IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, ETC.,
Appellants,
v.
ANDREW GILES FAY, ETC. ET AL.,
Appellees.
_____/

SC2022-1733
L.T. No.: 20220051-EI

SC2022-1735
L.T. No.: 20220050-EI

SC2022-1745
L.T. No.: 20220049-EI

SC2022-1748
L.T. No.: 20220048-EI

SC2022-1777
L.T. No.: 20220010-EI

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SYMBOLS AND DESIGNATIONS OF THE PARTIES

Appellee, the Florida Public Service Commission, refers to itself as the Commission. It refers to Appellant, Citizens of the State of Florida, through the Florida Office of Public Counsel, as OPC. It refers to Duke Energy Florida, LLC, as DEF. It refers to Florida Power & Light Company as FPL. It refers to Florida Public Utilities Company as FPUC. It refers to Tampa Electric Company as TECO.

The Commission cites to the Records on Appeal for dockets 20220048-EI through 20220051-EI according to the utility in each docket and the applicable page number(s). For example, R. DEF 331, refers to Bates page 331 in docket 20220050-EI. The Commission cites to the Record on Appeal for docket 20220010-EI, concerning cost recovery for the Storm Protection Plans, as R. SPPCRC with the applicable page number(s).

The Commission cites to OPC's Initial Brief as I.B. with applicable page number(s).

All references to statutory sections are to the 2022 edition of the Florida Statutes, unless otherwise specified.

STATEMENT OF THE CASE AND FACTS

This consolidated matter results from direct appeals by OPC of five Final Orders rendered by the Commission. Four of these Final Orders approved, with modifications, the Storm Protection Plans ("SPPs") of DEF, FPL, FPUC, and TECO. (R. DEF 173-94, R. FPL 187-212, R. FPUC 204-25, R. TECO 258-80) The fifth Final Order pertains to approval of the SPP Cost Recovery Clause ("SPPCRC") amounts and related tariffs for each SPP. (R. SPPCRC 3028-40)

This Court has mandatory jurisdiction pursuant to Article V, Section 3(b)(2), of the Florida Constitution, and sections 350.128(1) and 366.10, Florida Statutes, as the Final Orders relate to the service or rates of public utilities providing electric services.

The Storm Protection Plan Statute and Rules

In 2019, the Florida Legislature enacted section 366.96, Florida Statutes ("SPP Statute"), to require each investor owned public utility to develop and file with the Commission a ten-year[1] "transmission and distribution storm protection plan" ("SPP") providing a "systematic approach" to "reducing restoration costs

[1] While an SPP covers a ten-year period, it must be updated by the utility and re-evaluated by the Commission at least every three years. *See* §§ 366.96(3) and (6), Fla. Stat.

and outage times associated with extreme weather events and enhancing reliability." § 366.96(3), Fla. Stat. The SPP Statute provides general direction on what information the SPPs must include and requires the Commission to consider the following in reviewing the plans:

> (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.

§ 366.96(4), Fla. Stat. Within 180 days after a utility files an SPP containing all of the required information, the Commission "shall determine whether it is in the public interest to approve, approve with modification, or deny the plan." § 366.96(5), Fla. Stat.

After an SPP has been approved, "proceeding with actions to implement the plan shall not constitute or be evidence of imprudence." § 366.96(7), Fla. Stat. However, after a utility's SPP has been approved, the SPP Statute still requires the Commission to conduct an annual proceeding to determine the prudently incurred SPP costs and allow recovery of those costs through a charge distinct from base rates. *See id.* That proceeding is known as the Storm Protection Plan Cost Recovery Clause ("SPPCRC"). *See id.*

As mandated by the Legislature, the Commission adopted rules: Florida Administrative Code Rule 25-6.030 ("SPP Rule") and Florida Administrative Code Rule 25-6.031 ("SPPCRC Rule").[2] *See* § 366.96(3), Fla. Stat. The SPP Rule specifies the elements that a utility must include in its SPP. The portions of SPP Rule relevant to this appeal[3] state:

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[2] Collectively, the SPP Rule and the SPPCRC Rule will be referred to as "the Rules."

[3] OPC has only raised issues regarding whether the Commission correctly interpreted Florida Administrative Code Rule 25-6.030 (3)(d)1. and (3)(d)4. (I.B. 35-37) Subparagraph (3)(d)3. is listed only because it is referenced in Florida Administrative Code Rule 25-6.030(3)(d)4.

(3) Contents of the Storm Protection Plan. For each Storm Protection Plan, the following information must be provided:

* * *

(d) A description of each proposed storm protection program that includes:

1. 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 due to extreme weather conditions;

* * *

3. A cost estimate including capital and operating expenses;

4. A comparison of the costs identified in subparagraph (3)(d)3. and the benefits identified in subparagraph (3)(d)1.

The SPPCRC Rule sets forth the criteria and procedure for utilities to recover actual costs that were prudently expended in implementing the approved SPPs and states:

> An annual hearing to address petitions for recovery of Storm Protection Plan costs will be limited to determining the reasonableness of projected Storm Protection Plan costs, the prudence of actual Storm Protection Plan costs incurred by the utility, and to establish Storm Protection Plan cost recovery factors consistent with the requirements of this rule.

Fla. Admin. Code R. 25-6.031(3). The SPPCRC Rule also indicates which costs can be recovered and which costs are excluded from recovery, specifically disallowing costs "recovered through base rates or any other cost recovery mechanism." Fla. Admin. Code R. 25-6.031(6) and (7).

The 2022 SPP Dockets

In April 2022, the utilities filed their SPPs and supporting witness testimony. (R. DEF 7700-7821, R. FPL 8509-8659, R. FPUC 7199-7294, R. TECO 8044-8528) The Prehearing Officer ("PHO") consolidated all four SPP dockets for hearing only. (R. DEF 7831, R. FPL 8667, R. FPUC 7299, R. TECO 8534) OPC intervened in all four dockets. (R. DEF 7842-44, R. FPL 8680-82, R. FPUC 7310-12, R. TECO 8545-47)

Witness Kollen's Testimony

Relevant to this appeal, OPC prefiled testimony in each docket from Lane Kollen, whom it offered as an expert. (R. DEF 7253-83; R. FPL 7696-7769, R. FPUC 7065-7152, R. TECO 7134-7205) DEF, FPL, and TECO moved to strike portions of Kollen's testimony which they alleged (1) were irrelevant to the SPP hearing, (2)

suggested a standard of review contrary to the SPP Statute and the SPP Rule, or (3) asserted ultimate legal conclusions. (R. DEF 7003-06, R. FPL 7246-7386, R. TECO 6946-7004) FPUC did not file a Motion to Strike but concurred with the other utilities' arguments. (R. FPUC 6782-83, 6851) During the prehearing conference, all parties presented arguments regarding the motions to strike Kollen's testimony. (R. DEF 6926–52, R. FPL 6989-7015, R. FPUC 6775-6801, R. TECO 6906-32)

After consideration of the arguments, the PHO entered an Order ("Testimony Order") granting the requests to strike portions of Kollen's testimony. (R. DEF 6847-57, R. FPL 6808-18, R. FPUC 6695-6705, R. TECO 6826-36) The Testimony Order stated:

> The portions of Witness Kollen's testimony at issue are either irrelevant or attempt to set new standards and criteria that are beyond the scope of this proceeding. The portions of Witness Kollen's testimony that encourage the Commission to disregard the plain reading of the SPP Statute and Rule and to engage in impermissible rulemaking, outside of a properly noticed rulemaking hearing, lack merit.
>
> Witness Kollen's testimony conflates the portions of the SPP hearing guidelines contained within the Statute and the SPP Rule with the SPPCRC guidelines found within the Statute and Rule.

(R. DEF 6851, R. FPL 6812, R. FPUC 6699, R. TECO 6830)

Specifically, the PHO held the plain language of the SPP Statute and the Rules requires bifurcated and sequential SPP and SPPCRC proceedings, with the SPPs initially reviewed to determine if the SPPs were in the public interest and a prudence analysis only performed in the SPPCRC hearing. (R. DEF 6850-51, R. FPL 6811-12, R. FPUC 6698-99, R. TECO 6829-30) The Testimony Order stated:

> The Legislature intended that the SPP and SPPCRC hearings be bifurcated, driven by separate and distinct guidelines that are evident in the plain reading of both Rules 25-6.030 and 25-6.031, F.A.C., and Section 366.96, F.S. The plain reading of Section 366.96(7), F.S., provides that once a plan has been approved in the SPP docket, a utility's actions to implement the plan "shall not constitute or be evidence of imprudence." This language illustrates the bifurcated nature of the planning cycle that begins with the SPP and completed by the SPPCRC, rather than providing the grounds to transfer the cost recovery clause type "prudency review" from the SPPCRC to the SPP.

(R. DEF 6851, R. FPL 6812, R. FPUC 6699, R. TECO 6830) The PHO also held that both Commission practice and Florida case law indicate it is improper for a witness to testify concerning ultimate questions of law. (R. DEF 6850-51, R. FPL 6811-12, R. FPUC 6698-99, R. TECO 6829-30)

The Testimony Order delineated which testimony was stricken (1) as being "improper legal opinion and argument,"[4] (2) as being "more appropriate to the Storm Protection Plan Cost Recovery Clause, and, therefore, irrelevant to [the SPP] proceeding,"[5] and (3) as recommending "a standard of review that is outside the scope of [the SPP] proceeding."[6] The PHO allowed OPC time to identify testimony from the utility witnesses that was responsive to the stricken portions of Kollen's testimony and which should also be stricken. (R. DEF 6954-55, R. FPL 7017-18, R. FPUC 6802-03, R. TECO 6933-34)[7]

At the SPP hearing, OPC moved for reconsideration of the Testimony Order. (R. DEF 5593-95, R. FPL 5605-07, R. FPUC 5582-84, R. TECO 5650-52) In support of its motion, OPC alleged the

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[4] R. DEF 6852-53, R. FPL 6813-14, R. FPUC 6700-01, R. TECO 6831-32

[5] R. DEF 6854-55, R. FPL 6815-16, R. FPUC 6702-03, R. TECO 6833-34

[6] R. DEF 6855-56, R. FPL 6816-17, R. FPUC 6703-04, R. TECO 6834-35

[7] Certain rebuttal testimony from DEF witnesses Howe, Lloyd, and Menendez, FPL witnesses Jarro and Fuentes, FPUC witness Waruszewski, and TECO witnesses Plusquellic and Pickles was also stricken and proffered. (R. DEF 5243-65, 5307-27, 5358-78, R. FPL 5535-38, 5541-47, 5553-56, 5565, 5584-90, R. FPUC 5135-37, 5161-74, R. TECO 5068-69, 5098-5134, 5435-37, 5454-76)

PHO overlooked or failed to consider material and relevant points of fact and law. (R. DEF 5594, R. FPL 5606, R. FPUC 5583, R. TECO 5651) OPC alleged the Testimony Order materially mischaracterized its prior arguments and position. (R. DEF 5595-97, R. FPL 5607-09, R. FPUC 5584-86, R. TECO 5652-54) OPC further alleged the Testimony Order contained mistakes of fact or law. (R. DEF 5597-99, 5604; R. FPL 5609-11, 5616; R. FPUC 5586-88, 5593; R. TECO 5654-56, 5661) In response, FPL asserted the insufficiencies of OPC's Motion for Reconsideration. (R. FPL 5620-22)

After hearing arguments from all of the parties and reviewing the applicable legal standard for a Motion for Reconsideration, the Commission denied the motion. The Commission determined that: the PHO did not fail to consider any matters, the PHO had broad discretion to determine the admissibility of evidence, and the Testimony Order reflected no mistakes of law or fact. (R. 5611-14, R. FPL 5623-25, R. FPUC 5600-02, R. TECO 5668-70) In its post hearing brief, OPC again argued the Commission erred in striking portions of Kollen's testimony. (R. DEF 307-16, R. FPL 299-305, R. FPUC 306-15, R. TECO 368-78)

In the SPP Final Orders, the Commission reaffirmed that portions of Kollen's testimony were properly stricken on evidentiary grounds and also addressed the alleged procedural concerns raised in OPC's post-hearing brief. (R. DEF 95, R. FPL 190, R. FPUC 206, R. TECO 260) The Commission held the PHO's determination to strike certain testimony, the denial of the motion for reconsideration on that issue, and the rejection of those same arguments in OPC's post-hearing brief were consistent with due process. (R. DEF 95-96, R. FPL 190, R. FPUC 206-07, R. TECO 260-61) The SPP Final Orders highlighted that all parties were given the opportunity to cross-examine all witnesses and present legal argument on all matters, including those proffered. (R. DEF 95, R. FPL 190, R. FPUC 206, R. TECO 260-61)

The SPP Hearing

The Commission held an administrative hearing to determine whether to approve the SPPs during which the parties presented testimony, documentary evidence, and oral argument. (R. DEF 5007-6676, R. FPL 5019-6688, R. FPUC 4996-6665, R. TECO 5064-6733) Despite the dockets being consolidated for hearing, parties only participated in their own dockets. (R. DEF 6303, 6664-

74; R. FPL 6315, 6676-86; R. FPUC 6292, 6653-54; R. TECO 6360, 6721-22) Based on the denial of its Motion for Reconsideration, OPC proffered Kollen's testimony in each docket.[8] (R. DEF 5612-16, 5681; R. FPL 5626-28, 5662; R. FPUC 5603-05, 5824; R. TECO 5671-73, 5831)

Evidence presented by each utility in support of its assertion that its SPP satisfies the requirements of Florida Administrative Code Rule 25-6.030(3)(d)1. and 4. is discussed below.

Florida Administrative Code Rule 25-6.030(3)(d)1.

Rule 25-6.030(3)(d)1. requires:

> 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 due to extreme weather conditions.

DEF (SPP Docket 20220050-EI) described its SPP programs and used quantitative data to compare costs and benefits for each

[8] Each Record contains two versions of Kollen's testimony: one in which the stricken testimony is blacked out and one in which it is lined-through, but readable. As the testimony was proffered, only the lined-through version is referenced in this Answer Brief so that this Court may understand the nature of the testimony.

one. (R. DEF 506-561,[9] 562-602,[10], 6599, 6604, 6610, 6620, 6645-64) DEF's SPP proposed to reduce average, annual storm restoration costs by over $50 million, while reducing average, annual customer minutes of interruption by almost 400 million minutes. (R. DEF 570-71, 5296, 5300-01, 5306-07) DEF compared a range of revenue requirement options and selected what it determined was the best balance of investments to achieve the SPP benefits for its customers. (R. DEF 6364-76, 6383-89, 6392-94, 6403-04)

FPL (SPP Docket 20220051-EI) witness Jarro referenced Sections II through IV (R. FPL 399, 406-57) and Appendix A (R. FPL 462-79) of Exhibit MJ-1[11] in support of his assertion that FPL's SPP satisfies the requirements of the SPP Statute and the SPP Rule. (R. FPL 5465-66, 5552-53, 6543, 6546, 6548-50) He testified that some benefits were described qualitatively and others were described quantitatively. (R. FPL 5465, 5552) FPL further opined that assigning quantitative values to benefits could be inappropriate if it

[9] Hearing exhibit 3, BML-1. BML-1 was also hearing exhibit 6. (R. 604-59)
[10] Hearing exhibit 4, BML-2. BML-2 was also hearing exhibit 7. (R. 660-756)
[11] Hearing exhibit 2. (R. FPL 399-517)

required "assumptions, hypotheticals, futuristic visions of things that can happen." (R. FPL 5517-18)

FPUC (SPP Docket 20220049-EI) presented evidence regarding its various programs and how they reduce outage times and restoration costs. (R. FPUC 1063-75, 5880-90, 5894-96, 5902-04) FPUC opined that any realistic quantification of benefits would need precise information regarding many variables, the absence of which would make any quantification effort an exercise in futility and produce an illusory result. (R. FPUC 5087-88, 5100-02) Moreover, FPUC's customers are situated in two distinct geographical regions with differing electrical characteristics that are not physically connected at the distribution level. (R. FPUC 1048, 5894-95)

TECO (SPP Docket 20220048-EI) presented evidence regarding its various programs and how they reduce outage times and restoration costs. (R. TECO 821-26, 843-89, 6496) The "over-arching principles" considered by TECO included allocating some investment to each program every year, using a quantitative analysis to prioritize projects, and preparing targeted funding levels to evaluate each program for cost effectiveness. (R. TECO 6482-83)

Florida Administrative Code Rule 25-6.030(3)(d)4.

Rule 25-6.030(3)(d)4. requires: "A comparison of the costs identified in subparagraph (3)(d)3. and the benefits identified in subparagraph (3)(d)1."

DEF witness Lloyd testified about quantitative data being a type of a "description of the reduction of restoration costs," why DEF believes it demonstrated that each SPP program met the statutory and rule requirements, and that DEF evaluated the plan as whole. (R. DEF 6609-13) DEF provided quantitative data to compare costs and benefits for each SPP project. (R. DEF 506-602, 604-59, 660-756, 6613-18, 6652-54)

FPL presented evidence that Section IV of its SPP provided the comparison of costs and benefits using both quantitative and qualitative data. (R. FPL 411-57, 6542-43, 6546) FPL witness Jarro testified that the monetary value various customers place on reduced outage times "cannot be accurately or uniformly estimated" given their individual tolerance levels and financial situations, and that there is no uniform method to do so. (R. FPL 5462, 5526-27)

FPUC witness Cutshaw described the costs and benefits of FPUC's SPP. (R. FPUC 5884-90) FPUC's SPP provided a comparison

of costs and benefits for each program, but it did not assign a quantitative value to the benefits. (R. FPUC 1063-75, 5896-99)

TECO presented both quantitative and qualitative data regarding benefits and compared that data to costs. (R. TECO 881-89) TECO used a modeling program to "evaluate their potential benefits in terms of avoided restoration costs and reduced outage times." (R. TECO 6483-6484) The modeling program imposed funding levels for each project to "balance the principles of addressing all aspects of [TECO's] system, projected benefits to customers, and [TECO's] ability to execute." (R. TECO 6490) TECO's modeling program confirmed that its "projected funding levels are at the optimal point before additional investment does not result in materially greater restoration costs and outage time benefits." (R. TECO 6500-01)

The SPP Final Orders

Although separate Final Orders were issued in each docket, all four SPP Final Orders contain certain findings relevant to this appeal. First, as a matter of law, the Commission held that neither the SPP Statute nor Rule explicitly requires a quantitative cost-benefit analysis or a particular type of analysis or comparison. (R.

DEF 179, R. FPL 193, R. FPUC 209, R. TECO 263) The Commission further determined that qualitative data can be just as meaningful as quantitative data in describing benefits and that either can provide adequate information for the Commission to compare the estimated costs and benefits of the proposed improvements to both the utility and its customers. Accordingly, as a matter of law, the Commission determined that the SPP Statute and the SPP Rule allow the use of both quantitative and qualitative information to describe and compare costs and benefits. (R. DEF 179, R. FPL 194, R. FPUC 210, and R. TECO 264)

Finally, the Commission used the following hypothetical example of why it would be improper to require each project or program to be cost-effective in any particular year:

> A utility spends $10 million to convert wooden poles to concrete poles. Based on the assumption that a Category 3 hurricane would strike the area every three years, the projected benefits are $15 million over 30 years for a net savings to customers of $5 million. However, if the utility does not experience extreme weather in these locations for a period of time (as was the case for the period 2005 through 2017), the customers may nonetheless be receiving qualitative benefits (the system is better prepared for when extreme weather does occur) that are consistent with the public interest requirements of Section 366.96, F.S.

(R. DEF 179, fn. 8; R. FPL 194, fn. 9; R. FPUC 210, fn. 7; and R. TECO 264, fn. 7)

Pertinent facts specific to the Final Order in each SPP docket are presented below:

DEF SPP Final Order

The Commission found that the quantitative and qualitative data DEF provided satisfied the requirements of the SPP Statute and the SPP Rule. (R. DEF 177-86) The Commission determined that except for the Transmission Loop Radially Fed Substations (TLRFS) Program, DEF's SPP was in the public interest. (R. DEF 188-91) The Commission determined the TLRFS Program did not qualify as an SPP program as it did not pertain to enhancement of existing infrastructure. (R. DEF 189-90)

FPL SPP Final Order

Except as noted below, the Commission found that the quantitative and qualitative data FPL provided satisfied the requirements of the SPP Statute and the SPP Rule. (R. FPL 191-200) The Commission determined the qualitative data FPL submitted was sufficient as it provided "historical data that demonstrated how past storm hardening measures have reduced restoration costs and

outage times." (R. FPL 194) Specifically, the Commission held that FPL was able to incorporate historical data and calculate the 40-year net present value to demonstrate that the SPP programs increase infrastructure resiliency and reduce restoration time and costs. (R. FPL 195-97) The Commission found the methodology to assess costs and benefits to be reasonable. (R. FPL 195)

The Commission determined that except for the Transmission Access Enhancement Program and the Transmission Looping Initiative, FPL's SPP is in the public interest. (R. FPL 206-08) The Commission determined the Transmission Looping Initiative did not qualify as an SPP program as it did not pertain to enhancement of existing infrastructure, and that FPL did not provide sufficient data to determine whether the Transmission Access Enhancement Program qualifies as an SPP program. (R. FPL 207-08)

FPUC SPP Final Order

The Commission found FPUC's SPP satisfied the requirements of the SPP Statute and the SPP Rule (R. FPUC 207-14), stating:

> While FPUC's filing did not include dollar amounts for benefits or a cost-effectiveness analysis in the format requested by OPC, the descriptions it provided were

> sufficient for a meaningful review of the SPP pursuant to Section 366.96, F.S.

(R. FPUC 210)

The Commission determined that except for the Future Transmission & Distribution Enhancement Program and the Transmission & Substation Resiliency Program, FPUC's SPP is in the public interest. (R. FPUC 218-22) Both programs were rejected as they did not pertain to enhancement of existing infrastructure. (R. FPUC 219-22)

TECO SPP Final Order

The Commission found that the quantitative and qualitative data provided by TECO's SPP contained all of the elements required by the SPP Statute and the SPP Rule. (R. TECO 262, 264-69) In addition, the Commission determined that except for the Transmission Access Enhancement Program, TECO's SPP is in the public interest. (R. TECO 273-76) The Commission determined the Transmission Access Enhancement Program involved new construction and did not qualify as an SPP program as it did not pertain to enhancement of existing infrastructure. (R. TECO 75, 274-76)

The SPPCRC Hearing and Order (Docket 20220010-EI)

The Commission conducted the SPPCRC hearing to determine cost recovery for the SPPs. (R. SPPCRC 3041-3580) The parties waived submitting post-hearing briefs. (R. SPPCRC 3276-78) Some parties presented closing arguments. (R. SPPCRC 3278-95) In its closing argument OPC did not argue that the utilities failed to carry their burden regarding the reasonableness or prudence of the costs. (R. SPPCRC 3292-94) OPC only continued to assert the Commission erred in failing to evaluate the prudence of the SPP programs and projects, in addition to the prudence of the costs. (R. SPPCRC 3293-94) The Commission determined the specific amount of final true-up costs that were prudently incurred and the reasonable amounts for the estimated and projected costs. (R. SPPCRC 3032-34)

SUMMARY OF ARGUMENT

The Final Orders should be upheld because the Commission acted within its statutory authority and correctly interpreted section 366.96, Florida Statutes, and Florida Administrative Code Rules 25-6.030 and 25-6.031. The plain language of section 366.96, Florida Statutes, shows that a prudence determination is not required in

the SPP dockets. Moreover, the plain language of section 366.96, Florida Statutes, and Florida Administrative Code Rule 25-6.030, allows either qualitative (descriptive) or quantitative (numerical) data to satisfy the SPP requirement of describing reduced outage times and restoration costs in comparing the costs and benefits.

The Commission neither abused its discretion nor violated OPC's due process rights when it struck portions of Lane Kollen's testimony. In accordance with subsection 120.569(2)(g), Florida Statutes, the Commission properly excluded irrelevant testimony, testimony that proposed a new legal standard, and testimony on the ultimate legal conclusions. The exclusion of testimony did not preclude OPC from making any legal arguments regarding interpretation of the SPP Statute or Rule. In addition, many portions of Kollen's prefiled testimony were not stricken and none of his exhibits were excluded.

The Commission's five Final Orders should be affirmed.

STANDARD OF REVIEW

"Commission orders come to this Court clothed with the presumption that they are reasonable and just." *Sierra Club v. Brown*, 243 So. 3d 903, 907 (Fla. 2018) (quoting *West. Fla. Elec.*

Coop. Ass'n v. Jacobs, 887 So. 2d 1200, 1204 (Fla. 2004)). To overcome this presumption, a party challenging an order of the Commission on appeal has the burden of showing a departure from the essential requirements of law and the legislation controlling the issue, or that the findings of the Commission are not supported by competent, substantial record evidence. *Sierra Club* at 907-08 (quoting *Crist v. Jaber*, 908 So. 2d 426, 430 (Fla. 2005)).

The standard of review for the issue raised in Point I of OPC's Brief is whether the Commission erroneously interpreted a provision of law, and whether a correct interpretation compels a particular action. § 120.68(7)(d), Fla. Stat. This Court will review *de novo* an agency's interpretation of law. Article V, § 21, Fla. Const. This Court shall not substitute its judgment for that of the Commission as to the weight of the evidence on any disputed finding of fact, and must affirm an agency's factual findings if they are supported by competent, substantial evidence. *See* § 120.68(7)(b), Fla. Stat. *See also Gulf Power Co. v. Fla. Pub. Serv. Comm'n*, 453 So. 2d 799, 803 (Fla. 1984).

The standard of review for the issue raised in Point II of OPC's Brief is whether the Commission's exercise of discretion was outside

the range of discretion delegated to the agency by law. § 120.68(7)(e)1. Fla. Stat. Under abuse of discretion review, "[i]f reasonable [people] could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). In addition, if the reviewing court finds there was a material error in procedure, it must determine if the fairness of the proceedings or the correctness of the Commission's actions was impaired. § 120.68(7)(c), Fla. Stat.

ARGUMENT

I. THE COMMISSION'S INTERPRETATION OF SECTION 366.96, FLORIDA STATUTES, AND FLORIDA ADMINISTRATIVE CODE RULES 25-6.030 AND 25-6.031, IS CORRECT.

A. The Commission's interpretation comports with the plain language of section 366.96, Florida Statutes.

In claiming that the Commission erroneously interpreted the SPP Statute and the SPP Rule, OPC alleges subsection 366.06(1), Florida Statutes, requires the Commission to consider the prudence of the SPP projects during the SPP hearing, not just in the SPPCRC hearing where it is determined whether the costs were prudently incurred. (I.B. 19-29) As discussed below, OPC's interpretation of

the prudence determination required under subsection 366.06(1), Florida Statutes, is wrong. Although OPC cites to subsection 366.06(1), Florida Statutes, to support its argument, subsection 366.06(1), Florida Statutes, is neither the rule-making authority for, nor the law implemented by, Florida Administrative Code Rule 25-6.030, which pertains to the approval process for the SPPs.

OPC's argument that the Commission was required to assess the prudence of the SPPs during the SPP hearings is contrary to the plain language of the SPP Statute, the Rules, and case law. (I.B. 19-40) Citing the Testimony Order OPC asserts, "The Commission mistakenly assumed that the 'evidence of imprudence' language acted as a barrier to prevent a prudence determination." (I.B. 24)[12] That phrase is not what the Commission relied upon in holding that a prudence determination is not appropriate during the SPP hearing. Rather, the Commission relied on the plain language of the SPP statute. *See Crist*, 908 So. 2d at 432 ("Florida's rules of statutory construction require a term to be given its plain and

[12] OPC misquotes *Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 749 (Fla. 2013), alleging it cites similar "negative implication" language in section 366.93. *Southern Alliance* actually references section 403.519. Regardless, neither of the statutory sections nor *Southern Alliance* supports OPC's argument.

ordinary meaning."); *Verizon Fla., Inc. v. Jacobs*, 810 So. 2d 906, 908 (Fla. 2002) ("There is no need to resort to other rules of statutory construction when the language of the statute is clear and unambiguous."); *Citizens v. Brown*, 269 So. 3d 498, 504 (Fla. 2019).

The SPP Statute has two main parts. The first part, subsections 366.96(3)-(6),[13] Florida Statutes, sets forth the basis for requiring SPPs; what utilities must include in their SPP filings; what factors the Commission must consider in reviewing the SPPs; and that in approving the SPPs, approving them with modifications, or denying them, the Commission must determine if the SPPs are in the public interest. The second part, subsections 366.96(7)-(9), Florida Statutes, sets forth the parameters to determine when the utilities may seek cost recovery and what costs may be sought in recovery, and establishes that the Commission must apply the prudence standard in determining whether to allow cost recovery.

The plain language of the SPP Statute sets forth the distinct determinations the Commission must make at each stage of the SPP process. *See* §§ 366.96(5) and (7), Fla. Stat. The portion of the

[13] Subsections 366.96(1) and (2) pertain to the Legislative basis for, and the definitions applicable to, the entire SPP Statute.

SPP Statute governing the Commission's review of the SPPs directs the Commission to determine whether a plan "contains all the elements required by commission rule" and then "determine whether it is in the public interest to approve, approve with modification, or deny the plan." § 366.96(5), Fla. Stat. "Prudence" is not mentioned anywhere in that portion of the SPP Statute.[14] Therefore, there is no basis for OPC's allegation that the Commission's interpretation of section 366.96, Florida Statutes, deprives them of "the *right* to challenge the prudence of going forward with the proposed programs or projects." (I.B. 29) (emphasis added) Under the plain language of the SPP Statutes, only *after* a plan has been approved does the SPP Statute allow the Commission "to determine the utility's prudently incurred...costs and allow the utility to recover such costs through a charge separate and apart from its base rates." § 366.96(7), Fla. Stat.

The prudence standard is derived from subsection 366.06(1), Florida Statutes, in which the Commission is tasked with making

[14] While the word "prudent" is used in subsection 366.96(2) to define "Transmission and distribution storm protection plan costs," that phrase is used only in the second part of the statute pertaining to cost recovery.

certain that costs are honestly and prudently incurred. *See Sierra Club v. Brown*, 243 So. 3d 903, 908 (Fla. 2018). Prudence is a standard of conduct. *See The Fla. Bar v. Hines,* 39 So. 3d 1196, 1200 (Fla. 2010), *Vogel v. Allen*, 443 So. 2d 368, 369 (Fla. 5th DCA 1983). In the realm of utility regulation, the conduct evaluated for prudence is "what a reasonable utility manager would have done, in light of the conditions and circumstances that were known, or should have been known, at the time the decision was made." *Southern All. for Clean Energy v. Graham,* 113 So. 3d at 750 (Fla. 2013). Accordingly, OPC's call for a preemptive determination of the prudence of projects, not in the context of conduct (how the projects were implemented), is wrong.

All of the cases OPC cites in support of its allegation that the Commission erred in not assessing the prudence of the SPPs as part of the SPP dockets are inapplicable because they pertain to Commission rate-making. The Commission does not dispute that prudence is a proper standard of review for rate-making. In fact, the Commission's interpretation of the SPP Statute, in which it determines prudence at the SPPCRC hearing, is consistent with that principle. However, the SPP hearing, in which the Commission

reviews the plans pursuant to subsections 366.96(4) and (5), Florida Statutes, and Florida Administrative Code Rule 25-6.030(3), is not rate-making.

Rate-making involves setting the "just, reasonable, and compensatory rates, charges, fares, tolls, or rentals to be observed and charged for service within the state by any and all public utilities under its jurisdiction." § 366.041(1), Fla. Stat.; *see also* § 366.06(1), Fla. Stat. Nothing that occurs in the SPP dockets involves those issues, which is why the Legislature only tasks the Commission with determining whether the SPPs are in the public interest at the SPP review stage. It is only when the Commission reviews the SPP costs pursuant to subsections 366.96(7) and (8), Florida Statutes, and Florida Administrative Code Rule 25-6.031, that rates are affected. By citing subsection 366.96(7), Florida Statutes, for the proposition that "the approval of a [sic] SPP is a condition precedent to any cost recovery through rates" (I.B. 21), OPC tacitly admits that the SPP approval process is not rate-making. Accordingly, OPC's reliance on *Sierra Club* to assert that a prudence determination is a "crucial element of the public interest

standard"[15] and should have been performed in the SPP hearing[16] is misplaced, as *Sierra Club* concerned a rate-making settlement.

Moreover, OPC misquotes *Sierra Club* and misrepresents its holding. This Court stated, "prudence…is a *relevant consideration* in the Commission's review…under its public interest standard,"[17] not that it is a "crucial" element, as alleged by OPC. In addition, OPC inaccurately suggests that *Sierra Club* establishes the "integrated nature of prudence and public interest" and requires the Commission to determine whether each SPP project was prudent. To the contrary, *Sierra Club* demonstrates that prudence and public interest are distinct concepts.

Public interest governs everything the Commission does as it is the over-arching "legislative goal of chapter 366." *Id.* However, it is the Commission's statutory role or authority in any particular fact situation that determines whether something is in the public interest. After examining prior case law and Commission precedent on how the Commission has determined whether something is in the public interest, this Court held:

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[15] I.B. 26.
[16] I.B. 26, 29, 34.
[17] *Sierra Club*, 243 So. 3d at 912 (emphasis added).

> [A] reasonable distillation of the Commission's public interest standard may be that it is a fact-dependent inquiry generally focused upon—but not limited to—the Commission's historical and statutory role. Yet, regardless of the exact contours, any requirement for independent, individualized prudence review is notably absent from the definition.

Id. at 911.

Under subsection 366.06(1), Florida Statutes, when the Commission is acting under its statutory authority "to determine and fix fair, just, and reasonable rates," the Legislature directs the Commission to conduct a prudence review. Therefore, when settlements concern rate-making, such as in *Sierra Club*, prudence considerations are statutorily involved in determining whether the settlement is in the public interest even if the Commission is not required "to lay out findings on prudence" or "to make and set forth independently specific prudence findings." *Id.* at 912. However, in the plain language of the SPP statute the Legislature directs the Commission to perform a prudence review only in the cost recovery proceeding. *See* § 366.96(7), Fla. Stat. In the SPP Statute the Legislature prescribes a public interest review of the SPPs and does not require the Commission to make and set forth independently

specific prudence findings until the plans are reviewed in the cost recovery or "rate-making" stage.

The plain language of the SPP Statute sets forth the distinct requirements the Commission must apply at each stage of the SPP process. *See* §§ 366.96(5) and (7), Fla. Stat. That is why the Commission bifurcates the process into two parts that include (1) an evaluation of the SPPs by the Commission in the SPP hearing to determine if they contain the required information and are in the public interest and (2) an evaluation of the costs by the Commission in the SPPCRC hearing to determine whether they were prudently incurred and cost recovery may be had by the utilities. OPC's position that the Commission is required to make a prudence determination even when rates are not at issue is not supported by the plain language of the SPP Statute and the SPP Rule. Accordingly, after examining the criteria specifically set forth in the plain language of the SPP Statute, in the SPP hearings the Commission properly determined whether the SPPs are in the public interest. *See Citizens*, 269 So. 3d at 504, *Crist*, 908 So. 2d at 432, *Verizon Fla., Inc.*, 810 So. 2d at 908.

In promulgating two rules to administer section 366.96, Florida Statutes, the Commission gave effect to the bifurcated process that is expressly stated in the statute. (R. DEF 6851, R. FPL 6812, R. FPUC 6699, R. TECO 6830) Each rule sets forth separate and distinct requirements for each part of the process. The SPP Rule governs what each SPP needs to include, and the SPPCRC Rule governs the Commission's determination of the prudency of the costs incurred. (R. DEF 6851, R. FPL 6812, R. FPUC 6699, R. TECO 6830) The plain reading of the SPP Statute and Rules supports this conclusion. (R. DEF 6851, R. FPL 6812, R. FPUC 6699, R. TECO 6830) These rules and the bifurcated process they set forth were upheld as valid exercises of the Commission's legislative authority in *Office of Pub. Counsel v. Fla. Pub. Serv. Comm'n, Case* No. 19-6137RP, 2020 WL 416780 (Fla. DOAH Jan. 21, 2020), in which OPC raised and the Administrative Law Judge ("ALJ") rejected many of the same arguments asserted here.[18] *See id.*, ¶¶ 42, 43, 67, 68, 94, 96, 97. OPC did not appeal that order.

[18] Noting that "cost recovery clause" is a "term of art in the utiltity regulatory area," the ALJ held that "[b]y using the terms "cost recovery clause" in subsection 366.96(7), the Legislature created a cost recovery clause like the one created in section 366.8255 and

For these reasons, this Court should affirm the five Final Orders on appeal.

B. The Final Orders on appeal are consistent with established case law and Commission precedent.

The bifurcated SPP and SPPCRC processes established by the Commission are consistent with established case law and Commission precedent in which the Commission approves plans, projects, and programs, and then determines the prudence of incurred costs in a subsequent cost recovery proceeding outside of base rate determinations. For example, an analogy may be drawn to the approval and implementation of demand-side management (DSM) goals and subsequent energy conservation cost recovery (ECCR) hearings for activities undertaken in pursuit of those goals. To promote energy conservation, the Legislature enacted section 366.82, Florida Statutes, which requires the Commission to adopt "goals for increasing the efficiency of energy consumption and

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like all other cost recovery clauses the Commission administers." *Id.* at ⁋⁋ 102–105. Section 366.8255, Florida Statutes, was specifically mentioned by the ALJ as both statutes reference the subsequent recovery of "prudently incurred…costs." *Id.* at ⁋ 104. Moreover, the ALJ noted that "[l]ike section 366.96(7), section 366.8255 uses the past tense, requiring the Commission to allow recovery of 'prudently incurred' costs." *Id.* at ⁋ 104.

increasing the development of demand-side renewable energy systems." § 366.82(2), Fla. Stat. Those goals are developed in a proceeding in advance of and separate from the proceeding to determine the prudence of the associated costs. As with the SPP Statute, in developing the DSM goals the Legislature requires the Commission to consider costs and benefits. *See* §§ 366.82(3)(a) and (b), Fla. Stat. As with the SPP Statute, in section 366.82, Florida Statutes, the Legislature requires the utilities to develop plans and programs and requires the Commission to approve the plans and programs that meet those goals. *See* § 366.82(7), Fla. Stat. As with the SPP Statute, only reasonable and prudently incurred costs are recoverable in a separate proceeding outside of rate base. *See* § 366.82(11), Fla. Stat. And, as with the SPPCRC, the ECCR is governed by a specific rule. *See* Fla. Admin. Code R. 25-17.015.

However, unlike with the SPP Statute, the Legislature explicitly requires that DSM renewable energy systems and conservation systems be "the most efficient and cost-effective." *See* § 366.81, Fla. Stat.; *see also* Fla. Admin. Code R. 25-17.0021(1)(b) and (4)(j). The Legislature could have imposed that duty on the Commission regarding SPP evaluations, but it did not. Accordingly,

this Court should reject OPC's request to add such a duty into the SPP Statute. *See Kasischke v. State*, 991 So. 2d 803, 809-10 (Fla. 2008) ("The Legislature did not include such language, and we cannot add it on our own."). *See also State v. City of Fort Pierce,* 88 So. 2d 135, 137 (Fla. 1956) ("It is not the province of this Court to rewrite the acts of the Legislature.").

OPC attempts to draw an analogy between the SPP process and the process under section 366.93, Florida Statutes,[19] ("Nuclear Cost Recovery Statute") and its companion statute, section 403.519, Florida Statutes,[20] ("Need Determination Statute"). (I.B. 30-34) While certain similarities exist, the analogies suggested by OPC are inaccurate and the differences are integral to understanding why OPC's argument is invalid.

OPC alleges the Commission has inconsistently interpreted the SPP Statute and the Nuclear Cost Recovery Statute because both statutes use the phrase "shall not constitute or be evidence of imprudence." (I.B. 31-32) However, that phrase is used in the cost recovery portion of both statutes, after the Commission has

[19] "Cost recovery for the siting, design, licensing, and construction of nuclear and integrated gasification combined cycle power plants."
[20] "Exclusive forum for determination of need."

determined need under subsection 403.519(3), Florida Statutes, and after the Commission has approved the proposed SPPs as being in the public interest. *See* §§ 366.96(7) and 403.519(4)(e) Fla. Stat. This further undermines OPC's argument that prudence should be evaluated in the preliminary hearing.

OPC alleges these statutes present "similar forward-looking rate-making proceedings." (I.B. 30) As such, citing subsection 120.58(7)(e)(3)[sic], Florida Statutes,[21] OPC alleges it was error for the Commission to fail to explain why it deviated from "officially stated agency policy or a prior agency practice." (I.B. 30) However, the only "officially stated agency policy" regarding the SPP procedure is contained within the SPP Statute and the SPP Rule. Furthermore, comparing the plain language of sections 366.93 and 403.519, Florida Statutes, and the cases interpreting those sections, to the plain language of the SPP Statute and the SPP Rule, reveals no deviation from "prior agency practice."

A comparison of the differences between the Need Determination Statute and the SPP Statute reveals the fallacy of

[21] Presumably OPC intended to cite subsection 120.68(7)(e)3; subsection 120.58(7)(e)(3) does not exist.

OPC's argument. First, under the SPP Statute, the Legislature has already determined need for "a transmission and distribution storm protection plan."[22] Under the Need Determination Statute, as its name suggests, the Commission must determine if there is a need for a power generating plant.[23] Additionally, under the SPP Statute, the utilities are required to perform certain storm hardening activities.[24] Under the Need Determination Statute, no utility is required to build a facility.[25] Finally, under the SPP Statute, the only thing the Legislature has tasked the Commission to do when reviewing each utility's plan is to determine if those activities meet the statutory and rule criteria.[26] That is a distinctly different assessment than what the Commission must do under the Need Determination Statute.[27] Accordingly, case law relied upon by OPC in discussing what the Commission considers in performing its duties under the Need Determination Statute is inapplicable to

[22] §§ 366.96(1) and (3), Fla. Stat.
[23] *See* §§ 403.519(3) and (4), Fla. Stat.
[24] *See* § 366.96(3), Fla. Stat.
[25] *See* §§ 403.519(1) and (2), Fla. Stat.
[26] *See* §§ 366.96(3) and (4), Fla. Stat.
[27] *See* §§ 403.519(3) and (4), Fla. Stat.

what the Commission must consider in determining SPP compliance.

OPC erroneously suggests that *In re: Petition for Determination of Need for Hines Unit 2 Power Plant by Fla. Power Corp.,* Order No. PCS-00-1933-PCO-EI, 2000 WL 1663660 (Fla. P.S.C. Oct. 19, 2000) ("*Hines Unit 2* Order"), involving the Need Determination Statute, serves as precedent for the Commission to perform a prudence determination of the SPP projects as part of the SPP hearing. (I. B. 32-34) However, that order is only a prehearing, procedural order. The Final Order in that case makes no reference to any prudence determination being made. *See In re: Petition for Determination of Need for Hines Unit 2 Power Plant by Fla. Power Corp.*, Order No. PSC-01-0029-FOF-EI, 2001 Fla. PUC LEXIS 34 (Fla. P.S.C. Jan. 5, 2001) ("*Hines Unit 2* Final Order").

Moreover, in 2000, when the *Hines Unit 2* Order relied upon by OPC was issued, the applicable version of the Need Determination Statute was the 1991 version, which was substantially different than the current version. The 1991 version of the Need Determination Statute essentially only included what is currently contained in subsections 403.519(1)-(3), Florida Statutes. There

was no cost recovery clause, as is currently contained in subsection 403.519(4)(e), Florida Statutes, and the Nuclear Cost Recovery Statute would not be enacted until 2006. Perhaps as a harbinger of that cost recovery mechanism, the only reference to prudence in the *Hines Unit 2* Final Order quoted a recommendation from a Commission staff witness to establish "a short-term prudence review which would periodically evaluate the cost effectiveness of electric generating units like Hines 2." *Hines Unit 2* Final Order, p. 14.

Further undermining OPC's argument and reliance on the *Hines* order is that in a post-2006 Need Determination case, after Nuclear Cost Recovery Statute was enacted, OPC acknowledged "prudence of all aspects of the commercial arrangement itself should be determined in the ordinary course of the annual cost recovery proceeding." *In re: Petition to determine need for Turkey Point Nuclear Units 6 and 7 electric power plant, by Fla. Power & Light Co.,* Order No. PSC-2008-0237-FOF-EI, 2008 WL 2076454, p. 22 (Fla. P.S.C. Apr. 11, 2008).

Accordingly, OPC's analogy is inappropriate. As demonstrated in the DSM goal approval and ECCR dockets, the bifurcated SPP

and SPPCRC processes, and the restriction of the prudence determination to the cost recovery hearing (in which the Commission rate-making occurs) are consistent with established case law and Commission precedent. Therefore, the Final Orders should be upheld.

C. The SPP Rule does not require quantitative data regarding benefits or a cost-benefit analysis.

OPC's allegation that the Commission erred in not requiring the utilities to provide quantitative data of benefits or to perform a cost-benefit analysis for each program or project (I.B. 34-40) is also baseless. Neither the plain language of the SPP Statute nor the SPP Rule requires quantitative data or a cost-benefit analysis as part of the Commission's review and approval of an SPP.

Subsection 366.96(4), Florida Statutes, sets forth what factors the Commission must consider in assessing an SPP. Subsection 366.96(3), Florida Statutes, directs the Commission to "adopt rules to specify the elements that must be included in a utility's filing for review of transmission and distribution storm protection plans." As discussed in Point I.A., *supra*, because the plain language of the SPP Statute does not require the Commission to formulate a rule

requiring quantitative data regarding benefits or a cost-benefit analysis, the Commission did not include such requirements in its SPP Rule.

In the SPP Final Orders, the Commission held that qualitative data can be just as meaningful as quantitative data. For example:

> Qualitative information can be meaningful when it demonstrates:
>
> - How storm projects would impact the largest numbers of customers, such as transmission projects, and utility infrastructure serving critical customers such as hospitals, emergency responders, and water treatment plants.
>
> - Whether a proposed SPP program or activity is something in addition to or above-and-beyond normal utility practices.

(R. FPL 194, R. FPUC 210) Similarly, the Commission held that "[w]hile the nature of cost data is objective, benefits in the context of storm hardening specifically may require various forms of description and analysis to ascertain." (R. DEF 179, R. TECO 263) The Commission held that the monetary value customers place on reduced outage times cannot be accurately or uniformly estimated, and quantifying it requires speculative, variable, and subjective assumptions. (R. FPL 191-97, R. FPUC 207-212) Even evidence

presented by OPC indicated that "the validity of methodologies to assess the cost of lost load to customers, including the contingent valuation method (which includes measures of willingness of customers to pay to avoid outages) remains a subject of debate." (R. TECO 432, 2403) The Commission determined that historical data demonstrated how past storm hardening measures have reduced restoration costs and outage times, and could demonstrate that an SPP is expected to reduce restoration costs and outage times associated with extreme weather and enhance reliability. (R. FPL 191-97, R. FPUC 207-212)

Seemingly acknowledging that neither the plain language of the SPP Statute nor the SPP Rule supports its argument, OPC erroneously suggests that by using the term "comparison" in Florida Administrative Code Rule 25-6.030(3)(d)4., the Commission meant a cost-benefit analysis; otherwise, no "meaningful" comparison can occur. (I.B. 9, 34-40) It is from that incorrect interpretation that OPC then argues that Florida Administrative Code Rule 25-6.030(3)(d)1. requires quantitative data regarding benefits. (I.B. 37-38) However, if the Legislature intended the

Commission to conduct a "cost-benefit analysis"[28] or require quantitative data of benefits, it could have, and would have, included such language in the SPP Statute. It did not.

The plain language of the SPP Statute and the SPP Rule reflect there is no requirement of a cost-effectiveness evaluation or quantitative cost-benefit analysis. As this Court previously stated:

> [W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

Citizens, 269 So. 3d at 504 (citations omitted). *See also Crist*, 908 So. 2d at 432, *Verizon Fla., Inc.*, 810 So. 2d at 908. Accordingly, the Commission was correct not to include such a requirement in its SPP Rule.

D. There is competent, substantial evidence supporting the SPPs approved by the Commission and the associated costs.

OPC falsely alleges that the Commission's interpretation of the SPP Statute and the SPP Rule precludes any prudence determination, reflects an abdication of the Commission's obligation

[28] Even a utility that provided quantitative data regarding benefits did not characterize its assessment as a "cost-benefit analysis." (R. TECO 6519-20)

to assess prudence in rate-making, and results in the utilities recovering all costs expended in the implementation of the approved SPP projects. (I.B. 27-29, 40) In doing so, OPC ignores the SPPCRC docket in which the Commission fulfilled its obligation to assess prudence in rate-making, made a prudence determination, and allowed recovery of costs prudently incurred in implementing the approved SPP projects. (R. SPPCRC 3032-33, 3035) As shown above, the Commission's interpretation is in accordance with the plain language of the SPP Statute, established case law, and Commission precedent.

Only costs that are prudently incurred or prudently invested may be recovered by a utility. *See* §§ 366.06(1) and 366.96(7), Fla. Stat. To recover costs, a utility must "prove by a preponderance of the evidence that its actions and decisions leading up to and in [incurring the costs] were prudent." *Duke Energy Florida, LLC v. Clark*, 344 So. 3d 394, 395 (Fla. 2022). Thus, in evaluating the prudency of the incurred costs, the Commission not only considers the prudence of a particular expenditure, but also whether the utility's management decisions were prudent. *See Gulf Power Co.*, 453 So. 2d at 803. *See also Florida Power Co. v. Cresse*, 413 So. 2d

1187, 1189 (Fla. 1982). That review and the setting of rates properly occurred in the SPPCRC hearing. (R. SPPCRC 3041-3580)

The Commission found the utilities carried their burden to recover prudently incurred costs. (R. SPPCRC 3032) Prudence and reasonableness are standards of conduct. *See Hines*, 39 So. 3d at 1200 (Fla. 2010) (regarding duty imposed in real estate closings); *Vogel*, 443 So. 2d at 369 (Fla. 5th DCA 1983). In the realm of utility regulation, the conduct evaluated for prudence is "what a reasonable utility manager would have done, in light of the conditions and circumstances that were known, or should have been known, at the time the decision was made." *Southern All. for Clean Energy*, 113 So. 3d at 750. Determining whether something is in the public interest and determining whether a standard of conduct has been met both require findings of fact to be made on a case-by-case basis after an evidentiary hearing. *See Sierra Club*, 243 So. 3d at 910 (citing *In re: Petition for Rate Increase by Gulf Power Co.*, Order No. PSC-17-0178-S-EI, 2017 WL 2212158, *6 (Fla. P.S.C. May 16, 2017)).

OPC has not challenged the sufficiency of evidence supporting the Commission's fact-findings on appeal. (I.B. 17-19) It cannot

because the five Final Orders contain competent, substantial evidence to support the Commission's factual findings. (*Supra*, pp. 11-21, R. DEF 177-91, R. FPL 191-209, R. FPUC 207-22, R. TECO 262-76, R. SPPCRC 3031-40)

It is the Commission's job as fact-finder to consider and weigh the evidence, determine the credibility of the witnesses, and resolve any conflict in the evidence. *See Gulf Power Co.*, 453 So. 2d at 805. Moreover, this Court will not overturn a Commission order because it would have arrived at a different result had it made the initial decision and will not reweigh the evidence. *Id.* at 803; *see also* § 120.68(7)(b), Fla. Stat. (stating that "the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact). Thus, the Court must not substitute its judgment for that of the Commission in approving each utility's SPP. *See* §§ 120.68(7)(b) and (10), Fla. Stat.; *see also Cresse,* 413 So. 2d at 1189.

It is unclear why OPC appealed the SPPCRC Final Order. OPC has not alleged that the Commission erred in its conduct of the SPPCRC hearing nor has it alleged any error in the SPPCRC Final Order. None of the alleged errors OPC raises in its brief occurred in

the SPPCRC docket. None of Lane Kollen's testimony was stricken in that docket. Moreover, all of his testimony from the SPP docket was admitted in the SPPCRC docket. (R. SPPCRC 892-1153, 3519) The Commission performed a prudence determination in the SPPCRC hearing. (R. SPPCRC 3032-33, 3035) Finally, despite its objection at hearing (R. SPPCRC 3294), OPC is not seeking "the 'rollback' of rates already established and implemented" in the SPPCRC docket. (I.B. 19) Accordingly, OPC has not alleged any error in the SPPCRC docket, is not seeking any remedy regarding the SPPCRC Final Order, and appeal of the SPPCRC Final Order is inappropriate. For these reasons, the five Final Orders should be affirmed.

II. THE COMMISSION DID NOT ERR IN EXCLUDING CERTAIN TESTIMONY OF LANE KOLLEN IN THE SPP HEARINGS.

A. Subsection 120.569(2)(g), Florida Statutes, established case law, and Commission precedent support the Commission's decision to strike portions of Lane Kollen's testimony because the testimony was irrelevant to the SPP proceeding, attempted to establish a new standard in contravention of the SPP Rule, or offered an ultimate legal conclusion.

Subsection 120.569(2)(g), Florida Statutes, which governs the admissibility of evidence in administrative proceedings, states:

> Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida.

OPC admits that the stricken portions of Kollen's testimony relate to his opinion that the SPP Statute and the SPP Rule *require* the Commission to perform a prudence determination in reviewing the SPP programs. (I.B. 6-7, 9-10, 41) Moreover, to enable the Commission to do so, Kollen opined that the SPP Statute and the SPP Rule *require* quantitative data regarding the benefits of the SPP programs. (I.B. 41-42) However, as shown in Point I, *supra*, the Commission correctly determined that the prudence of the SPP programs was not at issue in the SPP proceeding and that neither the SPP Statute nor the SPP Rule requires quantitative data regarding benefits.

All the findings in the Testimony Order were upheld by the full Commission in the various SPP final orders. (R. DEF 176-77, R. FPL 189-90, R. FPUC 206-07, R. TECO 260-61) As such, Kollen's testimony that the Commission erred in its interpretation of the SPP Statute, suggesting the Commission inaccurately applied the SPP

Rule and purporting to direct the Commission on the correct interpretation and application, was irrelevant and properly stricken.

The Testimony Order also held that it is improper for an expert witness to testify concerning ultimate conclusions of law, both under Commission practice and Florida case law. (R. DEF 6850-51, R. FPL 6811-12, R. FPUC 6698-99, R. TECO 6829-30) OPC has admitted it retained Kollen to make recommendations to the Commission based on his "expert interpretations of the requirements of the SPP Statute, and the SPP and SPPCRC Rules." (I.B. 41) Such testimony is improper under established case law and Commission precedent.

The Commission has excluded legal opinion testimony in prior dockets. *See e.g., In re: Petition for approval of Special Gas Transp. Serv. agreement with Fla. City Gas by Miami-Dade Cty. through Miami-Dade Water & Sewer Dep't,* Order No. PSC-11-0228-PCO-GU, 2011 WL 2090841, *9 (Fla. P.S.C. May 20, 2011) and *In re: Investigation Into the Appropriate Rate Structure for SOUTHERN STATES UTILS., INC. for all Regulated Systems in Bradford, Brevard, Citrus, Clay, Collier, Duval, Hernando, Highlands, Lake, Lee/Charlotte, Marion, Martin, Nassau, Orange, Osceola, Pasco,*

Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties (*"Southern States"*), Order No. PSC-94-0371-PCO-WS, 1994 WL 168281, *2 (Fla. P.S.C. March 30, 1994). In those cases, testimony from a witness on legal issues was stricken from the record. In the *Southern States* case, the prehearing officer held:

> The most appropriate place for legal discussion is in a post-hearing filing, such as a brief, where all of the parties have equal opportunity to present case law and argument in support of their position on the issue. Cross-examination of a witness on legal opinion is not contemplated by Section 120.57, Florida Statutes, which provides for a fact finding proceeding.

Id. See also In Re: Request for Arbitration Concerning Complaint of American Comm. Svcs. of Jacksonville, Inc. d/b/a e.spire Comms., Inc. and ACSI Local Switched Svcs., Inc. d/b/a e.spire Comms., Inc. Against BellSouth Telecomms., Inc. Regarding Reciprocal Compensation for Traffic Terminated to Internet Serv. Providers, Order No. PSC-99-0099-PCO-TP, 1999 WL 159860, *1 (Fla. P.S.C. Jan. 20, 1999).

The ultimate issues in the SPP cases concerned whether the SPPs met the requirements of the SPP Statute and the SPP Rule, and whether the SPPs were in the public interest. *See* subsections 366.96(3)-(5), Florida Statutes. Resolving those issues required the

Commission to interpret and apply the SPP Statute and the Rules. The intent of Kollen's testimony was to direct the Commission on how to interpret the SPP Statute and the Rules, and how it should ultimately decide. (I.B. 6-7, 41-42) However, "the interpretation of a statute is a question of law to be determined solely by the court, not by expert witnesses." *T.J.R. Holding Co., Inc. v. Alachua Cty.*, 617 So. 2d 798, 800 (Fla. 1st DCA 1983). Moreover, in *Town of Palm Beach v. Palm Beach Cty.*, 460 So. 2d 879, 882 (Fla. 1984), this Court held it was improper for a witness to opine how the case should be decided. *See also Estate of Murray v. Delta Health Grp., Inc.*, 30 So. 3d 576, 578 (Fla. 2d DCA 2010) ("An expert...is not permitted to render an opinion that applies a legal standard to a set of facts."); *County of Volusia v. Kemp*, 764 So. 2d 770, 773 (Fla. 5th DCA 2000) ("If expert testimony...tells the [fact finder] how to decide the case, it should not be admitted."). Therefore, the portions of Kollen's testimony that were stricken were improper and the Commission correctly excluded them.

OPC further alleges it was error for the Commission to strike Kollen's testimony because the Commission allowed the utilities to opine as to how the Commission should interpret the SPP Statute

and the Rules. (I.B. 41-42) However, that allegation mischaracterizes the testimony of those witnesses. Unlike Kollen's testimony which purported to tell the Commission how to interpret the SPP Statute and the SPP Rule, the testimony from utility witnesses merely stated why they believed their plans complied with the SPP Statute and the SPP Rule. (R. FPL 6568, R. TECO 6508) Therefore, OPC's argument fails.

Accordingly, it was appropriate for the Commission to exclude portions of Kollen's testimony as it was irrelevant, inappropriate, contrary to established law, and pertained to the ultimate legal conclusions at issue in this matter. As the utilities have advanced reasoned arguments refuting OPC's position regarding the admissibility of Kollen's testimony,[29] the Commission's striking portions of Kollen's testimony cannot be considered unreasonable and there was no abuse of discretion.

[29] R. DEF 6926–52, 7003-06; R. FPL 5442-45, 5495-5579, 6991-96, 7246-7386; R. FPUC 6782-83; R. TECO 5068-69, 5098-5134, 5435-37, 5454-76, 6913, 6946-7004.

B. Striking portions of Lane Kollen's testimony did not impair the fairness of the hearings.

OPC's allegation that the Commission "impaired the fairness of the SPP and SPPCRC dockets by granting the utilities' motion to strike portions of OPC expert witness Kollen's testimony" (I.B. 40-41) is baseless because it is factually and legally unsupported. First, as demonstrated above, the Commission's decision to strike portions of Kollen's testimony was based on the correct interpretation of the SPP Statute and Rules. Moreover, not only was none of Kollen's testimony stricken in the SPPCRC docket, all of his testimony from the SPP dockets was admitted in the SPPCRC docket. As such, there was no impairment to OPC's presentation of its case.

For the reasons stated in Point II.A., *supra*, the Commission's decision to strike certain portions of Kollen's testimony was appropriate. "The fundamental requirements of due process are satisfied by reasonable notice and a reasonable opportunity to be heard." *Florida Public Service Commission v. Triple "A" Enterprises, Inc.,* 387 So. 2d 940, 943 (Fla. 1980). At the SPP hearing, in accordance with sections 120.569 and 120.57, Florida Statutes, all

parties were given full opportunity to present argument on all *relevant* issues and to conduct cross-examination of all witnesses.

The exclusion of portions of Kollen's testimony in the SPP hearing did not preclude OPC from making any legal arguments regarding the interpretation of the SPP Statute or Rule. In fact, OPC made its legal argument five times: in its written response to FPL's Motion to Strike, at the prehearing conference, in its *ore tenus* motion for reconsideration during the SPP hearing, in its opening statement during the SPP hearing, and in its post-hearing brief. (R. DEF 307-16, 5593-99, 5604; 6502-08, 6927-28, 6935-43; R. FPL 283-91, 297-305, 5605-11, 5616; 6514-20, 6990-91, 6998-7006, 7193-7200; R. FPUC. 306-15, 5582-88, 5593, 6491-97, 6775-76, 6783-91; R. TECO 368-78, 5650-56, 5661, 6559-65, 6906-07, 6914-22) Many portions of Kollen's prefiled testimony were not stricken in the SPP hearing and none of his exhibits were excluded. Accordingly, the Commission's decision to strike portions of Kollen's testimony did not impair the fairness of the SPP hearing and did not violate OPC's due process rights.

CONCLUSION

OPC has failed to meet the heavy burden of overcoming the presumption of correctness that attaches to Commission orders. *See Sierra Club v. Brown*, 243 So. 3d 903, 907 (Fla. 2018) (quoting *W. Fla. Elec. Coop. Ass'n v. Jacobs*, 887 So. 2d 1200, 1204 (Fla. 2004)). The Commission's five Final Orders in all of the consolidated cases should be affirmed.

Respectfully submitted,

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I HEREBY CERTIFY, pursuant to Florida Rule of Appellate Procedure 9.045(e), that this Answer Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.045(b), was prepared using Bookman Old Style 14-point font, and contains 10,623 words, complying with the word limit of Florida Rule of Appellate Procedure 9.210(a)(2)(B).

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