

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).

_____/

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PRELIMINARY STATEMENT

Within this Initial Brief, the Appellants will be identified also as “Citizens,” “Public Counsel,” or the “Office of Public Counsel,” which will be shortened to “OPC.” Florida Power & Light Company will be shortened to “FPL.” Duke Energy Florida, LLC will be shortened to “DEF.” Florida Public Utilities Company will be shortened to “FPUC.” Tampa Electric Company will be shortened to “TECO.” OPC will refer to all four companies collectively as the “Companies” or the “Utilities.” OPC will refer to the Florida Public Service Commission as the “PSC” or the “Commission.” OPC will refer to a storm protection plan as a “SPP” and the storm protection plan cost recovery clause as the “SPPCRC.”

Citations to the Record within this Brief will be as follows:

PSC Docket No. 20220051-EI/SC22-1733.....“R. FPL___,”

PSC Docket No. 20220050-EI/SC22-1735.....“R. DEF___,”

PSC Docket No. 20220049-EI/SC22-1745.....“R. FPUC _____,”

PSC Docket No. 20220048-EI/SC22-1748.....“R. TECO _____,” and

PSC Docket No. 20220010/SC22-1777.....“R. SPPCRC _____.”

For ease of reference, OPC will refer to section 366.96, Florida Statutes, as the “SPP Statute,” Florida Administrative Code Rule 25-6.030, as the “SPP Rule,” and Florida Administrative Code Rule 25-6.031, as the “SPPCRC Rule.” Florida Statutes will refer to the 2022 statutes unless otherwise noted. SPP hearing exhibits will be identified as “SPP Ex. _____,” and SPPCRC hearing exhibits will be identified as “SPPCRC Ex. _____.”

STATEMENT OF THE CASE AND OF THE FACTS

Appellants, the Citizens, on behalf of the customers of FPL,¹ DEF,² FPUC,³ and TECO,⁴ appeal the final orders issued by the Commission regarding each company’s SPP, as well as the Commission’s order regarding the 2022 SPPCRC docket involving all four companies.⁵

The issues in these consolidated cases are whether the Commission erred by misinterpreting the SPP Statute and SPP Rule, by acting inconsistent with prior agency practice without

¹ R. FPL 187-212.

² R. DEF 173-94; 195-215.

³ R. FPUC 204-25.

⁴ R. TECO 75-76; 258-80.

⁵ R. SPPCRC 3028-40.

explanation, and by improperly striking portions of OPC’s witness testimony from the record.⁶

I. STATEMENT OF THE CASE

In 2019, the Florida Legislature enacted the SPP Statute, which requires each public utility to file a, “transmission and distribution storm protection plan that covers the immediate 10-year planning period.” § 366.96(3), Fla. Stat. Each 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. Within 180 days after a utility files its proposed SPP, the Commission must determine whether it is in the public interest to approve, approve with modification, or deny the plan. *Id.* § 366.96(5). At least every three years, each utility must file an updated plan for the Commission to review and approve, modify, or deny pursuant to the criteria used to review the initial plan. *Id.* § 366.96(6). “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

⁶ R. FPL 6808-18; R. DEF 6847-57; R. FPUC 6695-6705; R. TECO 6826-36.

imprudence.” *Id.* § 366.96(7). Subsection (7) directs the Commission to hold an annual proceeding, the SPPCRC, “to determine each public 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” *Id.* Subsections (3) and (11) of section 366.96, respectively, direct the Commission to adopt rules that specify the elements to be included in a public utility’s storm protection plan for the Commission’s review, and to adopt rules to implement and administer the section as soon as practicable after the effective date, but not later than October 31, 2019. *Id.* §§ 366.96(3), (11), Fla. Stat. In January 2020, the Commission adopted two rules to comply with these requirements, the SPP Rule and SPPCRC Rule.

On April 10, 2020, FPL, DEF, and TECO filed their initial storm protection plans.⁷ In advance of the administrative hearing, the parties announced that they had each entered into settlement agreements with OPC (among others), and the Commission approved

⁷ Gulf Power also filed a storm protection plan, but FPL subsequently acquired Gulf Power. Additionally, the Commission granted FPUC a deferral of filing FPUC’s first SPP until 2022.

the settlement agreements on August 10, 2020. (R. SPPCRC 2349).⁸ Pursuant to the settlement agreements, each company agreed to file new 10-year SPPs in 2022 for Commission review and approval.

II. STATEMENT OF THE FACTS

On March 17, 2022, the Prehearing Officer issued an Order Establishing Procedure, which consolidated the four SPP dockets and set the SPP hearing for August 2-4, 2022. (R. FPL 8666-77; R. DEF 7830-41; R. FPUC 7298-309; R. TECO 8533-44). On April 11, 2022, FPL, DEF, FPUC, and TECO filed their updated SPPs, along with their witnesses' pre-filed testimony in support of the SPP proposals. (R. FPL 8509-659; R. DEF 7700-821; R. FPUC 7199-294; R. TECO 8044-528).

In the 2022 SPP dockets, TECO and DEF made an effort to include estimated costs and estimated reductions in outage times and restoration costs in their 2022 SPPs. (R. TECO 885; SPP Ex. 9, p. 67-72, App. F, p. 71, 75; R. DEF 514, 523, 533, 537, 540, 546, 552, 554, 557, 560; SPP Ex. 3, pp. 9, 18, 28, 32, 35, 41, 47, 49, 52, 55). FPL and FPUC provided the estimated costs of their proposed

⁸ Order No. PSC-2020-0293-AS-EI.

SPP investments, but they failed to provide estimates of the expected reduction in outage times and restoration costs. (R. FPL 416, 420, 426, 437-38, 443, 447, 450; R. FPL Ex. 2, p. 13, 17, 23, 34-35, 40, 44, 47; R. FPUC 1064, 1066-67, 1069, 1071-75; R. FPUC Ex. 12, pp. 26, 28-29, 31, 33-37). No utility sought or was granted a waiver of the requirements of either the SPP or SPPCRC Rule.

On May 31, 2022, OPC filed the direct testimonies of two expert witnesses, Lane Kollen and Kevin Mara, in each SPP docket. (R. FPL 7696-8095; R. DEF 7359-634; R. FPUC 6946-7054, 7065-152; R. TECO 7134-973). Witness Kollen is a Certified Public Accountant with over 40 years of experience in utility regulation, and has provided expert testimony in over 450 utility ratemaking cases nationwide. (SPP Ex. 21, p. 1, 5-38). In the SPP cases on appeal, witness Kollen's testimony addressed, in material part, the prudence of the programs and projects proposed by the Companies in their SPPs within the scope of his expertise.

On July 13, 2022, a little over two weeks prior to the scheduled hearing, FPL filed a motion to strike certain portions of the testimony of OPC witness Kollen. (R. FPL 7246-386). The subject testimony contained witness Kollen's expert opinion applying economic

screening criteria for determining the prudence of approving certain SPP projects or programs. On July 19, 2022, DEF filed its own motion to strike testimony of OPC witness Kollen, requesting that the portions of his testimony in the FPL docket be treated the same for all companies, and therein incorporated FPL's motion and arguments. (R. DEF 7003-06). On July 20, 2022, FPUC filed a letter suggesting that the Commission should consider taking a similar approach in FPUC's docket to ensure consistency and reduce confusion if the other Utilities' motions to strike portions of witness Kollen's testimony were granted. (R. FPUC 6851). Also on July 20, 2022, TECO filed its motion to strike certain portions of the testimony of OPC witness Kollen, citing similar testimony language in TECO's docket and requesting similar treatment, therein incorporating by reference FPL's motion to strike. (R. TECO 6946-7004).⁹ On July 20, 2022, OPC filed its response in opposition to FPL's motion, which contains OPC's position on the plain reading of the language in the

⁹ No party moved to strike any portion of OPC Witness Kevin Mara's testimony despite his multiple references to the prudence of the proposed SPP investments. (R. FPL 5941, 5948, 5952, 5954, 5957-58, 5964, 5990, 6002, 6007, 6011, 6034, 6041, 6042, 6043, 6060, 6063, 6073, 6074, 6077).

SPP Statute and SPP Rule requiring a costs and benefits analysis and a prudence determination. (R. FPL 7193-200). Due to the short timeframe between the filing of DEF's and TECO's motions to strike, FPUC's letter, and the prehearing conference set for July 21, 2022, OPC presented oral argument in opposition of DEF's and TECO's motions to strike and FPUC's letter based on the arguments presented in the written response to FPL's motion. (R. FPL 6990; R. DEF 6927; R. FPUC 6775; R. TECO 6906).

On July 21, 2022, the Prehearing Officer heard argument on all the motions to strike. Prior to presenting oral argument in opposition to the motions to strike, OPC's counsel asserted that a motion to strike that goes to the heart of the party's case should be decided by the full Commission, although a denial of such motion can be decided by the Prehearing Officer. (R. FPL 6991; R. DEF 6928, R. FPUC 6776, R. TECO 6907). However, in order to ensure all Commissioners had the arguments available before hearing, OPC presented oral argument on all parties' motions to strike. (R. FPL 6998-7006; R. DEF 6935-43, R. FPUC 6783-91, R. TECO 6914-22). After hearing argument, the Prehearing Officer granted the motions to strike for all four utilities, stating:

I understand the legislative process, the legislative intent. I understand the rule-making process. If I were to deny the motion, I would ultimately be changing the rules to the game. For That [sic] reason, and for others, I find that parts of Mr. Kollen's testimony are beyond the scope of this hearing and ultimately will be stricken.

(R. FPL 7016-17; R. DEF 6953-54, R. FPUC 6801-02, R. TECO 6932-33).

On August 1, 2022, the Prehearing Officer issued a written order granting the motions to strike, including the FPUC request. (R. FPL 6808-18; R. DEF 6847-57; R. FPUC 6695-705; R. TECO 6826-36). The written orders struck various portions of witness Kollen's testimony for one of three reasons: 1) the testimony was characterized as constituting improper legal opinion and argument, 2) the testimony was deemed more appropriately considered in the SPPCRC docket, or 3) the testimony was considered outside the scope of the SPP. *Id.* Generally speaking, the testimony characterized as improper legal opinion and argument included witness Kollen's expert opinion on how the Commission should apply objective thresholds when evaluating the company's cost-benefit analysis. (R. FPL 6813-14; R. DEF. 6852-53; R. FPUC 6700-01; R. TECO 6831-32). The testimony deemed to be more appropriately addressed in the

SPPCRC docket concerned witness Kollen's expert opinion that SPP costs must be incremental and are distinguished from costs recovered in base rates. (R. FPL 6815-16; R. DEF 6854-55; R. FPUC 6702-03; R. TECO 6833-34). The testimony considered to be beyond the scope of the SPP proceeding was primarily witness Kollen's expert opinion that in order for the Commission to determine whether SPP programs and projects were in the public interest, the Commission must consider the reasonableness and prudence of those projects. (R. FPL 6816-17; R. DEF. 6855-56; R. FPUC 6703-04; R. TECO 6834-35).

The orders granting the motions to strike also elaborated on the Prehearing Officer's interpretation of whether the Commission needed to conduct a prudence review of the SPP programs and projects, noting specifically:

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 "prudence review" from the SPPCRC to the SPP.

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

As a preliminary matter at the August 2-4, 2022 hearing, before the full Commission, OPC raised an *ore tenus* motion for reconsideration of the Prehearing Officer's orders granting the motions to strike. Since the written orders granting the motions to strike were issued at the end of the day prior to the hearing, the request to present oral argument on the *ore tenus* motion for reconsideration of these orders was deferred until before OPC's expert witness Kollen took the stand.

(R. FPL 6499-500; R. DEF 6487-88, R. FPUC 6476-77, R. TECO 6544-45). During TECO's case-in-chief, TECO's witnesses touted the prudence of TECO's proposed programs and projects.¹⁰ FPUC also

¹⁰ "Tampa Electric's 2022-2031 Storm Protection Plan describes the company's comprehensive approach to protect and strengthen its electric utility infrastructure to withstand extreme weather conditions as well as to reduce restoration costs and outage times in a **prudent**, practical, and cost-effective manner." R. TECO 816

referenced FPUC’s need for “prudent and necessary investments” in FPUC’s SPP.¹¹

On August 3, 2022, OPC made its *ore tenus* motion for reconsideration of the orders striking portions of OPC expert witness Kollen’s testimony. (R. FPL 5605-24; R. DEF 5593-612, R. FPUC 5582-601, R. TECO 5650-69). At the conclusion of the arguments by the Parties, the Commission voted to deny OPC’s motion for reconsideration. (R. FPL 5624-25; R. DEF 5612-13, R. FPUC 5601-02, R. TECO 5669-70). Given the ruling, OPC proffered the stricken testimony of OPC expert witness Kollen at the hearing. For ease of

(emphasis added); “To answer the question of how much hardening investment is **prudent** and where that investment should be made, it was necessary to include a Budget Optimization and Scheduling Model within the Storm Resilience Model.” R. TECO 8482 (emphasis added); “Q. Has Tampa Electric determined that it would be impractical, unfeasible, or **imprudent** to harden or enhance any part of the company’s system? A. No. All components of the transmission and distribution system can be hardened to achieve resiliency benefits. Furthermore, as explained above, Tampa Electric believes that all customers should benefit from storm protection investments. The company has, however, prioritized hardening of those components of the system that offer the greatest projected benefits for the associated cost.” R. TECO 8075 (emphasis added).

¹¹ “[**P**]rudent and necessary investments must be made to strengthen the resiliency of the electric grid and reduce storm restoration costs associated with either the planning for potential impact or the recovery from it.” R. FPUC 1047; R. FPUC Ex. 12, p. 9 (emphasis added).

reference, below is a table containing the record citations for witness Kollen’s testimony in each docket:

Record Citations	Witness Kollen testimony with stricken portions redacted	Witness Kollen testimony with proffered, stricken testimony
R. FPL	5632-5660	5663-5691
R. DEF	5682-5711	5713-5742
R. FPUC	5795-5823	5825-5853
R. TECO	5802-5830	5832-5860

The Utilities also proffered their rebuttal testimony to the stricken testimony, and OPC then proffered cross-examination on the Utilities’ rebuttal testimony.

Following the conclusion of the consolidated hearing, the parties submitted post-hearing briefs on September 6, 2022. (R. FPL 283-370; R. DEF 280-358; R. 280-346; R. TECO 355-415). On October 4, 2022, the Commission voted on the approval of the Utilities’ SPPs, with some minor modifications – not based on a prudence determination – due to the failure of some of the proposed investments to meet statutory criteria. (R. FPL 213-19; R. DEF 216-28; R. FPUC 227-33; R. TECO 281-305). The Commission entered its orders approving the Companies’ SPP plans on or between November

10, 2022 and December 1, 2022. (R. FPL 187-212; R. DEF 195-215, 173-94; R. FPUC 204-25; R. TECO 258-280, 75-76).

Concurrent with the SPP dockets, the Commission conducted the 2022 SPPCRC docket.¹² The Utilities filed testimony in support of their SPPCRC requests on April 1, 2022. (R. SPPCRC 8080-342; 7330-408). Given the Commission's ruling in the SPP dockets that prudence was relevant only in the SPPCRC proceeding, OPC filed the direct pre-filed testimonies of OPC expert witnesses Mara and Kollen, which included their complete testimonies from the SPP dockets as exhibits, in the SPPCRC docket on September 2, 2022. (R. SPPCRC Attachment D Confidential Testimony of Kevin J. Mara, 5699-6081).

On November 18, 2022, the Commission held the SPPCRC hearing. (R. SPPCRC 3041-580). There, the majority of the witnesses' testimonies were stipulated into the record. (R. SPPCRC 3318). OPC cross-examined the remaining four utility witnesses: Mr. David Plusquellic for TECO, Mr. Mark Cutshaw for FPUC, Mr. Michael Jarro for FPL, and Mr. Brian Lloyd for DEF. (R. SPPCRC 3134-43, 3156-65, 3222-34, 3265-72).

¹² PSC Docket No. 20220010-EI; SC22-1777.

TECO witness Plusquellic agreed under cross-examination that there is a difference between determining the prudence of a company's operation or managerial decision-making and determining the prudence of the costs spent on storm protection plan projects. (R. SPPCRC 3137). FPUC witness Cutshaw also confirmed that the determination of the prudence of a company's managerial and operational actions is different from evaluating a specific expenditure of cost and whether that cost was prudent. (R. SPPCRC 3160). FPUC witness Cutshaw agreed that the SPPCRC only looked at the reasonableness and prudence of incurring the cost of implementing the project and program activities under the SPP and OPC was not allowed to challenge the prudence of the SPP activities to implement the projects or programs in the SPP docket. (R. SPPCRC 3160-62). FPL witness Jarro agreed that there is a difference in determining the prudence of a company's managerial and operational decision-making and the prudence of a company's decision to expend money for a storm protection plan. (R. SPPCRC 3226-27). FPL witness Jarro also agreed that at some point in either the SPP or SPPCRC process, the Commission should determine the prudence of undertaking a specific project. (R. SPPCRC 3228-29). DEF witness

Lloyd also agreed that there is a difference between determining the prudence of a program or project and the prudence of the costs of a program and project. (R. SPPCRC 3268). DEF witness Lloyd confirmed that the Commission should determine whether or not programs or projects are prudent somewhere between the SPP docket and SPPCRC docket. (R. SPPCRC 3270).

During closing argument at the SPPCRC hearing, FPL suggested that when the Commission evaluates the prudence of the SPP costs submitted in the SPPCRC docket for recovery that the Commission is *de facto* considering the prudence of the programs themselves.¹³ Given the Commission's prior ruling in the SPP docket to not allow prudence to be addressed, at the end of the SPPCRC hearing OPC objected to the Commission making a ruling and allowing the Utilities to start charging customers for storm protection plan costs when those costs are related to programs that have not been reviewed for prudence. (R. 3292-94). The Commission voted to approve the

¹³ "In the event the Commission determines the costs are unreasonable or imprudent, the underlying project, by de facto -- the underlying project that's driving those projects would, de facto, be unreasonably imprudent." R. SPPCRC 3290.

Utilities SPPCRC requests and issued a written order to that effect on December 12, 2022. (R. SPPCRC 3028-40).

OPC timely appealed the Commission's SPP orders on December 9, 2022, and the Commission's SPPCRC order on December 19, 2022. (R. FPL 48-78; R. DEF 65-113; R. FPUC 41-66; R. TECO 43-73; R. SPPCRC 25-44).

SUMMARY OF ARGUMENT

The Commission erred by misinterpreting the SPP Statute when the Commission determined that it was not required to conduct a prudence review of the proposed program and project investments in the SPPs. The Commission's decision not to conduct a prudence review in the SPP docket is also inconsistent with prior agency practice and how the Commission has adjudicated the need for an upfront prudence review in similar types of forward-looking ratemaking dockets. The Commission also erred by misinterpreting the SPP Rule and refusing to require FPL and FPUC to provide an estimate of the reduction in outage times and restoration costs that would result from their proposed SPPs, or a comparison of the estimated costs and benefits of their proposed SPPs, both of which were required by the SPP Rule. The Commission's erroneous

interpretations of both the SPP Statute and the SPP Rule compel remand and reversal of the SPP and SPPCRC orders with instructions that the Commission consider the prudence of the Utilities' proposed SPP investments in the SPP dockets. Additionally, the Commission's decision to grant the motions to strike portions of witness Kollen's expert testimony was a material error that rendered the proceeding fundamentally unfair.

STANDARD OF REVIEW

Section 120.68, Florida Statutes, sets forth the standard of judicial review of the Commission's Final Order as follows:

(7) The court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:

. . .

(c) The fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure;

(d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action;

(e) The agency's exercise of discretion was:

. . .

3. Inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency;

(2022).

Furthermore, the Commission's interpretations of statutes and rules are subject to *de novo* judicial review. Art. V, §21, Fla. Const.

ARGUMENT

I. THE FLORIDA PUBLIC SERVICE COMMISSION ERRED BY ERRONEOUSLY INTERPRETING THE SPP STATUTE AND SPP RULE, AND A CORRECT INTERPRETATION OF THOSE LAWS REQUIRES REVERSAL AND REMAND.

Pursuant to section 120.68(d), Florida Statutes, the Court should reverse and remand the five orders on appeal since the Commission erroneously interpreted the SPP Statute and the SPP Rule. Due to this error, the Court should reverse and remand these cases and instruct the Commission to hold a new hearing to evaluate the prudence of the programs and projects proposed in each utility company's 2022 storm protection plans and require all Utilities to provide the requisite cost and benefit information required by the SPP Rule. Reversal and remand with these instructions would not automatically require the "rollback" of rates already established and implemented. Rather, it would at least ensure that future SPP and SPPCRC decision making would apply the cost/benefit and prudence determinations required under chapter 366, Florida Statutes.

A. Section 366.06(1), Florida Statutes, Requires the Commission to Consider the Prudence of SPP Investments.

Section 366.06(1), Florida Statutes, establishes the Commission's rate-making procedure for public utilities in the State of Florida. Upon application for a change in rates by a utility,

The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and **prudently** invested by the public utility company in such property used and useful in serving the public, less accrued depreciation, and shall not include any goodwill or going-concern value or franchise value in excess of payment made therefor.

Id. (emphasis added).

The requirement that the Commission evaluate the prudence of investments in all ratemaking requests before the Commission is embedded in the Commission's legislative mandate. The statute does not specify that the Commission must only consider prudence of investments in base rate cases, cost recovery dockets, or any other specified type of rate-setting case before the Commission. If the

Commission is setting rates, it must consider, among other things, the prudence of the investment at issue, regardless of whether that requirement is explicitly stated in the other provisions of chapter 366, Florida Statutes, or the Commission's rules. "It is from this statute that the Commission derives its prudence standard, which it applies to ensure that the recovered costs result from prudent investments." *Sierra Club v. Brown*, 243 So. 3d 903, 908 (Fla. 2018) (citing section 366.06(1), Florida Statutes). There is no provision in the SPP statute, or even chapter 366, Florida Statutes, that exempts the SPP and SPPCRC rate-setting process from the provisions of section 366.06(1) requiring the Commission to determine prudence.

The approval of a SPP is a condition precedent to any cost recovery through rates. § 366.96(7), Fla. Stat. Thus, the SPP approval is part of the rate-setting process governed by this statute. While some dockets involve retrospective prudence determinations of the execution of utility actions and take place after companies incur costs, the SPP and SPPCRC dockets are forward-looking and provide for the Commission to determine the prudence of planned programs and projects.

In the SPP and SPPCRC cases at issue, both TECO and FPUC recognized the role of a prudence determination in the Commission’s consideration of the proposed SPP investments. TECO included references to the prudence of TECO’s proposed investments throughout TECO’s witness testimony and proposed SPP. A few examples include:

Tampa Electric’s 2022-2031 Storm Protection Plan describes the company’s comprehensive approach to protect and strengthen its electric utility infrastructure to withstand extreme weather conditions as well as to reduce restoration costs and outage times in a **prudent**, practical, and cost-effective manner.

(R. TECO 816) (emphasis added).

To answer the question of how much hardening investment is **prudent** and where that investment should be made, it was necessary to include a Budget Optimization and Scheduling Model within the Storm Resilience Model.”

(R. TECO 8482) (emphasis added).

Q. Has Tampa Electric determined that it would be impractical, unfeasible, or **imprudent** to harden or enhance any part of the company’s system?

A. No. All components of the transmission and distribution system can be hardened to achieve resiliency benefits. Furthermore, as explained above, Tampa Electric believes that all

customers should benefit from storm protection investments. The company has, however, prioritized hardening of those components of the system that offer the greatest projected benefits for the associated cost.

(R. TECO 8075) (emphasis added).

Additionally, FPUC stressed to the Commission that:

[P]rudent and necessary investments must be made to strengthen the resiliency of the electric grid and reduce storm restoration costs associated with either the planning for potential impact or the recovery from it.

(R. FPUC 1047; SPP Ex. 12, p. 9) (emphasis added).

Despite OPC and at least two of the Utilities recognizing that the Commission must fulfill its obligations under section 366.06(1), Florida Statutes, to evaluate the prudence of the proposed SPP investments, the Commission explicitly refused to do so by granting (and denying the requested rehearing on) FPL and the other Utilities' motions to strike¹⁴ all of witness Kollen's expert testimony regarding

¹⁴ Although TECO incorporated by reference FPL's motion to strike into TECO's motion to strike, TECO did not explicitly adopt FPL's arguments. It appears as though TECO was attempting to ensure that if FPL's motion were granted, that Witness Kollen's similar testimony in the TECO docket would receive the same treatment. R. TECO 6946-50. FPUC did not file a motion to strike and simply filed a letter suggesting that if the Commission granted the motions to

the prudence of the investments, suggesting that it was “beyond the scope of the proceeding.” (R. FPL 6816-17; R. DEF. 6855-56; R. FPUC 6703-04; R. TECO 6834-35). In the orders granting each motion to strike, the Prehearing Officer stated:

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. FPL 6812; R. DEF 6851; R. FPUC 6699; R. TECO 6830).

This finding shows the Commission’s erroneous interpretation of the SPP Statute. The Commission mistakenly assumed that the “evidence of imprudence” language acted as a barrier to prevent a prudence determination in the SPP docket. The negative implication¹⁵ of this phrase actually recognizes that prudence of the overall SPP is

strike, that it should treat the corresponding testimony in the FPUC SPP docket similarly. R. FPUC 6851.

¹⁵ *Southern Alliance v. Graham*, 113 So. 3d 742, 749 (Fla. 2013) (citing the negative implication of similar language in Section 366.93, Florida Statutes, that states, “[p]roceeding with the construction of the nuclear or integrated gasification combined cycle plant...shall not constitute or be evidence of imprudence.”).

at issue in the SPP docket. By making a finding that a prudence review cannot be transferred from one docket to another and that such a review is beyond the scope of the SPP proceeding, the Commission overlooked the mandate of section 366.06(1), Florida Statutes, that the prudence of making investments is at issue in every ratemaking docket. The Commission simply misinterpreted the statute. Prudence of prospective management decisions is never beyond the scope of a ratemaking proceeding. Pursuant to section 366.06(1), Florida Statutes, prudence is, in fact, a required consideration in all ratemaking decisions. If the issue of prudence is raised by a party, the Commission is obligated under this statute to adjudicate the dispute.

Although the specific wording of the SPP Statute requires the Commission to determine if the proposed SPP investments are in the public interest, the court recently described the integrated nature of prudence and public interest in a case involving whether a settlement agreement satisfied the public interest standard, stating:

[T]he prudence of large capital investments is a relevant consideration in the Commission's review of a settlement under its public interest standard because imprudent investments of millions of dollars would likely clash with a public interest finding.

Sierra Club v. Brown, 243 So. 3d. at 912.

Applying the court's rationale to the SPP dockets, a SPP investment that is imprudent would likewise be inconsistent with the public interest. When the Commission struck OPC's expert witness testimony on the issue of prudence, finding that prudence was beyond the scope of the SPP proceeding, the Commission failed to implement a crucial element of the public interest standard, i.e. whether the proposed investments were prudent.

The Commission's orders granting the motions to strike also refer to a "prudency review" in the SPPCRC docket; however, subsection (7) of the SPP Statutes guarantees that once a SPP is approved, "proceeding with actions to implement the plan shall not constitute or be evidence of imprudence." § 366.96(7), Fla. Stat. Since the SPP plans are approved before the SPP costs are incurred, the only such "prudency review" that takes place in the SPPCRC docket involves the retrospective evaluation of the prudence of the costs

incurred after utilities proceed with already-approved SPP investments. This SPPCRC review cannot evaluate the prudence of the overall plan of making the SPP investments themselves. Thus, the Commission's ruling effectively barred any prudence review of the SPP investments in either the SPP or SPPCRC process, in violation of sections 366.06(1) and 366.96(5), Florida Statutes. This is the fatal flaw in the Commission's decision-making that is at the heart of this appeal.

Tellingly, on cross examination at the SPPCRC hearing, witnesses for FPL and DEF agreed that the prudence of SPP programs and projects should be evaluated at some point in the SPP and SPPCRC process.¹⁶ However, FPL's motion to strike portions of OPC witness Kollen's testimony argued the prudence of the SPP could not be considered in the SPP docket. R. FPL 7262-65. Inexplicably, during closing argument at the SPPCRC hearing, FPL suggested that the Commission evaluates the prudence of the SPP programs and projects during the SPPCRC docket. FPL argued:

¹⁶ R. SPPCRC 3228-29; R. SPPCRC 3270.

In the event the Commission determines the costs are unreasonable or imprudent, the underlying project, by de facto -- the underlying project that's driving those projects would, de facto, be unreasonably imprudent.

R. SPPCRC 3290.

This circular assertion is fallacious for several reasons. First, FPL's argument fails to acknowledge that a project may be prudent, but a cost incurred to undertake the project may be imprudent (e.g., engaging in the undergrounding of electrical wires as approved by the Commission, but hiring a utility executive's brother-in-law to carry out the work at an inflated price). The Commission's retrospective finding that a cost was imprudent is unrelated to whether a program or project itself was imprudent. Second, the retrospective prudence review of costs in the SPPCRC docket occurs *after* the plans are approved and *after* costs are incurred. Again, due to the provisions of section 366.96(7), Florida Statutes, once a program or project has been approved, incurring costs in furtherance of that project "shall not constitute or be evidence of imprudence." This proposed standard of Commission adjudication creates a loop of impossibility. The Utilities and the Commission contend that SPP programs and projects cannot be reviewed for overall prudent undertaking on the

front end and yet once the undertaking commences, any prudence review of the program or project is statutorily forbidden. A vacuum is created that deprives intervening parties the right to challenge the prudence of going forward with the proposed programs or projects. FPL's claim that denial of cost recovery in the SPPCRC phase of ratemaking constitutes some sort of retroactive, "*de facto*" adjudication of the prudence of the project that was barred from consideration in the SPP phase is nonsensical. This surreal claim illustrates the absurd nature of the Commission's departure from section 366.06(1), Florida Statutes.

Simply put, prudence is a required consideration in all ratemaking dockets.¹⁷ With these orders, the Commission has failed to evaluate the prudence of the now-approved 2022 SPP investments. This is a violation of sections 366.06(1), and 366.96, Florida Statutes. The court must reverse and remand the SPP and SPPCRC final orders with instructions for the Commission to consider the prudence of the 2022 SPP programs and projects.

¹⁷ "Importantly, in the absence of a settlement agreement, prudence review of investments-regardless of magnitude-is still an express statutory requirement." *Sierra Club v. Brown*, 243 So. 3d at 912 n.10.

B. The Orders on Appeal are Inconsistent With Commission Precedent and Practice Which is to Determine the Prudence of Investments Before the Investments are Made.

Further evidence that the Commission erroneously interpreted the SPP Statute and exercised its discretion inconsistently with prior agency precedent and practice without explanation¹⁸ can be found in the Commission's decisions in similar forward-looking ratemaking proceedings. Additionally, since the Commission has never presided over fully-litigated SPP dockets, the court may benefit from seeing how the Commission has adjudicated similar types of proceedings.

Section 366.93, Florida Statutes, establishes the Legislature's requirements for utilities seeking cost recovery for the siting, design, licensing, and construction of nuclear or integrated gasification combined cycle (IGCC) power plants. Much like the storm-hardening investments proposed in the SPPs, nuclear and IGCC power plants require enormous financial investment, and the Legislature has established a process to make sure that if utility desires to construct a nuclear or IGCC power plant, that the utility must first petition the

¹⁸ § 120.58(7)(e)(3), Fla. Stat.

Commission for a determination of need. *Id.* Section 403.519(4), Florida Statutes, adds that:

In making its determination to either grant or deny the petition, the commission shall consider the need for electric system reliability and integrity, including fuel diversity, the need for base-load generating capacity, the need for adequate electricity at a reasonable cost, and whether renewable energy sources and technologies, as well as conservation measures, are utilized to the extent reasonably available.

These Legislative instructions resemble the Legislative instructions in section 366.96(4), Florida Statutes, regarding which factors the Commission shall consider when determining whether a proposed SPP is in the public interest. An even more striking similarity between the nuclear/IGCC power plant and storm protection plan approval processes is that section 403.519(4)(e), Florida Statutes¹⁹ states:

¹⁹ Section 403.519(4)(e), Florida Statutes, is the companion statute to section 366.93, Florida Statutes. *Southern Alliance v. Graham*, 113 So. 3d 742, 749 (Fla. 2013) (discussed *supra* at footnote 15). The doctrine of *in pari materia* requires that statutes relating to the same subject be construed together to harmonize the statutes and give effect to the legislative intent. *Id.* at 749; *Fla. Dep't of State, Div. of Elections v. Martin*, 916 So. 2d 763, 768 (Fla. 2005).

Proceeding with the construction of the nuclear or integrated gasification combined cycle power plant following an order by the commission approving the need for the nuclear or integrated gasification combined cycle power plant under this act **shall not constitute or be evidence of imprudence.**

(emphasis added).

This highlighted language is identical to the functionally equivalent language found in subsection (7) of the SPP statute, which states that:

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. (emphasis added).

Despite the parallels between the legislatively-mandated nuclear/IGCC and the SPP requirements, the Commission has inconsistently interpreted them here without explanation.

For example, in 2000, Florida Power Corporation (FPC), filed a petition for a determination of need for an IGCC plant.²⁰ During the course of the case, FPC objected to a proposed issue by Commission

²⁰ PSC Docket No. 20001064-EI.

Staff regarding whether it was reasonable to obligate FPC's retail customers for the costs of the IGCC plant for the expected life of the plant.²¹ Although the Prehearing Officer ultimately granted FPC's motion to strike the issue on the grounds that the issue was duplicative of other issues in the docket, the Prehearing Officer reasoned:

I do not find that the subject matter of Preliminary Issue 6 is beyond the scope of this docket. The impact on a utility's future rates of an affirmative determination of need is a critical consideration. The finding of need is a determination by the Commission that the utility's plan to construct the proposed unit is prudent. Once that "prudence" is established, and absent some intervening changed circumstances, the Commission is obliged to allow the utility the opportunity to recover these costs. Therefore, consideration of issues relating to the prudence of this proposed plant is appropriate as part of the determination of need. ... The prudence of whether the proposed unit should be built is the subject of this case and not a determination of how rates will be impacted. That subject is more properly addressed in a subsequent proceeding if the company files for revenue recovery of the Hines 2 unit.

²¹ "Issue 6: 'Is it reasonable to obligate Florida Power Corporation's retail customers for the costs of the Hines 2 Unit for the expected life of the unit?'" *In re: Petition for determination of need for Hines Unit 2 Power Plant by Florida Power Corporation*, Order No. PSC-2000-1933-PCO-EI (Issued October 19, 2000), p. 1.

Id. at p. 5

The above quotation from a Commission order shows that the Commission, at one time, clearly understood how crucial it was to consider of the prudence of investments that would bind customers for years, and the need to make that determination *before* that investment is approved. In these SPP and SPPCRC orders, the Commission has veered away from that logical approach embodied in its precedent and practice and refused to consider the prudence of the SPP investments before approving them. The Commission has erroneously interpreted the SPP statute and interpreted the SPP statute inconsistently with similar statutory language without explanation.

C. The SPP Rule Required the Utilities to Provide a Meaningful Comparison of Costs and Benefits.

In addition to the Legislature's general requirements of the Commission in all rate-setting cases, additional requirements relating to storm protection are found in the SPP Statute. The Legislature established goals of reducing storm damage restoration costs and outage times as well as improving overall electric service reliability for utility customers. Pursuant to this statute, public

utilities are required to submit a 10-year storm-hardening plan for the Commission to approve, approve with modification, or deny. § 366.96, Fla. Stat.

Additionally, a company must submit updated versions of the plan at least every three years for the Commissions' review. *Id.* The SPP Statute requires that the Commission shall consider:

- (a) The extent to which the plan is expected to reduce restoration costs and outage times associated with extreme weather events and enhance reliability, including whether the plan prioritizes areas of lower reliability performance.
- (b) The extent to which storm protection of transmission and distribution infrastructure is feasible, reasonable, or practical in certain areas of the utility's service territory, including, but not limited to, flood zones and rural areas.
- (c) **The estimated costs and benefits** to the utility and its customers of making the improvements proposed in the plan.
- (d) The estimated annual rate impact resulting from implementation of the plan during the first 3 years addressed in the plan.

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

The Legislature also directed the Commission to adopt rules to specify the elements that must be included in a utility's proposed

SPP. Therefore, the Commission adopted the SPP Rule, which 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 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.

Fla. Admin. Code R. 25-6.030(3) (emphases added).

The express language of the SPP Rule shows that the estimated costs and benefits of proposed SPP programs and projects, and a comparison of the two, are essential components that the utilities must provide. In the 2022 SPP dockets, two of the companies clearly

agreed with this interpretation of the SPP Rule and made an effort to include quantitative estimated costs and estimated benefits, as well as a comparison, in their proposed SPPs. (R. TECO 885; SPP Ex. 9, p. 67-72, App. F, p. 71, 75; R. DEF 514, 523, 533, 537, 540, 546, 552, 554, 557, 560; SPP Ex. 3, pp. 9, 18, 28, 32, 35, 41, 47, 49, 52, 55). However, FPL and FPUC refused to provide any estimate of the reduction in outage times and restoration costs resulting from extreme weather conditions, as required by Florida Administrative Code Rule 25-6.030(3)(d)(1). Instead, they simply provided qualitative, generalized statements about potential future benefits with no comparison to the costs of those benefits. (R. FPL 416, 420, 426, 437-38, 443, 447, 450; SPP Ex. 2, p. 13, 17, 23, 34-35, 40, 44, 47; R. FPUC 1064, 1066-67, 1069, 1071-75; SPP Ex. 12, pp. 26, 28-29, 31, 33-37). FPL admitted on cross-examination that FPL failed to quantify the estimated future cost savings, saying that such an analysis, “was not the best use of, you know, our time and analysis capability” (R. FPL 6587). This disregard for the requirements of the SPP Rule, enabled by the Commission’s failure to enforce those requirements, rendered a true, apples-to-apples comparison of the estimated costs to the estimated benefits meaningless.

In the SPP final orders at issue, and despite the plain language in the SPP Rule that requires utilities to provide an estimate of the reduction in outage times and restoration costs due to extreme weather conditions, an estimate of the costs of those benefits, and a comparison of the two, the Commission appeared to go out of its way to avoid holding the utilities to the requirements of the Commission's own rule by finding that "[n]either Section 366.96, F.S., nor Rule 25-6030, F.A.C., explicitly require a cost effectiveness evaluation or quantitative cost-benefit analysis." (R. FPL 193, R. DEF 201, R. FPUC 209, R. TECO 263).

To the contrary, the Commission's SPP Rule expressly requires a quantitative comparison of the estimated costs and estimated reduction in outage times and restoration costs, i.e. benefits. The SPP Rule's wording is very specific in requiring an estimate of both the reduction of outage times and restoration costs. The SPP Rule does not request qualitative, generic information about potential benefits. The SPP Rule requires the specific estimates so that the also-required comparison will be meaningful.

What is worse is that the Commission did the work for FPL and FPUC and rationalized 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. (R. FPL 194; R. FPUC 210). The Commission is apparently satisfied that a utility has complied with the SPP Rule when a utility “provide[s] information that demonstrates their program is likely to mitigate potential outages and reduce restoration time and the subsequent costs, regardless if such information is presented in a qualitative or quantitative format.” (R. FPL 193; R. FPUC 209). The Commission’s watered-down interpretation of its own SPP Rule is inconsistent with the level of specificity that the plain language of the rule requires, and it is also inconsistent with a common-sense, apples-to-apples comparison of the estimated costs and estimated benefits of these proposed SPP investments. No utility sought or was granted a waiver of the requirements of the SPP Rule.

The Commission erred by not requiring FPL and FPUC to provide the estimated reduction in outage times and restoration costs or a meaningful comparison of the estimated costs to those benefits. The Court should reverse and remand the four SPP orders noting that FPL and FPUC, specifically, are required to provide the estimated

reduction in outage times and restoration costs and a comparison of that estimate to the estimated costs as required by the SPP Rule.

The Commission has erred in interpreting the SPP Statute and SPP Rule, despite the prudence review requirement of section 366.06(1), Florida Statutes, the Commission's precedent of determining the need, or prudence, of an investment before allowing the investment to be made, and the cost/benefit comparison requirements of the SPP Rule. As these orders stand now, customers are financially obligated for at least the next 10 years, including the future SPP dockets if not remedied here, to pay for storm-hardening projects which may or may not be prudent. This abdication of the Commission's obligation creates a risk that is harmful to customers and a violation of law, which the Court must reverse and remand for further proceedings.

II. THE FLORIDA PUBLIC SERVICE COMMISSION IMPAIRED THE FAIRNESS OF THE SPP AND SPPCRC HEARINGS BY GRANTING THE UTILITIES' MOTIONS TO STRIKE PORTIONS OF OPC EXPERT WITNESS KOLLEN'S TESTIMONY.

Pursuant to section 120.68(c), Florida Statutes, the Court should remand the five orders on appeal since the Commission impaired the fairness of the SPP and SPPCRC dockets by granting

the Utilities' motions to strike portions of OPC expert witness Kollen's testimony. Due to this error, the Court should remand these cases and instruct the Commission to hold a new hearing where the Commission must consider and expressly weigh the entirety of OPC witness Kollen's testimony.

OPC expert witness Kollen has more than 40 years of utility industry experience in the areas of finance, rate, tax, and planning. (SPP Ex. 21, p. 1.) Since 1986, he has appeared and provided testimony in over 450 utility ratemaking cases. (SPP Ex. 21, pp. 5-38). OPC retained witness Kollen to address and make recommendations to the Commission regarding the Utilities' proposed SPPs. (R. FPL 5635; R. DEF 5685, R. FPUC 5798, R. TECO 5805). Witness Kollen's complete testimony contains a variety of witness Kollen's expert interpretations of the requirements of the SPP Statute, and the SPP and SPPCRC Rules. Witness Kollen also provides expert opinions to the Commission, including that the Commission should consider the economic justification for the proposed investments through a cost/benefit analysis. Witness Kollen explains in his proffered testimony that:

The economic justification is an important consideration in whether the programs and projects are prudent and reasonable, a determination that can only be made in the SPP proceedings, in contrast to whether the costs actually incurred during implementation of the programs and projects were prudently incurred and reasonable, which is determined in the SPPCRC proceeding.

(R. FPL 5673, R. DEF 5723, R. FPUC 5835, R. TECO 5842).

Each utility also put forth witnesses who recommended that the Commission approve their proposed SPP according to their own version of the correct interpretation of the requirements of the SPP Statute, and the SPP and SPPCRC Rules. Not surprisingly, the Utilities themselves even disagreed on the requirements. For example, and as noted *supra*, TECO and DEF included estimates, although flawed, of the expected reduction in outage times and restoration costs that are required by Florida Administrative Code Rule 25-6.030(3)(d)(4). However, FPL and FPUC took the position that they were not required to provide a quantitative estimate of those expected customer benefits and that merely providing a qualitative, generic description of the potential benefits satisfied the SPP Rule.

(R. FPL 6587).

This example of differences in interpretation of the requirements of the SPP Statute and the SPP and SPPCRC Rules even among the Utilities themselves demonstrates why the Commission should have allowed OPC witness Kollen's expert testimony on the very same issues. The Commission's decision to strike portions of witness Kollen's expert testimony while allowing the utility witnesses to testify on the very same subjects violates fundamental principles of fairness.

Furthermore, section 120.569(2)(g), Florida Statutes, provides:

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.

(emphasis added).

Witness Kollen's expert testimony was highly relevant and material to the disputed issues in the cases, and it was not repetitious since his testimony was specifically from an accounting perspective, unlike OPC's other expert whose testimony involved an engineering perspective. Expert testimony is routinely relied upon by reasonably prudent persons across the world. Accordingly, 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 of admissible evidence in chapter 120, Florida Statutes. OPC asks the court to remand all five orders to the PSC and require the PSC to consider OPC's stricken and non-stricken expert testimony when determining whether to approve, deny, or approve with modifications the proposed SPPs and subsequent SPPCRC cost recovery requests.

CONCLUSION

The Commission's erroneous interpretations of the requirements of the SPP Statute and SPP Rule require reversal and remand of the orders with instructions that the Commission fulfil its obligation to consider the prudence of all investments in ratemaking dockets and to enforce the requirements of the SPP Statute and SPP Rule. The court should also instruct the Commission to adjudicate the prudence of the investments in a manner consistent with the Commission's prior agency practice. The court should further instruct the Commission to consider and weigh the entirety of OPC's expert witness testimony when making the requisite prudence determinations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **CITIZENS' INITIAL BRIEF** has been furnished by electronic mail on this 18th day of April, 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' INITIAL BRIEF was prepared using Bookman Old Style 14-point font and contains 9,098 words; therefore, this brief complies with the Florida Rules of Appellate Procedure.

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