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IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA,
Appellant(s), Case No.: SC22-1733
Lower Tribunal No.: 20220051-EI

vs.

ANDREW GILES FAY, ETC., ET AL.,
Appellee(s).

CITIZENS OF THE STATE OF FLORIDA,
Appellant(s), Case No.: SC22-1735
Lower Tribunal No.: 20220050-EI

vs.

ANDREW GILES FAY, ETC., ET AL.,
Appellee(s).

CITIZENS OF THE STATE OF FLORIDA,
Appellant(s), Case No.: SC22-1745
Lower Tribunal No.: 20220049-EI

vs.

ANDREW GILES FAY, ETC., ET AL.,
Appellee(s).

CITIZENS OF THE STATE OF FLORIDA,
Appellant(s), Case No.: SC22-1748
Lower Tribunal No.: 20220048-EI

vs.

ANDREW GILES FAY, ETC., ET AL.,
Appellee(s).

CITIZENS OF THE STATE OF

FLORIDA,

Appellant(s), Case No.: SC22-1777
Lower Tribunal No.: 20220010-EI

vs.

ANDREW GILES FAY, ETC., ET AL.,
Appellee(s).

_____/

CITIZENS' REPLY BRIEF

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REPLY ARGUMENT

In response to the Office of Public Counsel's (OPC) initial brief (OPC IB p. ___), the Florida Public Service Commission (PSC or Commission), Florida Power and Light Company (FPL), Duke Energy Florida (DEF), Tampa Electric Company (TECO), and Florida Public Utilities Company (FPUC) submitted separate answer briefs in this matter. OPC will reflect citations to the PSC's answer brief as "PSC AB p. ___," to FPL's answer brief as "FPL AB p. ___," to DEF's answer brief as "DEF AB p. ___," to TECO's answer brief as "TECO AB p. ___," and FPUC's answer brief as "FPUC AB p. ___." Citations to the record, parties, and identified statutes and rules shall continue in the same manner specified in OPC's initial brief. For the reasons described below, none of the arguments raised by either the Commission or any of Florida's four investor-owned electric utility companies have merit. This Court should find that the Commission's final orders on appeal are fundamentally flawed and should be reversed and remanded for further proceedings.

I. THE SPP AND SPPCRC PROCEEDINGS REQUIRED BY THE SPP STATUTE ARE INEXTRICABLY INTERTWINED AND JOINTLY CONSTITUTE RATEMAKING.

Each Appellee incorrectly argues that the SPP subsections of the SPP statute do not involve ratemaking. Each brief argues that since the prudence consideration requirement of section 366.06(1), Florida Statutes, is only necessary when the Commission engages in ratemaking, such consideration is not required in the SPP hearing.[1] Below are passages that reflect this argument within each Appellee's answer brief:

> 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. Commission does not dispute that prudence is a proper standard of review for ratemaking . . . 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.

PSC AB. pp. 28-29.

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[1] The PSC erroneously suggests that "OPC tacitly admits that the SPP approval process is not rate-making." PSC AB p. 29. OPC refutes this mischaracterization throughout OPC's initial and reply briefs.

> FPL certainly agrees the prudence standard in section 366.06(1) applies to all ratemaking proceedings conducted by the Commission, unless otherwise directed by the Legislature. However, the fundamental and fatal flaw to OPC's argument is that the Commission's review of Storm Protection Plans is not a ratemaking request, docket, or decision.

FPL AB p. 23.

> 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."

DEF AB pp. 23-24.

> To the contrary, the Commission is not required to determine the 'money honestly and prudently invested by the public utility company' in the SPP review docket because that docket does not involve rate setting.

TECO AB p. 17.

> The premise of OPC's assertion that the general ratemaking statute applies to FPUC's SPP is that 'the SPP approval is part of the rate-setting process governed by the statute.' [I.B. at 21] But that is incorrect.

FPUC AB p. 31.

While all Appellees make this argument, only the PSC even attempted to provide a citation to statutory authority for this assertion:

> Ratemaking 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." [sic] § 366.041(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.

PSC AB p. 29.

The PSC's interpretation of the SPP Statute, which is subject to a *de novo* review by this Court,[2] and the other Appellees' unsupported assertions suggest that nothing that happens in the SPP proceedings involves setting fair, just, and reasonable rates or charges – this is false.

Section 366.041(1), Florida Statutes, cited by the PSC as the ratemaking definition, involves the fixing of not just rates, but also

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[2] Appellees argue that PSC orders arrive at this Court 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); PSC AB p. 22; FPL AB p. 17; DEF AB p. 14; TECO AB p. 9; FPUC AB p. 18. However, "[t]his presumption is no rubber stamp." *Floridians Against Increased Rates, Inc. v. Clark*, 2023 Fla. LEXIS 1477, at *9 n.12 (Fla. Sept. 28, 2023). Furthermore, Art. V, § 21, Fla. Const. rebuts this presumption when the matter on appeal concerns the PSC's interpretation of statutes or rules, as this consolidated appeal primarily does. Therefore, this matter requires *de novo* judicial review.

"charges," and the SPP/SPPCRC process results in a "charge"[3] that is passed on to customers. The ratemaking elements of the SPP Statute are inextricably intertwined between the SPP and SPPCRC subsections and must be considered *in pari materia*.[4] Sections 366.96(2)(b) and (c), Florida Statutes, define "transmission and distribution storm protection plan" and "transmission and distribution storm protection plan costs" as follows:

> (b) "Transmission and distribution storm protection plan" or "plan" means a plan for the overhead hardening and increased resilience of electric transmission and distribution facilities, undergrounding of electric distribution facilities, and vegetation management.
>
> (c) "Transmission and distribution storm protection plan costs" means the reasonable and prudent costs *to implement an approved transmission and distribution storm protection plan.*

Id. (emphasis added.) The SPP Statute clearly contemplates a unity of purpose between the SPP approval process and the SPPCRC implementation process.

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[3] § 366.96(7), Fla. Stat.

[4] "[T]wo consecutive subsections of the same statute should be read *in pari materia*." *Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, Inc.*, 986 So. 2d 1279, 1284 (Fla. 2008).

The only costs that a utility may request recovery for in an annual SPPCRC hearing are costs incurred in the implementation of an approved transmission and distribution storm protection plan. In the absence of an approved SPP, there can be no SPPCRC costs, and in the absence of SPPCRC costs, there can be no "charge." By approving, denying, and modifying programs or projects during an SPP hearing, the Commission directly decides which costs ratepayers may be subjected to during subsequent SPPCRC hearings. While the SPP and SPPCRC hearings may be bifurcated, the ramifications of both jointly result in dollars on a customer's bill. The Court should reject Appellees' invitation to imagine an invisible ratemaking/not ratemaking line between subsections of the SPP Statute. From both a statutory and commonsense standpoint, when the Commission is making decisions about what customers may or may not ultimately have to pay for, the Commission is engaging in ratemaking.

Further statutory support for the position that the SPP procedure constitutes ratemaking is found in section 366.96(4)(c)-(d), Florida Statutes:

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

Id. (emphases added.) Why else would the Legislature require the Commission to consider the costs and benefits as well as the rate impact to customers of a proposed SPP, except to ensure that the rates and charges that the Commission ultimately sets are prudent in amount and fair, just, and reasonable?

Furthermore, the Commission's own SPP Rule requires utilities to provide not just the costs, benefits, and rate impacts of their proposed SPPs, but also the estimated annual revenue requirements for each year of the proposed SPPs.[5] In utility rate regulation, revenue

[5] Florida Administrative Code Rule 25-6.030(3)(g).

requirement is the ultimate ratemaking calculation.[6] It reflects a utility's financial bottom-line in recovering its costs and earning a fair rate of return.

While some Appellees were more forthcoming than others with providing the required information (as further argued in OPC's initial brief),[7] each utility did provide the estimated revenue requirement information required by the SPP Rule. FPL estimated that the annual revenue requirement to implement its proposed plan would be $418 million in 2023, and FPL further projected that by 2032, the annual SPP revenue requirement would soar to over $1.7 billion.[8] DEF estimated its SPP revenue requirement to be $149.4 million in 2023 and $812.1 million by 2032.[9] Both TECO and FPUC's estimated revenue

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[6] "Historically, utility pricing has focused on satisfying the 'revenue requirement': allocating to every customer the correct slivers of the utility's total fixed and variable costs, so that the sum of all customer payments equals the utility's revenue requirement, then raising or lowering the rates prospectively as actual costs and sales vary from predictions. The revenue requirement has been central to regulation because the utility's financial condition has been central to customer service." Scott Hempling, Regulating Public Utility Performance: The Law of Market Structure, Pricing, and Jurisdiction 13.B. (2d ed. 2021).

[7] OPC IB pp. 34-40.

[8] R. FPL 8602.

[9] R. DEF 7769.

requirements reflected similarly significant escalation by 2032.[10] Each Commission decision to approve, deny or modify proposed SPPs has a direct impact on each company's SPP revenue requirement – the more the Commission approves, the larger the revenue requirement customers could be charged for in the future. With its own rule mandating that the revenue requirement – the most fundamental element of the ratemaking calculus – must be estimated and included in each proposed SPP, the Commission effectively acknowledges that the SPP approval process involves ratemaking.

Appellees' arguments that rates are not affected by the SPP hearing are illusory and disturbingly misleading. The reality is that every single penny of storm protection costs passed on to customers is incurred because of a program or project approved during an SPP proceeding. As demonstrated in OPC's initial brief, there is no provision of the SPP Statute or chapter 366, Florida Statutes, exempting the combined SPP and SPPCRC rate-setting process from the provision of section 366.06(1) requiring the Commission to consider the prudence of investments.[11] Since the PSC conceded that prudence

[10] R. TECO 8159; R. FPUC 7264.
[11] OPC IB p. 21.

is a proper standard of review for ratemaking,[12] and since the determination of the storm protection "charge" to customers through the combined SPP and SPPCRC processes constitutes ratemaking, the Court should reverse and remand the SPP and SPPCRC final orders for the Commission to consider the prudence of the utilities' SPPs and the resulting prudent costs.

II. THE SELF-FULFILLING LANGUAGE OF THE SPP STATUTE EMPHASIZES THE NEED FOR A PRUDENCE REVIEW PURSUANT TO SECTION 366.06(1), FLORIDA STATUTES.

Appellees claim that the "plain" and "unambiguous"[13] language of the SPP Statute allows the Commission to bypass any prudence consideration and only determine whether the proposed SPPs are in the public interest. The Court should reject this meritless argument.

As demonstrated in OPC's initial brief, the SPP is not exempt from the requirements of section 366.06(1), Florida Statutes,[14] and this Court has previously held that "[i]mportantly, in the absence of a settlement agreement, prudence review of investments--regardless of magnitude--is still an express statutory requirement." S*ierra Club*

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[12] PSC AB p. 28.
[13] PSC AB pp. 24-25; FPL AB p. 21; DEF AB pp. 17-23; TECO AB p. 16, 20; FPUC AB p. 17.
[14] OPC IB p. 21.

v. Brown, 243 So. 3d 903, 912 n.10 (Fla. 2018) [citing § 366.06(1), Fla. Stat.].[15] The plain language of 366.06(1), Florida Statutes requires the Commission to review the prudence of all investments, regardless of the requirements of the SPP Statute.

Furthermore, the language of the SPP Statute is not nearly as plain and unambiguous as Appellees allege. While subsection five of the SPP Statute appears to contain a minimum requirement that the Commission determine whether a proposed SPP is in the public interest, other subsections of the same SPP Statute can be read to seemingly render the need for such a determination moot. Sections 366.96(1)(c),(e)-(f), Florida Statutes, provide:

> (1) The Legislature finds that:
> ....
> (c) 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.
> ...

[15] Appellees allege that OPC misquoted and misrepresented the Court's holdings in *Sierra Club*, a case which OPC appropriately identified as a case involving a settlement agreement. OPC IB pp. 25-26. OPC stands by all its initial brief arguments referring to the holdings of *Sierra Club*.

> (e) It is in the *state's interest* for each utility to mitigate restoration costs and outage times to utility customers when developing transmission and distribution storm protection plans.
> (f) *All customers benefit* from the reduced costs of storm restoration.

Id. (emphases added.)

With the SPP Statute, the Legislature requires investor-owned electric utilities to submit storm protection plans to "achieve the objectives of reducing restoration costs and outage times,"[16] requires the Commission to determine if those plans are in the public interest,[17] and yet preemptively finds that it is in the "state's interest" to reduce restoration costs and outage times.[18] Naturally this raises the question whether there is a material difference between the "state's interest" and the "public interest," and, if so, what is that difference? What should the Commission consider when evaluating the "public interest" of a proposed SPP that was not considered by the Legislature when it found that mitigating restoration costs and outage times was in the "state's interest" and "benefits" all customers? Any statute that requires an agency to make a particular finding and also codifies

[16] § 366.96(3), Fla. Stat.
[17] § 366.96(5), Fla. Stat.
[18] §§ 366.96(1)(c),(e)-(f), Fla. Stat.

that finding within the statute itself could not reasonably be considered plain or unambiguous. The "plain language" of the SPP Statute upon which Appellees rely actually refers to yet another loop of impossibility the Commission has interpreted in a way that prevents customers from having any meaningful evaluation of the prudence of these proposed programs and projects before the investments are made. Certainly this conundrum provides additional weight to the argument that the prudence review required by section 366.06(1), Florida Statutes, remains a mandate from the Legislature.

To be clear, OPC fully believes in the benefits of storm hardening to customers and to the State of Florida as a whole. However, storm hardening must be performed at a rate that customers can afford and must be prudent, pursuant to both the SPP Statute and section 366.06(1), Florida Statutes. With these appeals, OPC requests the Court to conduct a *de novo* review of the Commission's interpretation of the SPP Statute and to require the Commission to meaningfully evaluate both the prudence of the proposed storm hardening programs and projects before the utilities undertake them, as well as the

prudence of the costs of implementing the approved programs and projects.

III. APPELLEES CONTINUE TO CONFLATE THE SEPARATE AND DISTINCT PROSPECTIVE PRUDENCE OF INVESTMENTS IN A PROPOSED PLAN WITH THE RESTROSPECTIVE PRUDENCE DETERMINATION OF THE COSTS INCURRED DURING THE IMPLEMENTATION OF AN APPROVED PLAN.

In their answer briefs, both TECO and FPL acknowledge that SPP investments are subject to a prudence review, asserting that conducting a retrospective, after-the-fact prudence review of the *costs* incurred to implement the previously approved investments satisfies this requirement.[19] The conflation of the forward-looking prudence consideration of SPP investments and the hindsight prudence determination of SPP costs has plagued all five hearings, final orders, and appeals. The Commission's and other Appellees' confusion should not interfere with the Court's constitutional obligation to conduct its own *de novo* determination required by Art. V, Sec. 21.

[19] OPC identified in the record where witnesses for both DEF and FPL also conceded that the prudence of SPP programs and projects should be evaluated at some point during the SPP or SPPCRC process. OPC IB p. 27.

TECO explicitly states that "SPP investments are ultimately subject to a prudence review."[20] TECO then argues that the only required prudence review is of the costs incurred to implement the approved investments.[21] FPL goes even further with this conflation:

> Consistent with the requirements of the SPP Statute, the Commission must review the prudence of the individual SPP *projects* as part of the annual SPPCRC proceeding. In fact, the Commission actually has three bites at the proverbial prudence apple in each annual SPPCRC proceeding: (1) after the final actual *costs* have been incurred during the previous year; (2) while the *costs* are being incurred during the current year; and (3) before the *costs* are incurred in the subsequent year… If the Commission finds any portion of an SPP project or associated costs are imprudent, the imprudent project or imprudent portion thereof will be disallowed for recovery from customers.

FPL AB pp. 28-29. (emphases added.)

As presented in OPC's initial brief,[22] the prudence of an SPP program or project and the prudence of a cost incurred to implement that SPP program or project are distinct determinations that must be made – the former required by section 366.06(1), Florida Statutes,

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[20] TECO AB p. 18.

[21] "[C]osts must still undergo prudence review in the SPPCRC proceeding." TECO AB p. 21.

[22] OPC IB p. 28.

and the latter required by the SPP Statute. It might be prudent to build a house, but imprudent to do so with gold-plated bricks. If the Commission approves a utility's plan to underground power lines, but then denies cost recovery for an imprudent cost incurred when the utility implements an undergrounding plan, that does not necessarily mean it was imprudent to underground the power lines in the first place. The Commission's determination of the prudence of an SPP cost does not substitute for the section 366.06(1), Florida Statutes, requirement that the Commission evaluate the prudence of the investment itself.

Additionally, the related suggestion that OPC misinterprets the meaning of the first sentence of section 366.96(7), Florida Statutes, is similarly illogical.[23] The sheer magnitude of investment required by these SPPs, as discussed *supra*, is in the hundreds of millions and soon-to-be billions of dollars. No reasonable utility would willingly invest that much capital to implement their approved SPP with the risk that the Commission could later find the costs imprudent and

[23] "After a utility's transmission and distribution storm protection plan has been approved, proceeding with actions to implement the plan shall not constitute or be evidence of imprudence." § 366.96(7), Fla. Stat.

deny recovery of those massive investments without the protection of that provision. This is precisely the reason for the statutory language in the section. Utilities rely on the protections of that statutory provision, and it is undoubtedly the first authority to which a utility will cite upon a challenge of the prudence of a particular SPPCRC cost.

Appellants ask this Court to confirm the distinct prudence consideration requirements of sections 366.06(1) and 366.96, Florida Statutes, and find that the Commission erred by failing to address the prudence of the proposed SPPs in the combined final orders on appeal. Accordingly, Appellants request that the Court reverse and remand the final orders on appeal for further proceedings.

IV. OPC DOES NOT SEEK AN ADVISORY OPINION.

Multiple Appellees argued that OPC's request for relief was unclear and that OPC was improperly seeking an advisory opinion through these appeals.[24] This is incorrect.

As clearly stated on page 19 of OPC's initial brief, OPC asks the Court to "reverse and remand these cases and instruct the Commission to hold a new hearing to evaluate the prudence of the programs

[24] FPL AB pp. 54-56; FPUC AB pp. 19-20.

and projects" in the proposed storm protection plans. OPC also stated that, "[r]eversal and remand with these instructions would not *automatically* require the 'rollback' of rates already established and implemented."[25] With this statement, OPC intended to convey that some or all SPP programs and projects that are currently approved may ultimately be deemed prudent by the Commission, so there may be an identical or nearly identical cost recovery charge to the current charge approved in the SPPCRC order on appeal. The decision of whether to "rollback" rates would ultimately be up to the Commission should the Court reverse and remand the orders on appeal.

OPC recognizes that the utilities have all moved forward with implementing their approved SPPs in reliance upon the approved plans and have incurred significant costs in doing so. However, this omitted mandatory prudence consideration step in the ratemaking requirements represents a very real danger to customers, specifically that customers right now could be paying for imprudent investments. The only reason for not knowing whether that is the case is because the Commission refused to review the prudence of these investments

[25] *Id.* (emphasis added.)

during the SPP hearing, in violation of section 366.06(1), Florida Statutes. OPC does not seek only prospective relief – the danger is current and ongoing and will continue with each annual SPPCRC hearing and triennial SPP hearing unless and until the Commission considers the prudence of proposed SPPs. New SPP plans will be filed as early as 2025. A determination that the Commission has the obligation to prospectively consider the prudence of proposed SPPs will ensure that the relevant statutes are properly implemented in these cases as well as in the future.

V. THE COMMISSION'S DECISION TO GRANT THE MOTIONS TO STRIKE PORTIONS OF MR. KOLLEN'S TESTIMONY WAS ALSO AN ABUSE OF DISCRETION.

Appellees contend that the Commission properly struck portions of OPC witness Lane Kollen's testimony on the grounds that it consisted of impermissible legal opinion, and that it was "irrelevant" and "immaterial."[26] Appellees also argued, and OPC agrees, that the appropriate standard for reviewing the Prehearing Officer's written order is the abuse of discretion standard.[27] However, the exclusion

[26] PSC AB p. 53; FPL AB pp. 50-52; DEF AB pp. 34-35; FPUC AB p. 41; TECO AB pp. 27-28.
[27] PSC AB pp. 23-24; FPL AB p. 49; DEF AB p. 33; FPUC AB p. 19; TECO AB p. 27.

of portions of Mr. Kollen's testimony was an abuse of discretion for the same reasons that OPC argued in the initial brief that the exclusion impaired the fairness of the proceedings.

As DEF pointed out, an abuse of discretion is described as judicial action which is "arbitrary, fanciful, or unreasonable." *Lynch v. State*, 2 So. 3d 47, 80 (Fla. 2008). The Commission's decision to grant each motion to strike was both arbitrary and unreasonable since each of the utilities was allowed to testify about the how its proposed SPP complied with the SPP Statute and Rule, and, in some cases, testify about the prudence of its SPP, while Mr. Kollen was not allowed to testify about either.[28] As for Appellees' argument that the Commission's decision to grant the motions to strike was appropriate because the Commission can properly exclude evidence that is "irrelevant" or "immaterial," the primary subject of these appeals is the absence of a prudence consideration of the proposed SPPs. To the extent the Court accepts OPC's arguments on that issue, Mr. Kollen's testimony will be both highly relevant and highly material.

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[28] OPC IB pp. 40-44.

VI. A *DE NOVO* REVIEW OF THE COMMISSION'S INTERPRETATION OF THE SPP RULE REQUIRES REVERSAL AND REMAND.

As demonstrated in OPC's initial brief and *supra,* the Commission's interpretation of the SPP Rule should be reviewed *de novo,* and the only reasonable interpretation of the SPP Rule would require the reversal and remand of the orders on appeal. In its answer brief, FPL asserts that the terms "include" and "including" are typically interpreted to suggest a non-exhaustive list and provide an illustrative application of a general principle. (FPL AB p. 41). However, the cases[29] cited by FPL for this principle address statutes that are not phrased in the conjunctive.

The Commission's SPP Rule plainly states, in part:

> (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

[29] *White v. Mederi Caretenders Visiting Servs. of Se. Fla.*, LLC, 226 So. 3d 774, 778 (Fla. 2017); *Pro-Art Dental Lab, Inc. v. V-Strategic Grp., LLC*, 986 So. 2d 1244 (Fla. 2008).

> times and restoration costs due to extreme weather conditions;
> 2. If applicable, the actual or estimated start and completion dates of the program;
> 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.; *and*
> 5. A description of the criteria used to select and prioritize proposed storm protection programs.

Id. (emphases added).

The Court should consider if "reading the phrase as it is plainly written and construing the word 'and' in the conjunctive" leads to "unreasonable, absurd results." *Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings*, 686 So. 2d 1349, 1355 (Fla. 1997). OPC submits that the SPP Rule is clear about what "must be provided" in the plan, and reading the word "and" in subsection (3)(d)(4) in the conjunctive does not lead to unreasonable or absurd results. Rather, it ensures that all elements specified in subsections (3)(d)(1-5) of the SPP Rule are included in any proposed plan. This interpretation ensures that any "description" of a proposed SPP is meaningful and allows the Commission to perform its statutory

duty to evaluate SPPs. The Commission's interpretation of the SPP Rule fails to give effect to the conjunctive of the use of the word "and."

Further, this court has held that the Commission "must show that its decision results from the application of its 'specialized knowledge and expertise' to the facts". *Floridians Against Increased Rates, Inc. v. Clark* 2023 Fla. LEXIS 1477 (Fla. Sept. 28, 2023). The Commission cannot meet its responsibilities under the SPP Statute by approving generic, qualitative descriptions of proposed SPPs. The danger of allowing such is illustrated in this consolidated appeal, where the Commission performed the utilities' work for them by deciding that the companies provided enough information for the Commission to "ascertain a comparison of costs and benefits" in the companies' proposed SPPs, despite the fact that the SPP Rule required the Utilities to provide that comparison.[30]

CONCLUSION

OPC has rebutted the presumption of correctness attached to Commission orders. As the Court confirmed less than a month ago, "[t]he Public Service Commission has the power to 'determine and fix

[30] R. FPL 194; R. FPUC 210.

fair, just, and reasonable rates that may be requested, demanded, charged, or collected' . . . In doing so, the Commission must act in the 'public interest'... ." *Floridians Against Increased Rates, Inc. v. Clark*, 2023 Fla. LEXIS 1477, at *8. Additionally, the Court previously found that "imprudent investments of millions of dollars would likely clash with a public interest finding." *Sierra Club v. Brown*, 243 So. 3d. at 912. Appellees' myopic requests to isolate any prudence review exclusively to a hindsight review of the already-incurred costs in the SPPCRC stage would effectively abrogate the prudence consideration requirement of section 366.06(1), Florida Statutes. Whether the hundreds of millions and even billions of dollars of investments approved in proposed SPPs are prudent is a decision that must be made before they are undertaken. Once the proposed plans are approved and implemented, the prudence of the costs to implement the approved plans should also be examined. These decision-making procedures are mandated by the provisions of both sections 366.06(1) and 366.96, Florida Statutes.

For all of the reasons set forth in OPC's initial and reply briefs, this Court should remove the Commission's self-imposed blinders to the prudence of proposed SPPs so that millions and billions of dollars

are not invested before any consideration of the prudence of those investments takes place and before customers are on the hook for those costs. OPC requests that the Court reverse and remand the SPP and SPPCRC orders and instruct the Commission to hold each utility to the clear requirements of the SPP Statute and SPP and SPPCRC Rules.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **CITIZENS' REPLY BRIEF** has been furnished by electronic mail on this 16th day of October, 2023, to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Rules 9.045 and 9.210(a)(2), Florida Rules of Appellate Procedure, that the CITIZENS' REPLY BRIEF was prepared using Bookman Old Style 14-point font and contains 5,251 words; therefore, this brief complies with the Florida Rules of Appellate Procedure and this Court's order of July 26, 2023.

s/ Mary A. Wessling
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