IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, ETC.,
Appellant(s),

Case No.: SC18-213
Lower Tribunal No. 20180007-EI

vs.

JULIE IMANUEL BROWN, ETC., ET AL.
Appellee(s).

CITIZENS' CORRECTED INITIAL BRIEF

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PRELIMINARY STATEMENT

Within this Initial Brief, the Appellants will be identified also as "Citizens," "Public Counsel," or "OPC." OPC will refer to the order being appealed, *In re: Environmental Cost Recovery Clause*, Order No. PSC-2018-0014-FOF-EI, as the *"2018 ECRC Order*." OPC will refer to the Florida Public Service Commission as the "PSC" or the "Commission." OPC will refer to the active parties in the contested portion of the proceedings below as follows: 1) Florida Power & Light Company as "FPL" or "Company;" 2) Florida Industrial Power Users Group as "FIPUG;" and 3) The Southern Alliance For Clean Energy as "SACE." Commission Orders available on the Commission's website will be cited as Order No. PSC-XXXX-XXXX, and, where available, a citation to the Commission reporter as XX F.P.S.C. X:XX (year), which will be included along with the order number. The 2018 ECRC Order and certain hearing exhibits central to the issue on appeal are included in the Appendix. The PSC's annual Environmental Cost Recovery Clause rate recovery proceeding will be referred to as the "ECRC" or "ECRC Docket." The hearing in which the ECRC rates were established in the case below will be referred to as the "ECRC Hearing." The Florida Departmental of Environmental Protection will be referred to as "DEP." The Miami-Dade County Department of Regulatory and Economic Resources, Division of Environmental Resources Management will be referred to as "DERM."

The cost recovery project for pollution removal at the center of the issue on appeal will be referred to as the "Aquifer Repair Project." The physical contamination of the Biscayne Aquifer that is the subject of the Aquifer Repair Project and shown in Figure 1, *infra*, is referred to as the "hypersaline plume."

The DEP Consent Order dated April 26, 2016, at Appendix, pp. 272-298 will be referred to as the "CO." The DERM Consent Agreement dated October 7, 2015, at Appendix, pp. 171-194 will be referred to as the "CA." The amended CA dated August 15, 2016, at Appendix, 299-302 will be referred to as the "CAA." OPC will refer to evidence in the record on appeal in the index to the record prepared by the Commission Clerk as "(R., p.__)." The portions of the hearing transcript identified in Attachment One of the index will be referred to as "(TR V. __, p.__)." Hearing exhibits identified in Attachment Two of the index will be referred to as "(Ex.__, p.__)." Florida Statutes will be referred to as "Fla. Stat." and will refer to the 2017 version of the statute, unless otherwise noted. The Florida Administrative Code will be referred to as "F.A.C." The Florida Administrative Procedure Act will be abbreviated as "APA." Pages in the attached Appendix have been Bates numbered and will be referenced as "(Appendix, p.__)."

STATEMENT OF THE CASE

The Citizens of Florida request the Court set aside the Commission Order below, which authorized FPL to recover costs for cleaning up past contamination of

which FPL's own admitted violations of law were a major contributing cause. The cost recovery at issue was improperly approved under a statute which explicitly reserves cost recovery to projects designed to protect the environment; therefore, the Commission erred in applying the statute to an activity not authorized by the Legislature. The simple fact is the activities for which FPL received cost recovery were for the cleanup of severe, unlawful pollution long after the damage was done and years after the opportunity to prevent the harm, thus to "protect" the environment, had passed. The remediation was specifically designed to clean up after many chances for protection had failed; therefore, recovery for the project was not authorized by the controlling statute.

Each year, the Commission assigns a docket number to an on-going case to review and allow cost-recovery of statutorily-defined environmental compliance costs by Florida's investor-owned electric utilities. In 2016 and 2017, the ECRC Docket numbers were 20160007-EI, and 20170007-EI, respectively, (R., pp. 78-79, 820-21), and the 2018 ECRC Docket number is 20180007-EI (R., pp. 2,164-65). Citizens, through OPC, reaffirmed party status in each of these ECRC Dockets. (R., pp. 93-95, 839-41, 2,185-87).[1]

[1] The other Intervenors who actively participated in FPL's Aquifer Repair Project issue were FIPUG and SACE. (R., pp. 825-27; 875-79). Commission staff did not participate as a full party.

On April 1, 2016, FPL filed a petition in the ECRC docket in which it requested approval of various environmental compliance projects, including the Turkey Point Cooling Canal Monitoring Plan ("TPCCMP" or "2009 Monitoring Plan") and portions of the new Aquifer Repair Project. FPL had been issued multiple notices of violation for the operation of its Turkey Point Cooling Canal System ("CCS"); and these violations prompted FPL to enter the CA and CO, which explicitly required "remediation" of hypersaline plume contamination which leaked from FPL's CCS into the groundwater of the state and the Biscayne Aquifer.

On September 6, 2016, FPL filed its Petition for Approval of Environmental Cost Recovery Factors for January through December 2017 with testimony describing the CO and CA compliance costs totaling $206 million over the period 2016 – 2026, with $106 million of those costs applicable to 2016 - 2017. (Ex. 73, pp. 5-6). The updated 2016 costs for the CCS remediation included $17.5 million of expense for the salt contamination clean-up activities. FPL projected the total costs (expense and capital) in 2017 associated with cleanup of the waters around the CCS to be $75.6 million, including $38 million for the salt contamination clean-up. (*Id*.).[2]

[2] Total costs for the Aquifer Repair Project ultimately authorized for recovery in the *2018 ECRC Order* from retail customers for 2017-2018 are $63,999,797 (Ex. 67; TR V. 2, pp. 265-266) with the unrecovered plant balance of $67,143,028 to be recovered over the remaining life of the wells. (Ex. 24, p. 46, line 5 (December column)).

The Intervenors and FPL agreed to, and the Commission approved, a stipulation which deferred the final determination on the CCS issues until the 2017 ECRC docket.[3] (R., p. 815). Discovery on the CCS issues continued as the ECRC docket "rolled over" into 2017. (R., pp. 818-819).

On April 3, 2017, FPL filed its Petition for Approval of Environmental Cost Recovery True-up for the period ending December 2016. (R., pp. 882-967). On July 19, 2017, FPL filed its Petition for Approval of Environmental Cost Recovery Actual/Estimated True-up (with accompanying testimony) for the year 2017. (R., pp. 1,013-1,448). On August 11, 2017, FPL filed its Petition for Approval of Environmental Cost Recovery Factors for the Period January 2018 through December 2018 with accompanying testimony. The Citizens filed their testimony on August 23, 2017. (R., pp. 1,597-1,707).[4] FPL filed rebuttal testimony on September 25, 2017. (R., pp. 1,739-1,839). The Commission held the ECRC hearing on October 25-26, 2017.[5]

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[3] Temporary recovery of the submitted costs were allowed, subject to full refund, since any prudence or reasonableness determination on the 2016 and 2017 amounts and the reasonableness for the overall project consideration was deferred until 2017.

[4] Citizens filed errata on September 13, 2017, and Notice of Substitution of Exhibit SP-2 to its testimony on September 15, 2017. (R., pp. 1,708-1,710; 1,721-1,734).

[5] The hearing was scheduled for a three-day period. On the first day, the parties made opening statements and one witness testified in the Aquifer Repair Project portion of the docket. On day two, the hearing commenced on October 26th at 8:30 a.m. and

On December 12, 2017, the Commission found that FPL's proposal met the requirements of the ECRC statute and Commission precedent,[6] and voted to approve FPL's request for cost recovery. (R., pp. 2,150-2,152). The Commission issued the *2018 ECRC Order* approving $64 million in cost recovery for the Aquifer Repair Project on January 5, 2018. The Commission incorrectly labeled what are the overwhelmingly pollution clean-up costs of the Aquifer Repair Project as something called "Monitoring Plan Disputed Costs" throughout the 2018 ECRC Order. Specifically they used the naming device to describe "[c]ollectively, costs associated with the CA, CAA and CO." (R., pp. 2,190-2,221; Appendix, p. 5-36). Despite the history of violations which prompted FPL to enter the CO and CA, the Commission erroneously found that the consent documents constituted regulatory "requirements" eligible for recovery under § 366.8255, Fla. Stat. ("ECRC Statute"), and issued an order requiring FPL's customers to bail out FPL for the decades that the company

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adjourned 17 hours later, after midnight on October 27th. The hearing time reserved for the third day was not used, except for the first 39 minutes of that day when the hearing was adjourned at 12:39 a.m. (See, TR V. 6, pp. 959-967 where the Chair effectively cut off fellow Commissioner questioning as the hearing room had to be closed at 1 a.m.)

[6] The Citizens dispute the Commission's statement in the *2018 ECRC Order* that:

> No party argues, and there is no substantial evidence in the record, that the Monitoring Plan Disputed Costs were triggered prior to FPL's last test year upon which rates are based.

The Commission is mistaken because, regardless of the action or inaction of any party, the cost-triggering effect of either the CO or CA was well in advance of the 2017 test year of the case that was settled in September 2016.

allowed the hypersaline plume to spread and build up, and which, in turn, led to FPL's pollution of the Biscayne Aquifer via the hypersaline plume leakage from the CCS. The Commission did not address the Citizens' objection that Florida Statutes did not authorize recovery under the limitations imposed by the phrase "designed to protect the environment."[7] This appeal timely followed.

This Court has mandatory jurisdiction because the Final Order relates to the rates of a public utility providing electric service. Art. V, § 3(b)(2), Fla. Const. See also §§ 350.128(1) and 366.10, Fla. Stat.

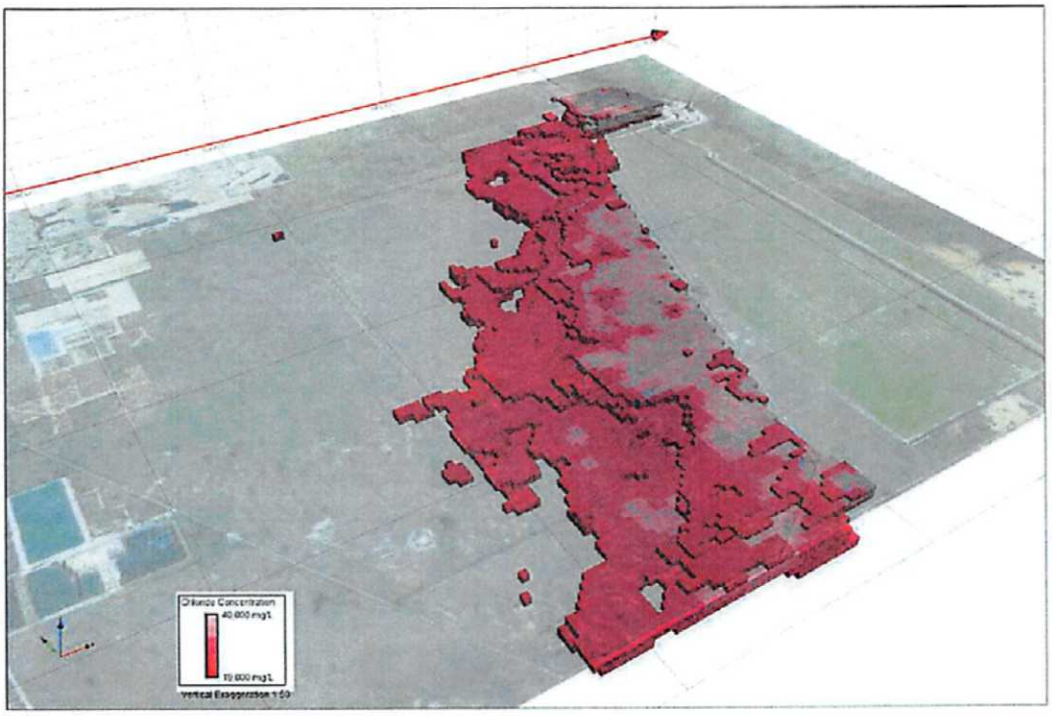
STATEMENT OF THE FACTS

FPL seeks customer reimbursement through the ECRC for cleaning up the pollution caused by its operation of its 6,000 acre facility containing 168 miles of cooling canals as shown here in Figure 1:[8]

[7] An expression of this disregard was foretold shortly before adjournment of the hearing (TR V. 6, p. 966, lines 4-8). In its post hearing brief, OPC reiterated its objection that the statute did not allow recovery of the costs agreed to by FPL in the CO where it admitted to unlawfully causing the very pollution that it was seeking cost recovery to clean up. (R., pp. 2085; 2088-2100).

[8] Figure 1 shows a state-of-the-art Continuous Surface Electromagnetic Mapping ("CSEM") model depicting the extent of the pollution at issue, as of 2016. This is an exhibit prepared on behalf of FPL and admitted at hearing to show the migratory extent of hypersaline water from the CCS unlawfully in the aquifer west and between a mile and a half to three miles outside of the permissible area – which is the boundary of the CCS. (TR V. 3, p. 341; 343; Exs. 46 (p. 17) and 69)). The scale, configuration and orientation of the CCS relative to the purple mass shown in Figure 1 can be seen more clearly at (Ex. 70, pp. 17-18).

Demonstrative 14b



Prepared for:
Florida Power & Light

Subject Property:
Turkey Point Nuclear Generating Station
Homestead, Florida

ENERCON

Figure 14: 3D View of AEM Chloride Concentrations Greater than 19,000 mg/L (View to the Northeast)
Reproduced from: "Report on Advanced Processing and Inversion of AEM Survey Data and Derived Chloride Concentrations near the TurkeyPoint Power Plant, Southern Florida. Aqua Geo Frameworks, Inc. 2016"

Prepared by: E. Dare; April 28, 2016

Demonstrative 14. Enercon, 2016, Figure 14: 3D View of AEM Chloride Concentrations Greater than 19,000 mg/L (View to the Northeast)

FPL first obtained a permit from the State of Florida to operate the CCS in 1978, even though it had operated the facility under an agreement with the South Florida Water Management District (SFWMD)[9] since 1972. (Ex. 57, Int. Resp. 12).[10] The U.S. Nuclear Regulatory Commission ("NRC") amended the license for Turkey Point Units 3 & 4 to prohibit FPL from discharging its heated wastewater into Biscayne Bay. In 1974, FPL made the CCS a "closed loop" system, meaning the wastewater would be confined within the unlined canals of the CCS instead of being discharged directly into the surface waters of the state. (Ex. 58, Int. Resp. 32). The unlined canals meant the CCS discharged saline and hypersaline water, through seepage, directly into the Biscayne Aquifer located below. (Ex. 11, p. 38; Appendix, p. 232).

From 1972 forward, FPL was under a continuous obligation to ensure the saline water from the CCS (which contained higher concentrations of saline than surrounding waters) did not contaminate the waters outside of the CCS. As a condition of its DEP permits and its agreements with the SFWMD, FPL was required to monitor the CCS and surrounding area for saltwater intrusion outside the

[9] The Term "SFWMD" includes its predecessor, the Central and Southern Flood Control District, with which FPL first entered an agreement regarding the CCS on February 2, 1972. (Ex. 71, p. 2; Appendix, p. 39).

[10] FPL constructed the CCS in 1971 pursuant to permits issued by the Dept. of Pollution Control (DEP's predecessor) and Dade County. (Ex. 8, p. 1; App. p. 157).

boundary of the CCS, and to proactively take action to prevent the CCS' saltwater from intruding into and harming public waters. (Ex. 71, pp. 3-4 (Para. A (6); Ex. 47, pp. 2-4; Ex. 5, pp. 1-2, 6-7; Ex. 4, p. 10 (2005 NPDES Permit); Appendix, pp. 40-41; 52-54, 89; 105-106; 110-111).

South Florida Water Management District Agreements

FPL first entered the successive and continuously binding series of agreements with the SFWMD in 1972; the original agreement has been amended and supplemented five times. From the start, the purpose of the original 1972 Agreement between FPL and the SFWMD was to prevent CCS-originated saltwater from degrading the groundwater and other waters of the state, principally located in Miami-Dade County. To that end, the agreement required FPL to conduct groundwater monitoring, and specifically provided the procedures by which FPL must propose changes to both the monitoring system and the cooling canals, when necessary, to meet FPL's obligation to prevent the CCS from contaminating public waters. From 1983 until at least 2009, FPL was obligated under Paragraph C.1 of the 1983 (Fourth) Agreement to follow this provision:

> FPL shall monitor the cooling water system and the interceptor ditch facilities to ensure that the objective specified in Paragraph A.1 is met.

Paragraph A.1 reads:

> FPL and DISTRICT agree that the purpose of the system is to restrict movement of saline water from the cooling water system westward of

> Levee 31E adjacent to the cooling water system to those amounts which would occur without the existence of the cooling water system.

(Ex. 47, pp. 2, 4; Appendix, pp. 52, 54). This was a standalone obligation independent of any directions initiated by the SFWMD.

The Fifth Supplemental Agreement between the SFWMD and FPL, dated October 16, 2009, documents that, since 1972, "FPL has had continuing obligations to monitor the impacts of the cooling canal system on the water resources of the District." (Ex. 5, pp. 1-2; Appendix, p.105-106). Consistent with the previous agreements,[11] the Fifth Supplemental Agreement further obligated FPL to implement modifications to the CCS to prevent contamination of the Biscayne Aquifer and waters outside the CCS' boundaries. (*Id*.). The Fifth Supplemental Agreement, at Whereas 5, states the following:

> FPL has continuing obligations to monitor for impacts of the cooling canal system on the water resources of the District in general and on the District's facilities and operations in particular and to implement new

[11] For example, under the Fourth Supplemental Agreement, dated July 15, 1983, FPL was always subject to the obligation to "promptly take action to find and implement other feasible engineering measures to achieve the objective" of restricting the movement of saline water from the CCS." (Ex. 47, pp. 2-3; Appendix, pp. 52-53). When contrasted with the standalone obligation, contained in Paragraphs C.1 and A.1, *supra*, of the same agreement, to ensure no harm, it is clear the District did not relieve or absolve FPL from its own obligation to "ensure" protection of the environment. In addition to outlining FPL's obligation, the District was also maintaining the right to compel FPL to take action if harm needed to be halted. See also, Whereas 6 in the Fifth Supplemental Agreement noting FPL's obligation since at least 1983 of independently "determining" if CCS saline water was moving westward outside the CCS.

operating criteria and/or engineering measures if the objectives of the 1983 Agreement are not being met.

Florida Department of Environmental Protection Permits

The first wastewater "No Discharge" National Pollutant Discharge Elimination System ("NPDES") permit for the CCS was issued by the U.S. Environmental Protection Agency ("EPA") in 1978. Subsequent NPDES permits, including the current one were issued by DEP. (Ex. 4, p. 1; Appendix, p. 80; Ex. 57, Int. Resp. 12).[12] The permit outlined the specific and general conditions regarding the wastewater FPL was allowed to release into the CCS, listed FPL's monitoring obligations, and established expectations for any impacts that the water from the CCS should have on the Biscayne Aquifer and Biscayne Bay. (Ex. 4, pp. 4-17; Appendix, pp. 83-96). Additionally, the permit prohibited FPL from allowing its discharges to cause a violation of the minimum criteria for groundwater specified in Rules 62-520.400 and 62-520.430, F.A.C. (Ex. 4, p. 10; Appendix, pp. 89), and specifically stated "[a]ny permit noncompliance constitutes a violation of Chapter 403, F.S., and is grounds for enforcement action." (Ex. 4, p. 13; Appendix, pp. 92).

[12] The 2005 NPDES permit expired on May 5, 2010; however, FPL applied for renewal prior to expiration which allows the CCS to remain in operation under the expired permit. At the time of the CO and CA execution, FPL was operating under the expired permits and was still doing so under administrative continuance at the time of the Commission hearing as provided for in the permit under Section VII, C.3. (Ex. 4, p. 12; Appendix, p. 91).

On October 29, 2008, FPL obtained authorization to increase the generating capacity at its Turkey Point Nuclear Units 3 & 4 ("the Uprate").[13] As a condition of this authorization, DEP required FPL to enhance its groundwater monitoring in order to determine whether the Uprate affected the CCS and surrounding waters.

In the 2009 ECRC proceeding, FPL requested the PSC to approve recovery for the enhanced monitoring required for the Uprate; FPL named this project the Turkey Point Cooling Canal Monitoring Plan (referred to by the Commission as the "TP-CCMP" and referred to herein as the "2009 Monitoring Plan"). *In re: Environmental Recovery Clause*, Order No. PSC-2009-0759-FOF-EI, pp. 10-11; 09 F.P.S.C. 11:101*("2009 Monitoring Plan Order")*. The stipulation approved by the Commission specifically referenced that the Conditions of Certification issued by the DEP for the Uprate required a monitoring plan for the CCS and surrounding area, and further stated that "[t]he purpose of the project is to conduct **water, groundwater and water quality monitoring, and ecological monitoring** to assess the potential impacts of the CCS." (emphasis added). The Commission concluded that "the TP-CCMP Project is tied to the Uprate construction requirements …." *Id.* at 11.

[13] Site certification for Units 3 & 4 occurred on October 29, 2008. (Ex. 6, p. 40; Appendix, p. 155).

The DEP permit and SFWMD agreements always prohibited FPL from polluting the waters of the state via the CCS' saline water. FPL was never prohibited from seeking permission to modify the CCS's operations to prevent harm. (TR V. 3, p. 415). Regardless, FPL polluted the aquifer as shown in Figure 1, *supra*.[14]

FPL's Violation of Law and FPL's Admissions of the Violations

FPL has been obligated to monitor the CCS and adjacent, surrounding areas for saltwater contamination since 1972. Early on, FPL's own consultants advised it to track and report trend data over the decades. (TR V. 5, pp. 733-734; Ex. 70, pp.100-101). Under the SFWMD agreements, FPL generally submitted only a year's worth of information to regulators each year – either through summary reports without raw data or through the data itself in single year increments. A prime example is found in the 1983 (Fourth Supplemental) agreement. (Ex. 47, p. 19). A notable exception is seen in the 1990 reports submitted by FPL that show the 18 year increasing hypersalinity trend both inside and outside the CCS to be steadily increasing since the CCS began operating. (TR V. 5, pp. 623-624, 733-737, 739-741; Exs. 70 (pp. 100-101); 82 (pp. 5-8)). Despite this information, FPL failed to

[14] FPL witness Sole acknowledged the accuracy of the exhibit and the depiction of pollution shown in Figure 1. He also acknowledged that this is the type of survey that will be used to monitor and evaluate the effectiveness of FPL's efforts to repair the harm caused by its salt pollution. (TR V. 3, pp. 336-342; 406; 436). He further acknowledged the pollution depicted in this accurate representation developed over as many as 45 years. (TR V. 3, p. 422; 436).

take any action pursuant to its obligation under the SFWMD Agreements to undertake measures to "ensure that its objectives" were being met to not increase the salinity of the Aquifer above that which would exist but for the existence of the CCS. For the four decades that the CCS has operated, FPL was the main source of information for regulators as to the salinity of the CCS. (Ex. 71, pp. 3-4 (Para. A (6); Ex. 47, pp. 2-4; Ex. 5, pp.1-2, 6-7; TR V. 5, pp. 739-741; Appendix, pp. 40-41; 52-54; 105-106, 110-111).

On April 16, 2013, the SFWMD issued a letter to FPL seeking "consultation" because data contained in FPL's October 31, 2012 Comprehensive Pre-Uprate Report showed that hypersaline water from the CCS had moved westward into the water resources outside the plant's property boundaries. (Ex. 7; Appendix, p.156).

Consent Order and Consent Agreement

In December 2014, DEP issued an Administrative Order ("2014 AO") requiring FPL to reduce the salinity of the CCS. The 2014 AO further required FPL to implement a Salinity Management Plan to monitor and manage the salinity of the CCS. (R., pp. 1217-19). A hearing on this order was requested by objecting parties and a resulting recommended order was issued that contained three "Water Quality Violations" findings of fact (38 – 40):

> 38. At the final hearing, a DEP administrator testified that DEP was unable to identify a specific violation of state groundwater or surface water quality standards attributable to the CCS, but DEP's position cannot be reconciled with the undisputed evidence that the

> CCS has a groundwater discharge of hypersaline water that is contributing to saltwater intrusion. Florida Administrative Code Rule 62-520.400, entitled "Minimum Criteria for Ground Water," prohibits a discharge in concentrations that "impair the reasonable and beneficial use of adjacent waters."
>
> 39. Saltwater intrusion into the area west of the CCS is impairing the reasonable and beneficial use of adjacent G-II groundwater and, therefore, is a violation of the minimum criteria for groundwater in rule 62-520.400.
>
> 40. In addition, sodium levels detected in monitoring wells west of the CCS and beyond FPL's zone of discharge are many times greater than the applicable G-II groundwater standard for sodium. The preponderance of the evidence shows that the CCS is contributing to a violation of the sodium standard.

(Ex. 11, p. 43; Appendix, p.237).

FPL and the DEP filed exceptions to these findings of fact (38-40) but those exceptions were all denied by the Secretary in the Final Administrative Order ("Final AO") DEP issued on April 21, 2016 and the three findings were accepted. (TR V.3, pp. 357-362; Ex. 11, pp. 22; Appendix, pp. 216). In the Final AO, the factual findings remained undisturbed and thus were not superseded. (TR V. 3, pp. 363, 378).

On October 2, 2015, DERM issued a Notice of Violation and Orders for Corrective Action ("2015 NOV") to FPL for violating the County's water quality standards. (R., p. 1224; Appendix, p. 169). The County found the elevated chloride levels, or hypersalinity, constituted "water pollution," and that the conditions also violated the portion of the County Code that prohibited the discharge of pollution-level cooling water and industrial wastes into waters of the County. (*Id.*). On

October 6, 2015, FPL entered into the CA with DERM. (R., pp. 1226-1249; Appendix, p. 171).

On April 25, 2016, DEP issued a Notice of Violation and Orders for Corrective Action ("2016 NOV") to FPL, finding that FPL violated the F.A.C., its permit, and § 403.161(1)(b), Fla. Stat. (R., pp. 1313-1326; Appendix, pp. 258-271). DEP entered the following specific findings against FPL:

> (a) The CCS is the major contributing cause for the continuing westward movement of the saline water interface;
> (b) The CCS groundwater discharge of hypersaline water contributes to saltwater intrusion;
> (c) Rule 62-520.400, F.A.C. prohibits a discharge in concentrations that impair the reasonable and beneficial use of adjacent waters;
> (d) Saltwater intrusion into the area west of the CCS is impairing the reasonable and beneficial use of adjacent G-II groundwater and therefore **is a violation** of the minimum criteria for groundwater in rule 62-520.400, F.A.C.

(R., p. 1315; Appendix, p. 260) (emphasis added). The violation of the referenced Rule was also a violation of FPL's NPDES permit issued by the DEP. As stated in the 2016 NOV, the failure to comply with a DEP permit is a violation of Florida law, as outlined in § 403.161(1)(b), Fla. Stat. (R., pp. 1315-1316; Appendix, pp. 260-261).

On June 20, 2016, FPL entered into the CO with DEP which required FPL to remediate the hypersaline plume contamination. FPL acknowledged contributing to the drafting of the Consent Order. (TR V. 4, p. 522). The CO directed FPL to retract the hypersaline plume from public water and back into FPL's property boundaries.

(R., pp. 1333; Appendix, pp. 278). Similar to the CA, the remediation/retraction to which FPL agreed in the CO was to be accomplished by a Recovery Well System ("RWS") and a separate set of wells for "freshening" intended to reduce the salinity in the CCS through pumping 14 million gallons per day of low salinity water into the CCS. In turn, this would reduce the salinity of water moving into the aquifer. The RWS is a system of wells to be placed inside and outside the perimeter of the CCS and used in an attempt to pump or "suck" the salt contamination out of the Biscayne Aquifer and deposit it in a region below the Biscayne Aquifer via an underground injection well. (TR V. 5, pp. 780-782). The experts did not agree that either the RWS or the overall remediation effort would succeed as proposed by FPL. (TR V. 5, pp. 642, 648).

In the CO, the RWS remediation was referred to alternately as the "hypersaline plume remediation project operation" and the "Plume Extraction operation." (R., p. 1342; Appendix, p. 287).

The CO included a requirement for FPL to report to the DEP on its progress in "retracting" the hypersaline plume. (R., pp. 1336, 1341; Appendix, pp. 281, 286). The CO explicitly distinguished the retraction monitoring requirements from the previous monitoring requirements contained in the 2009 Monitoring Plan. (R., pp. 1340-1342 Appendix, pp. 286-289). In the instant case, the Commission conflated FPL's obligation to remove the hypersaline plume from public waters with the

remediation verification monitoring obligation in the CO. The Commission then proceeded to find the new, substantive Aquifer Repair Project to be part of the 2009 Monitoring Plan, rather than evaluating it as a separate project.

FPL entered into an amended agreement to the 2015 CA ("CAA")[15] on August 15, 2016, which required FPL to submit to DERM a restoration plan to correct the ammonia exceedance that was documented at the time, and to make physical modifications to "eliminate the contributions of CCS waters to the surface waters of Miami-Dade County." (R., pp. 1354-1357; Appendix, pp. 300-302).

FPL acknowledged multiple times that it violated the law. FPL witness Keith Ferguson referenced FPL's "violation of groundwater standards" in his testimony (R., p. 947; TR V. 4, p. 561). FPL witness Michael Sole admitted that a "water quality violation did occur" (TR V. 3, p. 419), that the 2016 violation "identified there has been harm," *Id.* at 421, and that FPL's operation of the CCS "has resulted in a hypersaline plume which is a violation of the minimum criteria under Florida law." *Id.* at 426. FPL admits it was the cause of the harm, as shown in Figure 1, through its operation of the CCS. (TR V. 3, pp. 336-337, 343, 353-354 and 371; Ex. 69). Moreover, FPL willingly entered into and signed the CO, which left the findings of the April 2016 Final AO undisturbed, and FPL did not deny them. (TR V. 3, pp.

[15] The CAA documented an exceedance of ammonia which constituted water pollution under the Code of Miami-Dade County. (R., p. 1355; Appendix, p. 300).

356-379). FPL admitted that it did not challenge the AO, and, in an effort to rationalize that fact, its witness stated "FPL was in the mode of, we need to get on with remediating." (TR V.3, p. 376). FPL acknowledged that the task at hand was remediation and not protection in the form of prevention.

SUMMARY OF ARGUMENT

The Commission departed from the essential requirements of the law by exceeding the authority granted by the ECRC statute when it authorized FPL to recover from customers the costs of cleaning up FPL's unlawful pollution, where the ECRC statute authorizes recovery of costs only where those costs were incurred in compliance with environmental regulations designed to protect the environment.

The ECRC Statute authorizes environmental cost recovery by investor-owned electric utilities from customers, and limits recovery to only those costs incurred to comply with environmental laws or regulations. The statute restricts the definition of environmental laws or regulations to provisions which are "designed to protect the environment." The plain meaning of the term "protect" is to prevent harm or to preserve from injury. As such, the statute generally applies to prospective, preventive measures, but not to measures taken to reverse or correct illegal environmental harm after a violation has been issued and effectively conceded.

For example, in previous ECRC decisions, the Commission has allowed recovery of costs for equipment used to allow plant emissions to be cleaner going forward; however, the Commission's orders do not reflect that it has allowed recovery of costs for removing any residue of damage caused by polluted air put into

the environment by a utility seeking ECRC recovery. When the Commission authorized FPL to recover costs for retracting a plume of hypersaline contamination back into its own property boundaries, after FPL admitted that it violated the law in allowing the hypersaline plume to expand beyond its boundaries, the Commission violated the express terms of the ECRC statute.

In addition to erroneously interpreting the ECRC's clear statutory requirements and judicial precedent, the Commission's order deviated from the Commission's own established policies. Generally, agency orders express official agency policy. *See*, *Southern States Utils. v. Florida PSC*, 714 So. 2d 1046, 1055 (Fla. 1st DCA 1998). When it allowed FPL to recover the costs of the hypersaline plume retraction through the ECRC, the Commission made two incongruous findings: first, that the Aquifer Repair Project was the result of a new environmental requirement, and second, that the retraction project was, at the same time, an extension of a previously approved water sampling and monitoring project. As such, the Commission essentially deemed the new Aquifer Repair Project pre-approved under a requirement from 2009. This narrative deviated from prior Commission orders, and thus Commission policy. Pursuant to the APA, § 120.68(7)(e)3, Fla. Stat., a court shall set aside agency action or remand a case when the agency's exercise of discretion was "[i]nconsistent with officially stated

agency policy or a prior agency practice, if deviation therefrom is not explained by the agency."

As discussed *infra*, to the extent the Commission has based cost recovery eligibility of the Aquifer Repair Project on the highly situational monitoring that is required for the remediation verification, i.e., to demonstrate prospective success (or failure) of the retraction and any needed revisions, the Commission erred. That post-violation status report monitoring is irrelevant to the ECRC's statutory threshold of preventing harm. That monitoring is no different than the farmer counting his sheep as they are returned to the barn one-by-one after they escaped and saying the counting helped to prevent the initial escape. Likewise, the fact is the retraction monitoring exists solely because of the Aquifer Repair Project, so it cannot in any way be deemed to be a component of the specific Uprate impact monitoring approved by the Commission in its 2009 Order. The Commission erred when it allowed FPL to disguise the Aquifer Repair Project as ECRC-eligible, simply because it contained a monitoring component, where said monitoring is so demonstrably different, both in its origin and purpose, from the 2009 Monitoring Project monitoring, that it cannot by any stretch be considered the same project. In the same way that simply being related to "the environment" does not make any and all projects eligible for ECRC recovery, it also holds that just because a project

contains a monitoring component, that fact alone does not make it part of the 2009 Monitoring Plan.

Even if the Court accepts FPL's claim that a portion of the project at issue is designed to eventually contain the hypersaline plume within the CCS (in addition to retracting the plume back into FPL's borders from outside, i.e., remediation), and thus might be eligible for some sort of recovery, it would only be a matter for consideration in a base rate case, not an ECRC recovery issue.[16]

Because the Commission's order exceeded the grant of authority in the ECRC statute, the Court must set the order aside as a departure from the essential requirements of law. An unexplained agency decision that is inconsistent with stated agency policy must be remanded. § 120.68(7)(e)3, Fla. Stat.

Therefore, Citizens ask the Court to: (1) set aside the Commission's Order; (2) direct the Commission to order FPL to refund to customers any amounts recovered to date for the Aquifer Repair Project; and (3) order customer rates to be reduced accordingly.

[16] FPL is operating under a base rate freeze for the calendar years 2013 – 2020, pursuant to settlement agreements approved in *In re: Petition for rate increase by Florida Power & Light Company,* Order No. PSC-16-0560-AS-EI, 16 F.P.S.C. 12:108 (2016) and *In re: Petition for increase in rates by Florida Power & Light Company,* Order No. PSC-13-0023-S-EI 13 F.P.S.C. 1:26 (2013).Whether the ineligible portion of the aquifer repair costs are or would be recoverable through base rates is a question which is not before this Court.

STANDARD OF REVIEW

Citizens assert the Commission made errors in statutory interpretation. The agency's interpretation of a statute is an issue of law subject to *de novo* review. § 120.68(7)(d), Fla. Stat.; *Sch. Bd. v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1232 (2009). The Citizens further assert the Commission deviated from its prior policies. The standard of review governing deviation from prior agency policy in contravention of § 120.68(7)(e)3, Fla. Stat. is whether the Commission departed from the essential requirements of law and the legislation controlling the issue. *Citizens of Fla. v. Graham*, 213 So. 3d 703, 711-713 (Fla. 2017)*("Citizens 2017").*

I. THE COMMISSION VIOLATED THE ESSENTIAL REQUIREMENTS OF LAW BY ALLOWING FPL TO RECOVER, VIA THE ECRC STATUTE, COSTS ASSOCIATED WITH A CO TO REMEDIATE PAST POLLUTION, WHERE THE CO REFLECTED THAT FPL VIOLATED THE LAW, AND THUS CONTRIBUTED TO THE CONTAMINATION WHICH THE ORDER REQUIRED TO BE CLEANED UP

A. *De Novo* Review

In the Order below, the Commission incorrectly construed the controlling statute. The standard for review of a state agency's interpretation of law is *de novo*. § 120.68(7)(d), Fla. Stat. (2017); *See, e.g.*, *Citizens of State v. Graham*, 191 So. 3d 897, 900 (Fla. 2016)("Citizens 2016").

B. The ECRC statute requires that, to qualify for recovery, costs must be incurred in taking prospective action to protect environmental resources from harm, not to pay for post-violation remediation.

The controlling law is the ECRC statute, which defines "environmental laws or regulations" to include "all federal, state, or local statutes, administrative regulations, orders, ordinances, resolutions, or other requirements that apply to electric utilities[17] *and are designed to protect the environment*." § 366.8255(1)(c), Fla. Stat. (emphasis added).

In the Order below, the Commission applied the ECRC statute to allow recovery of costs which were not designed to "protect" the environment, but instead were explicitly designed to clean up contamination *after* FPL was issued multiple notices of violations for its failure to protect the waters of the state. The Commission erred below when it did not adhere to the key term of the operative statute: "protect." Based on the Order below, the Commission appears to have either ignored the statute's definition, or impermissibly determined the term "protect" to have a more expansive meaning than the plain and ordinary definition of the term.

[17] FPL is both a "public utility" and an "electric utility" that is also investor-owned. The former term includes certain gas companies; however, the ECRC remedy is only available to the latter type of utilities whose rates are set by the Commission. See, §§ 366.02(1) and 366.8255(1)(a), Fla. Stat.

Any previous Commission orders which stretched or misapplied the plain language of the statute cannot be deemed to re-write the statute; therefore, such orders have no precedential value. *See In re: Environmental Cost Recovery Clause*, Order No. PSC-2014-0714 at 6, 14 F.P.S.C. 12:346 (2014) *("2014 ECRC Order")* (stating, "notwithstanding the orders relied upon by FPL, based upon the plain meaning of § 366.8255, F.S., we find that this Commission lacks the authority to extend ECRC cost recovery …"). Any prior incorrect Commission decisions regarding ECRC recovery must be repudiated, and cannot serve as binding precedent in support of the *2018 ECRC Order* under appeal.[18]

1. The ECRC Statute is clear, thus the ordinary meaning of the word "protect" controls

The term "protect" is not defined in the ECRC statute, and the Commission has not specifically construed the phrase "designed to protect the environment," as used in § 366.8255(1)(c), Fla. Stat. One of the most fundamental tenets of statutory construction is that, when a term is undefined by a clear statute, the term's "plain

[18] The Commission has erred before in its efforts to apply clause recovery principles, and has recognized that, despite its past overreach, some costs that are peripherally related to a clause should not be approved through the clause recovery process. *Citizens of Fla. v. Graham*, 213 So. 3d 703, 717 (Fla. 2017) (in a case regarding the Fuel Clause, observing that "the Commission correctly proceeded to repudiate" a prior decision in its explanation of *In re: Petition by Florida Power and Light Co. to Recover Scherer Unit 4 Turbine Upgrade Costs through the ECRC or FCRC*, Order No. PSC-11-0080, 11 F.P.S.C. 1:327 (2011)("Scherer Turbine").

and ordinary meaning" applies. *Verizon Fla. v. Jacobs*, 810 So. 2d 906 (Fla. 2002)(reversing the PSC where it failed to apply the ordinary meaning of words in an unambiguous statute).

The plain and ordinary meaning test can be satisfied by an examination of the term's dictionary definition *Green v. State*, 604 So. 2d 471, 473 (Fla. 1992)). The dictionary definition of "protect" means to keep from harm or injury, safeguard or prevent harm; the term does not mean to remediate, clean-up or restore to the pre-harm state. *See, e.g., Frandsden v. Fla. Dep't. of Env. Protection*, 2001 Fla. ENV LEXIS 292, *29 fn. 9, 1 ER FALR 73 (citing Webster's II New College Dictionary for the definition of "protect" as "to keep from harm, attack or injury: GUARD …"); *Merriam-Webster.com.*, https://www.merriam-webster.com/dictionary/protect (last visited May 1, 2018) (including the definition of protect as to secure or preserve against violation).

In the Order below, the Commission erroneously decided that the CO and CA were "new environmental regulations" constituting qualifying requirements under the ECRC statute. *2018 ECRC Order* at 8. However, the Commission failed to evaluate the full context of the requirements which gave rise to the costs at issue; thus, it did not determine whether the requirements it referenced qualified for ECRC recovery under the controlling statutory terms, specifically whether the requirements were "designed to protect the environment."

The Commission neglected to discern that the remediation requirement at issue (retraction of FPL's hypersaline plume from the Biscayne Aquifer) was not an "environmental law or regulation" as defined by § 366.8255(1)(c), Fla. Stat., because the remediation portions of the CO and CA were not designed to protect, but rather to repair or restore, a damaged environment under circumstances where the damage was caused by FPL's operations. Thus, the remediation costs related to the requirements at issue were not "environmental compliance costs" as the term is defined in the ECRC statute, and as such, do not qualify for ECRC recovery.

A well-established rule of statutory construction is that legislative intent must be determined primarily from the words the Legislature chose to enact in the statute; the reason is that the Legislature is assumed to know the meaning of the words it used in the statute, and to have expressed its intent by the use of the words found in the statute. *See, e.g., S.R.G. Corp. v. Dep't of Revenue*, 365 So. 2d 687, 689 (Fla. 1978). Similarly, where the Legislature specifically chose not to use certain words in its enactment, one must presume that the Legislature purposely omitted them. In this case, the Legislature omitted words such as "correct," "remediate" and "repair."

When a statute is clear, there is no need for further statutory construction. *See State v. Sousa*, 903 So. 2d. 923, 928 (Fla. 2005)("The fundamental rule of construction in determining legislative intent is to first give effect to the plain and ordinary meaning of the language used by the Legislature."); *Taylor Woodrow*

Constr. Corp. v. Burke Co., 606 So. 2d 1154, 1155-56 (Fla. 1992)(the court "must" construe the words chosen by the legislature in their ordinary meaning when the statute is clear on its face and "may not go outside the statute to give it a different meaning").

The language chosen and enacted by the Legislature in § 366.8255(1)(c) Fla. Stat. is not ambiguous. It does not require the abandonment of common sense or the decipherment of numerous canons of statutory construction. By glossing over the clear wording of the statute, the Commission not only produced an absurd result, but set a dangerous precedent which could easily be misused in the future.

The clarity of the statute, combined with the Commission's misinterpretation of the term "protect" in the *2018 ECRC Order*, are sufficient grounds for the Court to set aside the Order with instructions to adhere to the plain and ordinary meaning of the term "protect," and thus interpret the ECRC statute as limiting recovery through the ECRC to prospective, preventive measures, consistent with the legislative intent apparent on the face of the law.

Should the court nonetheless apply additional rules of statutory construction, a review of legislative history only strengthens the Citizens' position. When the bill which created the ECRC was passed in 1993, the ECRC amendment's sponsor, Rep. Jack Tobin, purposely discussed the legislative intent of the ECRC in House Bill

2129 [19] on the floor of the House of Representatives in a colloquy with Rep. Jim Davis, who explained his questions were "designed to clarify the legislative intent behind this amendment so it will be used **in the most restrictive fashion possible** by the Public Service Commission." (Fla. H. Jour. 674 (Reg. Sess. 1993). (Emphasis added).

Rep. Tobin's intended limitation on the use of the ECRC is further consistent with the circumscribing words "designed to protect the environment," enacted in § 366.8255(1)(c), Fla. Stat. The Legislature's stated intention of ensuring that the PSC apply the section in a restricted faction is not consistent with the notion that the

[19] The procedural background on HB 2129 is that in 1993, the language now in § 366.8255, Fla. Stat., was amended onto existing Senate Bills 582 & 584, as described in a Senate Staff Analysis and Economic Impact Statement, dated February 20, 1993. (Fla. S. Comm. on Com., PCS/SB's 582 & 584 (1993) Staff Analysis (February 20, 1993) (available at Fla. Dep't of State, Fla. State Archives, Tallahassee, Fla., location in series 18, carton 2074, folder S582)). It was thus included as part of the Committee Substitute for SB 582 and 584. On March 16, 1993, what then became known as CS for SB 582 and 584 was amended on the Senate floor in ways not affecting the issue on appeal. As thus amended, the bill passed the Senate and was certified to the House. (Fla. S. Jour. 326-327 (1993 Reg. Sess.)). On March 24, 1993, the House took up HB 2129, and Rep. Tobin offered an amendment to HB 2129 that was subsequently described in a House Staff Final Bill Analysis and Economic Impact Statement, dated April 19, 1993 as "identical to the Committee substitute for Senate Bills 582 and 584." (Fla. H. Comm. on Bus. and Prof. Reg. HB 2129 (1993) Staff Analysis 7 (available at Fla. Dep't of State, Fla. State Archives, Tallahassee, Fla., location in series 19, carton 2466, folder HB2129)).

PSC should ever allow a utility to recover costs after agreeing to repair past damage or harm which it admits resulted from its own violation of a permit or statute.

A simple example from the legislative history shows the Legislature had two principal reasons for providing cost recovery for the Clean Air Act Amendments: new regulations with stricter standards, using equipment that would reduce future hazardous emissions, so a utility would not fall out of compliance.[20] The Aquifer Repair Project reflects none of these bedrock legislative foundations to the ECRC statute. The pollution prevention standards had been in place for 40-plus years, and compliance had already failed, hence FPL's admitted violations of law.

The Commission's decision in the 2018 ECRC Docket to allow use of the ECRC by utilities to recover costs to remediate their own violations of law will set a precedent which will inevitably encourage utilities to employ business models which rest on recovering costs for illegal environmental harm through the ECRC.

[20] History shows these principles reflected the Legislature's intent because of (a) timing: the Clean Air Act provision was first added to Chapter 366, F.S. in 1992, one year before the ECRC was enacted – which indicates the ECRC was specifically passed to facilitate recovery for work/projects similar to Clean Air Act compliance, and (b) the explanation on the House floor emphasizing the ECRC was to be applied *restrictively*: this shows the Legislature did not use the term "protect" in the expansive, general sense applied by the Commission, where, conceivably, anything you do to change the extent of the saline plume could in a roundabout way eventually protect the environment, but instead the Legislature meant directly "preventive" when it used the term "protect," meaning work to keep a plume from being released in the first place.

Utilities would not feel obligated to comply with environmental regulations, because they would not have to pay the consequences – if they failed to comply and they were caught, then the customers would be the ones required to pay to clean up the damage, via the ECRC. This would be a perversion of what the ECRC statute was designed to do. A decision to affirm the Commission's order would confirm a precedent which would be misused.

The Commission acknowledged the original purpose of the ECRC statute in *Scherer Turbine* at 2 (stating the ECRC "provides an investor-owned utility the opportunity to recover the costs associated with incremental changes in environmental regulations between rate cases"). The point was that, after base rates were already set, if new environmental regulations arose after the rate case, those costs might be eligible for recovery if they conformed to the statute. The projects at issue in *Scherer Turbine* were proposed in response to the EPA's Clean Air Interstate Rule and the Georgia Multipollutant Rule. *Id.* at 1.

The Aquifer Repair Project is completely different from the projects described by the Commission as eligible for recovery when it construed the ECRC in *Scherer Turbine*, et al., because the primary environmental rules in the instant case (salinity concentration standards and boundaries) were not new. Here, there was no new regulatory standard comparable to the Clean Air rules in *Scherer Turbine*. Instead, the circumstance which changed in the CCS context was that FPL had violated the

law and exceeded the standard, allowed the resulting contamination to expand beyond its borders, and was issued multiple Notices of Violation. The violations, in turn, prompted FPL to enter the CA and the CO, the latter document being the one in which FPL acknowledged its violation of the long-existing environmental law and agreed to commence the Aquifer Repair Project in order to remedy the harm resulting from its violation of that law. Agreeing to clean up a condition of one's own making is not akin or equivalent to being subjected to a regulatory agency's new industry-wide, nation-wide rule.

In this case, FPL acknowledged responsibility for polluting the public aquifer with billions of pounds of salt from its cooling canals which hold water that has run through its nuclear plant. FPL's demonstrably preventable release of billions of pounds of this pollution into public waters and the clean-up requirement bears no resemblance to an "incremental change in environmental regulation," like the Clean Air rules in *Scherer Turbine*. FPL was always on notice that it was not allowed to contaminate public waters with hypersalinity. As such, FPL's violation is not the type of change in regulation which the Legislature intended to make eligible for recovery under the ECRC.

The Aquifer Repair Project was a massive capital project started primarily to remediate a plume of pollution which was not only known to FPL, but the growth of which FPL had traced *for years*. (Ex. 82; TR V. 5, pp. 734-741). As such, it was the

opposite of the sort of post-rate case, unforeseen project contemplated for ECRC recovery. (TR V. 3, p. 422). Where the impetus and primary purpose of a project is remediation, it cannot be considered to be "designed to protect." The Aquifer Repair Project was not publicly proposed by FPL until after the hypersaline plume resulted in harmful pollution and a violation of law. The timing makes it clear that the repair was not devised simply as an operating function of the CCS – the sole reason it came about was to correct FPL's violations.

Nothing in the ECRC statute's words or its legislative history indicates the Legislature intended for utilities to use consent agreements or consent orders as a way to game the regulatory recovery process. Where the use of the consent order process is utilized for expedience instead of as a legitimate effort to comply with rules designed to protect the environment, a utility's request to recover costs to comply with such a consent order through the ECRC should be rejected. The legal argument which suggests the CO and CA are "new requirements," as proposed in the Order below, suggests an effort to divorce them from the underlying violations. Most certainly, FPL entered into the agreements to avoid more severe consequences; those agreements dictate the remediation of past violations, not prospective compliance with any regulatory obligation designed to protect the environment from harm. (Ex. 12, pp. 4-6; Appendix, pp. 261-263).

In the context of the plain language of the ECRC statute, one must remain mindful that it is easy for a company to "agree" to a consent order when it plans to shift the responsibility of all costs resulting from that consent order onto the backs of its ratepayers – where there is, by design, absolutely no shareholder risk or cost. Even if recovery of some of the costs for containing the plume within the CCS after the hypersaline plume retraction is deemed appropriate, that recovery is, at best, a base rate determination, not a clause issue.

2. The cases cited by the Commission applied "protect" in the ordinary sense – none explicitly approved post-violation cleanup, yet even if they had, they would have exceeded the Commission's Statutory Authority.

Each case cited by the Commission in its Order below involved prospective action or equipment designed to protect against, i.e., prevent, future harm – *none involved remedial work to clean up the residue of pollution caused by a recognized, much less admitted, violation of law*. In fact, neither the legislative history nor any Commission interpretation of the law suggests the ECRC statute was ever intended to reach back over decades to repair damage caused by a utility's violation of law.

To the contrary, in the Order below, the Commission cited *In re: Environmental Cost Recovery Clause,* Order No. PSC-2005-1251-FOF-EI, 05 FPSC 12:403 (2005)(*"2005 ECRC Order")* as support for its assertion that the Commission has previously approved recovery of costs associated with remediation activities under the ECRC. While the Order below did not specify or explain which

of the 22 company-specific cost issues in the Order the Commission meant to reference, the only references to "remediation" in the *2005 ECRC Order* concerned costs for the development of studies on arsenic levels and methods for remediation. *Id.*, at 8, 10. The key distinction is that these studies were necessary because the DEP had recently lowered the allowable level of arsenic in groundwater, **i.e., the regulatory standard for arsenic levels had changed;** therefore, the utilities anticipated that noncompliance *might* occur after the lowered standard became effective. Importantly, the Order does not state on its face that any utility had failed to comply with the arsenic standard either before or after the standard was lowered, or that any utility had violated a law regarding arsenic. *Id*. at 8, 10. The Order allowed Gulf to recover costs to complete and evaluate the results from studies… [and] "identify solutions necessary to ensure compliance with the new standard." *Id.* at 10. The Order further allowed Progress Energy Florida to recover "*costs to assess* groundwater arsenic levels and consultant costs" to develop an arsenic remediation plan. *Id.* at 8 (emphasis added). While the potential for mitigation was referenced, there is no language in the order that any mitigation,[21] if required, was pre-approved.

The simple fact is that the *2005 ECRC Order* did not, on its face, approve any actual remediation projects – no particular remediation plan was specified, evaluated or approved in the Order. Therefore, the *2005 ECRC Order* does not support the

[21] In any event, mitigation is not the same as remediation.

Commission's action below, and the Commission made no effort in the Order under review to explain its reliance on the *2005 ECRC Order*. The circumstances described in the arsenic level study plans were different from FPL's Aquifer Repair Project for two critical reasons: (1) no regulatory agency suddenly lowered the saline standard for the CCS; the scientific standard for the limit on the salinity concentration never changed, i.e., the regulation never changed, and (2) the work approved in the *2005 ECRC Order* was prospective – the companies at issue planned to study the arsenic levels; they were not in a post-violation, post-harm posture, the way FPL was when it entered into the CO and CA.

The Commission's practice in other cases where a study's results indicated some form of post-study follow-up work might be necessary was to require the utility to either submit a new petition or file an amendment to its petition to have the new project formally added to the pending case. *See, In re: Environmental Cost Recovery Clause*, Order No. PSC-2011-0553-FOF-EI at 7 (2011), Fla. PUC LEXIS 398, 11 FPSC 12:15 (2011) (containing the Commission's approval of a stipulation which specifically stated that, "[i]f any corrective actions are required as a result of the monitoring activities, FPL should petition the Commission to amend the project at that time for further ECRC cost recovery."); *In re: Petition for Approval of Recovery through ECRC of Costs Associated with Clean Water Act § 316(b) Phase II Rule Project by FPL*, Order No. PSC-2004-0987 at 4, 04 F.P.S.C. 10:145

(2004)(addressing a Comprehensive Demonstration Study per the Clean Water Act, and stating "FPL can make subsequent ECRC filings addressing the ongoing nature of FPL's CDS activities"). Therefore, oblique references in Commission orders to unspecified future work that may or may not be required based on forthcoming results of monitoring or study have not been generally treated as approvals of future projects.

The Commission's Order below also cited to *In re: Petition for Approval of New Environmental Programs for Cost Recovery through the ECRC by Tampa Electric Co.*, Order No. PSC-2000-2104, 01 FPSC 2:79 (2000) ("2000 TECO Order") for the assertion that a Consent decree based on alleged violations has previously been interpreted as a qualifying requirement under the ECRC. However, this 2000 Order authorized recovery of costs to reduce the future emission of contaminants into the air going forward, not to clean the air of contaminants emitted in past years. Though that case involved an alleged Clean Air Act violation, the order does not reflect an admission of liability by the utility.[22] The equipment authorized in that project would allow the plant to emit cleaner air in the

[22] Sources citing the Consent Decree quote the document as containing the statement that TECO "denied and continues to deny" the allegations which led to the Decree. *See*, Robert A. Greco, P.E., *Comment: When is Routine Maintenance Really Routine? A Proposed Modification to the EPA's New Source Review Program*, 88 Marq. L. Rev. 391, 405 (2004).

future; it did not involve the clean-up of a plume of contamination from the air already outside the plant that took decades to build up. Additionally, Clean Air Act compliance (prospective compliance) is specifically written into the ECRC statute, and thus was a primary focus of compliance when the statute was passed.[23]

The *2018 ECRC Order* also cited *In re: Petition for Approval of New Environmental Program for Cost Recovery through Environmental Cost Recovery clause by Tampa Electric Company*, Order No. PSC-2007-0499-FOF-EI (2007) for the assertion that a Consent decree has previously been interpreted as a qualifying requirement under the ECRC. Like the *2000 TECO Order* discussed *supra*, the project at issue related to Clean Air Act compliance, specifically the installation of equipment to help the plant emit cleaner air in the future – not to clean up past pollution. *Id.* at 1 (discussing equipment "designed to control SO_2 emmisions "). Nothing in this order indicates that the equipment approved was designed to retract decades of polluted air back into the utility's air space.

The history of ECRC interpretation is replete with examples where the Commission applied the ordinary meaning of the term "protect," , in that the orders approved preventive work or equipment for operations going forward, rather than authorizing recovery of costs to clean-up past, post-violation pollution. *See, e.g., In*

[23] The Clean Air Act is also the focus of § 366.825, Fla. Stat., which was passed a year before § 366.8255, Fla. Stat.

re: Petition for approval of Consumptive Use-Shield Water Substitution Project as new program for cost recovery through ECRC by Gulf Power Company, Order No. PSC-01-1788-PAA-EI at 2, 01 FPSC 9:10 (2001)(approving a project of which the primary purpose was "to reduce the potential for saltwater intrusion," not to remediate saltwater intrusion that had already occurred) (emphasis added); *In re: Petition by Gulf Power Co. for Approval of Plant Smith Sodium Injection System as a New Program through ECRC*, Order No. PSC-99-1954-PAA-EI at 4 (approving project to allow utility to "maintain compliance with existing air permit requirements.").

The Commission Order at issue in this appeal did not cite to any instance where the face of a PSC order showed that the Commission knowingly and transparently authorized ECRC recovery for pollution caused by a utility's violation of law, for the specific purpose of cleaning up or retracting any long-term pollution which resulted from a violation. If in fact the orders cited by the Commission approved such post-violation cleanup projects, the orders did not reflect that purpose in terms which adequately put the public or the courts on notice of that fact. More importantly, even if the Commission had approved ECRC recovery for post-violation harm caused by a utility's violation of law, it was not statutorily authorized to do so, and such an order would have no precedential effect. *See Citizens of Fla.*

v. Graham, 213 So. 3d 703, 716 (Fla. 2017)("*Citizens 2017*") (regarding repudiation of improper orders); *2014 ECRC Order*, *supra*.

C. The Commission erred when it held the Aquifer Repair Project was the evolution or part of the 2009 Monitoring Plan Project. Regardless of whether the Aquifer Repair was considered an evolution or a new project, the Commission was not authorized to approve it under the ECRC Statute in either instance.

In the Order under review, the Commission selectively quoted a section of its *2009 Monitoring Plan Order* as support for its assertion that the Aquifer Repair costs did not represent a change in scope from FPL's 2009 Monitoring Plan. The Commission also contended that the 2009 Monitoring Plan was not instituted solely because of the Uprate. *2018 ECRC Order*, p. 17-18. However, the Commission omitted essential context. A full reading of the *2009 Monitoring Plan Order* shows that the Commission's 2009 decision was, in fact, specifically tied to the Uprate.

As outlined in the *2009 Monitoring Plan Order*, the reason for the 2009 Monitoring Plan project, and thus the impetus for FPL's ECRC petition that year, was the Commission's approval of the Determination of Need for the Uprate Project and the related DEP Conditions of Certification for the Uprate Project, which required FPL to develop a monitoring plan to assess the potential impacts of the Uprate Project on the CCS. *Id.*, at 10-11. The Commission acknowledged that "…the TP-CCMP Project serves as a <u>prerequisite to the TP Nuclear Uprate</u> ..." *Id.*

at 12 (emphasis added). The Stipulation referenced in the *2009 Monitoring Plan Order* specifically stated that "the TP-CCMP Project is tied to the Uprate construction requirements of the TP nuclear units." *Id.* at 11 (emphasis added). The Commission omitted this contextual information from its *2018 ECRC Order* and cited only the text at the very end of the *2009 Monitoring Plan Order's* discussion regarding the "uncertain duration" of the Monitoring Plan Project's operations and maintenance ("O&M") costs. *2009 Monitoring Plan Order*, p. 13. The 2009 reference to "uncertain duration" was confined to a narrow decision on the appropriate clause for recovery, via a stipulation, and nevertheless is not enough to justify ignoring the change in scope to facilitate clause recovery for the 2016 Aquifer Repair Project. As stated in the *2009 Monitoring Plan Order*, groundwater monitoring activity had already been occurring and was included in base rates, long before the separate 2009 Monitoring Plan was proposed.[24] *Id.* at 12. However, remediation of the Biscayne Aquifer based on FPL's admitted violation of the law did not similarly pre-date the 2009 proceedings.

To properly delineate the context of the language quoted in the *2018 ECRC Order*, one must distinguish the substantive decision of the *2009 Monitoring Plan*

[24] Monitoring for saline has been conducted in and around the CCS virtually since the plant started operations in the 1970's. (Ex. 71, pp. 3-4 (Para. A (6); Ex. 47, pp. 2-4; Ex. 5, pp. 1-2, 6-7; 2005 NPDES Permit, Ex. 4, p.10; Appendix, pp. 40-41; 52-54; 89; 105-106;110-111).

Order from its tangential procedural discussion. Procedurally, an issue resolved in the 2009 stipulation was whether the monitoring costs should be recovered in the Nuclear Cost Recovery Clause (NCRC) or in the ECRC, as proposed by FPL. *Id.* at 12-13. The stipulation noted that the monitoring costs were predominantly O&M expenses and would be expected to recur past the 2012 time frame when the Uprate revenue requirement would be added to rate base. ECRC was the chosen recovery mechanism because the monitoring would capture all of the impacts of the CCS operation even though, *as noted in the substantive decision text of the order*, the sole purpose of the monitoring was to assess the impacts of the Uprate itself on the water quality. The narrow, stipulated language on procedure (NCRC vs ECRC) did not alter or address the restriction of the 2009 Monitoring Plan itself to the impacts of the Uprate, as is clear in the *2009 Monitoring Plan Order*.

Even though FPL pushed two contradictory arguments on this point, the Commission below adopted the description of the 2009 Monitoring Project as applying to the plant as a whole in the face of unrebuttable evidence to the contrary. In its *2009 Monitoring Plan Order*, the Commission mentioned pre-2009 monitoring activities (which applied to the whole plant) and distinguished them from the 2009 Monitoring Plan by noting that the pre-2009 monitoring activities were already being recovered through FPL's base rates. *2009 Monitoring Plan Order*, p. 12. FPL's own filing in support of its 2009 ECRC request stated the 2009 Monitoring

Plan was different from previous monitoring, because it was "designed to focus on the objectives as they relate to the cooling canal system and the Uprate Project …" *Id.* (quoting 2009 Testimony of FPL witness LaBauve; also quoted in 2018 ECRC Order, p. 17). The pre-2009 monitoring also applied to the CCS, so it is clear that the difference between the two was the Uprate. Thus, the text of the *2009 Monitoring Plan Order* fully demonstrates the Commission's consideration of the 2009 Monitoring Plan Project was born from and focused on FPL's Turkey Point Uprate Project, not the overall operation of the plant.

The incidental reference in the *2009 Monitoring Plan Order* to a potential need for future mitigation, depending on the TCMMP monitoring results, amounts to dicta, at best. The only project specified for the Commission in 2009 was monitoring, not mitigation, because there was no established need to mitigate at that point, as the Uprate monitoring work had not even been initiated. Thus, FPL did not propose a distinct, detailed plan for mitigation to be part of the monitoring.

The Commission's characterization of the Aquifer Repair Project as the "anticipated evolution" of the 2009 Monitoring Plan Project directly contradicts any suggestion that the hypersaline plume retraction was an unexpected cost between rate cases, per the *Scherer Turbine* policy. FPL's primary regulatory witness admitted the hypersaline plume build-up took years, the plume was not a result of the Uprate, and the Uprate did not add maximum thermal load/heat load to the CCS

and thus did not make the plume worse. (TR V. 3, p. 426; V. 4, p. 518). For the Commission's "anticipation" to be true, the suggestion is that the growth of FPL's hypersaline plume was apparent to either the company or the Commission in 2009, which would have made it eligible for base rate consideration prior to the 2016 settlement and subject to the base rate freeze. Furthermore, Witness Sole admitted the Company did not tell the Commission in 2009 that they were violating the law or that they would have remediation obligations in the future. (TR V. 3, pp. 436, 440-441).

Additionally, the mere fact that the CO and CA contain specifications for monitoring the hypersaline plume does not pull the Aquifer Repair Project backward into the ambit of the 2009 Monitoring Plan. In the instant case, the Commission again committed fundamental error by mischaracterizing FPL's obligation to remove the hypersaline plume from public waters with its obligation to *prove* that the removal (the Aquifer Repair Project) was actually working, i.e., the obligation to monitor the progress of retraction and report any progress (or lack thereof) as an accountability function embedded in the CO. The duty to show the status of remediation was not a grant of free rein for FPL to slip the Aquifer Repair Project into the ECRC under the guise of the more general, 2009 Uprate impact detection monitoring. The conflation of FPL's remediation verification obligations with its wholly separate Uprate impact detection monitoring obligations sowed confusion,

and thus the resulting error, in the Commission's *Order* below. Simply because the word "monitoring" appears in the specifications for each separate project does not make the context or the reason for the monitoring the same. The superficial label of "monitoring" does not morph distinct projects into one.

It would defeat the purpose of the ECRC procedure if the mere mention in an order of an unspecified, conditional future project (without inclusion of a specific, detailed requirement or plan) was considered tantamount to approval for recovery, and thus could trigger subsequent cost recovery. Such an ill-defined, arbitrary process would expand the clause exception to a point where it lacks any discernible limitations. The Commission's buy-in on the purported "evolution" of the 2009 Monitoring Plan into the Aquifer Repair Project is a deviation from its own policy; such a deviation requires reversal.

Commission findings must be supported by substantial evidence pursuant to § 120.68(7)(b), Fla. Stat. The record herein contains overwhelming evidence that the 2016 Aquifer Repair Project was not simply a part of the 2009 Monitoring Plan Project, such that the *2009 Monitoring Plan Order* could ever be read as approving it.[25] Additionally, and more importantly, even if the Aquifer Repair Project was the

[25] The Monitoring Plan project's complete change in function, and the change in capital cost from $3.6 million to $69 million (a 1,900% increase), taken together, demonstrate the Aquifer Repair Project was a wholesale change in the scope of the project instead of a mere incremental shift in phases of the 2009 Monitoring Plan. (Ex. 68; TR V. 2, p. 287).

same as the 2009 Monitoring Plan, post-violation remediation is not authorized for recovery under the ECRC statute. The Commission's claim otherwise is error, and must be reversed.

The Commission's deviation from prior policy provided the sole, tenuous connection between the Aquifer Repair Project (as "monitoring") and conformity with the words of the controlling ECRC statute. Once the 2016 Aquifer Repair Project is accurately evaluated in context, i.e., when post-violation remediation is distinguished from mere pre-violation monitoring, it is clear that ECRC recovery for the Aquifer Repair Project is not authorized under the plain terms of the statute. The Commission exceeded its authority in approving ECRC recovery below; therefore, its Order must be set aside.

Over the years, utilities have increasingly used the ECRC as a base rate relief mechanism, instead of following the dictates of the ECRC statute.[26]

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[26] *See In re: Petition by Progress Energy Florida, Inc. for Approval to Recover Modular cooling tower costs through Environmental Cost Recovery Clause*, 2007 Fla. PUC LEXIS 519, Order No. PSC-2007-0722-FOF-EI at 7, (2007)(even though no change in regulation occurred, a change in weather (warming) was held to be an eligibility triggering event such that costs to remain in compliance with an existing permit condition were recoverable); *In re: Petition for Approval of new Environmental Program for Cost Recovery through Environmental Cost Recovery Clause by Tampa Electric Company*, Order No. PSC-2006-0602-PAA-EI at 5, 2006 Fla. PUC LEXIS 437, 06 FPSC 7:51 (2006)(allowing ECRC recovery where the subject project was not strictly required by the Consent Decree, but the proposed project to increase the reliability of the scrubbers would allow TECO to meet a new

In *Citizens 2017*, this Court criticized the use of clause recovery for "convenience," as opposed to necessity in the Fuel Docket. *Id.* at 716. The Court specifically referred to a base rate freeze as the subject utility's impetus for seeking clause recovery. *Citizens 2017*, at 716-717 (reversing the PSC and discussing "overreach" in clause recovery). Similarly, in the instant case, the base rate freeze to which FPL agreed bars recovery of the Aquifer Repair Project costs through base rates; thus, FPL opted to seek recovery through the ECRC simply because it was an available vehicle, not because the remediation conformed to any of the ECRC's statutory criteria.[27]

This Court has recently emphasized the importance of adhering to the established policies which limit clause recovery in the Fuel Docket, lest an exception swallows the rule on rates. *Citizens 2017*, at 716. The Commission's *2018 ECRC Order* is a deviation from both the terms of the ECRC statute and the Commission's stated policies. The use of clause recovery for convenience rather than statutory eligibility must be rejected in the instant case. The Order below reflects arbitrary

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Clean Air Act requirement without de-rating the plants, while lessening risk of outages).

[27] Years earlier, the Commission had already rejected the idea of NCRC recovery for certain costs related to the CCS, so it appears FPL surmised ECRC recovery was the only convenient option left.

decision-making and is contrary to the face of the ECRC statute, thus reversal is required.

CONCLUSION

There is no evidence in the language of the ECRC statute that the Legislature intended the ECRC to be a bailout for polluters. The Legislature was presumably cognizant that the words "protect" and "remediate" are not synonymous.

The money at issue will not pay for "compliance" with laws or regulations designed to protect the environment, but instead will explicitly pay for FPL's non-compliance because the costs are paying for cleaning up the effects of decades of FPL's past, unlawful pollution. Any containment which could be considered compliance is, at best, 5-10 years away in the future and cannot occur until after retraction is achieved; the so-called containment aspect of the Aquifer Repair Project is actually a side-effect of the primary purpose of the RWS, which, as the name suggests, was built to recover or retract the salt that unlawfully seeped from FPL's property into public waters. In this case, the "design" of the project is, first and foremost, to clean up the pollution. There was no publicly disclosed plan to build the RWS until the Hypersaline Plume was discovered to have extended several miles beyond FPL's property boundary.

Rewarding utility shareholders for imprudent decisions by its management by passing remediation costs to ratepayers would tilt the risk allocation and incentive

structure to such a degree that there would be no limit to the level of negligence or misfeasance ratepayers would be forced to subsidize. Additionally, it would turn the utility's statutory duty to act prudently into a legal fiction that has no connection to reality because it would nullify any obligation by management to conduct business in a responsible manner.

By all appearances, FPL made a management decision to ignore the law. Indemnification of a utility by ratepayers for unlawful hypersaline plume pollution that grew and spread for years under the utility's direct control is not what the ECRC was intended to achieve. The Order below should be set aside with instructions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **CITIZENS' CORRECTED INITIAL BRIEF** and has been furnished by electronic mail on this 3rd day of May, 2018, to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Rule 9.100(l), Florida Rules of Appellate Procedure, that the CITIZENS' CORRECTED INITIAL BRIEF was prepared using Times New Roman 14-point font.

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