

**SC22-1733; SC22-1735; SC22-1745; SC22-1748; SC22-1777
L.T. Case Nos. 20220010-EI; 20220048-EI;
20220049-EI; 20220051-EI**

IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA,

Appellant,

v.

ANDREW GILES FAY, ET AL.,

Appellees.

ANSWER BRIEF OF DUKE ENERGY FLORIDA

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TABLE OF CONTENTS

STATEMENT OF THE CASE AND OF THE FACTS	1
A. Nature of the Case	1
B. The Storm Protection Plan Statute and Commission Rules	2
i. Commission review of Storm Protection Plans	2
ii. Commission review of Storm Protection Plan Cost Recovery.	4
C. DEF’s 2023-32 Storm Protection Plan Review Proceeding	5
i. DEF petitions Commission for approval of Storm Protection Plan; Commission approves Storm Protection Plan following administrative hearing.	5
ii. Commission conducts hearing and approves DEF’s Storm Protection Plan as modified.	8
D. DEF’s 2022 Cost Recovery Proceeding.....	10
SUMMARY OF THE ARGUMENT	12
STANDARD OF REVIEW.....	14
ARGUMENT	15
I. THE COMMISSION CORRECTLY DETERMINED THAT DEF’S 2023-32 STORM PROTECTION PLAN WAS IN THE PUBLIC INTEREST.....	15
A. The SPP Statute requires the Commission to determine whether a utility’s storm protection plan is in the public interest.	16
i. OPC’s interpretation of the SPP Statute as requiring a prudence review in Plan Review Proceedings is contrary to the statute’s text and structure.....	17

ii.	The prudence standard in section 366.06(1) does not apply to Plan Review Proceedings under the SPP Statute.....	23
B.	Competent substantial evidence supports the Commission’s determination that DEF’s 2023-32 Storm Protection Plan is in the public interest.	26
C.	OPC’s remaining arguments directed to DEF’s Storm Protection Plan are without merit.	29
i.	The Commission’s order does not represent an unexplained departure from a prior agency practice.....	30
ii.	The Commission did not abuse its discretion by striking portions of the testimony of OPC witness Lane Kollen.	32
II.	THE COMMISSION CORRECTLY DETERMINED THAT DEF’S ACTUAL AND PROJECTED STORM PROTECTION PLAN COSTS WERE REASONABLE AND PRUDENT TO IMPLEMENT DEF’S APPROVED STORM PROTECTION PLAN.....	36
A.	The SPP Statute requires the Commission to determine and allow a utility to recover its reasonable and prudently incurred costs to implement an approved storm protection plan.	37
B.	Competent substantial evidence supports the Commission’s determination that the actual and projected storm protection plan costs DEF sought to recover were reasonable and prudent to implement DEF’s approved storm protection plan.	39
	CONCLUSION	41
	CERTIFICATE OF SERVICE.....	43
	CERTIFICATE OF COMPLIANCE	46

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Alachua Cnty. v. Watson</i> , 333 So. 3d 162 (Fla. 2022)	18
<i>Bank of New York Mellon v. Glenville</i> , 252 So. 3d 1120 (Fla. 2018)	24
<i>Caldwell v. Fla. Dep’t of Elder Affairs</i> , 121 So. 3d 1062 (Fla. 1st DCA 2013)	28
<i>Calloway v. State</i> , 210 So. 3d 1160 (Fla. 2017)	33
<i>Citizens of State v. Fla. Pub. Serv. Comm’n</i> , 146 So. 3d 1143 (Fla. 2014)	26
<i>Coates v. R.J. Reynolds Tobacco Co.</i> , 48 Fla. L. Weekly S110, 2023 WL 4004339 (Fla. June 15, 2023).....	22
<i>Conage v. United States</i> , 346 So. 3d 594 (Fla. 2022)	18
<i>Crist v. Jaber</i> , 908 So. 2d 426 (Fla. 2005)	14
<i>DeGroot v. Sheffield</i> , 95 So. 2d 912 (Fla. 1957)	28
<i>Duke Energy Fla., LLC v. Clark</i> , 344 So. 3d 394 (Fla. 2022)	37
<i>Fla. Cities Water Co. v. State, Pub. Serv. Comm’n</i> , 705 So. 2d 620 (Fla. 1998)	31
<i>Ham v. Portfolio Recovery Assocs., LLC</i> , 308 So. 3d 942 (Fla. 2020)	17

<i>Holmes v. Turlington</i> , 480 So. 2d 150 (Fla. 1st DCA 1985)	38
<i>Huff v. State</i> , 569 So. 2d 1247, 1249 (Fla. 1990)	33
<i>Lab’y Corp. of America v. Davis</i> , 339 So. 3d 318 (Fla. 2022)	18
<i>Leisure Resorts, Inc. v. Frank J. Rooney, Inc.</i> , 654 So. 2d 911 (Fla. 1995)	22
<i>Lynch v. State</i> , 2 So. 3d 47 (Fla. 2008)	33
<i>McKendry v. State</i> , 641 So. 2d 45 (Fla. 1994)	24
<i>Nest v. Dep’t of Pro. Regul.</i> , 490 So. 2d 987 (Fla. 1st DCA 1986)	38
<i>O.H. v. Agency for Persons with Disabilities</i> , 332 So. 3d 27 (Fla. 3d DCA 2021)	28, 40
<i>Potter v. Potter</i> , 317 So. 3d 255 (Fla. 1st DCA 2021)	22
<i>Safeway Ins. Co. v. Godoy</i> , 584 So. 2d 1136 (Fla. 3d DCA 1991)	38
<i>Sierra Club v. Brown</i> , 243 So. 3d 903 (Fla. 2018)	14, 25, 26
<i>S. All. for Clean Energy v. Graham</i> , 113 So. 3d 742 (Fla. 2013)	14, 37
<i>Stanton v. Fla. Dep’t of Health</i> , 129 So. 3d 1083 (Fla. 1st DCA 2013)	27, 40
<i>State v. Gabriel</i> , 314 So. 3d 1243 (Fla. 2021)	22

<i>T.J.R. Holding Co., Inc. v. Alachua Cnty.</i> , 617 So. 2d 798 (Fla. 1st DCA 1993)	34
<i>Tsuji v. Fleet</i> , 48 Fla. L. Weekly S130, 2023 WL 4246120 (Fla. June 29, 2023).....	17
<i>W. Fla. Elec. Coop. Ass’n, Inc. v. Jacobs</i> , 887 So. 2d 1200 (Fla. 2004)	14

Rules

Rule 25-6.030, Fla. Admin. Code.....	3, 4, 18, 20
Rule 25-6.031, Fla. Admin. Code	<i>passim</i>

Statutes

§ 120.68(7), Fla. Stat.....	14, 30, 31, 32, 38
§ 120.569, Fla. Stat.....	34
§ 366.06(1), Fla. Stat.....	<i>passim</i>
§ 366.96, Fla. Stat.....	<i>passim</i>
§ 403.519, Fla. Stat.....	31

Other Authorities

ANTONIN SCALIA & BRYAN A. GARNER, <i>Reading Law: The Interpretation of Legal Texts</i> 56 (2012)	17, 18
Art. V, § 21, Fla. Const.....	15

STATEMENT OF THE CASE AND OF THE FACTS

A. Nature of the Case

This consolidated appeal includes two Public Service Commission orders addressing petitions filed by Duke Energy Florida: 1) Commission Order PSC-2022-0388A-FOF-EI (Nov. 14, 2022), approving DEF’s 2023-32 Storm Protection Plan (the “Storm Protection Plan Order” or “SPP Order”)¹; and 2) Commission Order PSC-2022-0418-FOF-EI (Dec. 12, 2022), approving DEF’s storm cost recovery amounts for 2021 and 2022 and establishing storm cost recovery factors for 2023 (the “Cost Recovery Order” or “SPPCRC Order”).²

¹ Florida’s three other investor-owned electric utilities also filed storm protection plans for Commission approval. Although the four Plan Review Proceedings were consolidated below for purposes of the hearing, the Commission resolved the Storm Protection Plan petitions with separate orders and has transmitted separate records on appeal. Citations to the record on appeal for DEF’s Storm Protection Plan Proceeding appear as R.DEF.___.

² The Cost Recovery petitions filed by all four of Florida’s investor-owned utilities were consolidated for a single hearing and a single record. Citations to the record on appeal for the Cost Recovery Proceeding appear as R.CRC.___.

B. The Storm Protection Plan Statute and Commission Rules

Florida's storm protection plan cost recovery statute ("SPP Statute") was enacted in 2019. § 366.96, Fla. Stat. The SPP Statute declares that it is in the state's interest "to strengthen electric utility infrastructure to withstand extreme weather conditions by promoting the overhead hardening of electrical transmission and distribution facilities, the undergrounding of certain electrical distribution lines, and vegetation management." § 366.96(1)(c), Fla. Stat. Projects undertaken by utilities to protect and strengthen electric utility infrastructure "can effectively reduce restoration costs and outage times to customers and improve overall service reliability for customers." § 366.96(1)(d), Fla. Stat.

The SPP Statute establishes two distinct proceedings at the Public Service Commission to accomplish these objectives.

1. Commission review of Storm Protection Plans

First, the SPP Statute requires each utility to file a Storm Protection Plan explaining "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 Storm Protection Plan must cover “the immediate 10-year planning period” and must include specific elements set out in Commission rules.³ *Id.* Utilities must file an updated Storm Protection Plan “[a]t least every 3 years.” § 366.96(6), Fla. Stat.

The Commission must consider four statutory factors in a proceeding to review a utility’s Storm Protection Plan (a “Plan Review Proceeding”):

- (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)(a)-(d), Fla. Stat.

³ See Rule 25-6.030, Fla. Admin. Code (the “SPP Rule”) (specifying contents of Storm Protection Plan).

Within 180 days after a utility files a Storm Protection Plan that contains all of the elements required by Rule 25-6.030, 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.

2. *Commission review of Storm Protection Plan Cost Recovery*

In addition to the Plan Review Proceeding described above, the SPP Statute also establishes a separate annual proceeding at the Commission “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.” (the “Cost Recovery Proceeding” or “SPPCRC”). § 366.96(7), Fla. Stat.; *see also* Rule 25-6.031, Fla. Admin. Code (describing scope of Cost Recovery Proceeding and required contents of petition for storm protection plan cost recovery).

If the Commission determines that costs were prudently incurred, “those costs will not be subject to disallowance or further prudence review except for fraud, perjury, or intentional withholding of key information by the public utility.” *Id.* A utility’s actions to

implement an approved Storm Protection Plan “shall not constitute or be evidence of imprudence.” *Id.*

C. DEF’s 2023-32 Storm Protection Plan Review Proceeding

i. DEF petitions Commission for approval of Storm Protection Plan; Commission approves Storm Protection Plan following administrative hearing.

On April 11, 2022, DEF filed a petition for approval of its 2023-32 Storm Protection Plan.⁴ R.DEF.7700-7821. DEF’s Storm Protection Plan proposed ten programs:

- Distribution Feeder Hardening
- Distribution Lateral Hardening
- Distribution Self-Optimizing Grid
- Distribution Underground Flood Mitigation
- Transmission Structure Hardening
- Transmission Substation Flood Mitigation
- Transmission Loop Radially Fed Substations
- Transmission Substation Hardening
- Distribution Vegetation Management
- Transmission Vegetation Management

R.DEF.7714-7810. The petition, its accompanying exhibits, and the pre-filed direct testimony of DEF witnesses Brian Lloyd, Christopher

⁴ DEF’s previous Storm Protection Plan was approved by the Commission under a 2020 settlement agreement. R.174-75. One component of that agreement was a requirement for DEF to file an updated plan for the period 2023-32. *Id.*

Menendez, and Amy Howe explained how DEF's 2023-32 Storm Protection Plan would continue to build upon the significant storm hardening activities DEF had undertaken over the preceding years, including programs under DEF's Commission-approved 2020 Storm Protection Plan. R.DEF.7714-7769. Those programs include tree trimming, pole inspections, hardening of feeders and laterals, and undergrounding. R.DEF.7718.

Five parties intervened in DEF's Plan Review Proceeding: the Office of Public Counsel; Walmart, Inc.; Florida Industrial Power Users Group ("FIPUG"); Nucor Steel Florida, Inc.; and White Springs Agricultural Chemical, Inc. d/b/a PCS Phosphate. R.DEF.7353-58, 7635-7641, 7673-7679, 7822-7826, 7843-7844.

OPC submitted pre-filed direct testimony from two witnesses: Kevin Mara (R.DEF.7359-7561) and Lane Kollen (R.DEF.7562-7634). Mara, an electrical engineer, provided testimony regarding the programs identified in DEF's proposed Storm Protection Plan. R.DEF.7359-7561. Kollen, an accountant, provided testimony including a series of "recommendations" that the Commission adopt and apply new criteria to its review of DEF's Storm Protection Plan,

in addition to the witness's interpretation of the SPP Statute and Commission Rules. R.DEF.7576-7591.

In advance of the prehearing conference, DEF filed a motion to strike portions of the testimony of OPC witness Kollen. R.7003-7006, 6970-7002. DEF's motion joined in arguments raised by Florida Power & Light in a motion to strike portions of Kollen's testimony filed in FPL's own Plan Review Proceeding. *Id.* The motions to strike argued that specific portions of Kollen's testimony should be stricken as beyond the scope of permissible expert opinion, particularly testimony regarding Kollen's interpretations of the Commission's statutes and rules and "recommendations" on new standards and criteria for the Commission to apply when reviewing storm protection plans. *Id.*

The prehearing officer granted the utilities' motions to strike in a written order dated August 1, 2022. R.DEF.6847-6857. The order noted that the Commission has generally excluded expert testimony on legal issues that are reserved for the trier of fact. R.DEF.6850-6851. The order then explains why portions of Kollen's testimony that attempt to set new standards and criteria or to provide legal

arguments in support of Kollen's interpretation of the Commission's statutes and rules are irrelevant and immaterial. R.DEF.6851-6852.

ii. Commission conducts hearing and approves DEF's Storm Protection Plan as modified.

The Commission conducted an administrative hearing on August 2-4, 2022. R.DEF.5007-6676. At the hearing, OPC requested reconsideration of the order striking portions of OPC witness Kollen's testimony. R.DEF.5593-5613. DEF introduced the pre-filed direct and re-direct testimony of Brian Lloyd, Christopher Menendez, and Amy Howe into evidence. R.DEF.5197-5217; 5269-5288; 5333-5348; 6306-6312; 6339-6341; 6596-6604. OPC introduced the pre-filed direct testimony of Lane Kollen and Kevin Mara. R.DEF.5682-5742; 5958-6001. The parties then engaged in live cross-examination and re-direct of witnesses. R.DEF.5218-5243; 5289-5307; 5349-5358; 5865-5870; 6068-6078; 6313-6336; 6349-6411; 6605-6664.

On September 6, 2022, the parties filed post-hearing briefs on the issues before the Commission in DEF's Plan Review Proceeding. *See* R.DEF.319-349 (post-hearing brief of DEF); R.DEF.280-318 (joint post-hearing brief of OPC, FIPUG, White Springs, Nucor); R.350-58 (post-hearing brief of Walmart).

The Commission discussed and voted on DEF’s 2023-32 Storm Protection Plan at an agenda conference held on October 4, 2022. R.DEF.216-28. The Commission then issued a Final Order (superseded on November 14 by an Amended Final Order) approving, with modifications, DEF’s 2023-32 Storm Protection Plan. R.DEF.173-94 (Amended Final Order); 195-215 (Final Order). As a preliminary matter, the order rejected OPC’s argument that the decision to exclude portions of OPC witness Kollen’s testimony was “procedurally infirm[.]” or negatively impacted the “fairness of the proceeding.” R.DEF.176-77.

The Storm Protection Plan Order then addresses seven issues relevant to the Commission’s review of storm protection plans, including a summary of the parties’ arguments and the Commission’s analysis and conclusion as to each. R.DEF.177-90. The Commission ultimately determined that DEF’s 2023-32 Storm Protection Plan was in the public interest and should be approved with one modification.⁵ R.DEF.188-91.

⁵ The Commission’s exclusion of DEF’s proposed Transmission Loop Radially Fed Substations program from the approved 2023-32 Storm Protection Plan (R.189-90) is not at issue in this appeal.

OPC timely appealed the Commission's Amended Final Order approving DEF's Storm Protection Plan. R.DEF.65-114.

D. DEF's 2022 Cost Recovery Proceeding

DEF filed two petitions on April 1 and May 2, 2022, seeking approval of its final storm protection plan costs true-up for 2021, its actual/estimated costs true-up for 2022, and its 2023 projected costs and 2023 storm protection plan cost recovery factor. R.CRC.7414-7698; 8280-8342. The petitions were supported by the pre-filed direct testimony of DEF witnesses Christopher Menendez, Brian Lloyd, Ron Adams, and Robert Brong, and Exhibits CAM-1 through CAM-4, which demonstrated DEF's entitlement to cost recovery. R.CRC.7421-7698; 8284-8342. The cost-recovery petitions filed by DEF were consolidated with those filed by Florida's other utilities for consideration by the Commission. R.CRC.3926-28.

The Commission held its final hearing on the Cost Recovery petitions on November 17, 2022. R.CRC.3041-3580. The parties waived cross-examination and stipulated to the admission of the pre-filed testimony of DEF witnesses Robert Brong, Ron Adams, and Christopher Menendez, and OPC witnesses Lane Kollen and Kevin Mara. R.CRC.3452-3559. DEF witness Brian Lloyd appeared,

testified through pre-filed direct and rebuttal testimony, and was subject to cross-examination at the hearing. R.CRC.3239-3275. DEF Exhibits CAM-1, CAM-2, CAM-3, and CAM-4 were admitted into evidence without objection. R.CRC.3048. The parties presented closing argument in lieu of post-hearing briefs. R.CRC.3279-95.

A final order approving DEF's storm protection plan cost recovery petitions was rendered on December 12, 2022. R.CRC.3028-3040. The Cost Recovery Order notes that OPC "raised only one, blanket argument" in opposition to the 2021 and 2022 true-ups and 2023 projections: OPC's disagreement that DEF and the other utilities had carried their burden of proof to demonstrate that their storm protection plan costs are reasonable and prudent. R.CRC.3032. No other intervenor raised any additional concerns or independent arguments. *Id.*

The Commission disagreed with OPC's contention, and found that each utility had satisfied its burden through witness testimony and exhibits providing details about SPP implementation activities and costs as required by the SPP Statute and Rule 25-6.031, Florida Administrative Code. R.CRC.3032-3033. The Commission found that the record contained sufficient evidence as to both prudence of actual

costs incurred and reasonableness of projected costs to support cost recovery. R.CRC.3033. Accordingly, the Commission approved the associated jurisdictional cost recovery amounts, tariffs, and cost factors for each utility. R.CRC.3033-3039.

OPC timely appealed the Commission's Final Order Approving Storm Cost Recovery Amounts and Related Tariffs and Establishing Storm Cost Recovery Factors for the Period January 2023 through December 2023. R.CRC.25-44.

SUMMARY OF THE ARGUMENT

This Court should affirm both the Commission's amended final order approving DEF's Storm Protection Plan and its separate final order approving DEF's petitions for Storm Protection Plan Cost Recovery. The Office of Public Counsel's initial brief fails to establish any legal basis to reverse.

First, in the appeal of the Storm Protection Plan Order, the Commission properly determined that DEF's 2023-32 Storm Protection Plan was in the public interest. The Commission correctly interpreted and applied the SPP Statute, which identifies the criteria that the Commission must consider when reviewing a utility's storm protection plan and the public-interest standard that applies to the

Commission’s determination. OPC’s interpretation of the SPP Statute seeks to introduce a “prudence” review into Plan Review Proceedings in a manner contrary to the statute’s text and structure. The Commission’s determination that DEF’s 2023-32 Storm Protection Plan should be approved in the public interest is supported by competent, substantial evidence in the record; OPC has abandoned on appeal each of its specific objections raised below to programs within DEF’s Storm Protection Plan.

OPC’s other arguments on appeal also lack merit. The Commission did not abuse its discretion by excluding portions of OPC witness Kollen’s testimony as irrelevant and immaterial. Nor did the Commission depart from “prior agency practices” on an issue of discretion. The Commission faithfully applied the language of the SPP Statute and SPP Rule during the Plan Review Proceeding below—the first fully adjudicated proceeding under the SPP Statute. OPC’s initial brief presents no proper grounds to reverse the Commission’s approval of DEF’s Storm Protection Plan.

Second, in the appeal of the Cost Recovery Order, OPC fails to present any arguments that the Commission erred in determining that the actual and projected costs DEF sought to recover were

reasonable and prudent. The Commission properly interpreted and applied the SPP Statute's provisions for Cost Recovery Proceedings, and the order's findings as to DEF's costs are supported by competent substantial evidence in the record.

Both orders on appeal should be affirmed in their entirety.

STANDARD OF REVIEW

“Commission orders come to this Court clothed with the presumption that they are reasonable and just.” *W. Fla. Elec. Coop. Ass’n, Inc. v. Jacobs*, 887 So. 2d 1200, 1204 (Fla. 2004). “To overcome these presumptions, 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 evidence.” *S. All. for Clean Energy v. Graham*, 113 So. 3d 742, 752 (Fla. 2013) (quoting *Crist v. Jaber*, 908 So. 2d 426, 430 (Fla. 2005)); *Sierra Club v. Brown*, 243 So. 3d 903, 907-08 (Fla. 2018); see also § 120.68(7)(b), Fla. Stat. (reviewing court shall set aside agency action that is not supported by competent, substantial evidence in the record but “shall not substitute its judgment for that of the

agency as to the weight of the evidence on any disputed finding of fact.”).

Questions of statutory interpretation are reviewed de novo. Art. V, § 21, Fla. Const.

ARGUMENT

I. THE COMMISSION CORRECTLY DETERMINED THAT DEF’S 2023-32 STORM PROTECTION PLAN WAS IN THE PUBLIC INTEREST.

In a proceeding to review a utility’s proposed storm protection plan, the Commission must “determine whether it is in the public interest to approve, approve with modification, or deny the plan.” § 366.96(5), Fla. Stat. The Commission correctly found that DEF’s 2023-32 Storm Protection Plan was in the public interest and should be approved. R.DEF.173-194. This Court should affirm the Commission’s order approving DEF’s Storm Protection Plan because it is supported by competent, substantial evidence in the record on appeal.⁶

⁶ OPC’s initial brief combines into two principal headings its arguments directed to portions of five separate final orders involving four utilities, often rendering it unclear which arguments OPC is asserting as to each utility and order on appeal. For clarity, DEF has reorganized the arguments in this brief to respond separately to

A. The SPP Statute requires the Commission to determine whether a utility’s storm protection plan is in the public interest.

Following a fully adjudicated administrative hearing, the Commission issued a final order concluding that DEF’s Storm Protection Plan satisfied the requirements of section 366.96 and was “approved in the public interest.” R.DEF.190-191.⁷ The Commission’s public-interest determination was not only amply supported by record evidence, it was also precisely the issue the SPP Statute requires the Commission to decide in a Plan Review Proceeding. § 366.96(5), Fla. Stat. (providing that the Commission “shall determine *whether it is in the public interest* to approve, approve with modification, or deny the plan.”) (emphasis added).

Notwithstanding this clear statutory directive, OPC argues that the Commission is also required to “consider the prudence of SPP investments” in a Plan Review Proceeding. IB.20. This interpretation

OPC’s arguments that challenge: 1) DEF’s Storm Protection Plan Order; and 2) the Cost Recovery Order.

⁷ The Commission withheld approval of one program included in DEF’s Storm Protection Plan (the “Transmission Loop Radially Fed Substations Program”). R.DEF.190-191. That program is not at issue in this appeal.

is wholly at odds with the text and structure of section 366.96, which establishes separate Plan Review and Cost Recovery Proceedings under distinct timelines and subject to different legal standards. OPC also attempts to engraft the prudence requirement for ratemaking proceedings under section 366.06(1) onto a Plan Review Proceeding under section 366.96, which is not a ratemaking proceeding. This Court should reject OPC’s interpretation as inconsistent with well-established rules of statutory construction.

i. OPC’s interpretation of the SPP Statute as requiring a prudence review in Plan Review Proceedings is contrary to the statute’s text and structure.

This Court recently reaffirmed that “[w]hen we construe statutes, our first (and often only) step . . . is to ask what the Legislature actually said in the statute, based upon the common meaning of the words used when the statute was enacted.” *Tsuji v. Fleet*, 48 Fla. L. Weekly S130, 2023 WL 4246120 at *3 (Fla. June 29, 2023) (cleaned up). The Court applies this approach because “[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.” *Ham v. Portfolio Recovery Assocs., LLC*, 308 So. 3d 942, 946 (Fla. 2020) (quoting ANTONIN SCALIA & BRYAN A. GARNER, *Reading Law: The Interpretation of*

Legal Texts 56 (2012)).

Because “[c]ontext is a primary determinant of meaning,” proper interpretation also “requires consideration of ‘the entire text, in view of its structure and of the physical and logical relation of its many parts.’ ” *Lab’y Corp. of America v. Davis*, 339 So. 3d 318, 324 (Fla. 2022) (quoting SCALIA & GARNER, *Reading Law* at 167); accord *Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022) (rejecting “misleading and outdated” approach to statutory interpretation exemplified in *Holly v. Auld* in favor of approach requiring exhaustion of “‘all the textual and structural clues’ that bear on the meaning of a disputed text”) (quoting *Alachua Cnty. v. Watson*, 333 So. 3d 162, 169 (Fla. 2022)).

OPC’s interpretation of section 366.96—which would require the Commission to undertake a prudence review not only in a Cost Recovery Proceeding but also in a Plan Review Proceeding—is irreconcilable with the statute’s text and structure. IB.19-34. As described above, the SPP Statute and its implementing rules establish two distinct proceedings before the Commission: 1) a Plan Review Proceeding under subsections 366.96(3)-(6) and Rule 25-6.030; and 2) a Cost Recovery Proceeding under subsections

366.96(7)-(8) and Rule 25-6.031. These two separate proceedings involve different timelines, different filing requirements, different factors for the Commission to consider, and—as relevant here—different ultimate determinations for the Commission to make upon the conclusion of its review.

A utility may initiate a Plan Review Proceeding by filing an updated Storm Protection Plan with the Commission—a filing that must occur “[a]t least every 3 years.” § 366.96(6), Fla. Stat. The Storm Protection Plan must explain “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 must consider four statutory factors when reviewing a Storm Protection Plan:

- 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.
- 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.
- The estimated costs and benefits to the utility and its customers of making the improvements proposed in the

plan.

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

§ 366.96(4)(a)-(d), Fla. Stat.

No later than 180 days after a utility has filed a storm protection plan that contains all of the elements required by Rule 25-6.030, 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. (emphasis added). A final order in a Plan Review Proceeding will therefore include the Commission’s ultimate finding as to whether approval of the Storm Protection Plan is “in the public interest.”

In contrast, a Cost Recovery Proceeding is 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.” § 366.96(7), Fla. Stat. (emphasis added); *see also* § 366.96(2)(c), Fla. Stat. (defining “transmission and distribution storm protection plan costs” as “the reasonable and prudent costs to implement an approved transmission and distribution storm

protection plan”). The Commission’s annual Cost Recovery Proceeding is “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” the Commission’s statutes and rules. Rule 25-6.031(3), Fla. Admin. Code. (emphasis added).

A utility’s petition to recover costs associated with its Storm Protection Plan must include detailed information about the recoverable costs associated with its approved Storm Protection Plan on a rolling three-year basis. Rule 25-6.031(7), Fla. Admin. Code. The Cost Recovery filings must include evidence justifying a final “true-up” of cost recovery for the previous year, an estimated “true-up” for the current year, and projected costs for the subsequent year. *Id.* A final order in a Cost Recovery Proceeding will therefore include the Commission’s ultimate findings as to whether the utility demonstrated that the costs it seeks to recover were “prudently incurred” and whether its projections are “reasonable.” § 366.96(7), Fla. Stat.; Rule 25-6.031(3), Fla. Admin. Code.

OPC’s interpretation of the SPP Statute (IB.20-29) would

eliminate the distinctions between these two separate Commission proceedings that are inherent in the statutory text and structure. In effect, OPC would have this Court judicially rewrite section 366.96(5) as follows:

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 the transmission and distribution storm protection plan investments are prudent and whether it is in the public interest to approve, approve with modification, or deny the plan.

Of course, this Court will not “add words to a statute in the guise of interpreting it.” *Coates v. R.J. Reynolds Tobacco Co.*, 48 Fla. L. Weekly S110, 2023 WL 4004339 at *1 (Fla. June 15, 2023); *see also, e.g., State v. Gabriel*, 314 So. 3d 1243, 1248 (Fla. 2021) (“When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded.” (quoting *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995)); *Potter v. Potter*, 317 So. 3d 255, 258 (Fla. 1st DCA 2021) (acknowledging rule of statutory construction that “courts may not insert words into a statute that the Legislature declined to enact”).

OPC’s contention that the Commission must make a prudence

determination in a Plan Review Proceeding is contrary to the text and structure of section 366.96, Florida Statutes. In accordance with the statute, the Commission appropriately limited its review of DEF's Storm Protection Plan to a determination of "whether it is in the public interest to approve, approve with modification, or deny the plan." § 366.96(5), Fla. Stat.

ii. The prudence standard in section 366.06(1) does not apply to Plan Review Proceedings under the SPP Statute.

OPC also argues that a prudence review of Storm Protection Plans is required by section 366.06(1), Florida Statutes. IB.20-29. Under section 366.06(1), the Commission must evaluate the prudence of utility company investments for "ratemaking purposes"—a purpose-based limitation that OPC emphasizes throughout in its brief. See IB.20 (noting that section 366.06(1) applies "[u]pon application for a change in rates by a utility" and to "ratemaking requests"); IB.21 ("rate-setting process"); IB.25 ("ratemaking dockets," "ratemaking proceeding," and "ratemaking decisions"); IB.29 ("ratemaking dockets").

OPC's argument that section 366.06(1) applies to Plan Review Proceedings fails, however, because the Commission's review of

Storm Protection Plans under section 366.96(3)-(6) *does not involve* “ratemaking.” The Commission’s consideration of the statutory factors in section 366.96(4) and its determination of whether it is in the public interest to approve or deny a utility’s Storm Protection Plan does not result in *any* change to *any* utility rate for *any* customer. Accordingly, section 366.06(1) is inapplicable to the Commission’s Plan Review Proceedings even under OPC’s arguments.

In contrast to Plan Review Proceedings, which are governed solely by the “public interest” standard and do not involve ratemaking, the SPP Statute *does* require a prudence determination in the Commission’s annual Cost Recovery Proceedings. § 366.96(7), Fla. Stat. This Court follows the longstanding principle of statutory interpretation that “a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms.” *Bank of New York Mellon v. Glenville*, 252 So. 3d 1120, 1129 (Fla. 2018) (quoting *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994)). Under this canon, the SPP Statute’s specific requirement for the Commission to “determine the utility’s prudently incurred transmission and distribution storm protection

plan costs” in a Cost Recovery Proceeding controls over the general ratemaking requirements of section 366.06(1), Florida Statutes.

This Court’s decision in *Sierra Club v. Brown*, 243 So. 3d 903 (Fla. 2018), does not compel a different result. *Sierra Club* addressed the standard of review applied by the Commission in considering a non-unanimous settlement of a base rate proceeding. *Id.* at 905. The principal dispute was whether the Commission was required to independently apply a prudence standard to each project addressed by the settlement or whether the Commission should instead apply a public interest standard to the settlement as a whole. *Id.* at 907. The Court held that “the public interest was the appropriate standard to apply and there was no need for the Commission to make an express individual prudence determination.” *Id.* at 913.

Although OPC highlights this Court’s statement in dicta that the “prudence of large capital investments” is a “relevant consideration” in the Commission’s review of a settlement agreement under the public interest standard (IB.26), that sentence should not be separated from its context. *Sierra Club* involved the settlement of a base rate case in which section 366.06(1) would otherwise expressly require a prudence review. *Sierra Club*, 243 So. 3d at 912 n.10. As

discussed above, however, section 366.06(1) has no proper application to Plan Review Proceedings under the SPP Statute. This Court has also stated that, in the context of the public-interest standard that applies to settlements, the “determination of what is in the public interest rests exclusively with the Commission.” *Sierra Club*, 243 So. 3d at 910 (quoting *Citizens of State v. Fla. Pub. Serv. Comm’n*, 146 So. 3d 1143, 1173 (Fla. 2014)). In short, *Sierra Club* fails to support OPC’s contention that a prudence review is required in Plan Review Proceedings under section 366.96, Florida Statutes.

This Court should reject OPC’s claim that the Commission was required to evaluate the prudence of the programs and projects in DEF’s Storm Protection Plan in its Plan Review Proceeding under section 366.96(3)-(6), Florida Statutes.

B. Competent substantial evidence supports the Commission’s determination that DEF’s 2023-32 Storm Protection Plan is in the public interest.

The Commission’s determination that DEF’s 2023-32 Storm Protection Plan is in the public interest is supported by competent substantial evidence. OPC has abandoned any specific challenges to the sufficiency of the Commission’s factual findings by failing to raise them in its initial brief. Even if OPC had not waived these arguments,

however, the record evidence before the Commission supports its public-interest determination as to DEF's Storm Protection Plan.

As a threshold matter, OPC has waived any arguments directed to the Commission's determination that DEF's Storm Protection Plan is in the public interest. "Claims for which an appellant has not presented any argument, or for which he provides only conclusory argument, are insufficiently presented for review and are waived." *Stanton v. Fla. Dep't of Health*, 129 So. 3d 1083, 1085 (Fla. 1st DCA 2013) (quotation marks omitted).

The Commission's final order rejects OPC's arguments opposing specific programs proposed in DEF's Storm Protection Plan (R.DEF.173-194). On appeal to this Court, however, OPC fails to present any legal argument challenging the sufficiency of the evidence to support the Commission's factual findings on the subsection 366.96(4) factors or the Commission's ultimate public-interest determination as to DEF's Storm Protection Plan.⁸ *See also*

⁸ Although the arguments in Section I(C) of OPC's initial brief (IB.34-40) do not appear to be directed to DEF, OPC nevertheless asks the Court in this section of its brief to "reverse and remand the four SPP orders." IB.39. DEF therefore responds only to the extent OPC seeks

Caldwell v. Fla. Dep't of Elder Affairs, 121 So. 3d 1062, 1064 (Fla. 1st DCA 2013) (holding that perfunctory argument in initial brief was not revived by further explanation in reply brief). OPC has therefore waived any argument on appeal that the Commission erred in concluding that DEF's Storm Protection Plan is in the public interest.

Waiver aside, the record evidence here thoroughly supports the Commission's public-interest determination as to DEF's Storm Protection Plan. The competent substantial evidence standard applied on appeal "is a low threshold," *O.H. v. Agency for Persons with Disabilities*, 332 So. 3d 27, 33 (Fla. 3d DCA 2021), and is satisfied by evidence that is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). "It does not matter that there may be competent substantial evidence to support alternative findings of fact, only whether the [agency's] findings of fact are supported by competent and substantial evidence." *O.H.*, 332 So. 3d at 33.

to challenge the sufficiency of the evidence supporting the Commission's approval of DEF's Storm Protection Plan Order.

The record evidence before the Commission in support of DEF's Storm Protection Plan readily surpasses the standard of competent substantial evidence. Specific evidence supporting the Commission's determination includes the direct and rebuttal testimony of DEF witnesses Brian Lloyd (R.DEF.7705-7713, 7101-7120), Christopher Menendez (R.DEF.7812-7814, 7122-7137), and Amy Howe (R.DEF.7815-7821, 6685-6705), and DEF Exhibits BML-1 (R.DEF.7714-7769), BML-2 (R.DEF.7770-7810), BML-3 (R.DEF.7811), and BML-4 (R.DEF.7121). If this Court does not affirm the Commission's public-interest determination on the basis of waiver, it should affirm on the merits based on the record evidence before the Commission.

C. OPC's remaining arguments directed to DEF's Storm Protection Plan are without merit.

OPC raises two additional arguments against the Commission's Storm Protection Plan Approval Order. First, OPC claims that approval of the Storm Protection Plans is inconsistent with "prior agency precedent and practice without explanation." IB.30-34. Second, OPC alleges that the Commission "impaired the fairness" of the Plan Review Proceeding by striking portions of the testimony of

OPC witness Lane Kollen. IB.40-44. These arguments fail to provide any basis to reverse the Commission’s order in the Plan Review Proceeding.

i. The Commission’s order does not represent an unexplained departure from a prior agency practice.

OPC argues that the Commission’s order on appeal improperly departs from prior agency practices in “similar types of proceedings.” IB.30; *see* § 120.68(7)(e)(3), Fla. Stat. (authorizing an appellate court to remand or set aside agency action where the agency’s exercise of discretion was “[i]nconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency . . . but the court shall not substitute its judgment for that of the agency on an issue of discretion”). This argument lacks merit, as OPC’s initial brief fails to identify any appropriate point of comparison to show a deviation from the Commission’s exercise of discretion in Plan Approval Proceedings.

OPC cannot identify any relevant “prior agency practice” from which the Commission has allegedly departed here for a simple reason. As OPC candidly admits, the Commission “has never presided over fully-litigated SPP dockets.” IB.30. The one example of

a “prior agency practice” identified by OPC therefore involves the Commission’s implementation of an entirely different statutory scheme for the siting, design, licensure, and construction of nuclear or integrated gasification combined cycle power plants. IB.30-32 (citing § 403.519, Fla. Stat.). Yet this separate statutory scheme bears only a superficial resemblance to the SPP Statute. For example, section 403.519 provides for a Commission proceeding to determine the “need” for an electrical power plant based on a set of statutory criteria; section 366.96 *presumes* a need to strengthen electric utility infrastructure and asks the Commission to consider whether a particular Storm Protection Plan should be approved as in the “public interest” based on a different set of statutory criteria.

Although agency action reaching inconsistent results based on similar facts may be improper, *Fla. Cities Water Co. v. State, Pub. Serv. Comm’n*, 705 So. 2d 620, 626 (Fla. 1998), OPC does not provide an appropriate point of comparison to evaluate any alleged departure from “prior agency practice.” OPC also misstates the relevant standard in arguing that the Commission has “interpreted the SPP statute inconsistently with similar statutory language without explanation.” IB.34; *but see* § 120.68(7)(e), Fla. Stat. (addressing

claims that an agency has *exercised its discretion* in a manner inconsistent with officially stated agency policy or a prior agency practice” without explanation) (emphasis added). And OPC’s citation to dicta from a single order issued by a prehearing officer more than two decades ago (IB.33-34) is entirely insufficient to demonstrate that the Commission has exercised its discretion *here* in a manner that departs from a prior agency practice.

Even if OPC had demonstrated a departure from prior agency practices, the final order here provides an adequate explanation under section 120.68(7)(e), Florida Statutes. The order includes a detailed summary of the SPP Statute, the opposing arguments made by the parties before the Commission, and the Commission’s analysis and reasoning supporting its determination that DEF’s Storm Protection Plan should be approved as in the public interest. R.DEF.173-194.

ii. The Commission did not abuse its discretion by striking portions of the testimony of OPC witness Lane Kollen.

Finally, OPC asks this Court to reverse the Storm Protection Plan Approval Order for a new hearing on the grounds that that the

Commission “impaired the fairness of the SPP and SPPCRC dockets⁹ by granting the Utilities’ motions to strike portions of OPC expert witness Kollen’s testimony.” IB.40-41. OPC’s arguments fail to establish that the Commission abused its discretion by excluding putative expert testimony on the interpretation of the SPP Statute and Commission rules.

This Court reviews a trial court’s decision to exclude expert witness testimony for an abuse of discretion. *See, e.g., Calloway v. State*, 210 So. 3d 1160, 1182 (Fla. 2017) (concluding that trial court did not abuse its discretion by limiting the testimony of an expert witness to matters within the permissible scope of expert testimony). An abuse of discretion will be found only where “the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court.” *Lynch v. State*, 2 So. 3d 47, 80 (Fla. 2008) (quoting *Huff v. State*, 569 So. 2d 1247, 1249 (Fla. 1990)).

⁹ Although OPC asserts that the exclusion of portions of Kollen’s testimony impaired the fairness of both “the SPP and SPPCRC hearings” (IB.40), Kollen’s pre-filed written testimony was admitted by stipulation in the Cost Recovery Proceeding. R.CRC.35, 3510-3542.

OPC fails to acknowledge its burden to demonstrate that the Commission abused its discretion in striking portions of its expert witness's testimony. Instead, the initial brief argues only that the Commission "should have denied the Utilities' motions to strike portions of witness Kollen's expert testimony for reasons of fairness and given broad the view [*sic*] of admissible evidence in Chapter 120, Florida Statutes." IB.44.

Even if OPC had identified the proper standard of review, the Commission did not abuse its discretion in excluding portions of Kollen's testimony. OPC argues on appeal that its expert witness should have been permitted to offer testimony containing his "expert interpretations of the requirements of the SPP Statute, and the SPP and SPPCRC Rules." IB.41; *see also* IB.43 (same). Florida law is clear, however, that "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 Cnty.*, 617 So. 2d 798 (Fla. 1st DCA 1993). And even under the broad standard of admissibility in administrative proceedings, the Commission is required to exclude evidence that is "irrelevant" or "immaterial." § 120.569(2)(g), Fla. Stat.

OPC's initial brief fails even to acknowledge the basis for the

Commission's exclusion of portions of Kollen's testimony. The Commission's final order notes that Kollen's testimony had been stricken based on its "lack of legal relevance" R.DEF.176. The prehearing officer's written order granting the utilities' motion to strike provided a detailed analysis in support of its conclusions. R.DEF.6850-6852. The Commission "has generally excluded expert testimony on legal issues" given the law's reservation of those issues for the trier of fact. R.DEF.6850-51. Portions of Kollen's proposed testimony presenting "improper legal arguments that advocate new standards and criteria that are improper for this proceeding" were excluded as irrelevant or immaterial. R.DEF.6852. The prehearing officer correctly noted that "the appropriate place to raise legal opinions" is in OPC's legal briefs rather than through expert witness testimony. *Id.*

Finally, OPC offers the unelaborated statement that "[e]xpert testimony is routinely relied upon by reasonably prudent persons across the world." IB.43. The relevant inquiry, of course, is not whether people rely on "expert testimony" in the abstract, it is whether the Commission abused its discretion in excluding the *specific testimony* offering legal opinions and policy recommendations

that OPC's witness sought to provide. OPC's initial brief on appeal fails to demonstrate legal error—much less an abuse of discretion—in the Commission's decision to exclude portions of Kollen's testimony in DEF's Plan Review Proceeding.

* * *

OPC's initial brief fails to establish any legal basis to reverse DEF's Storm Protection Plan Order. This Court should affirm.

II. THE COMMISSION CORRECTLY DETERMINED THAT DEF'S ACTUAL AND PROJECTED STORM PROTECTION PLAN COSTS WERE REASONABLE AND PRUDENT TO IMPLEMENT DEF'S APPROVED STORM PROTECTION PLAN.

In a proceeding to review a utility's petition to recover costs associated with implementation of an approved storm protection plan, the Commission must "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. The Commission correctly found that DEF satisfied its burden to demonstrate that the actual and projected storm protection plan costs it sought to recover were reasonable and prudent to implement DEF's approved storm protection plan. R.CRC.3028-3040. The Commission's finding should

be affirmed by this Court because it is supported by competent, substantial evidence. OPC's initial brief identifies no basis to reverse the Commission's Cost Recovery Order.

A. The SPP Statute requires the Commission to determine and allow a utility to recover its reasonable and prudently incurred costs to implement an approved storm protection plan.

Following the approval of a utility's Storm Protection Plan in a Plan Review Proceeding, the SPP Statute provides for 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." § 366.96(7), Fla. Stat. The Commission has adopted Rule 25-6.031, Florida Administrative Code, to implement its Cost Recovery Proceedings.

The Commission's well-established standard for determining prudence under Chapter 366 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." *Duke Energy Fla., LLC v. Clark*, 344 So. 3d 394 (Fla. 2022)

(quoting *S. All. for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013)) (alteration in original). The Commission’s factual findings as to prudence and reasonableness are reviewed on appeal for competent substantial evidence. § 120.68(7)(b), Fla. Stat.; cf. *Safeway Ins. Co. v. Godoy*, 584 So. 2d 1136, 1136 (Fla. 3d DCA 1991) (whether hours claimed by counsel were “reasonably, necessarily, and prudently expended” is a factual finding); *Nest v. Dep’t of Pro. Regul.*, 490 So. 2d 987, 989 (Fla. 1st DCA 1986) (“the ability to practice with reasonable skill and safety is essentially an ultimate finding of fact”); *Holmes v. Turlington*, 480 So. 2d 150, 153 (Fla. 1st DCA 1985) (“[D]eviation from a standard of conduct is essentially an ultimate finding of fact clearly within the realm of the hearing officer's fact-finding discretion”).

Following a fully adjudicated administrative hearing, the Commission issued a final order approving the storm cost recovery amounts and related tariffs and establishing storm cost recovery factors for the period January 2023-December 2023. R.CRC.3028-3040. The Cost Recovery Order identifies the legal standards applicable to the proceeding. R.CRC.3031-32.

OPC’s initial brief does not challenge the Commission’s

application of these standards in the Cost Recovery Proceeding, the validity of the specific actual and projected costs sought by DEF, or the Commission's interpretation of the statutory requirement to determine DEF's "prudently incurred transmission and distribution storm protection plan costs." § 366.96(7), Fla. Stat. Any such arguments are therefore waived.¹⁰

B. Competent substantial evidence supports the Commission's determination that the actual and projected storm protection plan costs DEF sought to recover were reasonable and prudent to implement DEF's approved storm protection plan.

The Commission's determination that the storm protection plan costs DEF sought to recover were reasonable and prudent to implement DEF's approved storm protection plan is supported by competent substantial evidence. OPC has waived any challenges to the sufficiency of the Commission's factual findings as to DEF by failing to raise them in its initial brief. Even if OPC had not waived

¹⁰ The precise relief requested by OPC regarding the Cost Recovery Order is unclear. The initial brief asks this Court to "reverse" and "instruct the Commission to hold a new hearing," but also suggests that the effect of the Court's decision may be limited to "future SPP and SPPCRC decision making" without affecting "rates already established and implemented." IB.19

these arguments, however, the record evidence before the Commission supports its prudence and reasonableness determinations as to DEF's actual and projected storm protection costs.

The Commission's final order on appeal notes that OPC raised "only one, blanket argument" as to the 2021 and 2022 true-ups and 2023 projections: a claim that all of the utilities failed to meet their burden of proof. R.CRC.3032. OPC failed to preserve, and has therefore waived, any arguments contesting the prudence or reasonableness of any actual or projected storm protection costs recovered by DEF. *Stanton*, 129 So. 3d at 1085 ("Claims for which an appellant has not presented any argument, or for which he provides only conclusory argument, are insufficiently presented for review and are waived."). OPC's initial brief filed in this Court likewise fails to present any legal argument challenging the sufficiency of DEF's evidence to support the Commission's findings as to the reasonableness or prudence of the storm recovery costs recovered by DEF.

As with the Plan Review Proceeding, the uncontested record evidence in the Cost Recovery Proceeding thoroughly supports the

Commission's factual findings. DEF's evidence presented to the Commission in support of its Cost Recovery petition readily surpasses the "low threshold" *O.H.*, 332 So. 3d at 33, of competent substantial evidence. Specific record evidence supporting the Commission's determination includes the direct and rebuttal testimony of DEF witnesses Brian Lloyd (R.CRC.3239-3275), Christopher Menendez (R.CRC.4075-4092, 7421-7427), Ron Adams (R.CRC.7682-7688), and Robert Brong (R.CRC.7689-7698), and DEF Amended Exhibits CAM-1 (R.CRC.6084-6129, CAM-2 (R.CRC.6130-6271), CAM-3 (R.CRC.6272-6374), and Exhibit CAM-4 (R.CRC.4093). If this Court does not affirm the Commission's prudence and reasonableness findings on the basis of waiver, it should affirm on the merits based on the record evidence before the Commission.

CONCLUSION

This Court should affirm both: 1) the Commission's Amended Final Order Approving, with Modifications, Duke Energy Florida's Storm Protection Plan (Order No. PSC-2022-0388A-FOF-EI); and 2) the Commission's Final Order Approving Storm Cost Recovery and Related Tariffs and Establishing Storm Cost Recovery Factors for the

Period January 2023 through December 2023 (Order No. PSC-202200418-FOF-EI).

Respectfully submitted,

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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 because the word count from the word-processing system used to prepare this document is 7,559.

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