requirements of chapter 120, Florida

[8] The Commission ordered that the necessary adjustments be made to DEF's Fuel Clause factors and that $7.2 million should be "credited to [DEF's] retail ratepayers." (R. 49)

Statutes, in every step of the administrative hearing process; OPC was afforded every opportunity to participate and make arguments on all issues in the proceeding below; and the record shows that OPC failed to offer any witnesses that countered DEF's witness testimony.

Moreover, the Final Order is supported by competent, substantial record evidence. OPC's arguments amount to a disagreement with the Commission's weighing of the evidence and with the Commission's judgment that DEF satisfied its burden of proof with respect to certain causal factors, determinations which led to the Commission's ultimate decision that DEF acted prudently in part and that therefore DEF was entitled to partial recovery in this case for those replacement power costs deemed to be prudently incurred.

The Court should reject OPC's invitation to reweigh the evidence in the record and to substitute its judgment for that of the Commission on matters of discretion. The Commission has the authority, flowing from its broad ratemaking authority, to allow partial recovery of a utility's replacement power costs where, as

here, the Commission makes a factual finding that only a portion of those costs were prudently incurred.

The Court should affirm the Final Order.

STANDARD OF REVIEW

"Commission orders come to this Court clothed with the presumption that they are reasonable and just." *Sierra Club v. Brown*, 243 So. 3d 903, 907 (Fla. 2018) (quoting *W. Fla. Elec. Coop. Ass'n v. Jacobs*, 887 So. 2d 1200, 1204 (Fla. 2004)). To overcome this presumption, a party challenging an order of the Commission on appeal has the burden of showing a departure from the essential requirements of law and the legislation controlling the issue, or that the findings of the Commission are not supported by competent, substantial record evidence. *Id.* at 907-08 (quoting *Crist v. Jaber*, 908 So. 2d 426, 430 (Fla. 2005)).

This Court affords great deference to the Commission's findings and will not overturn a Commission order because it would have arrived at a different result had it made the initial decision and will not reweigh the evidence. *Id.* at 908 (quoting *Gulf Power Co. v. Fla. Pub. Serv. Comm'n*, 453 So. 2d 799, 803 (Fla. 1984)*; see also* § 120.68(7)(e), Fla. Stat. ("[T]he court shall not substitute its

judgment for that of the agency on an issue of discretion."). The standard of review for each specific point on appeal is contained at the beginning of each point of the Commission's argument.

ARGUMENT

I. THE COMMISSION DID NOT ERRONEOUSLY INTERPRET ANY STATUTE OR RULE AND CORRECTLY APPLIED THE BURDEN OF PROOF TO DEF.

Standard of Review

OPC argues in Point I of its Brief that the Commission erroneously "interpreted and applied" the burden of proof in its decision to approve partial recovery of DEF's replacement power costs for the CR4 outage. (OPC B. 10-11, 13) The Court may remand to the agency or set aside an agency action where the Court finds that "[t]he agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action." § 120.68(7)(d), Fla. Stat. Where the Court is called upon to examine an agency's interpretation of a statute or rule, the Court does so *de novo*. Art. V, § 21, Fla. Const.

OPC has failed to show that the Commission erroneously interpreted a statute or rule. The Commission submits that in spite of the standard of review cited by OPC, the proper standard of

review is whether there is competent, substantial evidence supporting the Final Order. §§ 120.68(7)(b), (10), Fla. Stat. "[T]he Commission's factual findings are entitled to a presumption of correctness" when supported by competent, substantial evidence, and the Court must not substitute its judgment for that of the Commission as to the weight of disputed factual evidence. *S. All. for Clean Energy v. Graham*, 113 So. 3d 742, 752 (Fla. 2013) (quoting *Crist*, 908 So. 2d at 430); §§ 120.68(7)(b), (10), Fla. Stat.

Argument in Response

OPC argues in Point I of its Brief that the Commission erroneously interpreted the burden of proof in its decision to allow DEF to partially recover replacement power costs. (OPC B. 10-11, 13) However, OPC fails to point to any statute or rule that the Commission erroneously interpreted. It cannot do so because the Commission did not erroneously interpret any statute or rule. Instead, OPC misconstrues the standard of review and asks the Court to reverse the Commission's erroneous "application" of the burden of proof (OPC B. 11), apparently asking the Court to equate an allegedly wrongful application of a standard of evidence with an erroneous interpretation of a provision of law.

The Commission specifically cited to the legal standard for prudence in the Final Order—the same legal standard cited in case law and in OPC's Brief: "[W]hat 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." (R. 47) *See also, e.g.*, *S. All. for Clean Energy*, 113 So. 3d at 750. The Commission then weighed the evidence in light of this standard.

Moreover, the record is clear that DEF bore the burden of proof in the proceeding below. Indeed, the Final Order exclusively focused on DEF's petition to recover replacement power costs and the issues that stemmed from the petition—whether DEF's actions conformed to the reasonable utility manager prudence standard and what replacement power costs DEF should be allowed to recover. (R. 45-50) Furthermore, the record clearly demonstrates a consensus among the parties and the Commission that DEF bore the burden of proof to justify its requested cost adjustments, as the Commission explicitly stated in the Final Order. (R. 47, 55, 146, 197, 210)

A closer look at OPC's argument shows that it is not arguing that the Commission erroneously interpreted any legal standards but is really arguing that it disagrees with how the Commission weighed the evidence to determine whether the replacement power costs were prudently incurred. Prudence determinations are fact-intensive decisions made on a case-by-case basis after an evidentiary hearing on the record. *In re: Investigation of Fuel Adjustment Clauses of Electric Utilities*, Order No. 12645, 1983 WL 820350 (Fla. P.S.C. Nov. 3, 1983). The reasonable utility manager prudence standard is a standard of conduct, and Florida courts have consistently held that a determination of whether a party met or deviated from a standard of conduct is a factual determination for the trier of fact. *Holmes v. Turlington*, 480 So. 2d 150, 153 (Fla. 1st DCA 1985) (holding that "deviation from a standard of conduct is essentially an ultimate finding of fact clearly within the realm of the hearing officer's fact-finding discretion"); *Gross v. Dep't of Health*, 819 So. 2d 997, 1003 (Fla. 5th DCA 2002) (stating that "whether an individual violated a statute by breaching the applicable standard of care is a factual issue that is susceptible to ordinary methods of proof").

Likewise, whether a party has met its burden of proof is a question of fact. *J.D. v. Fla. Dep't of Children and Families*, 114 So. 3d 1127, 1133 (Fla. 1st DCA 2013); *Gross*, 819 So. 2d at 1005. Therefore, the Commission's determination of whether DEF met its burden of proof and satisfied the reasonable utility manager prudence standard is a finding of fact that, if supported by competent substantial evidence, the Court must not disturb. *See* §§ 120.68(7)(b), (10), Fla. Stat.; *Sierra Club*, 243 So. 3d at 914-15 (stating that "this Court will affirm the Commission's findings and conclusions if they are based upon competent, substantial evidence and are not clearly erroneous" and "will not re-weigh the evidence") (internal quotations omitted).

In the Final Order, the Commission summarized the positions of the parties and the record evidence. (R. 46-48) The Commission then made specific findings of fact on the two causes of the CR4 forced outage: the operator's use of a non-standard procedure in disregard of written procedures, and the equipment failure of the relay. (R. 48-49)

The two causal factors identified by the Commission mirrored the two "root causes" identified by DEF in its RCA (R. 341),

demonstrating that the Commission found DEF's evidence to be credible and persuasive. After stating its findings of fact, the Commission discussed issues related to the weight it gave DEF's evidence, summarizing its analysis by stating that the operator's actions "directly led to the outage" but that the operator's experience and the mechanical failure of the historically reliable relay "must also be taken into account." (R. 49) The Commission then reached its ultimate conclusion of whether DEF proved that its conduct conformed to the prudence standard by stating:

> As such, we find that replacement power costs shall be shared equally by retail ratepayers and DEF.

(R. 49) Thus, after making findings of fact, weighing the evidence, and applying DEF's undisputed burden of proof, the Commission found DEF's replacement power costs to be prudently incurred, in part, and accordingly allowed DEF partial cost recovery.

Contrary to OPC's assertions, the Final Order shows that the Commission made a factual finding that DEF met its burden to show by a preponderance of the evidence that its conduct in part conformed to the reasonable utility manager prudence standard, thereby resulting in an allowed recovery of only those costs the

Commission deemed to be prudently incurred. Nonetheless, even if it is assumed for the sake of argument that the Commission did not make an explicit finding regarding DEF's burden of proof, one can be inferred by the Commission's ultimate decision to allow DEF to partially recover replacement power cost costs. *See In re: Investigation of Fuel Adjustment Clauses of Electric Utilities*, Order No. 12645, 1983 WL 820350 (Fla. P.S.C. Nov. 3, 1983) (stating that "a ruling in favor of prudence should be inferred even if none is explicitly made"). In other words, because the evidentiary hearing and the Final Order exclusively focused on whether DEF incurred its replacement power costs prudently, the result granting partial recovery can only be taken as a determination that DEF met its burden with respect to a part of its conduct. The Final Order shows that the Commission applied the reasonable utility manager prudence standard to the facts and identified which of DEF's actions were found to have met the burden of proof thus meriting partial cost recovery. (R. 47, 49)

DEF was the only party to introduce witness testimony related to whether its replacement power costs were prudently incurred, and Commissioners specifically stated in their deliberations at the

Agenda Conference and made clear in the Final Order that they found DEF's evidence to be credible and persuasive to allow DEF partial cost recovery. (R. 48-49, 53) Thus, the Commission found after weighing *all* of the evidence that DEF met its burden of proof to receive partial cost recovery, and OPC's contention that the Commission omitted a specific finding to that effect, warranting reversal of the Final Order, is meritless.

OPC's argument that the Commission incorrectly applied the burden of proof in the proceeding below because the Commission "introduc[ed] its newly-minted notion of 'mitigating factors,' and . . . cit[ed] to those factors" in the Final Order in reaching its decision is also meritless. (OPC B. 11) OPC would have this Court believe that the Commission's weighing of the evidence in determining whether DEF met its burden of proof to allow for partial cost recovery was somehow erroneous because the word "mitigating" carried some legal meaning novel to the Fuel Clause cost recovery process. However, OPC's claim is based on a string of false equivalencies, flawed conclusions, and a reading of the Final Order that is questionable at best and disingenuous at worst.

OPC's characterization of the term "mitigating factors" is not supported by the Commission's discussion of mitigating factors in the Final Order. (OPC B. 13) While OPC seems to attach some legal significance to these words, the evidence described in the Final Order as "mitigating factors" was factual evidence the Commission weighed as it applied the burden of proof and came to its ultimate conclusions of fact that DEF satisfied its burden of proof with respect to certain causal factors and that DEF's replacement power costs were prudently incurred in part. Thus, the Court should reject OPC's false claim that the Commission's consideration of relevant evidence was some novel legal concept.

OPC's assertion that "the Commission determined that the *direct* cause of the outage was DEF's poor decision-making" is wrong. (OPC B. 12) OPC curiously ignores the Commission's explicit findings of fact regarding not one, but two, direct causal factors, or root causes, that directly led to the outage: operator error and equipment failure. (R. 48-49) As discussed above, the Commission weighed all the evidence from the hearing and found that DEF was prudent in some respects and imprudent in other respects, with the

Final Order reflecting this to allow DEF partial cost recovery for only those replacement power costs deemed to be prudently incurred.

The Commission, as the finder of fact, properly exercised its discretion to weigh all of the evidence in the record before coming to a conclusion regarding whether a utility has met its burden to show its costs were prudently incurred. In fact, by making specific findings of fact that both operator error and equipment failure contributed to the outage, the Commission clearly agreed with DEF's RCA, which identified "two root causes of the CR4 outage." (R. 47, 341) Moreover, as discussed in more detail in Point II, *infra*, Fuel Clause cost recovery decisions are ratemaking actions, and the Commission has broad discretion to consider fuel-related costs in ratemaking proceedings and allow utilities to recover prudently incurred costs.

OPC's arguments against the Commission's *application* of the burden of proof present a thinly-veiled attempt to have the Court reweigh the evidence in the record. Its disregard for the Commission's findings of fact and its misconstruing of the legal standard on appeal demonstrate that it disputes the weight given to that evidence by the Commission. The Court should therefore

decline OPC's invitation to substitute its judgment for that of the Commission on the weight given to disputed findings of facts. *See* §§ 120.68(7)(b), (10), Fla. Stat.

II. THE COMMISSION DID NOT ACT OUTSIDE THE RANGE OF DISCRETION DELEGATED BY THE LEGISLATURE.

Standard of Review

OPC argues in Point II of its Brief that the Commission acted outside its range of discretion by "refusing to apply the burden of proof." (OPC B. 14) The Court may remand to the agency or set aside an agency action where the Court finds that the agency's exercise of discretion was "outside the range of discretion delegated to the agency by law." § 120.68(7)(e)1., Fla. Stat. However, the Court "shall not substitute its judgment for that of the agency on an issue of discretion." § 120.68(7)(e), Fla. Stat.

Discretion is abused only "when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable [person] would take the view adopted by the trial court." *Gosciminski v. State*, 132 So. 3d 678, 695 (Fla. 2013) (internal quotation omitted). If reasonable people could disagree as to whether the lower court's

action was proper, then it cannot be said that the lower court abused its discretion. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980) (internal quotation omitted). The burden of proving abuse of agency discretion is on the party asserting error. *Bd. of Trs. of the Internal Improvement Tr. Fund v. Levy*, 656 So. 2d 1359, 1363 (Fla. 1st DCA 1995).

Argument in Response

As demonstrated in Point I, *supra*, the Commission did in fact correctly apply the burden of proof. Additionally, the Commission has broad ratemaking authority, and the Commission did not abuse its discretion in allowing DEF partial cost recovery for its replacement power costs.

The Legislature states in section 366.01, Florida Statutes, that the regulation of public utilities is "in the public interest and [chapter 366] 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 [of chapter 366] shall be liberally construed for the accomplishment of that purpose." The Court has recognized that the Commission has considerable discretion in the ratemaking process. *See, e.g.*, *Gulf Power Co. v. Bevis*, 296 So. 2d 482, 487 (Fla.

1974); *City of Miami v. Fla. Pub. Serv. Comm'n*, 208 So. 2d 249, 253 (Fla. 1968).

The Court has stated that it is "undisputed that the [Commission's] ratemaking authority encompasses the authority to examine fuel cost expenditures and approve cost recovery to compensate for utilities' fuel expenses through the fuel clause." *Citizens v. Graham*, 191 So. 3d 897, 901 (Fla. 2016) (citing *Gulf Power Co. v. Fla. Pub. Serv. Comm'n*, 487 So. 2d 1036, 1037 (Fla. 1986)). Furthermore, the ratemaking process outlined in section 366.06(1), Florida Statutes, requires the Commission to consider whether funds are "prudently" invested by the utility, and the Commission derives its "prudence standard" from this statutory requirement. *Sierra Club*, 243 So. 3d at 908. In ratemaking proceedings such as the Fuel Clause, the Commission applies this prudence standard to evaluate expenses for which a utility seeks cost recovery. *Id.*; *see also In re: Petition by Florida Power & Light Co. to recover Scherer Unit 4 Turbine Upgrade costs through environmental cost recovery clause or fuel cost recovery clause.*, Order No. PSC-11-0080-PAA-EI, 2011 WL 339538 (Fla. P.S.C. Jan. 31, 2011) (stating that "[p]rudently incurred fossil fuel-related

expenses . . . should be recovered through an electric utility's fuel adjustment clause").

Prior to issuing its Final Order, the Commission held an evidentiary administrative hearing to consider the CR4 outage and DEF's associated replacement power costs. (R. 1777-2227) At the hearing, the Commission heard testimony from DEF witness Simpson (R. 1860-74); heard cross-examination of witness Simpson by OPC and other parties (R. 1874-981); and admitted multiple relevant exhibits into evidence. OPC did not, nor did any other party for that matter, offer any witnesses at the hearing that countered DEF's witness. (R. 201) Thus, there is no witness testimony or exhibit in the record that contradict DEF's witnesses and exhibits.

OPC's argument that the Commission "refus[ed] to correctly apply the burden of proof" and thereby acted outside its discretion (OPC B. 14-19) is false. As detailed above, the Commission correctly applied the burden of proof. In fact, the Commission held an evidentiary hearing pursuant to its ratemaking authority provided in chapter 366, Florida Statutes, and in accordance with the requirements of chapter 120, Florida Statutes; the parties agreed on the standard of review for prudence (R. 47); the Commission

explicitly stated the burden of proof in the Final Order (R. 47); the Commission weighed the record evidence offered by DEF in the record; and the Commission exercised its ratemaking discretion to authorize a partial recovery of DEF's replacement power costs based on the evidence in the record. What OPC attempts to characterize as a "comparative negligence analysis" apportioning damages (OPC B. 18) is nothing more than the Commission exercising its role as the finder of fact to weigh the evidence in the record and to determine, based on the competent, substantial evidence in the record, an appropriate outcome that is in the public interest as required by the Legislature. *See* § 366.01, Fla. Stat.

The very purpose of the proceeding was to evaluate the prudence of DEF's replacement power costs related to the CR4 outage event. The Commission's Final Order explicitly addressed the issue of whether "DEF's actions were reasonable and prudent," and it exercised its discretion to allow partial cost recovery for DEF's replacement power costs. (R. 45, 49) Furthermore, as discussed in Point I, *supra*, the Commission's findings of fact aligned with DEF's identification in the RCA of two root causes of the CR4 outage: operator error and equipment failure. Thus, the

Commission clearly found DEF's evidence to be competent and persuasive. Therefore, even if the Court does not view the Final Order to be an explicit finding regarding DEF's burden of proof, one can be inferred from the Commission's ultimate decision to allow DEF to partially recover its replacement power costs after weighing competent, substantial evidence in the record. *See In re: Investigation of Fuel Adjustment Clauses of Electric Utilities*, Order No. 12645, 1983 WL 820350 (Fla. P.S.C. Nov. 3, 1983) (stating that "a ruling in favor of prudence should be inferred even if none is explicitly made"). Ultimately, the Final Order must be construed as a finding in favor of prudence in part and a finding that DEF met its burden of proof to justify a partial recovery of replacement power costs.

Moreover, because the Commission found that DEF acted prudently in part, its description of certain "mitigating factors" can only be construed as a conclusion on the weight of the evidence in the record. (R. 49) Rather than an "invent[ion]" of the Commission introduced "in lieu of [a] prudence determination" or a "comparative negligence analysis" as OPC asserts (OPC B. 17-18), the mitigating factors discussed by the Commission in its deliberations and in its

Final Order constituted nothing more than the weighing of competent, substantial evidence in the record related to "the factors [that led] to the forced outage of CR4." (R. 45, 53-54, 56-59)

OPC has failed to meet its burden to establish any matter in which the Commission acted outside the range of discretion delegated to it by law. Instead, OPC's arguments boil down to a disagreement with the Commission's decision on the weight of the evidence and an attempt to convince the Court to reweigh the evidence and substitute its judgment for that of the Commission on issues of discretion. Because a prudence determination is a factual question within the Commission's broad range of discretion granted by law and recognized by the Court, the Court must not substitute its judgment for that of the Commission. *See* §§ 120.68(7)(b), (7)(e), (10), Fla. Stat.

III. THE FINAL ORDER COMPORTS WITH PRIOR AGENCY PRACTICE AND ESTABLISHED COMMISSION POLICY.

Standard of Review

In Point III of its Brief, OPC claims that the Commission deviated from prior agency practice and established Commission policy without explanation when it allowed DEF partial recovery of

replacement power costs. (OPC B. 19) The standard of review for this point on appeal is whether the Commission's exercise of discretion was inconsistent with officially stated agency policy or a prior agency practice, and deviation therefrom is not explained by the agency. § 120.68(7)(e)3, Fla. Stat.

Argument in Response

Contrary to OPC's argument, the Commission has specifically allowed partial cost recovery for replacement power costs in a prudence case. *See In re: Fuel and purchased power cost recovery clause with generation performance incentive factor.*, Order No. 23232, 1990 WL 10548555 (Fla. P.S.C. July 20, 1990) (disallowing a portion of replacement power costs when utility management was responsible for an outage that coincided with a previously scheduled outage); *accord In re: Review of replacement fuel costs associated with the February 26, 2008 outage on Florida Power & Light's electrical system.*, Order No. PSC-10-0381-FOF-EI, 2010 WL 2466264 (Fla. P.S.C. June 15, 2010).

OPC points to a 2009 Commission order as an example of the Commission's practice in cases requiring a prudence determination. *In re: fuel and purchased power cost recovery clause with generating*

performance incentive factor., Order No. PSC-09-0024-FOF-EI, 2009 WL 692572 (Fla. P.S.C. Jan. 7, 2009) ("the 2009 Order"). The facts of that case revolved around an act of intentional vandalism at an electric utility plant and the utility management's failure to exercise proper oversight over temporary contract personnel—greatly differing from the facts of DEF's CR4 outage in the case at hand that involve an experienced employee's use of a circuit reset procedure that he had used successfully in the past and that relied on a sophisticated protective device with a near-zero failure rate. (R. 340, 344, 1975-77, 1981-82) Nonetheless, the 2009 Order exemplifies the Commission's practice in cases requiring a prudence determination because it shows that the Commission applied the burden of proof to the utility, weighed all of the presented evidence, and made a prudence determination based on the reasonable utility manager test that led to the Commission's decision on whether to allow cost recovery—the exact same practice that the Commission employed in the matter below. (R. 53-63)

To the extent that OPC relies on the 2009 Order to conclude that the Commission cannot allow partial cost recovery, such reliance is misplaced. (OPC B. 19-22) Unlike the instant case of the

CR4 outage, the 2009 Order deals with a case in which a utility failed to present competent, substantial evidence to support a finding that its actions were prudent in any respect.

OPC alleges that the Commission "introduced the concept of mitigation" and deviated from agency practice. (OPC B. 22) As discussed above in more detail, OPC is mischaracterizing the Commission's use of the term "mitigating factors" in the Final Order—the Commission was simply weighing the evidence like it does in all its evidentiary proceedings as fact-finder. The "mitigating factors" in this case are simply pieces of evidence that the Commission weighed in determining that the utility met its burden of proof to show that it acted prudently in part. (R. 49) The record shows that DEF's reliance on the relay was prudent under the reasonable utility manager test. (R. 47-49, 53-54, 57-58, 340, 344, 1975-76, 1981-82) The Commission has previously permitted the recovery of replacement power costs when a utility could not have reasonably known or discovered that a mechanical part would fail and lead to an outage because it "was not [a problem] that any past experience would have led it to anticipate." *See In Re: Recovery of Fuel Costs Associated with Florida Power Corporation's Crystal River*

3 Outages in 8/89 and 10/90., Order No. PSC-92-0289-FOF-EI, 1992 WL 12596201 (Fla. P.S.C. May 5, 1992) (finding that an outage was not the result of imprudent management because the utility was entitled to rely on the quality assurances of the part supplier).

Here, as in that case, the Commission determined that under the circumstances that were known or should have been known at the time, the utility acted prudently. DEF could not have known that the highly reliable relay had failed and, therefore, prudently relied on the relay to successfully reset the synchronization circuit consistent with the operator's experience. (R. 49, 53-59, 341, 1976, 1980) Because DEF's prudent reliance coincided with the DEF operator's error in deviating from standard procedures, the resulting Commission decision in this case appropriately found that DEF was prudent in certain respects and not prudent in other respects and, consistent with prior practice, allowed recovery of the portion of DEF's replacement power costs deemed to be prudently incurred.

OPC has failed to show that the Commission deviated from its prior practice or from established Commission policy, and the Court

should therefore not substitute its judgement for that of the Commission. § 120.68(7)(e), Fla. Stat.

IV. THE FINAL ORDER IS SUPPORTED BY COMPETENT, SUBSTANTIAL RECORD EVIDENCE.

Standard of Review

In Point IV of its Brief, OPC argues that the factors the Commission identified as having met the utility's burden of proof are not supported by competent, substantial evidence. (OPC B. 23) The standard of review for this point on appeal is whether the Final Order is supported by competent, substantial evidence in the record of the hearing. § 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." *Id*; *see also* § 120.68(10), Fla. Stat.

Argument in Response

The basis for OPC's argument in Point IV of its Brief is, again, its mischaracterization of the term "mitigating factors" in the Final Order. As explained in more detail above, the Commission in the Final Order was evaluating the evidence as fact-finder and was not applying some novel legal standard as OPC is alleging. Nonetheless,

OPC's argument is without merit because there is competent, substantial record evidence supporting the Commission's determination to allow DEF partial cost recovery.

The record shows that DEF witness Simpson is a highly qualified engineer with experience in generation engineering and that he leads a group of DEF employees that provide engineering and technical support in the areas of electrical, instrumentation, control systems, and protective relaying. (R. 1863-64) Witness Simpson provided testimony pertinent to the factors leading to the CR4 outage and was cross-examined by OPC, other intervenor parties, Commission staff, and Commissioners during the hearing. (R. 1874-981) Witness Simpson's expertise and ability to testify regarding these factors was not contradicted, and no objections to the entry of his testimony were raised by any party. The record shows that Commissioners found witness Simpson's testimony to be "very credible." (R. 53)

The record also shows that DEF's RCA was prepared by several DEF employees who were qualified to perform such an investigation, (R. 1867, 1879-80) and no objections to the entry of the RCA were raised at the hearing by any party.

Witness Simpson's expert opinion and DEF's RCA support the Commission's finding that the DEF operator's experience-based reliance on a previously-successful circuit reset procedure coupled with the established reliability of the protective relay device are factors that support partial cost recovery. (R. 49, 338-46, 1860-983) Both witness Simpson's testimony and the RCA discuss the relay's sophistication and exceedingly low failure rate (R. 340, 1981-82) along with the operator's expertise and past experience in troubleshooting. (R. 344, 1975-77) Witness Simpson's testimony also addressed the fact that there is no written process for troubleshooting. (R. 1982-83) The Commission properly weighed the record evidence and determined that the operator's reasonable reliance on his past experience and the historic reliability of the relay supported a finding of prudence. (R. 49, 52-63)

None of the parties to the hearing below introduced witness testimony to contradict DEF's witness testimony. OPC relied on two discovery responses, entered into the record as Commission staff's Hearing Exhibit No. 64, to question both the veracity of DEF's RCA and the cause of the out-of-phase synchronization that led to the CR4 outage. (R. 1483-565) The record shows that the Commission

considered this exhibit and determined that it weighed in favor of imprudence with respect to the operator error. (R 48-49, 56, 60-61)

As discussed above, the determination of whether a utility proves its actions were prudent under the reasonable utility manager test is a factual determination for the Commission as the trier of fact. *See J.D.*, 114 So. 3d at 1133; *Gross*, 819 So. 2d at 1003, 1005. As illustrated above, the Commission weighed the evidence presented in this case in order to arrive at its factual determination that DEF was prudent with respect to some of its actions. Because the Commission's decision rests upon competent, substantial evidence, the Court may not disturb the decision or reweigh the evidence. *See, e.g.*, *Gulf Power Co.*, 453 So. 2d at 803.

Where, as here, the Commission disagrees with parties and Commission staff as to the weight of credible evidence, it is within the Commission's authority as finder-of-fact to "choose a reasonable alternative" that is supported by competent, substantial evidence. *Id.* at 805. Thus, the Commission properly approved partial cost recovery, allowing DEF to recover half its replacement power costs based on this factual finding of prudence. (R. 49, 61-63)

Elsewhere in its brief, OPC alleges that the Commission based its decision on something other than record evidence when it allowed recovery for the portion of DEF's costs that were prudently incurred. (OPC B. 31) This argument is a red herring. The Commissioners discussed the absence of a "scientific formula" for weighing and assigning responsibility for the outage between the two causal factors—operator error and equipment failure—and discussed how to determine what percentage of the replacement costs were caused by each causal factor. (R. 60) OPC in effect argues that for the Commission to apply its judgment and expertise to a matter of discretion—the weighing of record evidence—was tantamount to basing a decision on something outside the record.

As discussed above, replacement power cost recovery determinations are undisputedly within the Commission's ratemaking authority, and the Commissioner is the trier of fact in such cases. *See Citizens*, 191 So. 3d at 901. Where evidence presented supports more than one outcome, it is the role of the trier of fact to decide the issue. *Heifetz v. Dep't of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Furthermore, additional deference is shown to agencies

making determinations that require agency expertise, particularly where questions are "infused with policy decisions for which the [agency] has special responsibility and expertise." *Citizens through Fla. Office of Pub. Counsel v. Fla. Pub. Serv. Comm'n*, 294 So. 3d 961, 965 (Fla. 1st DCA 2019) (quoting *Palm Coast Util. Corp. v. State, Fla. Pub. Serv. Comm'n*, 742 So. 2d 482, 484 (Fla. 1st DCA 1999)); *see also Citizens v. Fla. Pub. Serv. Comm'n*, 488 So. 2d 112, 114 (Fla. 1st DCA 1986).

The Legislature requires Commissioners to be "competent and knowledgeable" in one or more fields related to utility regulation and that "the Commission shall fairly represent" such fields. § 350.031(5), Fla. Stat. There is no question that ratemaking decisions involve matters of policy to be applied by the Commission's judgment and expertise. *See, e.g.*, § 366.01, Fla. Stat. (stating that "the regulation of public utilities" is in the "public interest" and that chapter 366, Florida Statutes, "shall be liberally construed" for the protection of the public welfare); *In re: Petition of United Telephone Company of Florida for an increase in its rates and charges.*, Order No. 11029, 1982 WL 912396 (Fla. P.S.C. July 27, 1982) ("Ratemaking is not a precise or exact science but a function

which necessitates the use of [the Commissioners'] informed judgment and expertise in setting rates."); *Chiles v. Pub. Serv. Comm'n Nominating Council*, 573 So. 2d 829, 832 (Fla. 1991) (explaining that ratemaking is legislative in nature).

Contrary to OPC's assertion, it is not only proper but necessary for the Commission to apply its judgment and expertise to the matter at hand. The Commission's factual findings on the prudence of DEF's actions and the burden of proof should be given "great weight" because they are matters "infused with policy considerations" for which the Commission has "special responsibility" and because its findings are supported by competent, substantial evidence. *Palm Coast Util. Corp.*, 742 So. 2d at 484; *Gulf Power Co.*, 453 So. 2d at 803. Furthermore, because the Commission's ultimate ratemaking decision in this case—the extent to which DEF should bear its replacement power costs—depends on such factual findings, the Court should give the Commission's decision "considerable discretion and latitude." *Gulf Power Co.*, 296 So. 2d at 487; *see also* §§ 120.68(7)(b), (10), Fla. Stat.

OPC's attempts to analogize DEF's actions to a traffic violation or tort law issue should also be rejected. (OPC B. 24-25) The argument pertaining to the operator's reliance on a non-standard procedure supported by past experience fails to consider the operator's experience in troubleshooting and that there was no written process for troubleshooting. (OPC B. 24; R. 344, 1975-76, 1982-83) The argument pertaining to the failure of the relay neglects to consider the device's high pedigree and exceedingly low failure rate. (OPC B. 24-25; R. 1981-82)

OPC also attempts to frame its argument in Point IV of its brief as an abuse of discretion by the Commission, injecting claims that the Commission made its decision on an arbitrary basis and that the Final Order is arbitrary and capricious. (OPC B. 26-28) As discussed above, this effort to mischaracterize the Commission's factual prudence determination as a legal determination is incorrect and should be rejected. *Gulf Power Co.*, 453 So. 2d at 803. The Commission found based on the record evidence that DEF demonstrated that it was prudent in certain respects and not prudent in other respects. (R. 49, 54, 56, 63) The fact that DEF, OPC, and the Commission each came to different conclusions based

on the record evidence (R. 49, 206, 223) demonstrates that reasonable persons could disagree as to the weight of the evidence and whether the Commission's action was proper. *See Gosciminski*, 132 So. 3d at 695; *Canakaris*, 382 So. 2d at 1203. Thus, allowing DEF to recover the portion of its replacement power costs found to be prudently incurred is neither arbitrary nor capricious, and it cannot be said that the Commission abused its discretion.

Ultimately, OPC's argument reveals only that it disagrees with the Commission's factual determination of DEF's prudence and its finding that DEF met its burden of proof in this case. The Commission considered the presented testimony and exhibits and based its findings on competent, substantial evidence. (R. 53-63, 338-46, 1860-983) The Commission then applied its expertise and judgment to the unique facts of this case, weighed the matters of policy under its statutory ratemaking responsibility, and determined to assign equal weight to the causal factors that led to the CR4 outage—operator error and equipment failure. Thus, the Court should reject OPC's argument as a disagreement on the weight of the evidence and an attempt to reargue the facts of the case, and it should affirm the Final Order. *See* §§ 120.68(7)(b), (10),

Fla. Stat. *See also, e.g., Citizens v. Fla. Pub. Serv. Comm'n*, 146 So. 3d 1143, 1164 (Fla. 2014) (stating that "this Court will affirm the Commission's findings and conclusions if they are based upon competent, substantial evidence and are not clearly erroneous and will not re-weigh the evidence") (internal quotations omitted).

V. THE COMMISSION DID NOT COMMIT ANY MATERIAL ERRORS IN PROCEDURE AND FOLLOWED ALL REQUIREMENTS OF CHAPTER 120, FLORIDA STATUTES.

Standard of Review

In Point V of its Brief, OPC argues that the Commission failed to establish a procedure before hearing that would allow it to make the findings and determinations found within the Final Order. (OPC B. 28-29) The standard of review for this point on appeal is whether the 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. § 120.68(7)(c), Fla. Stat.

Argument in Response

The Commission met all the due process requirements of chapter 120, Florida Statutes, which governs administrative hearings, and Florida Administrative Code Rule 25-22.001, which governs noticing of Commission meetings. *See Citizens*, 146 So. 3d

at 1154 (stating that "the fundamental requirements of due process are satisfied by reasonable notice and a reasonable opportunity to be heard") (quoting *Fla. Pub. Serv. Comm'n v. Triple "A" Enters., Inc.*, 387 So. 2d 940, 943 (Fla. 1980)).

It is uncontested that the Commission issued notice of the administrative hearing below, as required by section 120.569, Florida Statutes, and Florida Administrative Code Rule 25-22.001. That notice specified that the final fuel adjustment true-up amounts would be considered at the hearing. (R. 2596-2604)

In ratemaking proceedings, the Commission routinely finds that adjustments to a utility's requested rate are appropriate and ultimately approves a final amount that differs from that which was requested in the utility's petition instead of issuing a wholesale denial of the petition. *See, e.g., In re: Application for rate increase in Highlands, Hardee, and Desoto Counties, by Sebring Gas System, Inc.*, Order No. PSC-2020-0047-PAA-GU, 2020 WL 572230 (Fla. P.S.C. Feb. 3, 2020). Here, DEF's underlying petition requested cost recovery of the full amount of the CR4 outage replacement power costs ($14.4 million). (R. 3011-69) The amount of the outage costs was undisputed. (R. 46, 1642-43, 1898-99) Thus, because the

Commission was engaged in ratemaking in the hearing below, the parties, including OPC, had reasonable notice that the Commission could determine that an amount up to DEF's full replacement power costs of $14.4 million for the CR4 outage was recoverable.

The Commission afforded all parties the opportunity to be heard in the proceeding below in accordance with chapter 120, Florida Statutes. At the outset of this case, the Commission issued an Order Establishing Procedure that gave OPC the opportunity to provide any testimony and exhibits it wished the Commission to consider, yet OPC did not avail itself of this opportunity. (R. 6164-65, 6172-73) It is undisputed that OPC was allowed to conduct discovery and participate in a prehearing conference. (R. 2293-356, 2359, 2365, 2371, 6163-80) Furthermore, OPC was given full opportunity to present evidence and argument at the administrative hearing in accordance with section 120.569(2), Florida Statutes, and, in fact, conducted an extensive cross-examination of DEF's witness Simpson. (R. 1851-52, 1874-950) Additionally, OPC was given the opportunity to, and did, submit a post-hearing brief, which was considered by the Commission. (R. 195-208)

OPC's assertion that the Commission based its decision on something outside the record evidence (OPC B. 31) fails, as demonstrated in Point IV, *supra*. Therefore, its subsequent argument that the Commission thereby violated its due process rights must also be rejected because no material error was committed. Despite the fact that OPC was afforded every opportunity under chapter 120, Florida Statutes, to offer testimony or other evidence that countered DEF's testimony and evidence, it chose not to do so and failed to make its own case in response to the case DEF presented. Thus, OPC's claims that the Commission failed to give proper notice or an opportunity to participate and that its due process rights were somehow violated are completely unfounded and only highlight that OPC disagrees with how the Commission weighed the record evidence to arrive at the determination below.

CONCLUSION

OPC has failed to meet its heavy burden of overcoming the presumption of correctness that attaches to Commission orders. *See Sierra Club*, 243 So. 3d at 907. Thus, the Commission's Final Order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document has been furnished by electronic mail through the Court's e-filing Portal on July 27, 2022, to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Florida Rule of Appellate Procedure 9.045(e), that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b); was prepared using Bookman Old Style 14-point font; and complies with the word limit of Florida Rule of Appellate Procedure 9.210(a)(2)(B) and contains 9,913 words.

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