

SC22-1733; SC22-1735; SC22-1745; SC22-1748; SC22-1777

IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, ETC.,
Appellants,

v.

ANDREW GILES FAY, ETC., ET AL.,
Appellees.

ANSWER BRIEF OF FLORIDA POWER & LIGHT COMPANY

Lower Tribunal Case Nos.
20220051-EI; 20220050-EI; 20220049-EI; 20220048-EI;
20220010-EI

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STATEMENT OF CASE AND FACTS

In accordance with Florida Rules of Appellate Procedure 9.210, Appellee Florida Power & Light Company (“**FPL**”) submits this Answer Brief in support of the following Florida Public Service Commission (“**Commission**” or “**PSC**”) orders that were consolidated for appellate review and currently pending before this Court: (i) Commission Order No. PSC-2022-0389-FOF-EI issued in Docket No. 20220051-EI on November 10, 2022, approving the FPL 2023-2032 Storm Protection Plan (hereinafter referred to as the “**SPP Order**”); (ii) Order No. PSC-2022-0292-PCO-EI issued in Docket No. 20220051-EI on August 1, 2022, granting FPL’s Motion to Strike (hereinafter referred to as the “**Strike Order**”); and (iii) Order No. PSC-2022-0418-FOF-EI issued in Docket No. 20220010-EI on December 12, 2022, approving FPL’s Storm Protection Plan Cost Recovery Clause (hereinafter referred to as the “**SPPCRC Order**”).

I. Procedural Posture

FPL adopts the Procedural Posture set forth in the Answer Brief submitted by the Commission.

II. Factual Background

A. The Storm Protection Plan Statute

On June 27, 2019, Governor DeSantis signed SB 796, which directed each public utility to file a ten-year transmission and distribution Storm Protection Plan (“**SPP**”) explaining the systematic approach the utility will follow to achieve the legislative objectives of strengthening electric utility infrastructure to withstand extreme weather conditions by promoting the overhead hardening of transmission and distribution facilities, the undergrounding of certain electrical distribution lines, and vegetation management. *See* §§ 366.96(2)(b) and (3), Fla. Stat. (hereinafter referred to as “**SPP Statute**”). The Legislature also directed the Commission to conduct an annual proceeding to determine the utility’s prudently incurred SPP costs and to allow the utility to recover such costs through a charge separate and apart from its base rates, to be referenced as the Storm Protection Plan Cost Recovery Clause (“**SPPCRC**”). *See* § 366.96(7), Fla. Stat.

The Legislature directed the Commission to propose rules to implement and administer the SPP Statute, as soon as practicable but no later than October 31, 2019. *See* § 366.96(11), Fla. Stat.

Consistent with this mandate, the Commission initiated a rulemaking and voted at its October 3, 2019, Agenda Conference to adopt Rule 25-6.030 (“**SPP Rule**”) and Rule 25-6.031 (“**SPPCRC Rule**”), Florida Administrative Code. However, as a result of the Office of Public Counsel’s (“**OPC**”) unsuccessful challenges to the Commission’s SPP and SPPCRC Rules, these Rules did not become final and effective until February 18, 2020.

The SPP Rule directs what is to be included in and reviewed by the Commission as part of the Storm Protection Plan proceeding. The SPPCRC Rule describes what is to be included and reviewed as part of the Storm Protection Plan Cost Recovery Clause proceeding.

B. FPL’s 2023-2032 Storm Protection Plan

Each electric utility is required to file an updated ten-year Storm Protection Plan for Commission approval at least every three years. See § 366.96(6), Fla. Stat. The programs, projects, and costs included in FPL’s first Storm Protection Plan, the 2020-2029 SPP (“**FPL 2020 SPP**”), were agreed to by OPC and other parties in a Joint Motion for Approval of a Stipulation and Settlement Agreement (“**2020 SPP Settlement**”), which was approved by Commission Order No. PSC-

2020-0293-AS-EI in Docket Nos. 20200070-EI and 20200071-EI. (R. FPL 5453).

On April 11, 2022, FPL filed its 2023-2032 SPP (“**FPL 2023 SPP**”), which is the subject of OPC’s appeal in this case.¹ As originally filed, the FPL 2023 SPP included the continuation of eight existing programs from the FPL 2020 SPP and three new SPP programs, for a total of eleven programs. Subsequently, FPL voluntarily dropped two of the proposed new programs (Transmission and Distribution Winterization Programs) and the Commission rejected the other proposed new program (Transmission Access Enhancement Program). As a result, the final FPL 2023 SPP approved by the Commission is a continuation and expansion of the *same* eight existing programs included in the FPL 2020 SPP that OPC agreed to in the 2020 SPP Settlement. (R. FPL 5453; R. FPL 1255-93).

¹ The three other Florida investor-owned electric utilities also filed SPPs on April 11, 2022: the Tampa Electric Company (“TECO”) SPP was filed in Docket No. 20220049-EI; the Florida Public Utilities Company (“FPUC”) SPP was filed in Docket No. 20220049-EI; and the Duke Energy Florida, LLC (“DEF”) SPP was filed in Docket No. 20220050-EI. The four SPP dockets were consolidated for purpose of the hearing.

C. OPC's Challenge to the FPL 2023 Storm Protection Plan

Pertinent to OPC's appeal, the FPL 2023 SPP did not provide forecasts of quantified and monetized reductions in restoration costs and outage times associated with future extreme weather events for each SPP program during the 2023-2032 plan period. (R. FPL 6561). Rather, as FPL witness Jarro explained repeatedly during cross-examination, given the many highly variable and subjective factors in providing such projected benefits, as well as the fact that there is no industry- or Commission-accepted method to do so, FPL relied on its actual and real-world experience with recent extreme weather events, such as Hurricanes Irma and Matthew, which clearly demonstrate FPL's storm hardening programs work and will continue to provide customers with both reductions in restoration costs and outage times associated with extreme weather events. (R. FPL 6561-63, 6566-67, 6570-72, 6583-84, 6602-03).

Specifically, FPL performed an analysis of Hurricanes Irma and Matthew demonstrating the restoration construction man-hours, days to restore, and storm restoration costs for these storms would have been significantly greater without FPL's storm hardening

programs. See (R. FPL 462-79, 6542-43). Further, FPL demonstrated its underground laterals performed better than overhead laterals during extreme weather events. (R. FPL 6583, 6599; R. FPL 5480). FPL also demonstrated the forty-year net present value of the significant savings associated with storm hardening if storms similar to Hurricanes Irma and Matthew were to occur every three and five years. (R. FPL 471-79). Thus, FPL reasonably relied on its historical experience and results during actual hurricane events as a more realistic and reliable proxy to estimate the benefits expected from the programs included in the FPL 2023 SPP. (R. FPL 5517-18, 5528-29). Importantly, FPL's approach to describing the benefits of the FPL 2023 SPP is the *exact same approach used for the FPL 2020 SPP that OPC agreed to* in the 2020 SPP Settlement. (R. FPL 1255-93, 5529).

OPC submitted the testimony of witness Kollen recommending the Commission adopt and retroactively apply new standards and criteria to the utilities' SPPs. (R. FPL 5671-86). OPC witness Kollen then recommended the "Commission reject all proposed SPP projects that are not economic, meaning that they do not have a benefit-to-cost ratio of at least 100%." (R. FPL 5674). OPC witness Kollen went on to conclude that "FPL's programs and costs are not prudent and

reasonable unless they meet all of the requirements” proposed by OPC witness Kollen. (R. FPL 5679). OPC witness Kollen also raised concerns regarding whether the SPP costs were incremental to the costs being recovered in base rates, (R. FPL 5672-73, 5676-81, 5685), as well as with FPL’s calculation of the revenue requirements for the SPP projects and costs to be recovered through the Storm Protection Plan Cost Recovery Clause. (R. FPL 5673-75, 5681, 5686-91).

D. FPL’s Motion to Strike in the SPP Proceeding

On July 13, 2022, FPL filed a timely Motion to Strike certain portions of OPC witness Kollen’s testimony.² FPL argued that select portions of OPC witness Kollen’s testimony should be stricken because: (a) his recommendations that the Commission adopt new requirements and standards that are not included in the SPP Rule and then retroactively apply those new requirements and standards to the FPL 2023 SPP violate section 120.54, Florida Statutes; (b) his

² In its Initial Brief, OPC appears to take issue with the timing of FPL’s Motion to Strike. (OPC Br. at 6). Pursuant to Section VI.D of the Order Establishing Procedure, Order No. PSC-2022-0119-PCO-EI in Docket No. 20220051-EI, motions to strike any portions of pre-filed testimonies or exhibits were required be filed by no later than the Prehearing Conference, which was scheduled for July 21, 2022. Thus, contrary to OPC’s suggestion, FPL’s Motion to Strike was timely and, in fact, a week early under the Order Establishing Procedure.

recommendations that the Commission apply the cost recovery standards for the SPPCRC to the FPL 2023 SPP are irrelevant and beyond the scope of the SPP proceeding; and (c) his recommendations that rely upon and apply an incorrect standard of review in violation of section 366.96, Florida Statutes, are improper.³ OPC filed a timely response in opposition.

In the Strike Order issued on August 1, 2022, the Prehearing Officer granted FPL's Motion to Strike in its entirety, concluding the "portions of Witness Kollen's testimony sought to be stricken from these dockets are irrelevant and immaterial to the evaluation of these SPPs." (R. FPL 6813). Following oral argument, (R. FPL 5605-23), the Commission unanimously rejected OPC's *ore tenus* request for reconsideration and upheld the Prehearing Officer's Strike Order. (R. FPL 5624-25).

³ Motions to Strike certain portions of OPC witness Kollen's testimony were also filed by DEF and TECO. FPUC filed a letter requesting that, in the event similar portions of OPC witness Kollen's testimony were stricken by the Motions to Strike filed in the FPL, DEF, and TECO dockets, then those same matters should be stricken from the FPUC docket as redundant and immaterial.

E. The PSC's Order in the Storm Protection Plan Proceeding

Notwithstanding the fact that the Commission upheld the Prehearing Officer's order granting FPL's Motion to Strike, the Commission nonetheless addressed and rejected OPC's arguments that the SPP Statute and SPP Rule require a cost-effectiveness evaluation or quantified cost-benefit analysis. (R. FPL 192-93). The Commission also rejected OPC's arguments that the SPP Statute and SPP Rule require the utility to provide quantified or monetized benefits. (R. FPL 193-94, 196-97, 200-01).

The Commission found the SPP Statute requires it to apply the public interest standard, (R. FPL 207), and, based on the substantial record evidence, found the FPL 2023 SPP to be in the public interest with the following two modifications: (1) removal of the new Transmission Access Enhancement Program; and (2) removal of the transmission looping initiative from the existing Transmission Hardening Program. (R. FPL 208). Thus, the Commission approved FPL's proposal to continue and expand the following existing eight programs in the FPL 2023 SPP that OPC previously agreed to in the 2020 SPP Settlement:

- Distribution Inspection: eight-year cycle distribution pole inspection program
- Transmission Inspection: six-year cycle transmission pole, substation, and hardware inspection program
- Distribution Feeder Hardening: program to harden existing overhead feeder distribution lines to meet extreme wind loading standards
- Distribution Lateral Hardening: program to convert existing lateral distribution lines from overhead to underground, as well as harden certain overhead lateral lines
- Transmission Hardening: program to replace all wood transmission poles with steel or concrete structures
- Distribution Vegetation Management: three-year average vegetation maintenance cycle for feeders, mid-cycle targeted vegetation for certain feeders, and six-year average vegetation cycle for laterals
- Transmission Vegetation Management: program to inspect and maintain vegetation of approximately 9,350 miles of transmission lines annually

- Substation Storm Surge/Flood Mitigation: program to raise the equipment at certain substations above the flood level and construct flood protection around other substation to prevent/mitigate future damage due to storm surges and flooding

(R. FPL 207-08). Many of these storm hardening initiatives have been in place since 2007.⁴ (R. FPL 5453, 5511, 6541, 6555, 6579). The storm hardening projects and activities under the Commission-approved FPL 2023 SPP began to be implemented and installed January 1, 2023.

F. The 2023 Storm Protection Plan Cost Recovery Clause Proceeding

Pursuant to the SPP Statute, the Commission is required to conduct an annual hearing to determine the utility's prudently incurred SPP costs to be recovered through the Storm Protection Plan Cost Recovery Clause. § 366.96(7), Fla. Stat. Importantly, although the SPPCRC is based on the utility's SPP in effect at the time, the SPP

⁴ The Distribution Lateral Hardening Program was initially implemented as a pilot in 2018 and approved to continue in the FPL 2020 SPP, and the Substation Storm Surge/Flood Mitigation Program was implemented as part of the FPL 2020 SPP. (R. FPL 5479, 5511, 6579, 6594-95, 6640).

and SPPCRC are entirely separate proceedings before the Commission under the SPP Statute. *See id.* Consistent with the Commission's SPPCRC Rule, each annual SPPCRC filing includes (i) a final true-up of the SPP costs incurred during the prior year, (ii) an actual/estimated true-up of the SPP costs incurred during the current year, and (iii) a projection of the SPP costs to be incurred in the subsequent year. *See Fla. Admin. Code R. 25-6.031(7).*

On April 1, 2022, FPL filed its 2021 SPPCRC final true-up and on May 2, 2022, FPL filed its 2022 SPPCRC actual/estimated true-up and projected 2023 SPPCRC. The SPPCRC at issue in this appeal is FPL's projected 2023 SPPCRC, which was based on the FPL 2023 SPP. Following the Commission's approval of the modified FPL 2023 SPP, FPL filed a revised projected 2023 SPPCRC on October 14, 2022, to reflect the Commission-approved modifications to the FPL 2023 SPP.

In support of the projected 2023 SPPCRC, FPL provided voluminous project level detail, together with the data and calculations required by the Commission's schedules, to describe and support the SPP projects and costs projected to be incurred during 2023. (R. SPPCRC 437-64, 511-525). No party, including

OPC, challenged the reasonableness or prudence of a single 2023 SPP project or any associated costs. (R. FPL 6719). Rather, OPC attempted to relitigate the 2023 SPP by raising substantially the same arguments in the SPPCRC docket. (R. FPL 6721-23, 6725-29).

In the SPPCRC Order, the Commission found FPL's SPPCRC to be reasonable and prudent and approved FPL's 2021 SPPCRC final true-up, its 2022 SPPCRC actual/estimated true-up, and its projected 2023 SPPCRC Factors as revised by FPL's supplemental testimony and exhibits. The Commission-approved SPPCRC Factors became effective and were applied to customer bills beginning with the first billing cycle in January 2023.

SUMMARY OF ARGUMENT

The pending appeals are this Court's first opportunity to review Storm Protection Plans approved by the Commission. Nevertheless, the issues raised by OPC are very simple and straightforward questions of statutory construction. The Commission's orders should be affirmed for three reasons.

First, OPC improperly asks this Court to apply the prudence standard used by the Commission in ratemaking proceedings to the Commission's review of Storm Protection Plans because, according to OPC, the SPP is a ratemaking proceeding. OPC's argument contravenes the fundamental rules of statutory construction by ignoring the plain and unambiguous language of the SPP Statute that requires a public interest standard to be applied to the SPP, not the prudence standard. Moreover, OPC attempts to mislead this Court by mischaracterizing the SPP as a ratemaking proceeding, which it is not. As directed by the plain language of the SPP Statute, cost recovery and rates are determined and set in the separate SPPCRC proceeding, not the SPP.

Second, OPC likewise ignores the plain language of the SPP Rule requiring an unqualified description and comparison of cost and

benefits to be included in the SPP filing. Instead, OPC improperly asks this Court to read a new requirement into the SPP Rule that the SPP filing must provide a formulaic quantitative comparison of the SPP costs and benefits to ensure the SPP programs are cost effective. However, a review of the plain language reveals the Commission did not require such a prescriptive test when it adopted the SPP Rule. This is further demonstrated by the fact that each of the utilities in the SPP proceedings below took different approaches to provide the comparison of the SPP costs and benefits required by the SPP Rule.

Moreover, the Commission reviewed the information and data provided by FPL and concluded it was sufficient to ascertain a comparison of costs and benefits within the FPL 2023 SPP. The Commission's findings in this regard are supported by undisputed, competent, substantial evidence in the record and should not be re-weighed or second-guessed on appeal.

Finally, OPC's claim that the Commission's decision to strike certain portions of its expert's testimony in the SPP dockets impaired the fairness of the proceedings below is misplaced and without merit. As found by the Commission, the stricken testimony attempted to provide legal opinion on the interpretation of the SPP Statute and SPP

Rule, requested the Commission to adopt and retroactively apply new standards and criteria not provided in the SPP Statute or SPP Rule, was more appropriately addressed in the separate SPPCRC docket, and was beyond the scope of the SPP proceeding. Under these circumstances, it cannot be credibly argued the Commission abused its discretion in deciding to exclude those portions of the testimony from one of OPC's witnesses in the SPP dockets.

Furthermore, OPC briefed these legal issues and the Commission fully considered and rejected them in the final SPP Order. Therefore, even if the Commission's decision to strike these select portions of OPC's testimony was somehow an abuse of discretion, it was at most a harmless error that would not have changed the findings or conclusions made by the Commission in the SPP docket below.

STANDARD OF REVIEW

As this Court recently explained, “Commission orders arrive at this Court with a presumption that they are ‘reasonable and just.’” *LULAC Fla. Educ. Fund, Inc. v. Clark*, No. SC21-0303 (Fla. May 27, 2022) (order remanding case to the Commission) (quoting *Sierra Club v. Brown*, 243 So. 3d 903, 907 (Fla. 2018)). This Court reviews the Commission’s interpretations of statutes or rules *de novo*, see art. V, § 21, Fla. Const., but “it is not this Court’s job to substitute [the Court’s] policy views for the Commission’s or to reweigh the evidence.” *LULAC*, at 2.

This Court has repeatedly confirmed it “will affirm the Commission’s ‘findings and conclusions if they are based upon competent, substantial evidence and are not clearly erroneous.’” *Sierra Club v. Brown*, 243 So. 3d 903, 914-15 (Fla. 2018) (quoting *Citizens of State v. Fla. Pub. Serv. Comm'n (“Citizens I”)*, 146 So. 3d 1143, 1164 (Fla. 2014)). “Further, this Court ‘will not overturn an order of the [Commission] because we would have arrived at a different result had we made the initial decision and we will not reweigh the evidence.’” *Id.* (quoting *Citizens I*, 146 So. 3d at 1164).

A trial court’s decision to admit or exclude evidence is reviewed under the abuse of discretion standard.” *Jackson v. Household Fin. Corp. III*, 298 So. 3d 531, 535 (Fla. 2020).

ARGUMENT

I. The Plain Language of the SPP Statute Requires the Commission to Determine whether SPPs are in the Public Interest

OPC argues that the Commission is required to consider the prudence of SPP investments in reviewing a utility's Storm Protection Plan. (OPC Br. at 20). In making this argument, OPC relies on the prudence requirement in section 366.06(1), Florida Statutes, which governs ratemaking proceedings. The fundamental flaw with this argument is that the Commission's review of SPPs is governed by the SPP Statute, not the ratemaking statute. OPC completely ignores that the plain and unambiguous language of the SPP Statute expressly requires the Commission to determine whether a utility's Storm Protection Plan is in the "public interest." See § 366.96(5), Fla. Stat. For these reasons, as further explained below, OPC's argument that a prudence review is required for SPPs should be rejected and the Commission's application of the public interest standard prescribed in the SPP Statute should be affirmed.

A. OPC Ignores the Plain Language of the SPP Statute

This Court adheres to the "supremacy-of-text principle." *Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 2d 942, 946 (Fla. 2020).

Under this principle, “[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.” *Id.* (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 56 (2012)); *see also Lieupo v. Simon’s Trucking, Inc.*, 286 So. 3d 143, 145 (Fla. 2019) (“A court’s determination of the meaning of a statute begins with the language of the statute.”). When the language of a statute is clear, it is given its plain meaning; the Court does not look further for legislative intent or resort to rules of statutory construction. *Lieupo*, 286 So. 3d at 145.

The SPP Statute provides the factors the Commission must consider when reviewing a Storm Protection Plan:

(4) In its review of each transmission and distribution storm protection plan filed pursuant to this section, the commission shall consider:

(a) The extent to which the plan is expected to reduce restoration costs and outage times associated with extreme weather events and enhance reliability, including whether the plan prioritizes areas of lower reliability performance.

(b) The extent to which storm protection of transmission and distribution infrastructure is feasible, reasonable, or practical in certain areas of the utility’s service territory, including, but not limited to, flood zones and rural areas.

(c) The estimated costs and benefits to the utility and its customers of making the improvements proposed in the plan.

(d) The estimated annual rate impact resulting from implementation of the plan during the first 3 years addressed in the plan.

(5) No later than 180 days after a utility files a transmission and distribution storm protection plan that contains all of the elements required by commission rule, the *commission shall determine whether it is in the public interest to approve, approve with modification, or deny the plan.*

§ 366.96(4)-(5), Fla. Stat. (emphasis added).

The plain and unambiguous language of the SPP Statute unequivocally required the Commission to review the FPL 2023 SPP to determine whether it is in the *public interest* based upon the Commission’s consideration of the four factors in subsection (4). Even OPC acknowledges the public interest standard applies. *See* (OPC Br. at 25) (“[T]he specific wording of the SPP statute requires the Commission to determine if the proposed SPP investments are in the public interest . . .”).

Nonetheless, OPC would have this Court ignore the clear “public interest” mandate in the SPP Statute by conflating the SPP proceeding with a general ratemaking proceeding under section 366.06(1), Florida Statutes, which does include the prudence

standard. The critical flaw with OPC's reliance on the prudence standard in section 366.06 is that it does not take into account that the review of Storm Protection Plans is conducted under a different statute, which unambiguously requires the Commission to review those plans to determine if they are in the public interest. This Court need not try to divine a meaning of the SPP Statute by looking beyond its plain language. *See English v. State*, 191 So. 3d 448, 450 (Fla. 2016) ("When the statutory language is clear or unambiguous, this Court need not look behind the statute's plain language or employ principles of statutory construction to determine legislative intent.").

Under the well-established rules of statutory construction, this ends the analysis full stop. It would be inappropriate to look beyond the plain language of the SPP Statute to reinterpret the legislative intent contrary to this plain language. For this reason alone, OPC's arguments on the Commission's review of the FPL 2023 SPP should be rejected and the Commission's application of the public interest standard should be affirmed. In other words, because the Legislature adopted a clear and unambiguous statute requiring the Commission to review SPPs to determine if they are in the public interest, this Court need not reach OPC's arguments on the applicability of the

prudence standard in section 366.06(1), Florida Statutes. Out of an abundance of caution and to avoid potential waiver, FPL will nonetheless address OPC's prudence arguments, which also should be denied for the reasons explained below.

B. OPC's Reliance on the Prudence Standard in the General Ratemaking Statute is Misplaced

OPC argues at length that the Commission's prudence standard used during ratemaking proceedings must be applied to the Commission's review of SPPs. This argument is misplaced.

As OPC concedes, the prudence review in section 366.06(1), Florida Statutes, applies to "ratemaking requests," "ratemaking dockets," and "ratemaking decisions." (OPC Br. at 20, 25, 29). FPL certainly agrees the prudence standard in section 366.06(1) applies to all ratemaking proceedings conducted by the Commission, unless otherwise directed by the Legislature. However, the fundamental and fatal flaw to OPC's argument is that the Commission's review of Storm Protection Plans is not a ratemaking request, docket, or decision.

OPC suggests "the SPP approval is part of the rate-setting process governed by the statute." (OPC Br. at 21). This claim is

patently false. The Commission does not approve one single cent for recovery during its review of SPPs, nor does the Commission set any rates as part of the SPP docket.

Instead, the Legislature adopted a separate annual Storm Protection Plan Cost Recovery proceeding to determine a utility's prudently incurred SPP costs and to set rates for recovery of those costs:

After a utility's transmission and distribution storm protection plan has been approved, proceeding with actions to implement the plan shall not constitute or be evidence of imprudence. *The commission shall conduct an annual proceeding to determine the utility's prudently incurred transmission and distribution storm protection plan costs and allow the utility to recover such costs through a charge separate and apart from its base rates, to be referred to as the storm protection plan cost recovery clause.* If the commission determines that costs were prudently incurred, those costs will not be subject to the disallowance or further prudence review except for fraud, perjury, or intentional withholding of key information by the public utility.

§ 366.96(7), Fla. Stat. (emphasis added); *see also* § 366.96(2)(c), Fla. Stat. (defining "[t]ransmission and distribution storm protection plan costs" as "the reasonable and prudent costs to implement an approved transmission and distribution storm protection plan").

Thus, the Legislature mandated that the SPP and SPPCRC are separate and distinct proceedings before the Commission. Further, cost recovery and rates are determined and set in the SPPCRC proceeding, not the SPP. This is why the Legislature adopted a prudence standard for the SPPCRC proceeding.

The presence of the word “prudently” in section 366.96(7) undermines OPC’s attempt to apply section 366.06(1) to the Commission’s review of storm protection plans. If OPC is correct (and it is not) that “[t]here is no provision in the SPP statute . . . that exempts the SPP” from prudence review, (OPC Br. at 21), then the presence of the two instances of the word “prudently” in section 366.96(7) would be surplusage. The only proper construction of the SPP Statute is to give effect to the word “prudently” within the overall statutory scheme as this Court requires. *See, e.g., Hechtman v. Nations Title Ins. of New York*, 840 So. 2d 993, 996 (Fla. 2003) (“It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible.”).

Had the Legislature intended for a prudence review to be conducted during the initial approval of a SPP, it could have added

that language to section 366.96(5), Florida Statutes, but it did not. Instead, the Legislature directed the Commission to determine whether a utility's SPP is "in the public interest" and then "approve, approve with modification, or deny the plan." § 366.96(5), Fla. Stat.

There is nothing in the plain language of section 366.96(5) requiring the Commission to review SPPs to determine if they are prudent. To make the statute achieve that outcome, this Court would have to change the "public interest" language put there by the Legislature. But this Court is not at liberty to add words to the SPP Statute that were not placed there by the Legislature. *See Fla. Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844, 848 (Fla. 1st DCA 2002) (citing *Seagrave v. State*, 802 So. 2d 281, 286 (Fla. 2001)).

If the Legislature really wanted the result advocated by OPC, all it needed to do was copy the prudence language from the general ratemaking statute in section 366.06 or from the SPPCRC provision in section 366.96(7) and add it to section 366.96(5) for the review of the SPPs. The fact that the Legislature did not do this confirms its choice to treat ratemaking and SPP proceedings differently and thus confirms the plain and unambiguous meaning of the text of the SPP statute. *See generally Cason v. Fla. Dep't of Mgmt. Servs.*, 944 So. 2d

306, 315 (Fla. 2006) (“[W]e have pointed to language in other statutes to show that the Legislature ‘knows how to’ accomplish what it has omitted in the statute in question.”).

Finally, if the prudence standard is applied during the Commission’s review of SPPs, as requested by OPC, it would pre-determine the prudence of the annual SPP projects and costs to be addressed later in the secondary SPPCRC proceeding. This is a nonsensical result that would render the SPPCRC proceeding meaningless. As this Court has explained, “the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.” *Metro. Cas. Ins. Co. v. Tepper*, 2 So. 3d 209, 215 (Fla. 2009) (citation omitted).

In summary, the Commission’s review of SPPs is not a ratemaking proceeding as argued by OPC and, therefore, the prudence standard in the general ratemaking statute is not applicable. As directed by the Legislature, the time and the place to review the prudence of SPP projects and set rates is in the annual SPPCRC proceeding, not during the review of ten-year Storm Protection Plans.

C. OPC's Claim that the Commission's Interpretation of the SPP Statute Bars Any Prudence Review of the SPP Investments is Without Merit

OPC argues that the Commission's ruling that the public interest standard applies to the SPP proceeding effectively barred any prudence review of the SPP investments in either the SPP or SPPCRC proceedings. (OPC Br. at 27). OPC's argument is contrary to the plain language of the SPP Statute, disregards the rules of statutory construction, and disregards the fundamental principles of ratemaking.

As explained above, the Commission must conduct a separate and distinct annual proceeding to "determine the utility's prudently incurred transmission and distribution storm protection plan costs and allow the utility to recover such costs through a charge separate and apart from its base rates." § 366.96(7), Fla. Stat. Consistent with the requirements of the SPP Statute, the Commission must review the prudence of the individual SPP projects as part of the annual SPPCRC proceeding. In fact, the Commission actually has three bites at the proverbial prudence apple in each annual SPPCRC proceeding: (1) after the final actual costs have been incurred during the previous year; (2) while the costs are being incurred during the current year;

and (3) before the costs are incurred in the subsequent year. *See Fla. Admin. Code R. 25-6.031(7)*. If the Commission finds any portion of an SPP project or associated costs are imprudent, the imprudent project or imprudent portion thereof will be disallowed for recovery from customers. *See § 366.96(7), Fla. Stat.*

Despite this clear and unambiguous statutory language, OPC claims that another provision of section (7) of the SPP Statute—the provision that states “proceeding with actions to implement [an approved SPP] shall not constitute or be evidence of imprudence”—essentially prevents the evaluation of prudence in the SPPCRC proceeding. OPC misinterprets this language to mean that actions to implement an approved SPP are deemed prudent and not subject to further review or challenge. However, OPC’s suggested interpretation of the first sentence of subsection (7) would render the remainder of that provision requiring a prudence review in the SPPCRC proceeding meaningless. Accordingly, this Court should reject OPC’s construction of subsection (7). *See Metro. Cas. Ins., 2 So. 3d at 215.*

FPL submits that all the language referenced by OPC in subsection (7) means is that if a utility starts a project included in an approved SPP, doing so will not alone be evidence of imprudence.

However, it does not mean, as incorrectly suggested by OPC, that the started project and associated costs are deemed prudent or somehow exempt from review in the SPPCRC. The utility still has the burden to demonstrate the SPP costs sought for recovery through the SPPCRC proceeding are reasonable and prudent. *See* § 366.96(7), Fla. Stat.; Fla. Admin. Code R. 25-6.031(3). As explained above, the Commission and parties have multiple opportunities to review the prudence of the individual SPP projects as part of each annual SPPCRC filing.

As OPC notes repeatedly throughout its Initial Brief, prudence is a standard applied to cost recovery. A project or action is either prudent or it is not. A project can be imprudent if the utility incurs excessive costs or if the conduct or action was not reasonable under the circumstances.⁵ Importantly, from the ratemaking, utility, and customer perspectives, the difference between a prudent project and an imprudent project is the costs for a prudent project may be

⁵ The Commission's well-established standard for determining prudence is "what a reasonable utility manager would have done, in light of the conditions and circumstances which were known, or should have been known, at the time the decision was made." *In re Nuclear cost recovery clause*, Docket No. 20110009-EI, Order No. PSC-2011-0547-FOF-EI, 2011 WL 5904236 (F.P.S.C. Nov. 23, 2011).

recovered from customers whereas the costs for an imprudent project cannot.⁶ In fact, a utility could theoretically undertake a project that was later determined to be imprudent but, if it does so, none of the associated costs can be recovered from customers (*i.e.*, the costs must come from shareholders, commonly referred to as “below-the-line” in ratemaking, and not recovered in rates charged to customers). This is a fundamental principle of regulated utility ratemaking.

D. OPC’s Reliance on *Sierra Club v. Brown*, 243 So. 3d 903 (Fla. 2018), is Misplaced

OPC acknowledges that “the specific wording of the SPP Statute requires the Commission to determine if the proposed SPP investments are in the public interest.” (OPC Br. at 25). Nevertheless, OPC goes on to argue that prudence is a “crucial element of the public interest standard.” (OPC Br. at 26). Citing *Sierra Club v. Brown*, 243 So. 3d 903 (Fla. 2018), OPC suggests the Commission must always

⁶ See, *e.g.*, *In re Application for amendment of Certificates Nos. 359-W and 290-S to add territory in Broward County*, 96 F.P.S.C. 12:292, 1996 WL 745667 (F.P.S.C. Dec. 16, 1996) (“To the extent a particular project is an imprudent expenditure, the project and its associated [allowance for funds used during construction] would be disallowed in a rate proceeding.”).

conduct a prudence evaluation as part of the public interest review for capital investments. OPC's arguments are misplaced.

Notably, OPC fails to disclose that *Sierra Club* addresses a settlement agreement in a base rate case, not an SPP proceeding predicated on an express statutory public interest standard. In *Sierra Club*, the appellant challenged the Commission's standard of review used to approve a nonunanimous settlement agreement regarding a proposed base rate increase. 243 So. 3d at 905. The appellant argued the Commission was required to apply a prudence standard to a single capital investment individually, while the Commission contended it need only apply the public interest standard to the settlement agreement as a whole. *Id.* at 907. This Court rejected the appellant's argument that a prudence analysis is "necessary to support an overall public interest finding," reasoning that a determination of public interest is a "fact dependent" inquiry that rests solely with the Commission." *Id.* at 910.

OPC selectively quotes from *Sierra Club* in a way that mischaracterizes the Court's holding. The Court's comment in dicta that prudence of capital investments is a relevant consideration in a public interest review is immediately followed by its ultimate

conclusion that there is no “affirmative requirement upon the Commission to make and set forth independently specific prudence findings in a final order reviewing a settlement.” *Id.* at 912. Accordingly, the Court affirmed the Commission’s approval of the settlement agreement, holding that “it was *not* error for the Commission to apply its public interest standard and address the elements of the settlement agreement *without* independently and individually discussing the prudence of the [capital project].” *Id.* (emphasis added).

Despite the foregoing, OPC mischaracterizes the interplay between prudence and the public interest and asks this Court to adopt a standard for SPP proceedings that it is unsupported by the text of the SPP Statute and this Court’s case law. Just as in *Sierra Club*, the Court should decline to add words to the SPP Statute that are not already there. *See Seagrave v. State*, 802 So. 2d 281, 287 (Fla. 2001).

E. The Commission’s Approval of the SPPs is not Inconsistent with Prior Agency Practice

The orders on appeal are a result of the Commission’s first instance of presiding over a fully litigated SPP docket. OPC argues

the Commission's actions during the SPP proceeding are inconsistent with prior agency practice based on its view of "how the Commission has adjudicated similar types of proceedings." See (OPC Br. at 30). Specifically, OPC attempts to draw a parallel between the need determination for the siting of power plants in section 403.519, Florida Statutes, with the requirements of the SPP Statute to argue the Commission "inconsistently interpreted them here without explanation." (OPC Br. at 32). OPC's argument is flawed for multiple reasons.

First, even a cursory review of the SPP Statute and section 403.519 reveals they plainly do not apply to the same issue or have a common purpose. Section 403.519 establishes the process for the Commission to determine the need for the construction of new power plants subject to the Florida Electrical Power Plant Siting Act, §§ 403.501-403.518, Fla. Stat. In contrast, the SPP Statute established the process for the Commission to review SPPs for the storm hardening of existing overhead transmission and distribution facilities. There is no determination of need in the SPP proceeding. The Legislature has already determined that storm hardening the existing transmission and distribution system is needed. See §

366.96(1)(e), Fla. Stat. (“It is in the state’s interest for each utility to mitigate restoration costs and outage times to utility customers when developing transmission and distribution storm protection plans.”). Instead, under the SPP Statute, the Commission reviews a utility’s SPP to determine if the plan put forward is in the public interest as explained above. *See* § 366.96(5), Fla. Stat.

In short, a statute in Chapter 403 regarding the need for new power plants and a statute in Chapter 366 regarding the components and review of Storm Protection Plans to harden existing transmission and distribution facilities are not statutes relating to the same subject that must be construed together to harmonize them and give effect to legislative intent. *See* (OPC Br. at 31 n.19) (citing the *in pari materia* doctrine of statutory construction); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 348 (noting that a critical question when deciding whether to apply the related-statutes canon is how affiliated the examined statutes are).

Second, OPC overlooks that in 2006 the Legislature adopted a companion statute to section 403.519 directing the Commission to establish “alternative cost recovery mechanisms for the recovery of

costs incurred in the siting, design, licensing, and construction of” power plants and to “allow for the recovery in rates of all *prudently* incurred costs.” § 366.93(2), Fla. Stat. (emphasis added). This companion cost recovery statute makes it clear that a prudence review is to be done in a separate ratemaking docket filed *after* the Commission has issued a final order granting a determination of need for the proposed power plant. *See* § 366.93(3)(a), Fla. Stat.; *see also* Fla. Admin. Code R. 25-6.0423(3). This two-step process for new power plants is similar to the bifurcation of the Commission’s public interest review of SPPs and its prudence review done in the separate SPPCRC proceeding.

Finally, OPC’s reliance on a prehearing order issued in a power plant need determination proceeding is not persuasive. *See* (OPC Br. at 32-34). As explained above, the SPP Statute and section 403.519 need not be construed together; therefore, one prehearing officer’s interpretation of section 403.519 from more than a decade ago, and before the adoption of the cost recovery companion statute, is simply not relevant to the issues in this appeal.

II. The SPP Statute and SPP Rule Do Not Require SPPs to include a Quantitative Comparison of the Costs and Benefits

OPC argues that the SPP Statute and SPP Rule require the utilities to include in their SPPs “quantitative estimated costs and estimated benefits.” (OPC Br. at 35-37). OPC further argues that the “SPP Rule expressly requires a quantitative comparison of the estimated costs and estimated reduction in outage times and restoration costs, i.e., benefits.” (OPC Br. at 34-40).

The Commission rejected OPC’s arguments in the SPP proceeding, concluding that neither the SPP Statute nor the SPP Rule require the benefits identified in a utility’s SPP to be quantified or monetized. (R. FPL 193-94). The Commission also concluded that a quantitative cost/benefit comparison is not required by either the SPP Statute or SPP Rule. (R. FPL 193). Finally, the Commission found that FPL did, in fact, provide both qualitative and quantitative benefits expected from the storm hardening programs included in the FPL 2023 SPP based on actual real-world historical experience with hurricanes. (R. FPL 196-97).

For the reasons explained below, the Commission’s interpretation and application of the SPP Statute and the SPP Rule is

correct, supported by competent substantial evidence, and should be upheld.

A. The Plain Language of the SPP Rule Supports the Commission’s Order Approving the FPL 2023 SPP

The SPP Statute requires utilities to file with the Commission a ten-year Storm Protection Plan that “explain[s] the systematic approach the utility will follow to achieve the objectives of reducing restoration costs and outage times associated with extreme weather events and enhancing reliability.” § 366.96(3), Fla. Stat. The Commission was required to adopt rules to “specify the elements” to include in the SPPs. *Id.* Pursuant to this statutory direction, the Commission adopted the SPP Rule. That Rule directs that each SPP must include, among other things, a “description of how each proposed storm protection program is designed to enhance the utility’s existing transmission and distribution facilities including an estimate of the resulting reduction in outage times and restoration costs” and a “cost estimate including capital and operating expenses.” Fla. Admin. Code R. 25-6.030(3)(d)1.-3. In addition, each SPP is to include a “comparison” of the costs and the benefits described above. Fla. Admin. Code R. 25-6.030(3)(d)4. In reviewing

whether a SPP is in the public interest, the Commission must consider, among other things, the “estimated costs and benefits to the utility and its customers of making the improvements proposed in the plan.” § 366.96(4)(c), Fla. Stat.

Contrary to OPC’s argument, the text of the SPP Rule does not “expressly require[] a *quantitative* comparison” of the estimated costs and benefits of an SPP. (OPC Br. at 38) (emphasis added). The word “quantitative” is not used anywhere in the SPP Rule or the SPP Statute. Nor does the text of the SPP Rule or the SPP Statute direct utilities to quantify or monetize the benefits included in their SPPs.

During the SPP proceeding below, the Commission addressed OPC’s extratextual interpretation of the SPP Statute and the SPP Rule. The Commission concluded that requiring a *quantitative* cost/benefit comparison in the SPPs “at a minimum would result in the imposition of new filing and analytical requirements that are not contained within the current rule, and therefore would arguably be beyond the scope of the current rule.” (R. FPL 193). As the Commission implicitly acknowledged, it had no authority to add new requirements to the SPP Rule in the midst of litigating the SPP docket. *See generally* § 120.54(1)(b) (outlining requirements for

formal rulemaking); § 120.54(1)(f) (prohibiting retroactive application of rules). The Commission’s construction of the plain language of the SPP Rule should be affirmed.

Further, OPC’s interpretation of the SPP Rule improperly focuses on a limited portion of subpart (3)(d)1. to the exclusion of the remaining language in the subpart. During the cross-examination of FPL witness Jarro, OPC and other intervenors focused on the phrase “including an estimate of the resulting reduction times and restoration costs” to support their contention that subpart (3)(d)1. of the SPP Rule requires a quantification of projected SPP benefits. (R. FPL 6559, 6561, 6563-64, 6566, 6569, 6583). However, such an interpretation ignores the opening phrase of subpart (3)(d)1. requiring a “description of how each proposed storm protection program is designed to enhance the utility’s existing transmission and distribution facilities.” OPC’s reading of this subpart, if adopted, would remove the primary component of subpart (3)(d)1. of the SPP Rule requiring a “description” of the SPP benefits or, at minimum, render it meaningless. As this Court has explained, “the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.” *Metro.*

Cas. Ins. Co. v. Tepper, 2 So. 3d 209, 215 (Fla. 2009) (citation omitted).

Further, the terms “include” and “including” are typically interpreted to suggest a non-exhaustive list and provide an illustrative application of a general principle. *See, e.g., White v. Mederi Caretenders Visiting Servs. of Se. Fla., LLC*, 226 So. 3d 774, 781-83 (Fla. 2017); *Pro-Art Dental Lab, Inc. v. V-Strategic Grp., LLC*, 986 So. 2d 1244, 1257 (Fla. 2008). Thus, in the context of subpart (3)(d)1. of the SPP Rule, the phrase “including an estimate of the resulting reduction in outage times and restoration costs” is a non-exhaustive illustrative example of the general requirement to provide a “description of how each proposed storm protection program is designed to enhance the utility’s existing transmission and distribution facilities.”

Read in the proper context, OPC’s argument that FPL was required to quantify or monetize the costs and benefits of the FPL 2023 SPP is not supported by the text of the SPP Rule. OPC is improperly asking this Court to add words to the Rule that do not exist today. This Court should decline to do so. *See Seagrave*, 802

So. 2d at 286 (explaining that courts are not at liberty to add words to the text not placed there by the drafter).⁷

For these reasons, the Commission correctly interpreted the plain language of the SPP Rule in concluding that it does not explicitly require the SPP costs and benefits to be quantified or the SPP to include a quantitative cost/benefit comparison.

B. The Commission Wisely Chose Not to Require Utilities to Quantify the Costs and Benefits of SPPs

The Commission wisely did not prescribe specific quantitative metrics, standards, and formulas in the SPP Rule because each program is different, each utility service area is different, and the composition and status of each utility's system is different. As such, the benefits of the utilities' SPP programs must be evaluated on their particular facts and merits. The analysis of whether the benefits and costs of a SPP program or project are in the public interest is not a one-size-fits-all proposition as suggested by OPC. This is clearly

⁷ The rules of statutory construction apply equally to the interpretation of regulations. *See, e.g., Bleich v. Chicago Title Ins. Co.*, 117 So. 3d 1163, 1164–65 (Fla. 3d DCA 2013) (applying the canons of statutory construction to interpret regulations); *Halifax Area Council on Alcoholism v. City of Daytona Beach*, 385 So. 2d 184, 187 (Fla. 5th DCA 1980) (regulations are subject to the same rules of construction as are state statutes).

demonstrated by the fact that, as OPC acknowledges in its Initial Brief, each of the electric utilities took different approaches to estimating and comparing the costs and benefits of their SPP programs. (OPC Br. at 5-6).

Storm hardening is not a simple cost-effective proposition as implied by OPC's interpretation of the SPP Rule, which focuses only on program costs and savings in restoration costs associated with extreme weather conditions (*i.e.*, a strictly quantitative analysis). As the Commission correctly determined, the flaw with OPC's interpretation is it ignores the *qualitative* component required by both the SPP Statute and the SPP Rule—that is, a reduction in customer outage times. It cannot be credibly disputed that customers want the extended outage times associated with extreme weather events to be reduced. (R. FPL 5461). This unassailable fact underscores a primary goal and finding of the Legislature in passing the SPP Statute: “to mitigate restoration costs *and outage times to utility customers* when developing transmission and distribution storm protection plans.” See § 366.96(1)(e), Fla. Stat. (emphasis added).

Further, there is no uniform Commission or industry method to quantify or monetize reductions in outage times, and any such

analysis requires estimation of many unknown variables and assumptions to forecast the quantified value of SPP benefits over the 2023-2032 SPP period. (R. FPL 5455, 5462, 6570, 6601-03, 6605). There is also no industry accepted method to forecast the frequency, strength, speed, and path of future storms over the ten-year SPP period, which would directly affect the estimated reduction in restoration costs and outage times associated with the SPP projects. (R. FPL 5462, 5465, 5526-27).

In short, there is significant variability and uncertainty in how any such quantification analysis should be done and certainly fair debate on whether the results would provide any meaningful value to the Commission. Indeed, in the proceeding below, OPC attacked the attempts by DEF and TECO to provide such information in their SPPs, claiming those analyses lack credibility. *See* (R. FPL 5711-12, 5715-16, 5773-74, 5777-78). Thus, OPC proposes a test no one, including it, can ever pass. Such a result is contrary to the Legislature's directive in the SPP Statute for utilities to strengthen their electric infrastructure and reduce restoration costs and outage times associated with extreme weather events.

Based on the foregoing, the Commission correctly reasoned “either quantitative or qualitative information can provide us with adequate information to consider the estimated costs and benefits to the utility and its customers of making the improvements proposed in the plan, as required by Section 366.96(4)(c), F.S.” (R. FPL 194).

C. The Commission’s Finding that FPL Provided the Required Estimated Benefits is Supported by the Record

The undisputed record demonstrates that, consistent with the language in Rule 25-6.030(3)(d)1., FPL described and identified the benefits for the FPL 2023 SPP programs based on actual, real-world experience with extreme weather events and storm hardening. A detailed description of the benefits of the SPP programs was provided in Section II(A) of the FPL 2023 SPP, and the benefits of each program were provided in Section IV of the FPL 2023 SPP.⁸

Florida remains the most hurricane-prone state in the nation and, with the significant coast-line exposure of FPL’s system and the fact that the vast majority of FPL’s customers live within twenty miles of the coast, FPL’s service area has a high probability of being

⁸ See (R. FPL 406-08, 414-15, 418-19, 430-31, 436, 441, 445-46, 449, 455-56, 462-79).

impacted by multiple extreme weather events every year. (R. FPL 5465). The estimate of cumulative reductions in restoration costs and outage times associated with the FPL 2023 SPP will be directly affected by how frequently FPL's service areas are impacted by extreme weather events. Of course, no one can predict with certainty the frequency, strength, speed, and path of storms that will impact FPL's service area. *Id.*

Given the variability, assumptions, and subjectivity required to forecast estimated benefits of future SPP programs over a ten-year period, as explained above, the FPL 2023 SPP did not provide projected reductions in restoration costs and outage times associated with extreme weather events for the 2023-2032 plan period. (R. FPL 6561). Rather, FPL relied on its actual and real-world experience with recent extreme weather events, such as Hurricanes Irma and Matthew, as a more realistic and reliable proxy to estimate the benefits expected from the programs included in FPL's 2023 SPP.⁹ (R.

⁹ The majority of programs approved in the final FPL 2023 SPP have been in place since 2007 and have already demonstrated they have provided and will continue to provide increased transmission and distribution infrastructure resiliency, reduced restoration times, and reduced restoration costs when FPL is impacted by extreme weather events. (R. FPL 5453-54).

FPL 5517-18, 5528-29, 6561-63, 6566-67, 6570-72, 6583-84, 6602-03).

Specifically, FPL introduced the results of a post-storm analysis of Hurricanes Matthew and Irma demonstrating the restoration construction man-hours, days to restore, and storm restoration costs for these storms would have been significantly greater without FPL's storm hardening programs.¹⁰ See (R. FPL 462-79). FPL also calculated and provided the 40-year net present value of the significant savings associated with storm hardening if storms similar to Hurricanes Matthew and Irma were to occur every three and five years.¹¹ Notably, no parties disputed or otherwise challenged these estimated benefits of storm hardening.

¹⁰ In the case of Hurricane Matthew, FPL estimated without hardening, restoration would have taken two additional days (50% longer) and resulted in additional restoration costs of \$105 million (36% higher than actual costs). (R. FPL 6542). In the case of Hurricane Irma, FPL estimated without hardening, restoration would have taken four additional days (40% longer) and resulted in additional restoration costs of \$496 million (40% higher than actual costs). (R. FPL 6542-43). Further, FPL's underground laterals performed 6.6 times (85%) better during Hurricane Irma than overhead laterals. (R. FPL 5480, 6583). FPL's experience with recent extreme weather events, such as Tropical Storm Alex, demonstrated similar performance with the lateral system. (R. FPL 6598-6599).

¹¹ FPL estimated that the 40-year net present value of the savings associated with storm hardening if a storm similar to Hurricane

In fact, FPL’s approach to describing the benefits of the FPL 2023 SPP is the exact same approach used for the FPL 2020 SPP that OPC agreed to in the 2020 SPP Settlement. (R. FPL 1255-93, 5529). Simply put, OPC cannot credibly argue FPL’s approach to describing the benefits of the FPL 2023 SPP fails to meet the requirements of subpart (3)(d)1. of the SPP Rule where FPL used the exact same approach for the FPL 2020 SPP and OPC agreed that the programs in the FPL 2020 SPP were in the public interest.¹²

The Commission found and concluded “the information FPL provided is sufficient to ascertain a comparison of costs and benefits within its SPP.” (R. FPL 194). The Commission’s decision is supported by competent, substantial evidence in the record and, therefore, should be affirmed.

Matthew were to occur every three and five years would be \$653 million and \$406 million, respectively. FPL estimated that the 40-year net present value of the savings associated with storm hardening if a storm similar to Hurricane Irma were to occur every three and five years would be \$3.082 billion and \$1.915 billion, respectively. (R. FPL 471-79).

¹² As noted above, the FPL 2023 SPP is an update and continuation of the FPL 2020 SPP, with the same eight programs being approved in the final FPL 2023 SPP. Per section 366.96(6), Florida Statutes, the Commission “shall approve, modify, or deny each updated plan pursuant to the criteria used to review the initial plan.”

III. The Commission Did Not Abuse its Discretion in Striking Certain Portions of Testimony from OPC Witness Kollen

OPC argues the Commission should have denied the utilities' Motions to Strike portions of OPC witness Kollen's testimony "for reasons of fairness and given broad the [sic] view of admissible evidence in Chapter 120, Florida Statutes." (OPC Br. at 44). OPC asks this Court to remand and require the Commission to consider the stricken testimony of witness Kollen in deciding whether to approve the proposed SPPs and subsequent SPPCRCs. (OPC Br. at 44). OPC's arguments fall well short of the standard required to reverse a trier of fact's decision to admit or exclude evidence.

This Court has repeatedly held the decision to admit or exclude evidence "is reviewed under the abuse of discretion standard." See, e.g., *Evans v. State*, 177 So. 3d 1219, 1229 (Fla. 2015). Notably, nowhere in OPC's Initial Brief does it argue the Commission abused its discretion in granting the utilities' Motions to Strike in the SPP docket. Moreover, OPC fails to address the merits of the Commission's decision to grant the Motions to Strike. Finally, OPC disregards that the Commission addressed OPC's legal arguments in

its final SPP Order even though those arguments were stricken from OPC witness Kollen's testimony.

OPC makes two arguments in support of its request that this Court reverse the Commission's decision to grant the motions to strike: (1) OPC witness Kollen provided expert testimony on the interpretation of the SPP Statute, SPP Rule, and SPPCRC Rule; and (2) section 120.569(2)(g), Florida Statutes, provides that all evidence of a type commonly relied upon by a reasonably prudent person in the conduct of their affairs shall be admissible. (OPC Br. at 41, 43). These arguments fail to show how the Commission abused its discretion.

In Commission proceedings, irrelevant and immaterial evidence "*shall be excluded.*" § 120.569(2)(g), Fla. Stat. (emphasis added). Further, the "presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case." Fla. Admin. Code R. 28-106.211. Presiding officers also have significant discretion in ruling on motions to strike testimony. *See, e.g., Town of Palm Beach v. Palm Beach Cnty.*, 460 So. 2d 879, 882 (Fla. 1984).

OPC witness Kollen was proffered as an expert on accounting. (R. FPL 5634). However, the stricken testimony of OPC witness Kollen was based on his interpretations of the SPP Statute, the SPP Rule, and the SPPCRC Rule—*i.e.*, improper legal opinion. An expert witness need not be allowed to testify concerning questions of law, which are properly reserved for the trier of fact. *See, e.g., T.J.R. Holding Co., Inc. v. Alachua Cnty.*, 617 So. 2d 798, 800 (Fla. 1st DCA 1993); *Seibert v. Bayport Beach & Tennis Club Ass’n*, 573 So. 2d 889, 891 (Fla. 2d DCA 1990). As the Commission explained in the order granting the Motions to Strike, the “Commission has generally excluded expert testimony on legal issues.” (R. FPL 6811-12).

The Commission struck portions of OPC witness Kollen’s testimony in the FPL SPP docket (Docket No. 20220051-EI) in which he recommended the Commission adopt new requirements and standards not included in the SPP Statute or SPP Rule and then retroactively apply those new requirements and standards to the FPL 2023 SPP filed on April 1, 2022.¹³ This is unauthorized legal opinion. Accordingly, the Commission did not abuse its discretion in striking

¹³ *See* Proffered Record at: (R. FPL 5674-81, 5684-86).

these portions of OPC witness Kollen's testimony. *See* (R. FPL 6812-14).

Likewise, the Commission did not abuse its discretion in striking portions of OPC witness Kollen's testimony recommending the Commission apply the cost recovery standards from the SPPCRC Rule to its review of the Storm Protection Plans in the SPP docket.¹⁴ As the Commission correctly concluded, issues regarding cost recovery are to be addressed in the SPPCRC proceeding where the costs are reviewed and rates are set. *See* (R. FPL 6812, 6815-16).

The Commission also did not abuse its discretion in striking portions of OPC witness Kollen's testimony that relied upon and applied a prudence standard to the SPPs.¹⁵ As explained above, the clear and unambiguous language of the SPP Statute requires the public interest standard is to be applied during the Commission's review of SPPs, and the prudence review is to be applied in the SPPCRC proceeding. Therefore, the Commission properly struck

¹⁴ *See* Proffered Record at: (R. FPL 5672-81, 5685-86, 5691).

¹⁵ *See* Proffered Record at: (R. FPL 5672-74, 5676-77, 5679, 5684).

those portions of witness Kollen's testimony in the SPP docket as improper (and unsupported) legal opinion. *See* (R. FPL 6816-17).

OPC contends the Commission's decision to strike portions of OPC witness Kollen's testimony while allowing the utilities' witnesses to testify on similar subjects violates the "fundamental principles of fairness." (OPC Br. at 43). OPC fails to mention that the vast majority of the "legal opinions" from the utilities' witnesses were elicited by OPC on cross-examination over the utilities' objections. As OPC is aware, FPL and the utilities submitted revised rebuttal testimony that redacted those portions of their witnesses' testimony responsive to OPC witness Kollen's stricken testimony (R. FPL 5446-91, 5581), with the unredacted version being proffered only for purposes of preserving the record for appeal. (R. FPL 5534-78, 5583-90).

OPC's claim of prejudice is also flawed for other reasons. First, the Commission only struck certain portions of OPC witness Kollen's testimony with the remainder being entered into the SPP record without objection. Second, all of OPC witness Mara's testimony was admitted into the SPP record without objection. Third, a party cannot reasonably claim prejudice when it is not allowed to introduce

testimony that is irrelevant, not in the correct docket, improper, or contrary to law.

Finally, even assuming, *arguendo*, OPC met its burden to demonstrate the Commission abused its discretion in granting the Motions to Strike, it was, at most, a harmless error. Admitting OPC witness Kollen’s legal opinion about the meaning of the SPP Statute and SPP Rule would not have changed the outcome of the case. See *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1256 (Fla. 2014) (outlining test for harmless error). The Commission engaged in its own analysis of the plain language of the SPP Statute and SPP Rule and rejected the reading put forward by OPC and its expert witness.

IV. The Specific Relief OPC is Seeking from This Court is Unclear

In its Initial Brief, OPC asks this Court for multiple forms of relief. For example, in arguing that the Commission was required to do a prudence review during the SPP proceeding, OPC asks the Court to “reverse and remand the five orders on appeal since the Commission erroneously interpreted the SPP Statute and the SPP Rule” and “remand these cases and instruct the Commission to hold a new hearing to evaluate the prudence of the programs and projects

in each utility company’s 2022 [*sic*] storm protection plans.” (OPC Br. at 19); *see also* (OPC Br. at 29, 44). Similarly, OPC asks the court to reverse and remand the orders on appeal for “further proceedings” with instructions for FPL to quantify the costs and benefits of its SPP and for the Commission to consider the stricken testimony of OPC witness Kollen. *See* (OPC Br. at 39-41, 44).

At the same time, OPC seems to ask for prospective relief only, claiming that “[r]eversal and remand with these instructions would not automatically require the ‘rollback’ of rates already established and implemented.” (OPC Br. at 19) (explaining that such relief “would at least ensure that *future* SPP and SPPCRC decision making would apply the cost/benefit and prudence determinations required under chapter 366, Florida Statutes.” (emphasis added)). This statement suggests that OPC is not seeking a remand of the SPP or SPPCRC orders but, rather, is improperly asking this Court for an advisory opinion to be applied prospectively to future SPP and SPPCRC proceedings. Based on these inconsistent statements, it is entirely unclear the relief OPC is actually seeking from this Court.

OPC’s inconsistent requests for relief and lack of any explanation on how such relief could practically be implemented is

particularly troublesome given the clear and unequivocal mandate from the Legislature in the SPP Statute that the utilities are to harden their electric systems and reduce restoration costs and outage times. These issues are important not only for this Court, but also for the PSC, the utilities, and the millions of customers and thousands of communities that rely on the utilities' electric systems to provide safe and reasonably reliable electric service, including during and after extreme weather events.

Finally, although OPC appealed the Commission's order from the SPPCRC proceeding, OPC did not identify any alleged errors in the SPPCRC Order in its Initial Brief. To the extent OPC is asking for the SPPCRC Order to be reversed and remanded, they are not entitled to that relief; OPC has waived any challenge to the SPPCRC Order. *See, e.g., D.H. v. Adept Cmty. Servs., Inc.*, 271 So. 3d 870, 880 (Fla. 2018). The SPPCRC Order is supported by competent, substantial evidence and should be affirmed.

CONCLUSION

The Commission correctly concluded the plain and unambiguous language of the SPP Statute requires it to review Storm Protection Plans to determine if they are in the public interest, not whether they are prudent. The Commission also correctly concluded that neither the SPP Statute nor the SPP Rule require the SPP benefits to be quantified or that a quantitative comparison of cost and benefits must be included in the SPP filing. The Commission's finding that the information and data provided by FPL was sufficient to ascertain a comparison of costs and benefits within the FPL 2023 SPP is supported by undisputed, competent, substantial record evidence. Finally, the Commission did not abuse its discretion in striking portions of the testimony from one of OPC's witnesses in the SPP dockets. That witness attempted to provide unauthorized legal opinion on the interpretation of the SPP Statute and SPP Rule, and requested the Commission adopt and retroactively apply new standards and criteria not provided in the SPP Statute or the SPP Rule. For these reasons, the Commission's SPP Order, Strike Order, and SPPCRC Order should be affirmed.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Florida Rules of Appellate Procedure 9.045(b) and (e) and 9.210(a)(2) because it was prepared using Bookman Old Style 14-point font and the word count from the word-processing system used to prepare this document is 10,871.

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