IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, ETC.,

Appellant(s), Case No.: SC22-94
Lower Tribunal No.: 20210001-EI

vs.

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

Appellee(s).

_____/

CITIZENS' INITIAL BRIEF

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PRELIMINARY STATEMENT

Within this Initial Brief, the Appellants will be identified also as "Citizens," "Public Counsel," or the "Office of Public Counsel," which will be shortened to "OPC." Duke Energy Florida, LLC will be shortened to "DEF." OPC will refer to the Florida Public Service Commission as the "PSC" or the "Commission." OPC will refer to the order being appealed, Order No. PSC-2021-0466-FOF-EI, as the "Final Order." OPC will refer to PSC Docket Number 20210001-EI or the Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor docket as the "Fuel Clause." Unless otherwise indicated, all statutory citations refer to the 2021 Florida Statutes.

STATEMENT OF THE CASE AND OF THE FACTS

Appellants, the Citizens, on behalf of the customers of DEF, appeal the Order Approving Crystal River Unit 4 Replacement Power Costs for Duke Energy Florida, LLC, issued by the Florida Public Service Commission on December 21, 2021. R. 45-50.

The issue in this case was whether DEF prudently operated DEF's Crystal River Unit 4 (CR4) power plant on the evening of December 17, 2020, and, if not, whether DEF customers should

receive a refund, or "adjustment," for the $14.4 million already being collected from customers for the replacement power costs incurred during the 98 days that CR4 was offline. R. 2301.

The PSC's Final Order correctly found that DEF's poor management decisions directly led to the outage at CR4. R. 49. However, the Final Order then identified two "mitigating factors" and improperly reduced the adjustment from the full $14.4 million to $7.2 million. R. 49. This appeal challenges the PSC's decision to impose $7.2 million in imprudently incurred costs on DEF's customers.

I. STATEMENT OF THE CASE

The Fuel Clause is an annual docket which addresses fuel cost recovery issues for all investor-owned electric utility companies in Florida. R. 6286-87. Through the clause proceedings, electric utilities are allowed to promptly recover prudently incurred costs of fueling generation, including the costs of buying more expensive replacement power in the case of an unforeseen outage. In the 2021 docket, all parties stipulated to the resolution of all but one issue. R.45, 95. The sole remaining contested issue was labeled 1C, concerning DEF's request to recover replacement power costs

associated with the January 2021 through April 2021 unforeseen, forced outage of CR4. By agreement of the parties, the Prehearing Order framed the issue as follows:

> "ISSUE 1C: Has 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. at 2301.

An evidentiary hearing on this issue was conducted on November 2, 2021. R. 1777-2227. DEF presented one witness, Joseph Simpson, who testified about DEF's investigation into the root cause of the outage. R. 1861-74. Appellants, Staff, and other customer representatives cross-examined Mr. Simpson. R. 1874-1981. The Commission admitted sixty-seven exhibits into evidence.[1] R. 1849, 1986. The parties submitted post-hearing briefs on November 15, 2021. R. 195-208, 209-27. The Commission staff filed a memorandum on November 23, 2021, which recommended that

[1] Most of the exhibits pertained to the stipulated issues in the docket between the other parties. Exhibits 8, 9, 54, 58, 59, and 64 are the main exhibits which relate to the contested issue.

the Commission find that DEF's operator's failure to follow written procedures, "directly and independently led to the outage event at CR4." R. 147.

The Commission scheduled this case for decision at the December 7, 2021, Agenda conference and limited participation in the discussion of this case to Commissioners and their staff. R. 143. At the Agenda Conference, in their first opportunity to publicly discuss and debate the case, the Commissioners for the first time speculated about whether they could "split the baby" regarding the replacement power costs and mentioned that "… there's not a formula we can follow here, we're going to have to lean on what our gut tells in some of these regards." R. 54, 60. The Commission's own professional staff did not recommend or even address such a novel approach or course of action in their memorandum. R. 143-150. Similarly, DEF, who has the burden of proof, never contended that these factors constituted mitigation. Based on what was described, at least in part, as their gut notion, the Commissioners voted on an *ad hoc* basis to impose on customers half of the extra fuel expenses associated with the outage. R. 63. The Commission issued the Final Order on December 21, 2021, which found that,

> "In sum, failure of the plant operator to follow written procedures, without supervisory approval, directly led to the outage at Crystal River Unit 4."

R. 49.

However, the Commission then suggested that two curiously described "mitigating factors" existed that the Commissioners believed should reduce the replacement power cost adjustment from $14.4 million to $7.2 million, stating:

> "…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 failed to make a finding of whether DEF met or satisfied the burden of proof. Citizens filed their notice of appeal on January 20, 2022. R. 32-42.

II. STATEMENT OF THE FACTS

On December 16, 2020, DEF returned CR4 to service after a planned outage, and DEF began to bring another unit, Crystal River 5 (CR5), online the following day. R. 339, 1875. However, CR4 tripped

(i.e., went offline) due to a boiler feed water pump issue on December 17, 2020, at 19:10. R. 339-40, 1876. Once the unit tripped, it required an immediate response by the plant operator. R. 1489. In order to return the unit to service and deliver electricity to customers, DEF needed to synchronize Unit 4 to the grid again. R. 339. While synchronization to the grid can be done either automatically or manually, the standard operating procedure at CR4 was to synchronize to the grid automatically. R. 339, 1865. At CR4, synchronization had been performed automatically since 2017 and had rarely been done manually. R. 339, 1901-02.

Three hours after CR4 initially tripped, the DEF operator crew[2] attempted to automatically synchronize (auto-sync) the unit to the grid about 12 seconds after 10 p.m. (or more precisely, the system-generated military timestamp of 22:00:12.608). R. 340, 1933-34. However, two lockout relays tripped and this auto-sync attempt failed. R. 339-40. The DEF crew persisted in attempting to automatically sync the unit to the grid in rapid succession without

[2] OPC will use the term "crew" since DEF witness Simpson and other evidence pointed to the fact that there was a "crew" (including a supervisor) conducting and overseeing the synchronization effort. R. 341, 1960, 1975-76.

success. R. 339-40, 1934. Following the first failed synchronization attempt, the standard DEF procedure called for the crew to perform a walkdown (i.e. inspecting various potential failure modes in turn, and if an issue is discovered, correcting the issue, resetting the system, and attempting synchronization again). R. 1346. Whether anyone on the crew actually conducted such a walkdown is in serious doubt, but the crew attempted to auto-sync again at 22:00:16.924 (just 4.3 seconds after the first failed attempt) which similarly failed as a different set of lockout relays tripped. R. 148, 339-40, 1934. The crew immediately initiated a third attempt at 22:00:20.132 (just 3.2 seconds after the second attempt). R. 339-40. All three auto-sync attempts failed. R. 339-40.

Approximately 11 minutes after the three failed attempts to auto-sync CR4, the crew decided to attempt to "reset" the synchronization circuit by "green-flagging" (leaving open) the breaker in auto-sync, placing the sync switch in manual, and then "red-flagging" (forcing closed) the breaker. R. 339. Instead of resetting the synchronization circuit, this action caused CR4 to attempt to sync to the grid dangerously out of phase. R. 339. This instantly caused significant

damage to the generator rotor before other relays could open and created enough grid instability to trip the Citrus Combined Cycle Power Block No. 1 offline. R. 339. Ultimately, that damage resulted in an unplanned, forced outage to CR4 for 98 days and replacement power costs of $14.4 million. R. 1349, 1643. All parties agree that $14.4 million was the accurate replacement power cost for this outage. R. 46.

Following the events of December 17, 2020, DEF selected a team consisting solely of DEF employees to conduct a Root Cause Analysis (RCA). R. 338-39, 1867, 1878-79. After producing several versions, DEF completed the final version of the RCA on February 16, 2021. R. 338-46, 1483-1565, 1866, 1877-79. The final RCA attributed the synchronization failure, plant damage, and outage costs to two root causes and seven contributing causes, and the RCA recommended 18 different corrective actions in an effort to prevent this event from reoccurring. R. 341-42. DEF labelled the two root causes as a failed backup "check" relay and individual operator performance error. R. 341. DEF asserted that it had acted prudently at all times during the outage. R. 1871-72. DEF presented no evidence or argument

regarding what portion of the $14.4 million replacement power costs it believed were a result of the failed relay and what portion of the costs were due to operator performance error.

SUMMARY OF ARGUMENT

The Public Service Commission erred when it failed to determine whether DEF met its burden of proof and instead introduced the concept of "mitigating factors." The Order is unsupported by jurisdictional authority, Commission precedent, or competent and substantial evidence. The Court must reverse this Order as it constitutes a material error, and DEF's customers must not be ordered to split the cost when DEF management is solely responsible for the $14.4 million replacement power costs at issue.

STANDARD OF REVIEW

§ 120.68, Fla. Stat., sets forth the standard of judicial review of the Commission's Final Order as follows:

> (7) The 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:
> (a) There has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts;

> (b) The agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to ss. 120.569 and 120.57; however, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact;
> (c) 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;
> (d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action; or
> (e) The agency's exercise of discretion was:
> 1. Outside the range of discretion delegated to the agency by law;
> 2. Inconsistent with agency rule;
> 3. Inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or
> 4. Otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

Furthermore, whether the PSC has the authority to act is a question of law, which is subject to *de novo* review. Art. V, §21, Fla. Const.

ARGUMENT

I. THE FLORIDA PUBLIC SERVICE COMMISSION ERRONEOUSLY INTERPRETED AND APPLIED THE BURDEN OF PROOF, AND THE CORRECT APPLICATION OF THE BURDEN OF PROOF COMPELS THAT DEF BEAR

RESPONSIBILITY FOR ALL $14.4 MILLION IN REPLACEMENT POWER COSTS.

The Supreme Court of Florida has long recognized that if a utility company seeks to recover replacement power costs, the company bears the burden to prove that the costs incurred were reasonable and prudent. *Fla. Power Corp. v. Cresse,* 413 So. 2d 1187, 1191 (Fla. 1982). The Court clearly expressed the standard of review for prudence determinations as, "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. Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013). The utility company must prove the prudence of their actions by a preponderance of the evidence. *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981). However, the PSC abrogated the burden of proof by introducing its newly-minted notion of "mitigating factors," and by citing to those factors in reducing the replacement power cost adjustment. R. 49. Pursuant to § 120.68(7)(d), Fla. Stat., this Court must reverse the PSC's erroneous application of the burden of proof and hold DEF responsible for the entirety of the CR4 outage replacement power costs. (2021).

In PSC prudence determination cases, long-established policy and practice require that utilities either meet their burden of proof or they do not. However, in the case below, the PSC circumvented this practice and policy and never made a finding regarding whether DEF met its burden. Instead, the Final Order concluded that:

> In sum, failure of the plant operator to follow written procedures, without supervisory approval, directly led to the outage at Crystal River 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 also be taken into account.

R. 49.

Therefore, after reviewing all of the evidence, including the evidence regarding the operator's reliance on an unapproved procedure and the evidence regarding the failed relay, the Commission determined that the *direct* cause of the outage was DEF's poor decision-making. R. 49. What the Commission pointed to as mitigation were simply unsuccessful assertions presented by DEF during the hearing to attempt to prove that DEF acted prudently. R. 49, 1863-74.

Having made the penultimate determination that DEF's imprudence caused the outage, by default, the Commission effectively determined that DEF had failed to meet its burden to demonstrate that it had acted prudently. R. 49. Once the Commission attributed the direct cause of the outage to DEF's poor decisions, the Commission's practice required it to make a specific finding that DEF failed to prove that's it acted prudently. Inexplicably, the Commission violated its policy and made no finding regarding the burden of proof at all. Then, the Commission cited to evidence that was insufficient to establish DEF's prudence claim, framed that insufficient evidence as mitigation, and rewarded DEF's imprudence by arbitrarily reducing the adjustment to the replacement power costs from $14.4 million to $7.2 million. R. 49.

The Commission erroneously interpreted and applied the burden of proof by injecting into its decision the concept of "mitigation"-a previously unheard-of concept in PSC prudence determinations-in lieu of making a finding regarding whether DEF met its burden. R. 49. Based on the finding that the Commission did make, that DEF's actions directly led to the outage, this Court should

rule that DEF failed to meet DEF's burden to prove that it acted prudently, and the Court should order the Commission to disallow DEF's requested replacement power costs in the full amount of $14.4 million. R. 49.

II. THE FLORIDA PUBLIC SERVICE COMMISSION ACTED OUTSIDE THE RANGE OF DISCRETION DELEGATED BY THE LEGISLATURE.

By refusing to correctly apply the burden of proof in this case, the PSC erred, pursuant to § 120.68(7)(e)1., Fla. Stat., and acted outside of the range of discretion delegated to it by the Florida Legislature. (2021). The Commission, "shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service." § 366.06(1), Fla. Stat. (2021). Additionally, the Florida Supreme Court has historically afforded great deference to the Commission's findings and has declined to reweigh the evidence or overturn a Commission Order simply because the Court, "…would have arrived at a different result had we made the initial decision." *Sierra Club v. Brown,* 243 So. 3d 903, 908 (Fla. 2018); *Gulf Power Co. v. Fla. Pub. Serv. Comm'n*, 453 So. 2d 799, 803 (Fla. 1984). However, the Public Service

Commission, like all administrative bodies, is a creature of statute. *Cape Coral v. GAC Utilities, Inc.,* 281 So. 2d 493, 495-496 (Fla. 1973). Most specifically, Chapters 350 and 366, Florida Statutes codify the jurisdiction of the Florida Public Service Commission, albeit in rather broad strokes, as § 366.01, Fla. Stat. states that all provisions of Chapter 366 shall be "liberally construed." (2021). While the Commission was afforded leeway and deference in the judicial review proceedings of the past, the Court may no longer defer to the Commission's interpretation of § 366.06(1), Fla. Stat., or any other Florida Statute. (2021). *United Tel. Co. of Fla. v. Fla. Pub. Serv. Comm'n*, 496 So. 2d 116, 118 (Fla. 1986). Instead, the Court must interpret the statutes *de novo.* Art. V, §21, Fla. Const. Furthermore, "If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested." *Radio Tel. Communications, Inc. v. Southeastern Tel. Co.,* 170 So. 2d 577, 582 (Fla. 1964).

In addition to the fuel cost recovery clause, the Commission also presides over several other cost recovery dockets that function in a similar way, i.e. allowing utilities to recover certain costs near the

time the company incurs those costs subject to the Commission's review at a later date. Examples of other annual cost-recovery dockets include the Environmental Cost Recovery Clause, the Energy Conservation Recovery Clause, Natural Gas Conservation Cost Recovery Clause, the Storm Protection Plan Cost Recovery Clause, and the Nuclear Cost Recovery Clause.[3]

However, there is no corresponding Florida statute that explicitly authorizes fuel cost recovery, or indeed even mentions it. Instead, the Commission asserts its jurisdiction over the Fuel Clause through an interpretation of the combination of § 366.04-06, Fla. Stat., and this Court has acknowledged the Commission's jurisdiction, ruling that, "[T]he PSC'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 of State v. Graham,* 191 So. 3d 897, 901 (Fla. 2016). While

[3] The Legislative authority for those dockets comes from the Florida Energy Efficiency and Conservation Act, codified in § 366.80-83, Fla. Stat. (2021). Additionally, § 366.8255, Fla. Stat. provides further context and parameters for the Environmental Cost Recovery Clause, as does § 366.96, Fla. Stat. for the Storm Protection Plan Cost Recovery Clause, and § 366.93, Fla. Stat. for the Nuclear Cost Recovery Clause.

the prior rulings of this Court regarding the Commission's ability to administer and preside over the Fuel Clause acknowledge that the Fuel Clause is an efficient mechanism that benefits all parties, it is clear that the Commission's authority for administering the Fuel Clause is not well-defined within the Florida Statutes; therefore, it is not boundless. Since the Commission derives its power, "…solely from the Legislature," the Court must scrutinize the Commission's interpretation of its nebulous Fuel Clause powers. *Id.* at 900.

From this historical patchwork of authority, the Commission has stitched together a quilt of precedent and caselaw over the years, the chronology of which is well documented. *See In re: Petition on behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers $143 million*, Order No. PSC-2007-0816-FOF-EI (October 10, 2007). Despite these antecedents, there is a distinct lack of statutory guidance regarding the boundaries of the Commission's power with regard to the Fuel Clause. The Commission's decision to, *ab initio*, invent and insert the notion of "mitigation" in lieu of making the required prudence determination is clearly an overreach of even the broad grant of the Commission's

legislative authority and, as discussed *infra*, a violation of existing policy in the Fuel Clause, in derogation of § 120.68(7)(e)3., Fla. Stat. (2021).

Instead of following practice and policy and deciding whether DEF proved by a preponderance of the evidence that DEF acted prudently on December 17, 2020 with respect to CR4, the Commission failed to make a finding regarding the burden of proof and instead applied what is tantamount to a comparative negligence analysis[4] to the facts of this case in order to apportion the replacement fuel costs. The Legislature has not delegated to the Commission the authority to eliminate a party's obligation to satisfy the burden of proof, and this Court must stop the Commission's efforts to adjudicate outside of its authority with this Final Order.

While the provisions of Chapter 366 must be liberally construed regarding the Commission's authority, nothing allows or requires the

[4] For application in negligence cases, the Florida Legislature adopted the concept of comparative negligence by enacting § 768.81, Fla. Stat., which states, "In a negligence action, the court shall enter judgment against each party liable on the basis of such party's percentage of fault and not on the basis of the doctrine of joint and several liability."

provisions to be limitlessly construed. The Court must set aside the Final Order in this case, and require the Commission to enter a new order finding that DEF failed to meet DEF's burden of proof; therefore, the PSC must adjust DEF's replacement fuel costs by $14.4 million.

III. THE FLORIDA PUBLIC SERVICE COMMISSION'S DECISION TO APPORTION REPLACEMENT FUEL COSTS IN A PRUDENCE CASE IS INCONSISTENT WITH PRIOR AGENCY PRACTICE AND ESTABLISHED POLICY, AND THE FLORIDA PUBLIC SERVICE COMMISSION FAILED TO EXPLAIN THE DEVIATION.

The Florida Public Service Commission's Final Order is inconsistent with prior prudence determinations of the Commission; therefore, the Final Order is subject to judicial review pursuant to § 120.68(7)(e)3., Fla. Stat. (2021). The Commission has never before cited to "mitigating factors" and apportioned replacement fuel cost responsibility in lieu of making a finding of whether the utility company met their burden of proof. Further, the Commission has failed to explain its reason for doing so in this case and for deviating from the Commission's prior agency practice. It is controlling law in this state that "…agency action which yields inconsistent results based upon similar facts, without reasonable explanation, is

improper." *Fla. Cities Water Co. v. PSC,* 705 So. 2d 620, 626, (Fla. 1st DCA 1998).

The Commission has presided over many Fuel clause cases reviewing the prudence of an electric utility company's actions. [5] The case of *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor,* Order No. PSC-2009-0024-FOF-EI, (January 7, 2009), exemplifies the practice of the Commission in cases involving a prudence determination involving one event. In that case, a temporary employee of Florida Power & Light (FPL) vandalized the Turkey Point Unit 3 power plant by drilling a hole in pressurized piping, resulting in over $6 million in replacement power costs. The Commission undertook to determine whether FPL proved by a preponderance of the evidence that FPL prudently managed and exercised proper oversight of temporary

[5] A few examples of other fuel clause prudence determination cases include *Gulf Power Co. v. Fla. Pub. Service Comm'n.*, 487 So. 2d 1036 (Fla. 1986); *In re: Investigation into Forced Shutdown of Florida Power Corporation's Crystal River No. 3 Unit*, Order No. 12240 (July 13, 1983*); In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, Order No. 23232 (July 20, 1990*); In re: Petition on behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers $143 million*, Order No. PSC-2007-0816-FOF-EI (October 10, 2007).

contract personnel with regard to that outage.[6] Ultimately, the Commission concluded that:

> The utility had the burden of proving the prudence of its costs. We find that FPL had reasonable opportunity to carry it's [*sic*] burden, but failed to provide evidence that would show it prudently managed and exercised proper oversight of temporary contract personnel during the spring outage of 2006. FPL failed to show the replacement fuel cost of $6,130,000 was prudently incurred, and therefore FPL shall be required to implement a customer refund, with interest.

Id. at 15.

In the instant case, the Commission was bound by the Prehearing Order, Issue 1C to determine whether DEF management acted prudently with regard to the December 17, 2020 outage. R. 2301. However, rather than making the necessary finding regarding the burden of proof, the Commission made no prudence determination

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[6] The issue was formally framed in the prehearing order in that docket as follows:

> With respect to the outage extension at Turkey Point Unit 3 which was caused by a drilled hole in the pressurized piping, should customers of FPL be responsible for the additional fuel cost incurred as a result of the extension?

Id. at 1.

at all. Instead, the Commission contradicted itself by appearing initially to find that DEF's actions were imprudent and directly led to the outage at CR4, yet then inexplicably ruling that the aforementioned "mitigating factors" somehow alleviated DEF of half of its financial responsibility. R. 49. The Commission's final decision, which is unsupported by either competent or substantial evidence, only holds DEF responsible for half of their imprudence and is inconsistent with prior agency practice and established policy. In addition to the fact that the Commission departed from all Commission precedent by refusing to make a decision about whether DEF satisfied the burden of proof and introduced the concept of mitigation, the Commission also made no attempt to explain the deviation from their own precedent.

This Court should set aside the Final Order in this case. In contrast to all precedent regarding prudence determinations, the Commission abdicated its responsibility to make a decision regarding whether DEF proved that it prudently incurred $14.4 million in replacement power costs, and the Commission also made no attempt to justify or explain such a diversion from precedent. This Court

should order DEF to adjust their requested replacement fuel cost amount by the full cost of the outage - $14.4 million.

IV. THE FLORIDA PUBLIC SERVICE COMMISSION'S RELIANCE ON MITIGATING FACTORS IS NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

Assuming *arguendo* that the Commission has the authority to consider "mitigating factors" in prudence cases, neither of the two factors noted by the Commission could be considered mitigating by a reasonable person in light of the record, and they are not supported by competent, substantial evidence. Therefore, this Court must reverse the Commission's order, pursuant to § 120.68(7)(b), Fla. Stat., and order the Commission to hold DEF accountable for the entirety of the CR4 outage replacement power costs. (2021).

Competent, substantial evidence is defined as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred…such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). Furthermore, any type of competent evidence may support a finding of fact if it is substantial in light of the record as a whole, taking into account whatever in the

record fairly detracts from its weight. *Miller v. State, Div. of Ret.*, 796 So. 2d 644, 646 (Fla. 1st DCA 2001).

The first "mitigating factor" the Commission leaned on was, "…[T]he operator's reliance on an unapproved procedure that had been successful at CR4 in the past…" R. 49. A reasonable person could not conclude that this circumstance *mitigates* anything. That's like complaining to the police officer who pulled you over for not wearing your seatbelt that you shouldn't get a ticket because you never wear your seatbelt. If anything, the operator's continuous reliance on an unapproved procedure is simply further proof of DEF management's imprudence in allowing the poor practice on a continuous basis. The Commission's description of this circumstance as a mitigating factor is nonsensical and is contradicted by the competent, substantial evidence in the record.

The second "mitigating factor" relied upon by the Commission was the, "repeated testing establishing the reliability of the relay…" R. 49. OPC submits that the circumstance that the relay malfunctioned was a red herring argument throughout this entire proceeding, which is

confirmed in DEF's own witness testimony. In DEF witness Simpson's testimony, he stated,

> …(H)ad the operator closed the breaker one second later, no damage would have occurred (and the failure of the relay would have gone unnoticed until the next scheduled test or potentially the next attempt at manual synchronization.)…Had the unit synced to the grid in the automatic setting, or had the operator red-flagged the breaker within the range that would have allowed synchronization, DEF would still be unaware of the failure and would have remained unaware until either the next component test was completed or an operator attempted to manually sync the unit to the grid following a later outage – but in the latter case, only then if the operator mis-timed the synchronization attempt.

R. 1869, 1871.

Witness Simpson's testimony explicitly concedes that the failure of the relay did not cause the damage to CR4. Therefore, whether DEF properly maintained and tested the relay has no logical bearing on this case. To continue the analogy, the fact that a person can prove they took their car in for an oil change every 3,000 miles does not "mitigate" that person's responsibility for the damages in an accident caused when they ran a red light.

Not only do the two "mitigating factors" lack support from competent, substantial evidence, but they also pose a threat to future agency decision making. If this type of arbitrary and capricious decision making stands, how can any party, customer or utility, argue against the soundness of any future ruling? A customer could never present evidence to mitigate their financial responsibility for an event that occurred inside a power plant.

By going with their "gut" and attempting to avoid making a prudence determination by referring to "mitigating factors," the Commission has created a loophole through which it can evade decades of established policy and dispense with requiring a utility to meet a burden of proof altogether. R. 60. Ultimately, the Commission could use the same logic to "split the baby" along any percentage division in all future prudence cases guided only by the Commission's "gut" when it comes to replacement power costs. R. 54, 60. This creates a standard that is impossible for the utility to prove and impossible for intervenors to litigate. Without any rules regarding what constitutes a mitigating factor and the degree to which each factor can reduce liability, the Commission has created moving,

phantom goalposts for which no party to the proceeding will be able to dependably, predictably, or reliably aim. Such uncertainty is arbitrary, contrary to law, and unfair to customers and utility companies alike; therefore, this Final Order must not stand.

Additionally, DEF presented zero evidence of the breakdown of the outage costs that were associated with what DEF argued were the two root causes of the outage. Therefore, the was no evidence in the record which would indicate what portion of the outage costs were associated with the failure of DEF's plant operator to follow written procedures without supervisory approval and what portion of the costs were associated with the "mitigating factors" relied upon by the Commission. The Commission even acknowledged that they had no formula to follow or facts to rely on in making such a decision, yet the Commission proceeded on the admittedly arbitrary basis.[7] The Commission's decision to apportion fuel cost recovery responsibility between DEF and DEF's customers was not based upon any

[7] I mean, what are the facts in this case where you draw that line saying it's going to be 50/50, or it's going to be 60/40, or it's going to be 75/25?... there's not a formula we can follow here, we're going to have to lean on what our gut tells in some of these regards. R. 58-60.

competent or substantial evidence, further demonstrating the arbitrary and capricious nature of the Final Order.

OPC is not asking this Court to reweigh the evidence. The Commission's finding that these two factors "mitigate" DEF's financial responsibility for the damage to CR4 and replacement power costs resulting from that damage is simply illogical and is not supported by the competent, substantial evidence in the record. Furthermore, the arbitrary and capricious nature of this Final Order poses a serious threat to due process in all future prudence cases. This Court should reverse the Commission's finding of mitigating factors and order that DEF alone is responsible for the entirety of the $14.4 million of replacement power costs associated with the damage to CR4.

V. THE FLORIDA PUBLIC SERVICE COMMISSION'S FAILURE TO RULE ON WHETHER DEF SATISFIED THEIR BURDEN OF PROOF WAS A MATERIAL ERROR THAT IMPAIRED THE FAIRNESS OF THE PROCEEDING AND THE CORRECTNESS OF THE COMMISSION'S ACTION.

Pursuant to § 120.68(7)(c), Fla. Stat., this Court should find that the fairness of the proceedings or the correctness of the Commission's action was impaired by a material error when the

Commission 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. (2021). As demonstrated *supra*, DEF had the burden to prove, by a preponderance of the evidence, that the replacement power costs associated with DEF's actions with regard to the December 17, 2020 outage at CR4 were reasonably and prudently incurred. R. 47. However, the Commission deviated from its long-established practice and policy by failing to decide whether DEF met that burden, introduced the concept of "mitigating factors," and ordered customers to pay for half of DEF's imprudence. R. 49. This material error both violates principles of fairness and impairs the correctness of the Final Order.

The Commission's material error impairs the fairness of the proceeding in several ways. First, no parties were on notice (when devising litigation strategy, preparing for hearing, cross-examination or briefing) that the Commission was considering a novel "split the baby" decision. Therefore, even if the parties had been allowed to

participate at the Agenda Conference[8], no party could have provided argument in support of or against the concept of "mitigating factors" before the Commission ruled. Not only was such lack of notice unfair to both DEF and customers, it also violated § 120.57(1)(b), Fla. Stat., which provides that, "All parties shall have an opportunity to respond, to present evidence and argument on *all issues involved*, to conduct cross-examination and submit rebuttal evidence..." (2021)*(emphasis added)*. Since the parties were not on notice of the issue of the potential apportionment of the costs, the parties were deprived of their statutory right to present evidence and argument on that issue – that is a material error.

As previously addressed, the complete lack of evidence supporting the apportionment of the replacement power costs renders the apportionment arbitrary, capricious, and, therefore, patently unfair. Finally, the Commission's failure to follow the law and hold DEF to their burden of proof robs customers of their due

[8] Staff's November 23, 2021 memorandum stated that participation as the December 7, 2021 Agenda Conference was to be "…[l]imited to Commissioners and Staff." Additionally, OPC could not have formally objected to the Commission's decision due to the participation restriction. R. 143.

process right to a fair hearing. § 120.57(1)(j), Fla. Stat. provides that, "Findings 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." (2021). Making a decision based on anything other than the evidence presented at the hearing, as the Commissioners did here when they "split the baby" in the absence of any evidence regarding how much of the $14.4 million in replacement power costs were associated with DEF management's actions or with the failed relay, violates the customers' due process right to a fair hearing. Customers should not be penalized by the Commission's material error in deciding to abandon precedent and cut DEF a break. These same reasons also underscore how the Commission's material error led to an incorrect resolution of this matter.

For all of the reasons stated above, this Court must not allow the Commission's erroneous Final Order to stand. To do so would force DEF's customers to pay the price for DEF's imprudence and the Commission's material error.

CONCLUSION

As demonstrated above, the Commission committed reversible error when it introduced the concept of "mitigating factors" into a Fuel Clause prudence determination case. Between inappropriately applying the burden of proof, acting beyond the scope of its delegated authority, inexplicably deviating from Commission precedent, failing to cite to competent and substantial evidence, and making a material error in the determination of this case, the Court must reverse the Final Order and require the Commission to enter a final order that is consistent with the evidence in this case – that DEF failed to meet its burden of proof with regard to the prudence of DEF management's actions during the December 17, 2020 outage at CR4 and that DEF must adjust its replacement power costs by the full amount of $14.4 million.

Respectfully submitted,

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CERTIFICATE OF SERVICE

SC22-94

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I HEREBY CERTIFY, pursuant to Rules 9.045 and 9.210(a)(2), Florida Rules of Appellate Procedure, that the CITIZENS' INITIAL BRIEF was prepared using Bookman Old Style 14-point font and contains 6,621 words; therefore, this brief complies with the Florida Rules of Appellate Procedure.

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