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IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, Appellant, v. JULIE IMANUEL BROWN, ETC., ET AL. Appellees.	))))))))))	 CASE NO. SC18-213 Lower Tribunal No. 20180007-EI

APPELLEE FLORIDA POWER & LIGHT COMPANY'S CORRECTED ANSWER BRIEF

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PRELIMINARY STATEMENT

This brief will use "**FPL**" to refer to Appellee Florida Power and Light Company. "**OPC**" refers to the Appellant Office of Public Counsel. The "**Commission**" refers to the Florida Public Service Commission. "**SFWMD**" refers to the South Florida Water Management District. "**FDEP**" refers to the Florida Department of Environmental Protection. "**DERM**" refers to the Miami-Dade County Department of Environmental Resource Management. "**ECRC**" refers to the Environmental Cost Recovery Clause, § 366.8255, Fla. Stat.

Several other defined terms are used throughout this brief. "**CCS**" refers to the Cooling Canal System used at Turkey Point. The Turkey Point Cooling Canal Monitoring Plan Project will be referred as "**Cooling Canal Project**." "**RWS**" refers to Recovery Well System. The "**AO**" refers to the Administrative Order issued by the FDEP in December 2014, the "**2015 CA**" refers to the October 7, 2015 Consent Agreement (as amended) between DERM and FPL, and the "**2016 CO**" refers to the Consent Order executed between FPL and the FDEP on June 20, 2016. Collectively, the measures taken to comply with the AO, 2015 CA, 2016 CO will be referred to as the "**Consent Actions**."

Finally, this brief will use "**R. _**" to cite pages of the record on appeal, "**Ex. _**" for exhibits introduced below, and "**Tr. _**" for the transcript. The brief will cite the OPC's Appendix as "**OPC Appx. _**" and FPL's Appendix as "**FPL Appx. _**"

STATEMENT OF CASE AND FACTS

This is an appeal by OPC of a decision by the Public Service Commission that approved FPL's recovery of certain costs under the Environmental Cost Recovery Clause. The Commission's decision correctly found that recovery was appropriate because FPL incurred these costs to comply with recent administrative orders intended to protect the environment, and because FPL acted prudently both before and after those orders were issued. The Commission also correctly construed these costs as an outgrowth of an earlier-approved project. OPC's appeal challenges whether the administrative orders could trigger recovery under the Clause, whether these costs were prudently incurred, and whether the costs should have been treated as a new project rather than an evolution of the previous one.

I. FACTS RELEVANT TO THIS APPEAL

A. Design and Purpose of the Turkey Point CCS

Turkey Point is an electrical generating station located in southeast Miami-Dade County, Florida. OPC Appx. 120, Ex. 6, p.5. At present, there are two nuclear units (Units 3 and 4) and one combined-cycle natural gas unit (Unit 5) operating at the site. *Id.* Originally, the site also had two oil-fired units (Units 1 and 2), but those units have been decommissioned and no longer produce electricity for customer consumption.

In the process of generating electricity, Turkey Point Units 3 and 4 require cooling water that circulates through the system for condenser and auxiliary equipment cooling. Tr. 287. Units 1 and 2 became operational in the 1960s and used Biscayne Bay as their source of cooling water, returning the warm water discharge back to Biscayne Bay, a method known as "once through cooling." Tr. 287-88. In the late 1960s FPL began the design and construction of Units 3 and 4, intending to similarly use a once through cooling design. Tr. 288. In 1971, however, due to concern about the thermal impacts on Biscayne Bay, FPL agreed in a settlement with the U.S. Department of Justice to modify its original once through cooling design. *Id.*; *also* FPL Appx. 42, Ex. 3, page 7. Pursuant to that settlement, FPL licensed and constructed a Cooling Canal System ("CCS") to serve all four units. Tr. 288. The CCS, completed in 1973, is an approximately 5,900-acre closed loop cooling system,[1] constructed by dragline and initially filled by in-seepage of salty ("saline") groundwater. Tr. 287. Being a large open-air system, water enters and leaves the CCS through a number of natural and engineered processes. *Id.* Water enters the system primarily through precipitation and groundwater in-seepage. *Id.* Water leaves the system through evaporation and seepage back into the groundwater underneath the CCS. *Id.*

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[1] The CCS is referred to as a "closed loop" system because the cooling water runs through the generating units, out into the CCS and then back into the generating units once it has cooled off. Tr. 483-84.

B. FPL's History of Regulatory Compliance for the CCS

Since the inception of the CCS more than 40 years ago, its construction and operation have been closely monitored by federal, state, and local agencies to ensure ongoing protection of water quality and the environment. Tr. 289. FPL has complied with all operational requirements of applicable permits, while working collaboratively with federal, state, and local agencies to make decisions and to take action to respond to all regulatory obligations related to the CCS. *Id*.

In February 1972, FPL entered into an agreement with the Southern and Central Florida Flood Control District (the predecessor agency of the South Florida Water Management District; both will be referred to as the "SFWMD") which established the SFWMD's oversight and approval authority for FPL's final design, construction, operation and monitoring of the CCS (the "SFWMD Agreement"). Tr. 288. The CCS is also a permitted industrial wastewater facility. The United States Environmental Protection Agency ("EPA") issued a permit on June 14, 1978, with subsequent renewal permits being issued by the Florida Department of Environmental Regulation (now Florida Department of Environmental Protection or "FDEP"). *Id*. Today, the cooling canals continue to operate under an Industrial Wastewater Permit from FDEP, Permit No. FL0001562. *Id*.

Saltwater intrusion is common along coastal areas and existed within the Biscayne Aquifer for several miles inland prior to construction of the CCS. Tr. 289.

Historical data show that, when the CCS was constructed in the 1970s, saline water had already intruded inland along the coast due to many factors such as freshwater withdrawals, drought, drainage and flood control structures, and other human activities. *Id*. Near the coast, the Biscayne Aquifer was saline through its full depth. *Id*. Therefore, when the cooling canals were constructed, the salinity of the water infiltrating into the CCS was consistent with the adjacent Biscayne Bay and in effect moved the coast line westward by the width of the CCS. *Id*.

Further, during the design and permitting of the CCS, it was well understood that the unlined cooling canals would exchange with the saline groundwater below, and that salinity could increase in the canals during operations. Tr. 289. Because the groundwater underneath the CCS contained high salinity, it is classified as non-potable by the FDEP. Tr. 351-52.

In recognition of those factors, as well as a common desire to limit the westward migration of saltwater, the SFWMD Agreement required FPL to design, construct and operate the CCS with an approximately 18 foot deep interceptor ditch along the western edge of the CCS to restrict movement of saline water from the CCS west of the L-31 Canal. Tr. 291. Because the underlying aquifer was already saltwater-intruded, FPL understands that the focus of the interceptor ditch was on protection of a shallow, surficial freshwater lens (a shallow freshwater layer) near the CCS and thus the ditch did not need to be very deep. Tr. 794-95. The SFWMD

Agreement spelled out the operational criteria for interceptor ditch pumps and included a monitoring plan consisting of 38 monitoring well sites and seven surface water sites monitored bi-weekly and monthly. Tr. 291. FPL shared the monitoring data with the SFWMD in quarterly meetings. *Id.* The SFWMD Agreement provided that if, *in the sole judgment of the SFWMD*, the objectives of the agreement were not being achieved, the SFWMD could require FPL to change its operating criteria for the interceptor ditch or to implement other feasible engineering measures to achieve those objectives. *Id.*

The SFWMD has retained continuous oversight of the CCS for the more than four decades since the CCS was built, amending the SFWMD Agreement several times over those years. Tr. 292. In July 1983, the SFWMD found that FPL had met all its obligations under the original SFWMD Agreement and that the required monitoring could be accomplished by a reduced monitoring network which included four groundwater monitoring wells and five surface water monitoring stations. *Id.* Under the 1983 amendment, monitoring data was summarized and reported to the SFWMD for its review annually. *Id.* FPL regularly provided the periodic monitoring reports to SFWMD consistent with the 1983 modification. *Id.* As OPC's witness admitted at hearing, throughout the long history of the SFWMD Agreement and its amendments, the SFWMD never required FPL to change its operational

criteria for the interceptor ditch or to implement alternative engineering measures to achieve its objectives. Tr. 667-68.

In 2008, an environmental review of the CCS was conducted under the Power Plant Siting Act, Sections 403.501-403.518, Florida Statutes, in conjunction with FPL's request to modify its site certification for Turkey Point to increase the output of Units 3 and 4, referred to as the "Uprate Project." Tr. 293, 326. The SFWMD participated in this review and imposed Conditions of Certification requiring FPL to revise its monitoring obligations in order to evaluate the interceptor ditch's effectiveness in restricting the movement of saline water westward from the CCS. Tr. 293, 326. The required monitoring was intended to delineate the impacts of the CCS since 1972 and to identify potential solutions to abate, mitigate or remediate the movement of saline water from the CCS. Tr. 293, 326. FPL committed to an expanded monitoring program, in both Conditions of Certification IX and X in the 2009 Site Certification Modification issued by the FDEP ("Conditions IX and X") and in a Fifth Supplemental Agreement with the SFWMD. Tr. 293. This program was referred to as the Comprehensive Pre-uprate Monitoring Plan. Tr. 294.

The Comprehensive Pre-uprate Monitoring Plan was substantial and significant. Tr. 293-94. It included extensive new requirements, expanded reporting, and a requirement to determine the vertical and horizontal effects and extent of the CCS on existing and projected groundwater and ecological conditions

surrounding Turkey Point. Tr. 293. After two years of data collection, FPL was to prepare and submit to the SFWMD a Comprehensive Pre-uprate Monitoring Report. Tr. 294.

Commencing in 2009, at the SFWMD's direction and under its guidance, FPL began implementing the Comprehensive Pre-uprate Monitoring Plan. Tr. 294; OPC Appx. 116, Ex. 6. Construction of the monitoring network and initiation of monitoring began in 2010. Tr. 294. Automated data from the surface water and groundwater sites initially were collected every 15 minutes. *Id*. The Comprehensive Pre-uprate Monitoring Report containing data and analyses covering the pre-uprate monitoring period of June 2010 through June 2012 was completed and submitted to the appropriate agencies on October 31, 2012. *Id*.

C. Despite FPL's Full Compliance, Salinity Standards Were Exceeded

Although FPL always complied with all the operational guidelines and requirements designed to contain saline water within the Turkey Point plant boundaries, the SFWMD nonetheless concluded after reviewing the Comprehensive Pre-uprate Monitoring Report that saline water had moved beyond the plant boundaries. Tr. 370; OPC Appx. 156, Ex. 7. In an April 2013 letter, the SFWMD requested that FPL consult with the SFWMD, FDEP and Miami-Dade County Department of Environmental Resource Management ("DERM") to identify measures to mitigate, abate or remediate the "hypersaline plume"—the movement

of water with heightened salinity west of the CCS. Tr. 294-95; OPC Appx. 156, Ex. 7. FPL's witness, former Secretary of FDEP Michael Sole, likened this predicament to that of an underground storage tank owner who has properly registered the tank, has operated and maintained the tank in accordance with all applicable rules and requirements, and has conducted the required leak-detection monitoring for the tank, yet nonetheless the tank develops a leak that the leak-detection monitors do not detect for many years. Tr. 422-23. In those circumstances, the tank owner is properly held responsible for cleaning up the leak, but fines or other adverse consequences of deliberate or careless violations would be inappropriate. *Id.*

Indeed, the SFWMD's letter acknowledged the significant work FPL put into the collection, analysis and interpretation of data pursuant to the Pre-uprate Monitoring Plan and into analyzing environmental conditions surrounding the CCS over the years. OPC Appx. 156, Ex. 7. The letter also recognized the challenging nature of the water resources issues involved and reiterated the SFWMD's commitment to continue working collaboratively with FPL and the FDEP to address them. *Id.* Nothing in the April 2013 letter states that FPL's operation of the CCS violated any environmental laws or regulations. Tr. 363-64; OPC Appx. 156, Ex. 7.

FPL immediately began to work with the agencies to identify appropriate abatement measures. Tr. 295. The result of these consultations was an Administrative Order ("AO") issued by the FDEP in December 2014 directing FPL

to develop a Salinity Management Plan to lower salinity in the CCS, among other requirements. *Id*. Specifically, FPL would lower the salinity of the CCS to a level that matched the salinity of Biscayne Bay, removing the cooling canals as a source of hypersaline water in the region. OPC Appx. 157, Ex. 8. The AO outlined, in paragraph 16, that "there are many factors that may influence the saltwater orientation and movement in southeastern Miami-Dade County, including sea level rise, storm surges, the CCS, groundwater withdrawals, mining, land use practices, other private uses and local and regional water management actions conducted as described in the [U.S. Army Corp of Engineers] Central and Southern Florida Projects for Flood Control and other Purposes, Master Water Control Manual, East Coast Canals Volume 5." *Id*. Put simply, the AO acknowledged that the movement of saltwater in a saline environment is a complicated process not driven by one single factor. *Id.* The AO did not state that FPL's operation of the CCS violated any environmental laws or regulations. Tr. 286; OPC Appx. 157, Ex. 8.

FPL accepted the AO and was prepared to develop and implement the Salinity Management Plan that it required. Tr. 816. However, the AO was challenged by several parties, including DERM, before FPL could do so. Tr. 295. FPL advised DERM that it would prefer to focus its energy on identifying and addressing the salinity issues associated with the CCS rather than engaging in a protracted dispute

regarding DERM's concerns about the AO. Accordingly, FPL and DERM agreed to enter into a Consent Agreement to address DERM's concerns. Tr. 295.

As a procedural predicate for the Consent Agreement, DERM issued a Notice of Violation ("NOV") on October 2, 2015. *Id*. The Notice of Violation did not find that FPL had acted negligently or imprudently, or that FPL had violated any operational guidelines or requirements: the alleged violation was simply a finding that salinity standards outside the Turkey Point boundaries had been exceeded. Ex. 9. On October 7, 2015, DERM and FPL entered into a Consent Agreement ("2015 CA"). Tr. 295. The 2015 CA recites the alleged violations contained in the NOV, but FPL does not admit those violations. Tr. 286, 377, 390; OPC Appx. 171, Ex. 10. As Mr. Sole testified, FPL preferred to focus its energy on identifying and addressing the salinity issues associated with the CCS rather than engaging in a protracted dispute over whether a violation had occurred. Tr. 376-77. The 2015 CA acknowledged FPL's plans to reduce salinity in the CCS and required FPL to implement additional actions to intercept, capture, contain, and retract hypersaline groundwater west and north of the FPL property boundary. Tr. 295. It also required FPL to conduct additional monitoring and reporting. *Id*.

Separately, after an administrative hearing in which the presiding judge had originally recommended rescinding the AO, the FDEP issued a Final Administrative Order ("Final AO") on April 21, 2016. Tr. 296. The Final AO contains findings of

FPL violations. OPC Appx. 195, Ex. 11. While FPL disagreed with several of the findings in the Final AO, believing there to be inadequate science to support them, FPL concluded that it would be more productive to work with the FDEP to address salinity issues rather than continuing to dispute the Final AO. Tr. 376-77.

Following up on the findings of the Final AO, the FDEP issued an NOV on April 25, 2016 finding that the discharge of hypersaline groundwater from the CCS was contributing to saltwater intrusion west of the CCS and that this was "impairing the reasonable and beneficial use of adjacent waters." Tr. 296, 369; OPC Appx. 258, Ex. 12. Again, the NOV does not identify any negligent or imprudent conduct by FPL, does not identify any failure to follow an operational guideline or regulation, and indeed cites no exceedance of any water quality standard beyond this qualitative, narrative standard. Tr. 286, 390; OPC Appx. 258, Ex. 12. Because the NOV did not suggest that FPL had engaged in any wrongful conduct, FPL again focused on cooperation rather than contention: it promptly entered into consultations with the FDEP to develop a Consent Order to address the NOV by implementing abatement and remediation measures to address the hypersaline water's impact on saltwater intrusion. Tr. 296, 376-77; OPC Appx. 258, Ex. 12. On June 20, 2016, a Consent Order ("2016 CO") was executed between FPL and the FDEP. Tr. 296. The 2016 CO supersedes all requirements of the Final AO and rescinds the AO. Tr. 297.

On August 15, 2016, DERM and FPL executed an addendum to the October 2015 CA. Tr. 297. The addendum requires FPL to take action to address DERM's allegations of violations of water quality standards and cleanup target levels relating to the exceedance of ammonia in deep remnant canals adjacent to the Turkey Point CCS. *Id*. DERM alleged that the exceedance violates water quality standards but did not allege that FPL caused the exceedance. OPC Appx. 299, Ex. 14.

By the time that it filed prepared testimony in July 2017 for the Commission proceeding under review here, FPL was actively engaged in an extensive program to comply with the regulatory requirements of the 2015 CA, the 2016 CO and the addendum (collectively, the "Consent Actions"). Tr. 298-99. FPL's Consent Actions include but are not limited to the following:

- Permitting, modeling, design and construction of a Recovery Well System ("RWS");
- Completion of an Upper Floridan Aquifer well system to provide the CCS up to 14 million gallons per day of low salinity freshening water;
- Continuation of an extensive program of monitoring and modeling salinity in the groundwater west of the CCS; and
- Collection of groundwater, porewater and surface water samples to determine if the CCS is contributing ammonia in adjacent canals.

Tr. 299-300, 302-03, 305.

The data available in the record show that the Consent Actions are serving to protect the Biscayne Aquifer and Biscayne Bay. Tr. 306. For example, between

commencement of the underground injection well testing phase of the RWS on September 28, 2016 and June 30, 2017, approximately 3.7 billion gallons of hypersaline groundwater from beneath the CCS were extracted and disposed of in the naturally saline Boulder Zone Formation located 3,200 feet below the surface. Tr. 307. This amounts to approximately 890,000 tons of salt removed from the Biscayne aquifer beneath the CCS. In addition, construction of the 10 RWS extraction wells began in June 2017, and operations began in 2018. *Id*. Groundwater models of the RWS indicated that the westward migration of the hypersaline plume will be stopped in three years of operation, with retraction of the hypersaline plume north and west of the CCS beginning in 5 years. *Id*. Retraction of the plume back to the FPL site boundary was projected in ten years. *Id*.

The record before the Commission uniformly supports the conclusion that, throughout the history of the CCS: FPL has collected the water quality monitoring data that it was directed to collect and has shared that information with the relevant regulatory agencies; FPL has operated the CCS in compliance with all the applicable permits and SFWMD agreements; and FPL did not deviate from any of the authorizations that were in the permits and agreements. Tr. 286-87. Nonetheless, without finding that FPL failed to follow the agencies' guidelines or otherwise that FPL breached its duties, DERM and the FDEP ultimately concluded that violations

of strict-liability water quality standards occurred, and FPL has moved forward promptly and collaboratively to address them. OPC Appx. 258, 299; Exs. 12, 14.

D. FPL's History of Cost Recovery For CCS Environmental Costs

FPL petitioned the Commission in 2009 to recover the substantial, incremental costs that it would incur in implementing the expanded monitoring plan required under Conditions IX and X and the Fifth Supplemental Agreement. Tr. 308. The Commission approved a stipulation, to which OPC was a party, creating the Turkey Point Cooling Canal Monitoring Plan Project ("Cooling Canal Project") and authorizing FPL to recover costs incurred pursuant to the expanded monitoring plan under that project. *Id.*; FPL Appx. 83, Ex. 74 (Order No. PSC-09-0759-FOF-EI).

The authorization for cost recovery stated that the Cooling Canal Project could include "mitigation measures to offset such impacts of the Uprate Project necessary to comply with State and local water quality standards." Tr. 451; FPL Appx. 83, Ex. 74. The Commission's authorization further made clear that "the water-quality issues the [Cooling Canal] Project is being undertaken to address relate to operation of the Turkey Point plant as a whole and not just the [Turkey Point] Nuclear Uprate." *Id*. As a result, the Commission concluded that "FPL should be allowed to recover the costs associated with the [Cooling Canal Project] through the ECRC." *Id.*

The first step under the approved Cooling Canal Project was to implement groundwater monitoring to determine the impact of the Turkey Point Uprate Project on the groundwater in the vicinity of the CCS. Tr. 308. That was the action initially required under Conditions IX and X and the Fifth Supplemental Agreement. *Id*. However, the testimony that supported FPL's petition for approval of the Cooling Canal Project also made it clear that if the FDEP, in consultation with the SFWMD and DERM, found that water from the CCS was causing harm or potential harm to adjacent waters, the next step under Conditions IX and X and the Fifth Supplemental Agreement would be expanded assessment and remediation measures. OPC Appx. 140-41, Ex. 6, pp. 20-21 (FDEP states: "If the Department determines that the pre- and post-Uprate salinity and monitoring data indicate potential adverse changes in the surface water in Biscayne Bay, then the Department may propose additional measures to evaluate or to abate such impacts to Biscayne Bay."). At the time that the Cooling Canal Project was approved, OPC did not object or seek in any manner to limit FPL's ability to recover the costs of expanded assessment and remediation measures that FPL might be required to undertake. FPL Appx. 83, Ex. 74.

FPL has updated the Commission and all parties to the Commission's ECRC dockets regularly throughout the period since the Cooling Canal Project was approved in 2009. Tr. 309. As required, FPL has annually filed with the Commission all cost data concerning the Project, including information relating to

actual costs incurred as well as projections of future costs. *Id*. FPL has also filed project description and progress reports annually to provide the Commission with information concerning Project accomplishments and the associated expenditures. In 2013, FPL filed testimony with the Commission to describe activities that FPL was required to perform following the completion of consultation with the SFWMD, FDEP, and DERM. Tr. 309; FPL Appx. 107, Ex. 79. In 2015, FPL filed testimony that discussed additional salinity reduction-related activities FPL was required to undertake pursuant to updated regulatory requirements. Tr. 309. These activities included, but were not limited to, water delivery projects and sediment management. In 2016, FPL filed testimony with the Commission that discussed at length the activities required to comply with the Consent Actions. *Id.*; FPL Appx. 107, Ex. 79.

OPC never disputed any of the costs incurred for Consent Actions that FPL undertook pursuant to the Cooling Canal Project from its inception in 2009 through 2015. *See* Order Nos. PSC-09-0759-FOF-EI, PSC-11-0083-FOF-EI, PSC-11-0553-FOF-EI, PSC-11-0553A-FOF-EI, PSC-12-0613-FOF-EI, PSC-13-0606-FOF-EI, PSC-14-0643-FOF-EI, and PSC-15-0536-FOF-EI.

II. THE COMMISSION'S 2017 ECRC ORDER

On September 6, 2016, in the annual ECRC Docket, FPL petitioned for recovery of costs associated with the Consent Actions under the Commission-approved Cooling Canal Project. R. 525-27. For the first time since the Project's

inception, OPC raised a concern. Upon stipulation of the parties, the Commission deferred consideration of those costs to 2017. R. 815. On January 3, 2017, the Commission established Docket 20170007-EI, the ECRC Docket for 2017. R. 820. FPL, OPC and several other intervenors participated in that Docket and focused most of their attention on the issues related to the Cooling Canal Project.

On October 25 and 26, 2017, the Commission held a hearing in the 2017 ECRC Docket, with both FPL and OPC presenting expert testimony addressing the Cooling Canal Project and the Consent Actions. *See, e.g.*, R. 278-554; 603-704. FPL's experts were cross-examined at length not only by OPC but two other intervenors as well as the Commission. All parties submitted post-hearing briefs following the close of the evidence. R. 2053-2124.

The Commission voted at an agenda conference to approve ECRC recovery for most of the compliance costs associated with the Consent Actions, memorializing its decision on January 5, 2018 in Order No. PSC-2018-0014-FOF-EI (the "2017 ECRC Order"). R. 2150-52; 2190-2221; FPL Appx. 4. The Commission found that "FPL adhered to the monitoring requirements and was under the continuous oversight of environmental regulators from the inception of Turkey Point," and that no substantial evidence was presented which indicated that FPL intentionally withheld or submitted false data to environmental regulators or the Commission. R. 2203. Accordingly, given what FPL knew or should have known at the time, it found

that "FPL was prudent in its actions regarding the historic operation of the CCS." *Id*. Finally, the Commission concluded that these costs were properly considered an outgrowth of the previously approved Cooling Canal Project, which had always been understood to address water-quality issues associated with the Turkey Point Plant as a whole. R. 2206-07. The Commission therefore approved cost recovery for substantially all of the amounts incurred for implementing the Consent Actions. OPC brought this direct appeal from the Commission's Order.

SUMMARY OF ARGUMENT

The Commission's Order below correctly determined that the Consent Actions were eligible for ECRC recovery under the plain terms of the statute, that the record demonstrated that these costs were prudently and reasonably incurred,[2] and that these costs were appropriately considered part of the previously approved Cooling Canal Project.

First, in finding that the Consent Actions could be eligible for recovery under the ECRC, the Commission properly found that the Consent Actions were "legally required to comply with a governmentally imposed environmental regulation" that

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[2] The Commission examines actual costs incurred in the prior year for prudence and costs projected to be incurred in future years for reasonableness. *In re: Petition to establish an environmental cost recovery clause pursuant to Section 366.0825, Florida Statutes by Gulf Power Co.*, 148 P.U.R.4th 545 (F.P.S.C. Jan. 12, 1994) ("*Gulf Power*"). Projected costs determined to be reasonable remain subject to a prudence evaluation after they are incurred. For simplicity, this brief uses "prudent and reasonable" to refer to determinations regarding both actual and projected costs.

"became effective, or whose effect was triggered after the Company's last test year upon which rates are based." On the plain text of the statute, ECRC recovery is available for prudently incurred costs of complying with "all federal, state, or local statutes, administrative regulations, orders, ordinances, resolutions, or other requirements that apply to electric utilities and are designed to protect the environment." § 366.8255(1)(c). The Commission recognized that the Consent Actions were undertaken to comply with "orders" from FDEP and DERM that were "designed to protect the environment" from harms associated with the hypersaline plume. In arguing otherwise, OPC attempts to draw a line, found nowhere in the ECRC statute, between orders designed to prevent future harm to the environment and orders designed to protect the environment by remediating or eliminating existing harm to the environment. OPC's reading of the statute is contrary to the plain meaning of the text and impossible to apply in practice.

Second, having found that the Consent Actions were incurred to comply with environmental regulations, the Commission concluded that the costs were prudent and reasonable. In making its determination, the Commission examined all of FPL's actions, including its conduct prior to the violations. The Commission found that FPL acted prudently at all times, having worked closely with multiple agencies that continuously oversaw discharges from the plant, and having always followed the changing regulations and guidelines imposed by those agencies. Although the

salinity standards were ultimately violated, the Commission found no substantial evidence that alternative actions should have been taken to avoid the violations, nor that such actions would have been cheaper for ratepayers, and ultimately concluded that "given what FPL knew or should have known at the time … FPL was prudent in its actions." 2017 ECRC Order at 14, FPL Appx. 17.

Contrary to OPC's hyperbole, the Commission's decision does not license utilities to intentionally violate environmental regulations and then charge ratepayers for the consequences, because ECRC recovery is available only for prudently incurred costs. Utilities that recklessly violate applicable regulations will not be able to meet this standard. Here, however, the Commission properly found that the violations did not result from any negligence or misconduct by FPL; rather, they happened *despite* FPL's best efforts to comply with applicable regulations.

Finally, there is no merit to OPC's irrelevant contention that FPL was required to begin a new ECRC project-approval process rather than petition for recovery under the already approved Cooling Canal Project. The Commission's earlier approval of the Cooling Canal Project made clear that the Project could include efforts to mitigate harms and address water-quality issues uncovered in the Project. As a result, the mitigation orders resulting from the information gathered during the Project were an "anticipated evolution" of the Cooling Canal Project.

STANDARD OF REVIEW

It is firmly established that when "reviewing an order of the Commission, this Court affords great deference to the Commission's findings." *Sierra Club v. Brown*, 243 So. 3d 903, 907 (Fla. 2018) (quoting *Citizens v. Fla. Pub. Serv. Comm'n*, 146 So. 3d 1143, 1149 (Fla. 2014)). Commission orders are "clothed with the presumption that they are reasonable and just." *Id*. (quoting *W. Fla. Elec. Coop. Ass'n 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 [to] show[] 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." *Id*. (quoting *Crist v. Jaber*, 908 So. 2d 426, 430 (Fla. 2005)). This Court has emphasized that it will not second-guess the PSC's rate-making decisions, nor will it overturn a PSC order because it would have reached a different result in making the initial decision. *Id*. at 908 (citing *Gulf Power Co. v. Fla. Pub. Serv. Comm'n*, 453 So. 2d 799, 803 (Fla. 1984)). Nor will the Court reweigh the evidence that was presented to the Commission. *Id*.

Furthermore, the Commission's interpretation of statutes it is tasked with enforcing "is entitled to great deference and will be approved by the Court unless it is clearly erroneous." *Id.* (citing *BellSouth Telecomms. v. Johnson*, 708 So. 2d 594,

596 (Fla. 1998)). Determining whether the Commission acted within the authority granted to it by the Legislature is subject to de novo review by this Court. *Id.*

ARGUMENT

I. THE CONSENT ACTIONS WERE CORRECTLY FOUND TO BE ELIGIBLE FOR ECRC RECOVERY

Florida law authorizes utilities to recover environmental compliance costs pursuant to a framework prescribed by Section 366.8255, Florida Statutes ("ECR Statute"). Under the ECR Statute, an electric utility may submit to the Commission a petition describing its proposed environmental compliance activities and projected environmental compliance costs. If the activities are approved, "the commission *shall* allow recovery of the utility's prudently incurred environmental compliance costs . . . . through an environmental compliance cost-recovery factor that is separate and apart from the utility's base rates." § 366.8255(2) (emphasis added). Environmental compliance costs are defined to include "all costs or expenses incurred by an electric utility in complying with environmental laws or regulations." § 366.8255(1)(d). In turn, "environmental laws or regulations" are defined to include "all federal, state, or local statutes, administrative regulations, orders, ordinances, resolutions, or other requirements that apply to electric utilities and are designed to protect the environment." § 366.8255(1)(c).

The Commission established the Environmental Cost Recovery Clause ("ECRC") and articulated its policy for cost recovery in 1994. *Gulf Power*, 148

P.U.R.4th 545 (F.P.S.C. Jan. 12, 1994). Consistent with the ECR Statute, the Commission stated that it "shall" allow the recovery of costs associated with an environmental compliance activity through the environmental cost recovery factor if: (1) such costs were prudently incurred after April 13, 1993; (2) the activity is legally required to comply with a governmentally imposed environmental regulation enacted, became effective, or whose effect was triggered after the company's last test year upon which rates are based; and (3) such costs are not recovered through some other cost recovery mechanism or through base rates. *Id.* The Commission established an on-going proceeding for the ECRC that examines annually actual costs incurred in the prior year and costs projected to be incurred in future years.

Contrary to OPC's argument, the Commission correctly concluded that the costs associated with the Consent Actions are eligible for ECRC recovery because they are incurred to comply with directives from the FDEP and DERM that were intended to protect the environment by containing the salt water plume and preventing it from spreading beyond the CCS boundary.

A. The Consent Actions Were Ordered to Protect the Environment.

The ECR Statute does not define the phrase "designed to protect the environment," so that phrase must be given its plain and ordinary meaning. *State v. Burris*, 875 So. 2d 408, 411 (Fla. 2004). That phrase is well understood by governments, regulators, and ordinary speakers of the English language to include

all measures to maintain and improve the quality of the environment and preserve it for future generations. This includes both preventative and remedial measures, protecting the environment from both new sources of harm and from old sources that would otherwise continue to damage or degrade it.

That common-sense definition is confirmed in numerous laws and texts. For example, the multinational Organization for Economic Co-operation and Development defines "environmental protection" as "any activity to maintain or restore the quality of environmental media through preventing the emission of pollutants **or reducing the presence of polluting substances** in environmental media." OECD, Glossary of Statistical Terms, "Environmental Protection," https://stats.oecd.org/glossary/detail.asp?ID=836 (emphasis added). Courts have similarly concluded that "to protect the environment" includes activities such as "restoration." *E.g.*, *Tahoe Reg'l Planning Agency v. Terrace Land Co.*, 772 F. Supp. 506, 512 (D. Nev. 1991) ("[T]he Court questions whether a sufficient period of time has elapsed to adequately determine whether the restoration which has been done is sufficient to protect the environment … ."). Likewise, federal regulations state that the Environmental Protection Agency's "purpose and functions" include "**protection** of the environment by **abating** and controlling pollution on a systematic basis." 40 C.F.R. § 1.3 (emphasis added).

OPC attempts to distort this ordinary meaning by focusing on the word "protect" in isolation, then cherry-picking a definition of "protection" that focuses narrowly on prevention of future harm, rather than maintenance, abatement, restoration, or cleanup. OPC Br. 25-27. But a statute "must be given its plain and obvious meaning," *Florida Dept. of Env'tl Protection v. ContractPoint*, 986 So. 2d 1260, 1265 (Fla. 2008); *A.R. Douglass, Inc. v. McRainey*, 137 So. 157, 159 (Fla. 1931), and OPC's definition cannot be squared with the ordinary use of the phrase "protect the environment." For example, under the OPC's definition, the EPA is not protecting the environment when it "ensure[s] that … [c]ontaminated lands and toxic sites are cleaned up by potentially responsible parties and revitalized." EPA, *Our Mission and What We Do*, https://www.epa.gov/aboutepa/our-mission-and-what-we-do. Institutions working to repair the ozone layer are similarly remedying past harms rather than protecting the environment under OPC's crabbed definition.

OPC's distinction between preventative and remedial efforts cannot be coherently applied in the realm of environmental protection, since remedying past harms is often an essential component of preventing further harms to the environment. Indeed, it is difficult to imagine a remedial effort that is not designed to prevent future harms to the environment, or to the plants, animals, and people who inhabit it—such as when oil spills are cleaned to prevent further harms to the flora and fauna living nearby. Indeed, FDEP regulations state that when an installation is

discharging into the groundwater in a manner hazardous to public health, the FDEP "shall require the installation owner to take immediate action to remove or reduce the hazard in such a way as to *prevent any threat to* the public health and *the environment*." Fla. Admin. Code R. 62-520.700 (emphasis added).[3]

The plain and obvious meaning of "protect the environment"—as that phrase is used by governments, environmentalists, and ordinary speakers of the English language—is commonly understood to include both remedial and preventive measures designed to improve the quality of the environment. It clearly encompasses the Consent Actions here, which were designed to protect the environment from the adverse consequences of the hypersaline plume.

B. Florida Law Recognizes That Environmental "Protection" is Not Limited to "Prevention."

Construing the ECR Statute *in pari materia*[4] with the Florida Air and Water Pollution Control Act ("Pollution Control Act") further confirms the Legislature's

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[3] Even if the Commission had accepted OPC's crabbed definition of "protect," the Consent Actions would be eligible for ECRC recovery. The Consent Actions will contain the hypersaline plume and thereby *prevent* hypersaline water from leaving the property boundary and entering groundwater outside the CCS. In other words, even under OPC's own theory, the Consent Actions do "protect" the environment.

[4] It is well-established that if "part of a statute appears to have a clear meaning if considered alone but when given that meaning is inconsistent with other parts of the same statute or others *in pari materia*, the court will examine the entire act and those *in pari materia* in order to ascertain the overall legislative intent." *ContractPoint*, 986 So. 2d at 1265-66. Stated differently, statutes that relate to the same subject matter or to closely related subjects should be read *in pari materia* and construed in such a manner as to give meaning and effect to each provision. *Florida Dept. of*

sensible understanding that environmental protection is a comprehensive effort that necessarily involves a broad range of actions. The ECR Statute concerns cost recovery for compliance activities associated with federal, state, or local laws designed to protect the environment. The Pollution Control Act reflects the Legislature's policy to protect Florida's air and water[5] and is particularly relevant because it is the Act from which the FDEP and SFWMD derived their authority to require the Consent Actions.[6] *See* §§ 403.021(2), 403.061, Fla. Stat.; *Dep't of Envtl. Regulation v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985) ("The legislature enacted chapter 403 to protect the air and waters of Florida from pollution and degradation."). Addressing related subject matters, the ECR Statute and the

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Highway Safety & Motor Vehicles v. Hernandez, 74 So. 3d 1070, 1075 (Fla. 2011), *as revised on denial of reh'g* (Nov. 10, 2011); *also E.A.R. v. State*, 4 So. 3d 614 (Fla. 2009) (*in pari materia* doctrine recognizes that when statutes relate to the same object, they illuminate one another, and if construed together, will give effect to the Legislature's intent).

[5] *See* § 403.021(2), Fla. Stat. ("It is declared to be the public policy of this state to conserve the waters of the state and to *protect*, maintain, and improve the quality thereof for public water supplies . . . and to provide that no wastes be discharged into any waters of the state without first being given the degree of treatment necessary to *protect* the beneficial uses of such water.) (emphases added); § 403.021(3), Fla. Stat. ("It is declared to be the public policy of this state and the purpose of this act to achieve and maintain such levels of air quality as will *protect* human health and safety and, to the greatest degree practicable, prevent injury to plant and animal life and property . . . .") (emphasis added).

[6] *See* § 403.061, Fla. Stat. (granting the FDEP the "power and the duty to control and prohibit pollution of air and water" through regulations and orders) and § 403.182, Fla. Stat. (authorizing local pollution control programs so long as they are consistent with the Act).

Pollution Control Act illuminate one another, and if construed together, will give effect to the Legislature's intended application of term "protect."

Section 403.021 of the Pollution Control Act sets forth the Legislative declaration and public policy and states:

> (5) It is hereby declared that the *prevention, abatement, and control* of the pollution of the air and waters of this state are affected with a public interest, and the provisions of this act are enacted . . . for the purpose of *protecting* the health, peace, safety, and general welfare of the people of this state.
>
> (6) The Legislature finds and declares that *control, regulation, and abatement* of the activities which are causing or may cause pollution of the air or water resources in the state . . . be increased to ensure *protection* and preservation of the public health, safety, welfare, and economic well-being . . . .

Section 403.061, Florida Statutes also grants the FDEP the power and duty to administer the Pollution Control Act in accordance with the law and rules adopted and promulgated by it. Specifically, the FDEP is authorized to:

> (8) Issue such orders as are necessary to effectuate the *control* of air and water pollution and enforce the same by all appropriate administrative and judicial proceedings.
>
> (10) Develop a comprehensive program for the *prevention, abatement, and control* of the pollution of the waters of the state.

(emphases added).

These express legislative declarations remove all doubt. "Protection" includes prevention, but it encompasses more. Protection also includes, at a minimum, abatement, control and regulation. *See State v. Miller*, 227 So. 3d 562,

564 (Fla. 2017) (the Court should give meaning to each word of a statute rather than treat any word as mere surplusage) (citing *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198-99 (Fla. 2007)). Through these words, the Legislature articulated its understanding that the protection of Florida's air and water is a multi-faceted endeavor that requires more than just "prevention."

The Pollution Control Act's definition of "pollution prevention" also undermines OPC's argument that protection occurs only before a contaminant enters the environment.[7] Section 403.031(8) defines "pollution prevention" as "the steps taken by a potential generator of contamination or pollution to eliminate or reduce the contamination or pollution before it is discharged into the environment." Thus, when the Legislature intended to refer only to protection against future pollution, it used a specific, distinct phrase ("pollution prevention"). Had the Legislature intended to limit the reach of the ECR Statute to recovery of only preventative costs, it could have used that or a comparable phrase. *Cf. State v. Chubbuck*, 141 So. 3d 1163, 1171 (Fla. 2014) (rejecting appellant's constricted interpretation of statute where restrictions proposed by appellant appeared in a related law but not the statute

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[7] The ECR Statute itself contradicts OPC's prevention argument. Subsection (1)(d) authorizes ECRC recovery of emission allowance costs—costs paid to be allowed to emit more pollution than the legally established limit. This is categorically the opposite of preventing pollution in the first place. *ContractPoint*, 986 So. 2d at 1265 (a "statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts.").

in question); *Knowles v. Beverly Enterprises-Florida, Inc*., 898 So. 2d 1, 9 (Fla. 2004) (courts must presume that the Legislature passes statutes with the knowledge of prior existing statutes); *Am. Bankers Life Assurance Co. of Fla. v. Williams*, 212 So. 2d 777, 778 (Fla. 1st DCA 1968) ("Had the legislature intended the statute to import a more specific and definite meaning, it could easily have chosen words to express any limitation it wished to impose."). The Legislature chose instead to use "protect"—a broader term that recognizes the comprehensive nature of environmental protection. OPC's attempt to rewrite the ECR Statute must be denied.

C. The FDEP and Commission Have Authoritatively Declared That the Orders Requiring the Consent Actions Are Designed to "Protect" the Environment.

As the agency responsible for protecting the State's air and water, the FDEP's interpretation regarding how to effectuate that protection must be accorded great deference. *Goldring*, 477 So. 2d at 534 (quashing district court order that failed to accord deference to the FDEP's interpretation of Chapter 403). "This Court will not depart from the contemporaneous construction of a statute by a state agency charged with its enforcement unless the construction is 'clearly unauthorized or erroneous.'" *Level 3 Communications, LLC v. Jacobs*, 841 So. 2d 447, 450 (Fla. 2003) (quoting *P.W. Ventures, Inc. v. Nichols*, 533 So. 2d 281, 283 (Fla.1988)). Rules adopted and orders issued by the FDEP confirm that the Consent Actions are designed to protect

the environment, and the Commission's Order below confirms that such orders properly trigger recovery under the ECRC.

FDEP Rule 62-520.700 governs Consent Actions pertaining to groundwater. It provides that, when an installation is discharging into the groundwater in a manner hazardous to public health, the FDEP "shall require the installation owner to take immediate action to remove or reduce the hazard in such a way as to *prevent any threat to the public health and the environment*." Fla. Admin. Code R. 62-520.700 (emphasis added). The rule goes on to specify that "[s]uch action includes clean-up of the aquifer, halting the discharge or confinement or containment of the water plume." *Id.* These words are directly applicable here. Thus, the FDEP has officially declared that the types of Consent Actions required of FPL—clean-up, containment, halting—prevent environmental threats.

If more were needed, the FDEP's orders further clarify that the Consent Actions are designed to protect. First, the AO, the precursor to the 2016 CO, explained that, in choosing to require Consent Actions, the FDEP was "exercis[ing] its authority at this time in favor of *remediation to protect the public health*." OPC Appx. 206, Ex. 11, p. 12 (emphasis added).[8] In the NOV, the FDEP states that the forthcoming 2016 CO should incorporate Consent Actions to "abate the CCS

[8] The FDEP's statement directly undermines OPC's argument that "where the impetus and primary purpose of a project is remediation, it cannot be considered to be 'designed to protect.'" *See* OPC br. 34.

contribution to the hypersaline plume, reduce the size of the hypersaline plume, and prevent future harm to the waters of the State." OPC Appx. 262, Ex. 12, p. 5, ¶ 22.

The 2016 CO describes the objectives of the Consent Actions. The first objective of the CO is for FPL to "*cease discharges* from the CCS that impair the reasonable and beneficial use of adjacent [] ground waters . . . ." OPC Appx. 278, Ex. 13, p. 7, ¶19. FPL was directed to achieve this first objective by (i) undertaking freshening activities, (ii) eliminating the CCS contribution to the hypersaline plume, and (iii) halting the westward migration and reducing the westward extent of the hypersaline plume. *Id*. The CO recognizes that these activities at the CCS would "remov[e] its influence on the saltwater interface, without creating adverse environmental impacts." *Id*. To achieve this first directive, FPL was ordered to implement a remediation program that includes the RWS. *Id*. at p. 8, ¶ 20(c).

The second objective[9] of the CO is "to prevent releases of groundwater from the CCS to surface waters connected to Biscayne Bay that result in exceedances of surface water quality standards in Biscayne Bay." *Id*. at p. 7, ¶ 19. The FDEP directed FPL to accomplish this primarily by undertaking restoration projects in the Turtle Point Canal and Barge Basin area. *Id*. and p.10, ¶ 21(a).

[9] The Commission did not approve ECR cost recovery for the activities associated with the third objective, so it is not discussed here.

As contemplated by Rule 62-520.700, the Consent Actions "remove or reduce" the CCS's impacts on the surrounding waters, require FPL to "clean up the aquifer," and "contain" and "halt" the movement of the plume. The FDEP has determined that these efforts prevent threats to the environment, thereby protecting the public health. OPC's attempt to read the measures comprising the Consent Actions out of the laws that the Florida Legislature enacted to protect the environment reflects either a fundamentally flawed understanding of those laws or a stunningly misguided attempt to re-write those laws. The interpretation of those laws by the FDEP—the agency statutorily designated to protect Florida's waters—should be respected.

Likewise, as the agency charged with applying the ECRC, the Commission's interpretation of the Clause and determination that the ECRC applies to costs of remediating violations of environmental standards (as long as the utility acted prudently) is entitled to deference.[10] Because the Commission's interpretation is consistent with the plain meaning of the text, this Court should not depart from the Commission's interpretation. *See Level 3*, 841 So. 2d at 450 ("[U]nless this Court

[10] The Commission is given express statutory authority to apply the ECRC. *See* §§ 366.8255(1)(b), (2), Fla. Stat. (explaining that "the commission shall allow recovery of the utility's prudently incurred environmental compliance costs" upon proper petition). Accordingly, its interpretation of the ECRC's definition of "environmental compliance costs" is entitled to deference. *Level 3*, 841 So. 2d at 450.

finds that the PSC acted outside the scope of its powers and jurisdiction … or its decision was 'clearly unauthorized or erroneous,' the PSC's decision will be afforded deference."); *see also Sierra Club*, 243 So. 3d at 908.

II. THE COMMISSION CORRECTLY DETERMINED THAT THE CONSENT ACTIONS WERE PRUDENT AND REASONABLE AFTER EVALUATING FPL'S ACTIONS BEFORE AND AFTER THE VIOLATIONS.

The Commission properly found that the costs of the Consent Actions were prudent and reasonable because FPL acted prudently to avoid the violations in the first place and there was no evidence of "potential alternatives or cost savings measures that FPL could or should have implemented" to avoid the expense of the Consent Actions. 2017 ECRC Order at 14, FPL Appx. 17. The Commission further noted that FPL worked closely with multiple agencies overseeing the environmental impact of the power plant, and that FPL adhered to the agencies' monitoring requirements while under their "continuous oversight." *Id.* The Commission's prudence and reasonableness findings are supported by competent substantial evidence and should be respected here.

This Court has recognized the Commission's well-documented prudence standard. *S. All. for Clean Energy v. Graham*, 113 So. 3d 742, 749-50 (Fla. 2013). The Commission evaluates the prudence of costs that a utility seeks to recover based on "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." *Id*. Prudence is a fact-specific determination, and hindsight review is not permitted. *Id*. Any attempt to invoke hindsight as a basis for finding imprudence must be rejected. *See In re Nuclear Cost Recovery Clause*, Order No. PSC-11-0547-FOF-EI, 2011 WL 5904236 (F.P.S.C. 2011), *cited with approval in S. All. for Clean Energy*, 113 So. 3d at 750.

The Commission considered the evidence and the arguments presented by all parties to the 2017 ECRC proceeding. It found that FPL was prudent in its actions regarding the historic operation of the CCS, that the costs for 2015 and 2016 expenditures were prudent, and that FPL's projected costs 2017 expenditures were reasonable. 2017 ECRC Order, p. 14, FPL Appx. 17. The record fully supports the Commission's conclusions.

OPC does not argue directly that FPL acted imprudently, but it suggests throughout its brief that FPL should have reacted differently years earlier. These assertions rely on hindsight and are improper, belated collateral attacks on the judgment of the agencies responsible for oversight of the CCS. And, contrary to OPC's suggestion, the Commission's Order would not allow utilities to intentionally violate environmental regulations and then recover the costs of remedying the violation, because environmental compliance costs may be recovered through the ECRC only if they are prudently incurred. § 366.8255(2), Fla. Stat. The Commission properly considered the utility's conduct prior to the violation in its

assessment of prudence and reasonableness. It is hard to imagine how a utility that negligently or intentionally violated pollution standards could satisfy that prudence standard.

A. FPL's Historic Operation of the CCS Was Prudent.

Throughout its operating life spanning more than four decades, FPL has operated the CCS in compliance with its permits. FPL also performed all required monitoring and submitted all reports pursuant to its contractual and regulatory commitments. SFWMD confirmed FPL's compliance in 1983. OPC Appx. 51, Ex. 47, p. 1, ("WHERAS, the obligations undertaken by FPL and the [SFWMD] in the Original Agreement and the supplemental agreements have been satisfactorily performed to date"). And as recently as 2016, the FDEP acknowledged FPL's ongoing compliance. OPC Appx. 276, Ex. 13, p. 5 ("FPL has operated the CCS under regulatory approvals, and the Department has not previously issued FPL either a Warning Letter or a Notice of Violation concerning FPL's operation of the CCS").

At all times, the FDEP and SFWMD had the right to terminate FPL's permits if the Company failed to meet its obligations, including those related to water quality standards. That never occurred. To the contrary, the agencies continued to renew FPL's permits and agreements over the four decades since Turkey Point has been in operation. *See, e.g.*, OPC Appx. 105, 116; Exs. 5 and 6.

OPC suggests that FPL should have reacted differently to the monitoring information. To form this opinion, OPC's expert interpreted many data points found in FPL's monitoring reports. Tr. 618. But he missed the big picture: each report upon which OPC relied was submitted to and reviewed by the SFWMD. Tr.712; FPL Appx. 49, Ex. 66. FPL did not withhold any data. Contrary to OPC's suggestions, all stakeholders were equally informed. Armed with the required information, the SFWMD never decided that there was a need to require FPL to take any action until 2013, at which point FPL promptly and fully cooperated with the SFWMD and other agencies to identify and implement appropriate actions. Tr. 286-89, 370.

OPC's claim that FPL was required to "proactively take action" to find other engineering measures with respect to operation of the CCS is wrong, and could not have been accomplished unilaterally by FPL under the agreements with SFWMD. OPC br. 9-10. The SFWMD Agreement, cited by OPC for this proposition, actually provides the exact opposite: decisions regarding CCS operational changes could be made only by the agency, not FPL. In fact, the 1974 Agreement mandates that FPL *not* alter the CCS without prior agency approval. OPC Appx. 40, Ex. 71, p. 2, ¶A(3). Likewise, the Fourth Supplemental Agreement states expressly that SFWMD—not FPL—would determine whether the water quality objectives were being achieved. If SFWMD concluded that the objectives were not met, FPL would then be required

to revise the operating criteria for the interceptor ditch "upon written instructions of SFWMD." OPC Appx. 52, Ex. 47, p. 2, ¶ A(2). Evaluation and implementation of other measures could be made only if "in the sole judgment of [SFWMD] it was determined that the operational changes were not adequate to achieve the objectives." *Id*. at ¶¶ A2-A3. The Fifth Supplemental Agreement, issued in 2009, again provides that the SFWMD in its sole discretion would determine whether the interceptor ditch was not effective or the objectives were otherwise not being achieved.[11] OPC Appx. 110, Ex. 5, p. 6, ¶ D(2).

It was only after review and analysis of the expanded monitoring plan data in 2013 that the SFWMD was able to determine that, in its judgment, FPL needed to begin consultations to identify measures to "mitigate, abate or remediate" the effects of the CCS. OPC Appx. 156, Ex. 7. The expanded monitoring enabled the agencies to ascertain the extent to which the hypersaline water associated with the CCS was impacting the groundwater below and adjacent to the CCS. *Id*.

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[11] OPC also points to page 10 of the 2005 NPDES permit issued by the FDEP. That permit contains a "General Condition" that FPL take "all reasonable steps" to minimize or prevent any discharge that has a reasonable likelihood of affecting the environment. The permit also provides, however, that unauthorized deviations from approved permit specifications constitutes grounds for an enforcement action.

B. The Costs Associated With Implementing the Consent Actions Are Prudent and Reasonable.

As a threshold matter regarding the costs associated with the Consent Actions, the Commission recognized that its role is economic regulation, not "to determine if the requirements of the CO, CA, or CAA are appropriate or will be effective at mitigating saltwater intrusion from the CCS." 2017 ECRC Order, p. 14, FPL Appx. 17. That role is left to the agencies with expertise in this area: the SFWMD, FDEP and DERM.

FPL presented substantial evidence demonstrating that the process that ultimately resulted in the Consent Actions was a collaborative effort between FPL and the SFWMD, FDEP, and DERM. Tr. 286, 364. The course of Consent Actions that includes the RWS was selected after the evaluation of a number of credible alternatives with a range of outcomes and impacts. Tr. 717. Moreover, the specific design of the RWS and the models supporting that design were reviewed in detail and approved by DERM with technical assistance from Miami-Dade County Water and Sewer Department and the University of Florida's School of Civil and Coastal Engineering. OPC Appx. 185, Ex. 10, p. 14. The Consent Actions thus reflect the collective judgment of the agencies with the expertise and statutory mandate to oversee the CCS and protect the surrounding waters.

OPC argues that the experts did not agree on the future success of the remediation efforts proposed by FPL. OPC br. 18. But OPC did not and cannot

argue that evidence supporting the selected course of action was lacking. As with all remediation efforts, modifications might be required as the project progresses. Mr. Sole testified that an iterative process is "normal" in the "world of contamination assessment and remediation." Tr. 408-09, 717. Rather than letting the perfect stand in the way of good, the agencies and FPL struck an appropriate and practical balance between the need to begin Consent Actions promptly and the desire to optimize system performance over time. Tr. 717. The opportunity to make future improvements in no way undermines the prudence of moving forward today, based on the best information currently available.

C. A Notice of Violation Does Not Constitute Imprudence *Per Se.*

With no substantive response to the abundance of competent, substantial evidence supporting the prudence of FPL's actions, OPC resorts to suggesting that the violations asserted by the FDEP and DERM constitute "imprudence *per se*." This Court has had occasion to evaluate a similar concept, and concluded long ago that a violation notice is no substitute for an independent factual determination by the Commission regarding prudence. *Florida Power Corp. v. Public Service Commission*, 424 So. 2d 745 (Fla. 1982). This is particularly true when, as here, the violation involves strict liability rather than fault with FPL's decision-making.

In *Florida Power Corp.*, this Court reversed a Commission order denying cost recovery that was based substantially on a notice of violation issued by another

regulatory agency. *Id.* at 747. In that case, Florida Power tested a fuel transfer device by lowering a 2000-pound test weight into the device and subsequently lifting the weight with a "fish hook." The test weight dropped and damaged the fuel assembly, resulting in a 55-day outage. Pointing to findings contained in a notice of violation issued by the Nuclear Regulatory Commission ("NRC"), the Commission ruled that Florida Power had poor management policies and procedures in place and was therefore responsible for the resulting fuel costs. *Id.* On appeal, this Court concluded that the Commission relied "excessively" on the NRC's notice of violation, which "should not serve as the primary source of evidence in a fault-finding determination." *Id.* The Court emphasized that the notice was concerned solely with safety-related matters and involved a very different risk and much higher standard of care than was applicable to the Commission's cost-recovery determination. *Id.*

OPC's attempt to use the DERM and FDEP notices of violation as conclusive evidence of imprudence here is likewise improper, because the asserted environmental violations are concerned solely with whether salinity reached a certain level in the waters surrounding the CCS, and whether the CCS contributed to that level, not on FPL's decision-making. Nothing in the notices of violation attributes negligence or imprudence to FPL. To the contrary, as described above, the very same agencies that issued the notices explicitly recognized FPL's history of

compliance. OPC Appx. 276, 51; Exs. 13, p. 5, 47, p.1. There is not a single reference in any SFWMD, FDEP or DERM document to a poor management decision or failed operating commitment on FPL's part.

Additionally, the laws or regulations FPL allegedly violated do not involve the same standard of care as does a prudence determination. Akin to a negligence standard, prudence concerns what a reasonable utility would have done in light of the conditions and circumstances that were known or should have been known at the time. By contrast, the alleged violations in question result from strict liability laws. *See* § 403.161(a), Fla. Stat. ("It shall be a violation of this chapter, and it shall be prohibited for any person . . . [t]o cause pollution, except as otherwise provided in this chapter . . . ."). FPL operated the CCS and the related interceptor ditch in full compliance with all applicable operational requirements, and nonetheless an unintended consequence occurred, which resulted in a violation. Tr. 414, 426. Under fundamental principles of Florida law, a strict liability violation does not establish the sort of behavior that could constitute negligence or imprudence. *See West v. Caterpillar*, 336 So. 2d 80, 90 (1976) (holding that strict liability "remove[s] the burden . . . of proving specific acts of negligence"); *see also* Tr. 422-23 (Mr. Sole explaining that it is not uncommon for an environmental violation to occur even if the owner operates a facility in compliance with all applicable permits).

D. The Commission's Decision Will Not Foster Imprudent Management.

OPC suggests that allowing ECRC recovery for remediation costs when a utility has been cited for a violation would lead to a construct in which "utilities would not feel obligated to comply with environmental regulations." OPC br. 31-32. According to OPC, "there would be no limit to the level of negligence or misfeasance ratepayers would be forced to subsidize . . . and would nullify any obligation by management to conduct business in a responsible manner." OPC br. 50. There is, however, no substance to this parade of horribles. Both the ECR Statute and the Commission's policy implementing it contain absolute protections against any such possibilities by requiring prudence as a prerequisite to recovery.

The ECR Statute expressly limits recovery to "prudently incurred environmental compliance costs," and the Commission's policy implements that requirement. § 366.8255(2), Fla. Stat.; 2018 ECRC Order p. 6-7. A utility that flouts its obligations could never satisfy this standard. No reasonable utility manager would flagrantly disregard its permit obligations. Indeed, management decisions of that nature could have consequences far greater than remediation costs: the utility could be subject to penalties and, ultimately, termination of the permit which could require plant closure. Here, by contrast, the record evidence demonstrates that FPL responsibly operated the CCS, followed operational rules and guidelines designed to protect the groundwater, and worked closely with the FDEP, SFWMD and DERM at all times to prevent saltwater intrusion. There is no contrary evidence.

E. The Commission Did Not Deviate from Its Policy on ECRC Recovery.

OPC asserts that the Commission deviated from its prior policy by authorizing ECRC recovery for activities associated with a notice of violation, but it cannot cite a single Commission statement establishing a bar to recovery on that basis. None exists. In contrast, the Commission's order approving ECRC recovery for the Consent Actions identifies multiple instances in which it has approved recovery of costs for remediation requirements imposed by consent decrees or orders—agreements with agencies to resolve alleged violations of environmental regulations.

In 2007, for example, the Commission approved Tampa Electric Company's petition for ECRC recovery of costs associated with three construction projects required by a consent decree that settled litigation between EPA and Tampa Electric regarding its alleged non-compliance with the Clean Air Act. FPL Appx. 193, *In re: Petition for Approval of New Environmental Program for Cost Recovery through Environmental Cost Recovery Clause by Tampa Electric Company*, Order No. PSC-07-0499-FOF-EI, Docket No. 050958-EI (F.P.S.C. June 11, 2007). Based on its review of the evidence, the Commission reasoned that the projects were required by and would not have been constructed but for the consent decree. OPC objected to Tampa Electric's request for ECRC recovery for various reasons, but none of its objections were grounded on the fact that the requirements arose from a consent

decree or that Tampa Electric purportedly violated the Clean Air Act. OPC did not appeal the Commission's order.

In 2000, the Commission approved Tampa Electric's request for ECRC recovery of costs associated with emissions monitoring and reduction programs required by settlement agreements between Tampa Electric and EPA and the FDEP following Clean Air Act lawsuits. FPL Appx. 173, *In re: Petition for approval of new environmental programs for cost recovery through the Environmental Cost Recovery Clause by Tampa Electric Company*, Order No. PSC-00-2104-PAA-EI, Docket No. 001186-EI (F.P.S.C. Nov. 6, 2000). OPC did not protest the Commission's decision allowing ECRC recovery for costs incurred under those settlement agreements.

In 2005, the Commission approved a stipulation regarding Progress Energy Florida's request for recovery of costs to assess groundwater arsenic levels and develop a groundwater remediation plan at its power generation facilities. FPL Appx. 180, *In re: Environmental Cost Recovery Clause*, Order No. PSC-05-1251-FOF-EI, Docket No. 050007-EI (F.P.S.C. Dec. 22, 2005). OPC lodged no objection to the stipulation. Nothing in this order indicates that the Commission's approval was premised on a conclusion that Progress Energy had not been cited for a violation.

The Commission did not cite to *In re: Environmental Cost Recovery Clause*, Order No. PSC-07-0922-FOF-EI, Docket No. 070007-EI (F.P.S.C. Nov. 16, 2007)

(FPL Appx. 203) (as amended by Order No. PSC-07-0922A-FOF-EI (F.P.S.C. Dec. 21, 2007)), but it, too, demonstrates that approval of cost recovery for the Consent Actions is consistent with prior decisions. In that order, the Commission approved a stipulation allowing FPL to recover prudently incurred costs associated with its Martin Plant Drinking Water System Compliance Project. There, FPL and the FDEP entered a consent order that required FPL to implement a corrective action plan at its Martin Plant, which was designed to determine the most cost-effective method to achieve compliance with drinking water system requirements. Again, OPC asserted no objection to ECRC recovery for costs incurred in response to that consent order.

OPC attempts to distinguish each of these decisions on the grounds that the utilities had not been cited or had not admitted to violations, or that the projects involved reductions in future emissions rather than clean-up. But nothing on the face of the orders expresses a policy that ECRC recovery is unavailable where the utility was cited for a violation notwithstanding its prudent actions. *See Florida Power & Light Co. v. State*, 693 So. 2d 1025, 1027-28 (Fla. 1st DCA 1997) (agency policy statements must be express).

III. THE CONSENT ACTIONS WERE AN ANTICIPATED STEP IN THE APPROVED COOLING CANAL PROJECT.

OPC's final, alternative argument is that the Commission inappropriately treated the Consent Actions as an anticipated step in the Cooling Canal Project—which was approved for ECRC recovery in 2009, after a stipulation by numerous

parties including OPC—rather than a new project requiring independent ECRC review by the Commission. At the outset, OPC fails to explain how this conclusion affected the Commission's decision. Below, OPC argued that treating the Consent Actions as part of the Cooling Canal Project would allow FPL to "avoid being held to its required burden" of proving that the costs were prudent and recoverable under the ECRC. R. 2109. The Commission's Order, however, plainly held FPL to that burden and expressly conducted "a full prudence determination" of the costs. 2017 ECRC Order at 12, FPL Appx. 15.

Regardless, the Commission correctly concluded that the Consent Actions were an anticipated step in the Cooling Canal Project. First, FPL was express and direct in describing the scope of the Cooling Canal Project when it was first proposed for Commission approval. OPC's claim that the Project was limited to the impacts of the Uprate Project (as opposed to the impacts of the Turkey Point Plant overall) disregards unambiguous language contained in the Commission's 2009 Order (FPL Appx. 83, Ex. 74). Based on FPL's testimony and exhibits in the 2009 ECRC proceeding, the Commission acknowledged that:

> FPL has been conducting certain monitoring activities at the [Turkey Point] Plant for some time, and FPL indicates that the DEP and water management district have been concerned with adverse environmental impacts from the CCS *beyond the specific impacts that may result from the nuclear uprate*.

FPL Appx. 83, Ex. 74, p. 12. (emphasis added). In concluding that the Cooling Canal Project costs are recoverable through ECRC, the order further states:

> Because the costs for the [Cooling Canal] Project are predominantly O&M expenses that will continue for an uncertain duration, and because the water-quality issues the Project is being undertaken to address *relate to operation of the Turkey Point plant as a whole and not just the [Turkey Point] Nuclear Uprate*, FPL should be allowed to recover the costs associated with the [Cooling Canal] Project through the ECRC.

Id. at p. 13 (emphasis added).

Second, FPL was equally transparent regarding the potential for the Cooling Canal Project to require steps beyond just monitoring, ultimately including Consent Actions. The testimony and exhibits described the breadth of FPL's obligations under Conditions IX and X. FPL witness Randall LaBauve explained at the Project's inception in 2009 that the next steps in the Project could include mitigation and abatement activities if environmental agencies deemed them necessary. The terms of Condition X, entered as an exhibit in that proceeding, provide that the FDEP, in consultation with SFWMD and DERM, could determine that the monitoring data indicate the need for "additional measures" to evaluate or to abate the CCS's environmental impacts. FPL fully apprised the Commission and the parties that the potential additional measures included:

- mitigation measures . . . which may include methods and features to reduce and mitigate salinity increases in groundwater . . . .;

- operational changes in the cooling canal system to reduce any such impacts; and/or
- other measures to abate impacts.

FPL Appx. 107, Ex. 79, 2009 Testimony of R. LaBauve, p. 12; *see also* OPC Appx. 141, Ex. 6, p. 22 ¶ X(D).

The words are clear. From its inception, the status and future expectations of the Project could not have been clearer. Neither OPC nor any other party raised any issues at any time from 2009 through 2014.[12] OPC's position regarding the authorized scope of the Project is not well taken.

CONCLUSION

The plain text of the ECR Statute authorizes recovery for costs associated with the Consent Actions, because they were prudently incurred to comply with orders designed to protect the environment. The Commission examined FPL's actions both before and after the violations here, and its determination that FPL acted prudently is supported by an abundance of competent, substantial evidence. Accordingly, the Commission's decision should be affirmed.

Dated: July 25, 2018

Respectfully submitted,

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[12] Moreover, because this project was approved for ECRC Recovery in 2009, FPL has never included these costs in any subsequent test year for base rates. The Commission explained that "[n]o party argues, and there is no substantial evidence in the record, that the Cooling Canal Project Disputed Costs are being recovered through base rates or an alternate clause mechanism." (R. 2197; FPL Appx. 11).

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I HEREBY CERTIFY that a true copy and correct copy of the foregoing was served electronically on July 25, 2018:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Rule 9.210(a)(2), Florida Rules of Appellate Procedure, that this brief was prepared using Times New Roman 14-point typeface.

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