

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' REPLY BRIEF

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REPLY ARGUMENT

The Florida Public Service Commission (“Commission”) committed reversible error with the issuance of Order No. PSC-2021-0466-FOF-EI (“Order”), by incorrectly applying the burden of proof, acting beyond the scope of its delegated authority, inexplicably deviating from Commission precedent, failing to rely on competent substantial evidence, and committing material error in the determination of disputed Issue 1C in Commission Docket Number 20210001-EI. Both the Commission and Duke Energy Florida, LLC (“DEF) filed Answer Briefs on July 27, 2022. OPC will reflect citations to the Commission’s Answer Brief as, “PSC AB p._.” and citations to DEF’s Answer Brief as, “DEF AB p._.” For the reasons described below, DEF and the Commission have failed to answer the issues OPC raised in OPC’s Initial Brief; therefore, the Court should reverse the Order and remand with instructions to refund the full amount of \$14.4 million to DEF customers.

I. OPC PROPERLY APPEALED THE COMMISSION’S ORDER.

OPC has properly preserved OPC’s right to appeal the Commission’s Order. DEF incorrectly argues that OPC was required to file a

motion for rehearing before seeking appellate review of the Commission's Order. For the reasons explained below, the Court should reject DEF's position regarding OPC's preservation of appellate issues and should consider OPC's arguments on the merits.

The governing law on this issue is found in the Florida Constitution and a statutory provision. "The Supreme Court ... [w]hen provided by general law ... shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service." Art. V, § (3)(b)(2), Fla. Const. "As authorized by s. 3(b)(2), Art. V of the State Constitution, the Supreme Court shall review, upon petition, any action of the commission relating to rates or service of utilities providing electric or gas service." § 366.10, Fla. Stat. (2022). This case involves the Commission's improper decision that, while DEF's actions "directly led to the outage at Crystal River 4," DEF's customers should nevertheless be responsible for half the bill for the replacement power costs.¹ OPC timely petitioned the Court to review this action on January 20, 2022.² DEF failed to present a

¹ R. 49.

² R. 32-42.

single case involving a decision of the Florida Public Service Commission to support its erroneous suggestion that OPC did not preserve its appellate rights, and the Commission itself made no such argument. There is no constitutional or statutory requirement that a party first file a motion for rehearing before the Florida Public Service Commission prior to seeking appellate review of a Commission order. The Court is constitutionally and statutorily required to consider this appeal.

One of the cases that DEF did cite, *Holland v. Cheney Bros., Inc.*, 22 So. 2d 648 (Fla. 1st DCA 2009), stands for the principle that when the alleged error first appears in the final order, “an objection must be preserved by filing a motion for rehearing on the issue.” *Id.* at 650. However, the error of which OPC seeks review did not first appear in the final order. The Commission first committed this error at the agenda conference on December 7, 2021, when the Commission deliberated and voted on this impermissible apportionment of replacement power costs. Notably, only the Commissioners and Commission staff were permitted to participate in that agenda conference.³ R. 143.

³ Staff’s Recommendation to the Commission states that participation at the Post-Hearing Decision conference on the December 7,

Had OPC been allowed to participate at that hearing, OPC would have adamantly argued against and objected to such an inappropriate ruling. Furthermore, even if OPC had been permitted to participate at that agenda conference, and as demonstrated in OPC's initial brief, OPC was never provided notice that the Commission would consider apportioning the replacement power costs for the first time in the Commission's history. No party introduced evidence on that subject or even requested that the Commission do so. The Commission's error at the agenda conference constitutes a due process violation further described in OPC's initial brief. That error, which was later reduced to writing in the Order using language and rationale not even discussed in the public deliberations at the agenda conference, is what OPC appeals in this case. OPC cannot be required to move for rehearing on an issue for which they never received a hearing.

Further, the Order itself provides that OPC, and any adversely affected party, had two options for seeking review of the Order:

Any party adversely affected by the Commission's final action in this matter may request:1)

2021 regular agenda was to be limited to Commissioners and Staff. R. 143.

reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; **or** 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility...”

(Emphasis added.) R. 50. Simply because OPC withdrew its motion for reconsideration does not mean that OPC forfeited its constitutionally and statutorily guaranteed appellate rights.

Additionally, OPC’s withdrawal of OPC’s motion for reconsideration is harmless as the parties would very likely still be before this Court on this issue. Pursuant to Rule 25-22.0376, Florida Administrative Code (F.A.C.), OPC filed a motion for reconsideration on January 5, 2022.⁴ DEF filed its response to the motion on January 12, 2022.⁵ Staff then filed its recommendation to the Commission containing Staff’s analysis of OPC’s motion for reconsideration on January 25, 2022,⁶ prior to OPC’s withdrawal of OPC’s motion later that

⁴ Supp. R. (Transmitted on August 1, 2022) at 17-24.

⁵ Supp. R. (Transmitted on August 1, 2022) at 7-16.

⁶ Supp. R. (Transmitted on August 3, 2022) at 6-12.

same day.⁷ In its recommendation, Commission Staff urged the Commission to deny OPC's motion for reconsideration and to find no merit in OPC's arguments. Notably, the objections offered in the Commission's Answer Brief share much of the same rationale offered in its recommendation when the staff urged rejection of the OPC's motion for reconsideration. This is further evidence of the futility of waiting for the Commission to formally vote on OPC's motion for reconsideration. Undoubtedly, this case would still be in the same procedural position it is in now.

Alternatively, if the Court decides that OPC does not have constitutional and statutory appellate rights and did not properly preserve its appellate arguments, the Court should nevertheless consider this appeal because the Commission's denial of OPC's due process rights constitutes fundamental error. "Even if unpreserved, a denial of due process constitutes fundamental error." *Pumphrey v. Dep't of Children & Families*, 292 So. 3d 1264, 1266 (Fla. 1st DCA 2020) ("A denial of due process, if proven, constitutes fundamen-

⁷ Supp. R. (Transmitted on August 1, 2022) at 4-6.

tal error, which may be challenged for the first time on appeal.” *Verizon Bus. Network Servs. ex rel. MCI Communs., Inc. v. Dep't of Corr.*, 988 So. 2d 1148, 1151, (Fla. 1st DCA 2008). As demonstrated above and in the Initial Brief,⁸ the Commission violated OPC’s due process rights by failing to notify OPC or any other party that the Commission would consider for the first time ever the apportionment of replacement power costs in lieu of making a finding regarding whether DEF satisfied its burden of proof. This is a material, fundamental error, and the Court should consider OPC’s appeal.

II. THE COMMISSION IMPROPERLY ATTEMPTS TO SHIFT THE BURDEN OF PROOF AWAY FROM DEF AND ONTO CONSUMERS DEMONSTRATING THAT THE COMMISSION DOES NOT UNDERSTAND ITS OBLIGATION TO REQUIRE DEF TO SATISFY THE BURDEN OF PROOF.

With its Answer Brief, the Commission has only highlighted its erroneous and unjust interpretation of how the burden of proof should be applied. The Commission seems to believe that weighing the evidence really just means counting the evidence, regardless of quality, and whichever side presents the most exhibits or testimony, wins. The Commission also seems to believe that if intervenors do not

⁸ OPC’s Initial Brief, p. 29-31.

call a witness to the stand, then the utility's evidence *de facto* satisfies the utility's burden of proof, even if the utility's evidence is riddled with deficiencies and inconsistencies like DEF's evidence was in this case. The Commission's argument fails to recognize the role that cross-examination plays in the introduction of evidence, since cross-examination is a fundamental method a party may use to directly introduce competent, substantial evidence.

Both OPC and DEF cited to *Fla. Power Corp. v. Cresse*, 413 So. 2d 1187 (Fla. 1982), for this Court's foundational principle that the utility bears the burden of proof to demonstrate the reasonableness and prudence of their actions.⁹ OPC also cited to *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981), for the requirement that the utility must present evidence that establishes their claim of prudence by a preponderance of the evidence. *Id.* at 787. All parties agree that DEF was required to prove their case by a preponderance of the evidence. DEF AB p. 24; PSC AB p. 22. DEF presented one witness, Joseph Simpson, and two exhibits: a root cause analysis¹⁰

⁹ The Commission cited to *Cresse* in the Order. R. 47.

¹⁰ Ex. 8.

and a repair evaluation report.¹¹ The Commission's staff, who are permitted to enter evidence and cross-examine witnesses, also entered a number of exhibits into the record, including DEF's Responses to Staff's Fifth Set of Interrogatories, Nos. 8-14;¹² DEF's Responses to OPC's First Request for Production of Documents, Nos. 1, 3 and 4;¹³ DEF's Responses to OPC's First Set of Interrogatories, Nos. 1-8;¹⁴ and DEF's Supplemental Responses to OPC's First Set of Interrogatories, No. 8 and DEF's Supplemental Responses to OPC's First Request for Production, No. 4.¹⁵ OPC and two other consumer parties conducted extensive cross-examination of Mr. Simpson. R. 1874-1974. Staff also cross-examined Mr. Simpson. R. 1974-77.

In criminal law, whether the State has met its burden of proof that a defendant is guilty beyond a reasonable doubt does not depend upon the number of witnesses the State has called or upon the number of exhibits the State has offered, but instead upon the nature and

¹¹ Ex. 9.

¹² Ex. 54.

¹³ Ex. 58.

¹⁴ Ex. 59.

¹⁵ Ex. 64.

quality of the evidence presented.¹⁶ If the State fails to present evidence of a high enough quality to prove its case beyond a reasonable doubt, then the State fails to meet its burden of proof, regardless of whether a defendant chooses to present evidence in his own defense.¹⁷

The same is true in civil law.

The burden of proof, in its strict sense, is the duty of establishing the truth of a given proposition. In civil litigation, this burden is discharged by the production of a preponderance of the evidence and does not shift during the course of a trial.

Generally speaking ... the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails.

In re Estate of Ziy, 223 So. 2d 42, 43 (Fla. 1969).

¹⁶ Fla. Std. Jury Instr. (Crim.) 3.9.

¹⁷ Obviously, all criminal defendants are entitled to constitutional presumptions regarding their choice to present a defense. OPC is not claiming to have those same constitutional presumptions. Amend. V, VI and XIV, U.S. Const.

Although the case at bar is an administrative law case, the principles regarding a party's obligation to satisfy the burden of proof remain. *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981).

DEF alone bore the burden of proof in this case to show, by a preponderance of the evidence, that its actions on December 17, 2020, at the Crystal River Unit 4 (CR4) power plant were prudent. In an attempt to meet that burden, DEF presented Mr. Simpson's testimony and two exhibits. Multiple parties, including OPC and the Commission's Staff, cross examined Mr. Simpson and pointed out many inconsistencies in both his testimony and DEF's two exhibits. This cross-examination, including the entry of exhibits, was an appropriate method of entering direct evidence that the Commission was bound to consider and weigh. Given those inconsistencies and the weakness of DEF's case, further demonstrated in OPC's initial brief, DEF's evidence failed to satisfy DEF's burden of proof.

Inexplicably, the Commission erroneously suggests that since OPC did not call a witness or enter an exhibit that DEF by default

met its burden of proof since DEF presented at least one witness/exhibit at the hearing.¹⁸ The Commission’s brief heavily relies on the repeated references to OPC’s “failure” to allegedly present its own evidence as the reason that DEF established the prudence, in part, of DEF’s actions.¹⁹ OPC had no obligation to present any witnesses or evidence to counter DEF’s insufficient evidence, and the Commission’s brief only highlights the Commission’s lack of understanding and improper application of the burden of proof addressed in OPC’s initial brief.

Even though OPC never shouldered the burden of proof, OPC, the Commission staff, and other parties nevertheless presented direct evidence that directly contradicted DEF’s testimony and evidence. The Commission staff recognized this in its recommendation where

¹⁸ The Commission’s Order states, “[d]espite 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.” (Emphasis added.) PSC AB p. 50.

¹⁹ PSC AB at p. 4, 23, 30, 50.

it cited to evidence that OPC²⁰ and the Commission staff²¹ elicited on cross-examination of Witness Simpson. R. 148. The Commission relied on this evidence in the Order.²²

The Commission cannot now be heard to argue that OPC failed to carry a burden of proof. No such concept is expressly or impliedly contained in the Order. The Commission's own staff conducted cross examination and introduced evidence in a manner diametrically the opposite of the method the agency now erroneously suggests that it adheres to – i.e., that all evidence must be introduced through a witness called to the stand by the party. The Commission offered no authority for this proposition. The Commission should be estopped

²⁰ “The brief eight-second timeframe in which the synchronization attempts occurred, and this contradictory statement, leads staff to question whether a thorough walkdown occurred prior to each synchronization attempt.” R. 148. OPC introduced evidence through cross-examination on these points. R. 1934-38.

²¹ “It is further alleged that this procedure was not approved or pre-approved at any point before the outage event. (Tr. 446-447).” R. 148. Pages 446-447 of the hearing transcript contain cross-examination by Commission staff of Witness Simpson. R. 1974-75.

²² “DEF witness Simpson testified that there was no approved written procedure in place for the procedure the operator was using to reset the synchronization, even though the operator had successfully utilized it at CR4 previously.”; “The brief eight-second timeframe in which the automatic synchronization attempts occurred, and this contradictory statement, lead us to question whether a thorough walkdown occurred after each synchronization attempt.” R. 48.

from arguing this given that the agency and its staff conducted cross-examination and introduced documentary evidence in the form of exhibits containing responses to staff's own discovery requests on this issue.²³

III. THE COMMISSION CONSIDERED “MITIGATING FACTORS” IN LIEU OF MAKING A DETERMINATION ABOUT THE PRUDENCE OF DEF’S ACTIONS.

The Commission attempts to argue in its Answer Brief that the Commission's self-titled “mitigating factors” in the Order were considered prior to the Commission's purported finding that DEF's actions were prudent in part, thus justifying the apportionment of financial responsibility. For many reasons, this is demonstrably false.

First, there is no finding whatsoever, in whole or in part, regarding the Commission's determination of DEF's prudence in the Order. The Commission refused to make such a finding, after giving lip service to the *Cresse* standard of burden of proof, and skipped ahead to apportioning the replacement power costs. R. 45-50. As OPC illustrated in its initial brief, this is a fundamental flaw in the Order.

²³ R. 1974-81; Ex. 54.

The Commission wrongly relies on *In re: Investigation of Fuel Adjustment Clauses of Electric Utilities*, Order No. 12645 (Nov. 3, 1983), as purported support for the argument that “a ruling in favor of prudence should be inferred even if none is explicitly made.” This is alarmingly misleading. The cited Order concerned the generic fuel clause process considerations surrounding the Commission’s jurisdiction (or lack thereof) to “look back” and consider the issue of prudence in evaluating the fuel invoice expenditure transactions related to the purchase of fuel in true-up proceedings in general, as opposed to whether the Commission has made a prudence determination surrounding certain operational actions of management in a specific case. In the instant case, whether DEF management’s prudence in its operational actions on a specific day necessitated incurring higher fuel costs was the sole issue. The concept of an implied determination of prudence has no place in this case.

Second, not once during the Commission’s agenda conference did the Commissioners utter the words “mitigating factors.” The Order itself, and the unanimously signed agenda vote sheet, clearly show the Commissioners ruled that, “[f]ailure of the plant operator to

follow written procedures, without supervisory approval, directly led to the outage at Crystal River 4.” R. 49, 91. While one would presume that such a finding would compel the corresponding finding that, “Therefore, DEF failed to meet DEF’s burden of proof that DEF’s actions were prudent,” no such finding is found in the Order. Instead, the written Order supposedly reflecting public deliberations intentionally sidesteps making the determination about whether DEF met its burden of proof and cites to the newly minted, post-deliberation “mitigating factors” standard to justify a split of the financial responsibility for the replacement power costs between DEF and ratepayers.

Third, the Commission’s Answer Brief erroneously implies that the concept of “mitigating factors” does not have legal significance. To the contrary, the term “mitigating factors” is commonly understood to be a legal consideration *after* a determination of responsibility has been made. In criminal court, once a defendant has been adjudicated guilty of a crime, the Court then allows for the presentation of mitigation for sentencing purposes.²⁴ Similarly, in administrative

²⁴ § 921.0026, Fl. Stat. (2021); “A trial court must not impose a downward departure sentence unless mitigating circumstances or factors

law, licensed healthcare professionals who have violated the rules regulating their profession regularly cite to “mitigating factors” provided for in their profession’s sentencing guidelines as a method of reducing their punishment.²⁵ If the Commission intended to convince the Court that what they cited as “mitigating factors” was merely evidence that the Commission considered prior to determining the cause of the outage, they should have tried to do so using other language.

What is much more likely is that despite Commission staff’s agreement with OPC that DEF did not act prudently, the Commission avoided making a ruling about whether or not DEF met their burden of proof, voted to split the costs between DEF and DEF’s ratepayers, and then left Commission Staff to cobble together an Order, and now an Answer Brief, insisting that the Commission made an appropriate ruling supported by competent, substantial evidence. The record and

are present which reasonably justify such a departure.” *Jackson v. State*, 64 So. 3d 90, 92 (Fla. 2011).

²⁵ Rule 64B7-30.002(3), F.A.C.; Rule 64B8-8.001(3), F.A.C.

competent substantial evidence do not support the post-deliberation narrative in the Order.

IV. APPELLEES FAILED TO CITE TO ANY PRIOR AGENCY ACTION CONSISTENT WITH THE PSC'S IMPROPER RULING.

Both DEF and the Commission failed to rebut OPC's initial brief demonstration that the Order is inconsistent with prior agency practice and established policy, and thus contravenes sec. 120.68(7)(e)3., Fla Stat. (2022). DEF failed to cite to any prior order on this issue, and the three orders the Commission cited to are not on point.

First, the Commission cites to *In re: Fuel and purchased power cost recovery clause with generation performance incentive factor.*, Order No. 23232 (July 20, 1990). This case involved a series of several outages at Florida Power & Light's ("FP&L") Turkey Point Units 3 and 4 where the Commission found that FP&L was prudent with regard to the duration of some of the outages but not prudent with regard to the duration of other outages. However, the case before the Court involves a single outage with a single cause.²⁶ This is why the 2009

²⁶ As the Commission stated in the Order, "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.

fuel clause case that OPC cited in the initial brief, which also involved a single outage with a single cause, is more appropriate for comparison.²⁷ Also, the 1990 Turkey Point case cited by the Commission never discussed “mitigating factors.” No apportionment occurs in the Turkey Point case, and the case utterly fails to support the Commission’s decision here. Furthermore, Commission Staff failed to reference this case either in their recommendation,²⁸ their comments to the Commission at the agenda conference,²⁹ or the Order itself.³⁰ Obviously, it was not a predicate upon which the Commission’s decision was based.

The Commission’s reliance on *In re: Review of replacement fuel costs associated with the February 26, 2008 outage on Florida Power & Light’s electrical system.*, Order No. PSC-2010-0381-FOF-EI (June 15, 2010), is even further off the mark, because the case did not involve a contested prudence determination at all. In that case, FP&L entered into a settlement agreement and did not dispute its respon-

²⁷ OPC Initial Brief, p. 20-23.

²⁸ R.143-50.

²⁹ R. 55-6, 59.

³⁰ R. 45-50.

sibility for the cause of the outage. *Id.* at p. 3. The only dispute involved how to calculate the replacement power costs. That case provides no precedential value with regard to the case at bar since all parties in this matter agree that the disputed replacement power costs for the CR4 outage are \$14.4 million.

The only other case that the Commission attempts to offer in response to OPC's argument on this point is *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-1992-0289-FOF-EI (May 5, 1992). This case involved two separate outages. The Commission decided that the cause of one outage was due to a mechanical failure that the company could not have foreseen, and the cause of the other outage was due to an oil leak. The Commission found that the utility acted prudently in repairing the leak. It appears that the Commission has cited to this case as precedent that an unforeseeable mechanical failure could be a reason for finding that a utility nonetheless acted prudently. However, in this case, the Commission clearly stated in the Order that the cause of the outage at CR4 was the failure

of DEF's plant operator to follow written procedures without supervisor approval, not a mechanical failure.³¹ The Order only referred to the failure of the relay as a "mitigating factor" for purposes of lessening DEF's financial responsibility for the outage, not as evidence bearing on DEF's prudence. Reliance on this case is an impermissible attempt at recasting of the Commission's post-deliberation written order.

V. OPC IS NOT ASKING THE COURT TO REWEIGH THE EVIDENCE.

In its Answer Brief, Commission repeatedly claims that OPC is simply unhappy with the result of the Order and that OPC impermissibly asks this Court to reweigh the evidence.³² It also insists that the Commission's purported "decision" that DEF was prudent "in part" is a question of fact supported by competent, substantial evidence; therefore, the Court may not disturb that ruling. The problem with this argument is that the Commission made no such finding, in whole or in part, about the burden of proof at all. This appeal has been

³¹ "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.

³² PSC AB at pp. 15, 16, 26, 33, 41.

brought because the Commission intentionally chose to disregard its duty to decide whether DEF met its burden of proof and instead bypassed its responsibility to perform that duty and simply apportioned costs without articulating any basis whatsoever. The Commission's decision to avoid making a decision about the burden of proof, without authority, is purely an issue of law, which is subject to *de novo* review. *Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 597 (Fla. 1st DCA 2000).

CONCLUSION

In sum, the Commission and DEF have failed to answer the issues raised in the Initial Brief. The Court should consider OPC's arguments in this appeal, which are constitutionally and statutorily authorized, and reverse the Commission's Order.

CERTIFICATE OF SERVICE

SC22-94

I HEREBY CERTIFY that a true and correct copy of the foregoing **CITIZENS' REPLY BRIEF** has been furnished by electronic mail on this 26th day of September, 2022, to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Rules 9.045 and 9.210(a)(2), Florida Rules of Appellate Procedure, that the CITIZENS' REPLY BRIEF was prepared using Bookman Old Style 14-point font and contains 4,608 words; therefore, this brief complies with the Florida Rules of Appellate Procedure and the Court's Order granting Citizens' Motion for Enlargement of Word Limits.

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