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IN THE SUPREME COURT OF FLORIDA

DUKE ENERGY FLORIDA, LLC

Appellant,

v.

GARY F. CLARK, ETC., ET AL.

Appellees.
_____/

Case No.: SC20-1601
Lower Tribunal No.:
20200001-EI

JOINT ANSWER BRIEF OF OFFICE OF PUBLIC COUNSEL AND FLORIDA INDUSTRIAL POWER USERS GROUP

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PRELIMINARY STATEMENT

Within this Joint Answer Brief, Joint Appellee State of Florida, Office of Public Counsel is identified as the "Office of Public Counsel" or "OPC" and Joint Appellee Florida Industrial Power Users Group is identified as "FIPUG." Appellee State of Florida, Public Service Commission is identified as the "Commission" or the "PSC." Appellant Duke Energy Florida, LLC is identified as "Duke" or "DEF." The order being appealed, Commission Order No. PSC-2020-0368A-FOF-EI is identified as the "Final Order."[1] The Recommended Order issued in Florida Division of Administrative Hearings Case No. 19-6022, adopted by the Commission and approved as the Final Order, is identified as the "Recommended Order." The Florida Division of Administrative Hearings Administrative Law Judge is referred to as the "ALJ."

[1] Use of the term "Final Order" refers to the amended Final Order. The PSC amended the Final Order to include the ALJ's Recommended Order as an attachment. R. 6269-6305.

Citations to the Record below are designated by "R. #" where # indicates the page or pages of the Record.[2] Citations to OPC and FIPUG's Joint Appendix are indicated as "Joint App. p. #." Citations to the Findings of Fact set forth in the Recommended Order, adopted *in toto* by the Commission in its Final Order, are designated as "R.O., F.O.F. ¶," where ¶ designates the applicable paragraph of the Recommended Order. Citations to the Conclusions of Law set forth in the Recommended Order are designated as "R.O., C.O.L. ¶," where ¶ designates the applicable paragraph of the Recommended Order. Citations to the Final Order below are designated "F.O., at #," where # refers to the page of the Final Order. Yellow highlighting indicates information required by law to be maintained as confidential under orders of the Commission. Redactions in black are made for the public version of this brief.

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[2] Joint Appellees discovered that exhibits 68-75 and 80-82 from the formal evidentiary hearing which were entered into the record were apparently inadvertently omitted from the record transmitted to the Court. Exhibits 73-75 and 80-82 are confidential. All have been or will be submitted to the Court by stipulation of the parties, pursuant to Rule 9.200(f)(1), Florida Rules of Appellate Procedure. For the ease of reference, the Joint Appendix contains non-confidential exhibits 68, 69, 71, and 72.

STATEMENT OF THE CASE AND FACTS

The Joint Appellees reject the Statement of Facts in Appellant's Initial Brief as incomplete and as including allegations of "facts" not found below. Given that no party filed Exceptions to the ALJ's Findings of Fact below, this Court must only rely on the Findings of Fact as set forth in the Recommended Order, adopted *in toto* by the Commission in its Final Order. See *Envtl. Coal. of Florida, Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991) ("Having filed no exceptions to the findings of fact contained in the recommended order, Environmental Coalition has thereby expressed its agreement with, or at least waived any objection to, those findings of fact. The facts relied on by this court are taken directly from the recommended order.").

In the interest of efficiency, Joint Appellees adopt as their Statement of Facts the Findings of Fact set forth in the Recommended Order as adopted by the Final Order below. R. 6244; Joint App. p. 41-146.

I. Statement of the Case

In November 2019 the Commission referred the instant matter

to the State of Florida Division of Administrative Hearings, requesting the assignment of an Administrative Law Judge to conduct a formal evidentiary hearing and to issue a Recommended Order containing Findings of Fact and Conclusions of Law determining the following two issues:

> ISSUE 1B: Was DEF prudent in its actions and decisions leading up to and in restoring the unit to service after the February 2017 forced outage at the Bartow plant and, if not, what action should the Commission take with respect to replacement power costs?
>
> ISSUE 1C: Has DEF made prudent adjustments, if any are needed, to account for replacement power costs associated with any impacts related to the de-rating of the Bartow plant? If adjustments are needed and have not been made, what adjustment(s) should be made?

The case was assigned Division of Administrative Hearings Case No. 19-6022. R. 6079-80.

A formal evidentiary hearing was conducted before an Administrative Law Judge on February 4 and 5, 2020. R. 3130. The Record of the formal evidentiary proceeding includes live expert testimony presented by Duke and by OPC, extensive additional pre-

filed testimony, and 34 exhibits that were admitted into evidence including a voluminous composite exhibit and other records. R. 3130-3337. The official transcript of the final hearing is contained in three volumes, not including exhibits and additional pre-filed testimony admitted into evidence. R. 3130-3337.

In the evidentiary proceeding below, DEF had the burden of proving, by a preponderance of the evidence, that it acted prudently in its actions and decisions leading up to and in restoring the unit to service after a February 2017 forced outage at the Bartow Plant. R. 3132. Additionally, DEF was required to prove[3] by a preponderance of the evidence that no adjustment to replacement power costs should be made to account for the fact that after the installation of a pressure plate in March 2017, the Bartow Plant could no longer produce its rated nameplate capacity of 420 MW. § 120.57(1)(j), Fla. Stat.; *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 788 (Fla. 1st DCA 1981); R.O., C.O.L. ¶108; R. 6105; Joint App. p. 32.

[3] No party disputes that DEF had the burden of proof as described in the Final Order below. R. 3132; Joint App. p. 41-146.

At the conclusion of the evidentiary hearing all parties, including the Commission, submitted detailed proposed recommended orders containing proposed findings of fact and conclusions of law. After duly considering the entirety of the record, applicable law, and the proposed recommended orders, the ALJ issued a detailed Recommended Order containing numerous Findings of Fact and Conclusions of Law. R. 6078-6113; Joint App. p. 5-40.

Pursuant to § 120.57(1)(k), Fla. Stat., and Rule 28-106.217, Florida Administrative Code (F.A.C.), DEF submitted Exceptions to the Recommended Order. R. 6063-6076. In its Exceptions, DEF expressly stated it did not contest the ALJ's Findings of Fact. At page 2 of DEF's Exceptions below, DEF stated:

> While DEF takes exception to multiple findings of fact, due to the standard of review discussed above, DEF will not relitigate those points here nor ask this Commission to reweigh evidence. As discussed below, even accepting the ALJ's findings of fact, this Commission should still reject the ALJ's legal and policy conclusions. R. 6064.

DEF did not contend, anywhere in its Exceptions, that the ALJ's Findings of Fact are not supported by competent substantial evidence of record.

The Public Service Commission subsequently held a formal Agenda Conference at which it reviewed the ALJ's Recommended Order, the Record, Exceptions, and Responses to Exceptions and after due consideration, pursuant to § 120.57(1)(l), Fla. Stat., rejected all of Duke's exceptions as lacking merit. R. 750-781. The Commission issued Final Order No. PSC-2020-0368A-FOF-EI, adopting, *in toto*, the ALJ's Recommended Findings of Fact and Conclusions of Law. R. 6244-6268. The Final Order is the subject of this appeal.

II. Statement of Ultimate Facts as Found by the ALJ and Adopted *in toto* by the Commission in the Final Order.

The ALJ's ultimate Findings of Fact, adopted by the Commission and incorporated into the Final Order, include findings, set forth verbatim below with supplemental record citations provided by Joint Appellees, that:

- The greater weight of the evidence establishes that the Mitsubishi steam turbine was designed to operate at 420 MW of output and that 420 MW was an operational limitation of the turbine. R.O., F.O.F. ¶33; R. 6089; F.O., at 8; R. 6252; Joint App. p. 16, 49.

- DEF's imprudent operation of the turbine during Period 1 resulted in "cumulative wear caused by running the unit in excess of its capacity half of the time." R.O., F.O.F. ¶89, fn. 4; R. 6101; F.O., at 15; R. 6259; Joint App. p. 28, 56.

- The evidence was clear that Mitsubishi did not contemplate DEF's operation of the steam turbine beyond the heat balance scenarios set forth in the Purchase Agreement. The evidence was also clear that DEF made no effort before the fact to notify Mitsubishi of its intended intensity of operation or to ask Mitsubishi whether it could safely exceed the numbers stated in the Purchase Agreement. Mr. Swartz was unable to explain away this criticism and thus DEF failed to meet its burden of demonstrating that it prudently operated the Bartow Plant during the times relevant to this proceeding. R.O., F.O.F. ¶102; R. 6104; F.O., at 13; R. 6257; Joint App. p. 31, 54.

- OPC accurately states that the DEF working documents demonstrate that during the [Root Cause Analysis] RCA process, before and after the Period 5 event, DEF consistently identified excessive steam flow

> in the LP turbine as one of the "most significant contributing factors" toward blade failure over the history of the steam turbine, the same conclusion reached in the Mitsubishi RCA. R.O., F.O.F. ¶71; R. 3151, 3157, 5716, 5722, 5732, 5751, 5759, 5767, 5779, 5789, 5801, 5815, 5829, 5843, 5857, 5908; Joint App. p. 24. See also Hearing Exhibit 73 at 3; R. 3418.

The Final Order below further adopts the following ultimate Findings of Fact and Conclusions of Law laid out verbatim (in relevant part) below, with supplemental record citations provided by Joint Appellees:

> - DEF failed to demonstrate by a preponderance of the evidence that its actions during Period 1 were prudent. DEF purchased an aftermarket steam turbine from Mitsubishi with the knowledge that it had been manufactured to the specifications of Tenaska with a design point of 420 MW of output. Mr. Swartz's testimony regarding the irrelevance of the 420 MW limitation was unpersuasive in light of the documentation that after the initial blade failure, DEF itself accepted the limitation and worked with Mitsubishi to find a way to increase the output of the turbine to 450 MW. R.O., C.O.L. ¶110; R. 6105; F.O., at 5; R. 6249; Joint App. p. 32, 46.
>
> - The record evidence demonstrated an engineering consensus that vibrations associated with high energy loadings were

the primary cause of the L-0 blade failures. DEF failed to satisfy its burden of showing its actions in operating the steam turbine in Period 1 did not cause or contribute significantly to the vibrations that repeatedly damaged the L-0 blades. To the contrary, the preponderance of the evidence pointed to DEF's operation of the steam turbine in Period 1 as the most plausible culprit. R.O., C.O.L. ¶114; R. 6106; F.O., at 13; R. 6257; Joint App. p. 33, 54.

- It is not speculative to state that the events of Periods 2 through 5 were precipitated by DEF's actions during Period 1. R.O., C.O.L. ¶119; R. 6107; F.O., at 14; R. 6258; Joint App. p. 34, 55.

- The greater weight of the evidence supports the conclusion that DEF did not exercise reasonable care in operating the steam turbine in a configuration for which it was not designed and under circumstances which DEF knew, or should have known, that it should have proceeded with caution, seeking the cooperation of Mitsubishi to devise a means to operate the steam turbine above 420 MW. R.O., C.O.L. ¶121; R. 6108; F.O., at 17; R. 6261; Joint App. p. 35, 58.

- DEF failed to carry its burden to show that the Period 5 blade damage and the required replacement power costs were not consequences of DEF's imprudent operation of the steam turbine in Period 1. R.O., C.O.L. ¶123; R. 6109; F.O., at 18; R. 6262; Joint

App. p. 36, 59.

- Because it was ultimately responsible for the de-rating, DEF should refund replacement costs incurred from the point the steam turbine came back online in May 2017 until the start of the planned fall 2019 outage that allowed the replacement of the pressure plate with the redesigned Type 5 40" L-0 blades in December 2019. R.O., C.O.L. ¶124; R. 6109; F.O., at 19; R. 6263; Joint App. p. 36, 60.

SUMMARY OF ARGUMENT

The ALJ found, and the Commission adopted, the finding that DEF failed to demonstrate by a preponderance of the evidence that the Period 5 outage at the Bartow Plant was not a consequence of DEF's imprudent actions in Period 1. DEF claims for the first time on appeal that there is no competent and substantial evidence supporting the link between its actions in Period 1 and the outage in Period 5. However, DEF did not take exception to any of the Findings of Fact below, including the ones that abundantly demonstrate the direct link between Duke's imprudence in Period 1 and the damage that resulted in the outage in Period 5. By failing to take exception to any of the Findings of Fact, DEF abandoned the argument that the Findings of Fact supporting the ALJ's and Commission's ultimate

determination—that DEF failed to demonstrate by a preponderance of the evidence that DEF's imprudent action in Period 1 was not the source of the February 2017 forced outage—are not supported by competent and substantial evidence of record. DEF's argument is illogical and must fail because the ALJ expressly found that the preponderance of the evidence demonstrated DEF's imprudent operation of the steam turbine in Period 1 was the "most plausible culprit" for the blade damage which resulted in the outage in Period 5. R.O., C.O.L. ¶114; R. 6106; F.O., at 13; R. 6257; R.O., F.O.F. ¶102; R. 6104; F.O., at 13; R. 6257; Joint App. p. 33, 54, 31. Nevertheless, the ALJ and Commission's determination that Duke's imprudence in Period 1 is the source of the February 2017 forced outage, and that DEF failed to demonstrate, by a preponderance of the evidence, that DEF's imprudence in Period 1 was not the cause of the February 2017 forced outage, is supported by competent, substantial evidence of record. This evidence includes findings that 420 MW was an operational limitation of the steam turbine which DEF exceeded at least half of the time in Period 1, that exceedance resulted in cumulative wear on the turbine [blades] and that the record

demonstrated an engineering consensus that the vibrations associated with high energy loadings were the primary cause of the blade damage causing the Period 5 outage. R.O., F.O.F. ¶33; R. 6089; F.O., at 8; R. 6252; R.O., F.O.F. ¶89, fn. 4; R. 6101; F.O., at 15; R. 6259; R.O., C.O.L. ¶114; R. 6106; F.O., at 13; R. 6257; Joint App. p. 16, 49, 28, 56, 33, 54. The discretion to consider evidence, resolve conflicts in evidence, judge credibility of witnesses, draw permissible inferences from the evidence and reach ultimate findings of fact based on competent and substantial evidence belongs solely to the ALJ. *Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. & Prof'l Regulation*, 146 So. 3d 1175 (Fla. 1st DCA 2014), citing *Heifetz v. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

The Final Order and transcripts of the Commission Agenda demonstrate that the Commission understood and applied the correct legal standard in rejecting DEF's exceptions to the ALJ's conclusions of law. While the Commission may substitute a conclusion of law for one that is as or more reasonable than the conclusion made by the ALJ, the Commission is not required to adopt a party's proposed substituted conclusion of law. DEF has failed to

demonstrate any erroneous interpretation of law which requires reversal under § 120.68(7)(d), Fla. Stat.

STANDARD OF REVIEW

Section 120.68, Fla. Stat., sets forth the standard for judicial review of the Commission's Final Order which was entered pursuant to §§ 120.569 and 120.57(1), Fla. Stat.

Section 120.68(7), Fla. Stat. provides:

> (7) The court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:
> (a) There has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts;
> (b) The agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to ss. 120.569 and 120.57; however, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact;
> (c) The fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure;
> (d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action; or
> (e) The agency's exercise of discretion was:

> 1. Outside the range of discretion delegated to the agency by law;
> 2. Inconsistent with agency rule;
> 3. Inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or
> 4. Otherwise in violation of a constitutional or statutory provision;
> but the court shall not substitute its judgment for that of the agency on an issue of discretion.

Section 120.68(8), Fla. Stat. further provides:

> (8) Unless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

This Court reviews the Commission's interpretation of applicable state statutes or rules *de novo*. Art. V, § 21, Fla. Const.

DEF does not contend that the fairness of the proceeding below or the correctness of the action was impaired by a material error in procedure or a failure to follow prescribed procedure. Nor may DEF raise, for the first time on appeal, the argument that the Commission's action depends on any finding of fact that is not supported by competent, substantial evidence in the record.

ARGUMENT

I. THE DETERMINATION BY THE ALJ AND COMMISSION—THAT DEF FAILED TO DEMONSTRATE, BY A PREPONDERANCE OF THE EVIDENCE, THAT THE PERIOD 5 OUTAGE AND RESULTING FUEL COSTS WERE NOT A CONSEQUENCE OF DEF'S IMPRUDENT OPERATION OF THE STEAM TURBINE IN PERIOD 1—WAS ENTIRELY CONSISTENT WITH THE FINDING OF PRUDENCE IN PERIOD 5.

A. Criteria for Approval of Recovery of Replacement Power Costs.

As stated by the ALJ and the Commission below, the legal standard for determining whether a regulated utility's replacement power costs are prudent is "what a reasonable utility manager would have done, in light of the conditions and circumstances that were known, or should [have] been known, at the time the decision was made." *S. Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013); R.O., C.O.L. ¶109; R. 6105; F.O., at 7; R. 6251; Joint App. p. 32, 48.

B. DEF is Precluded from Raising, for the First Time on Appeal, the Argument that the ALJ's Findings of Fact are not Based on Competent, Substantial Evidence.

DEF contends, for the first time on appeal, that "[n]o competent substantial evidence in the record supports the Final Order's conclusion that the replacement power costs DEF seeks to recover as

a result of the February 2017 outage, based on blade damage that occurred in Period 5, were consequences of 'DEF's imprudent operation of the steam turbine in Period 1.'" (DEF's Initial Brief, p. 23).

A party is prohibited from raising issues on appeal that were not properly excepted to or challenged before an administrative body. *Henderson v. Dep't of Health, Bd. of Nursing*, 954 So. 2d 77, 81 (Fla. 5th DCA 2007); see also *Colonnade Med. Ctr., Inc. v. State, Agency for Health Care Admin.*, 847 So. 2d 540, 542 (Fla. 4th DCA 2003) ("Colonnade also contends that the final order is unsupported by competent, substantial evidence. This challenge, however, is not preserved for review. An appellant cannot raise issues on appeal that were not properly excepted to or challenged before an administrative body.").

DEF is thus foreclosed from asserting that the Findings of Fact supporting the ALJ's and Commission's ultimate determination—i.e., that DEF failed to demonstrate by a preponderance of the evidence, that DEF's imprudent actions in Period 1 were not the source of the

February 2017 forced outage—are not supported by competent substantial evidence of record.

C. The ALJ and Commission Correctly Determined that Duke Failed to Demonstrate by a Preponderance of the Evidence that Duke was Prudent in its Actions and Decisions Leading Up to the February 2017 Forced Outage at the Bartow Plant.

DEF concedes that the ALJ and Commission's determination that DEF acted imprudently in operating the steam turbine during Period 1 is based on competent substantial evidence of record. On appeal, however, DEF suggests that the additional determination that DEF operated prudently in Period 5 "is irreconcilable with the ultimate conclusion of imprudence." (DEF's Initial Brief, p. 25). DEF's argument is illogical and must fail because the ALJ found that the preponderance of evidence demonstrated a causal link between Duke's imprudent operation of the steam turbine in Period 1 and the blade damage in Period 5 that resulted in the February 2017 forced outage giving rise to the replacement power costs Duke seeks to recover, and this finding is supported by competent, substantial evidence as detailed below. R.O., C.O.L. ¶114; R. 6106; F.O., at 13; R. 6257; R.O., F.O.F. ¶102; R. 6104; F.O., at 13; R. 6257; Joint App.

p. 33, 54, 31, 54.[4]

D. The ALJ and Commission's Determination that the Preponderance of the Evidence Pointed to DEF's Imprudent Operation of the Turbine in Period 1 as the Source of the Period 5 Forced Outage is Overwhelmingly Supported by Competent, Substantial Evidence of Record.

DEF belatedly suggests that there is a lack of competent, substantial evidence in the record linking its imprudent actions in Period 1 to the Bartow Plant's outage during Period 5. (DEF's Initial Brief p. 29). Duke is attempting to make an impermissible back-door attack on the foreclosed factual determinations supporting its culpability by seeking to shift the burden of proof onto appellees. This argument should be rejected because Duke has waived raising a challenge to whether there is competent and substantial evidence in

[4] To the extent that DEF's argument claims that the ALJ improperly applied hindsight in reviewing its actions, Recommended Order, C.O.L. ¶109 clearly demonstrates the contrary in stating "The legal standard for determining whether replacement power costs are prudent is "what a reasonable utility manager would have done, in light of the conditions and circumstances that were known, or should [have] been known, **at the time the decision was made.**" *S. Alliance for Clean Energy v. Graham, 113 So. 3d 742, 750 (Fla. 2013).*" (Emphasis added).

the record linking its imprudence to the damage and further because the burden was not on appellees to establish this link.

Nevertheless, the ALJ and Commission's determination that Duke's imprudence in Period 1 is the source of the February 2017 forced outage, and that DEF failed to demonstrate, by a preponderance of the evidence, that DEF's imprudence in Period 1 was not the reason for the February 2017 forced outage, is supported by competent, substantial evidence of record. Key citations are set out verbatim below with supplemental supporting citations to the competent and substantial evidence of record provided by Joint Appellees:

- The greater weight of the evidence establishes that the Mitsubishi steam turbine was designed to operate at 420 MW of output and that 420 MW was an operational limitation of the turbine. R.O., F.O.F. ¶33; R. 6089; F.O., at 8; R. 6252, 3351, 3353, 3373, 3377-78; Joint App. p 16, 49.

- DEF's imprudent operation of the turbine during Period 1 resulted in "cumulative wear caused by running the unit in excess of its capacity half of the time." R.O., F.O.F. ¶89, fn. 4; R. 6101; F.O., at 15; R. 6259; Joint App. p. 28, 56.

- The evidence was clear that Mitsubishi did not contemplate DEF's operation of the steam turbine beyond the heat balance scenarios set forth in the Purchase Agreement. The evidence was also clear that DEF made no effort before the fact to notify Mitsubishi of its intended intensity of operation or to ask Mitsubishi whether it could safely exceed the numbers stated in the Purchase Agreement. Mr. Swartz was unable to explain away this criticism and thus DEF failed to meet its burden of demonstrating that it prudently operated the Bartow Plant during the times relevant to this proceeding. R.O., F.O.F. ¶102; R. 6104; F.O., at 13; R. 6257, 3164, 3378, 4927, 5903; Joint App. p. 31, 54.

- DEF failed to demonstrate by a preponderance of the evidence that its actions during Period 1 were prudent. DEF purchased an aftermarket steam turbine from Mitsubishi with the knowledge that it had been manufactured to the specifications of Tenaska with a design point of 420 MW of output. Mr. Swartz's testimony regarding the irrelevance of the 420 MW limitation was unpersuasive in light of the documentation that after the initial blade failure, DEF itself accepted the limitation and worked with Mitsubishi to find a way to increase the output of the turbine to 450 MW. R.O., F.O.F. ¶102; R. 6104; F.O., at 13; R. 6257; R.O., C.O.L. ¶110; R. 6105; F.O., at 5; R. 6249; R. 246, 3140, 3148, 3150-52, 3156-57, 3161-62, 3164, 3174-75, 3177, 3222-23, 3225, 3237, 3268, 3351, 3353, 3356-57, 3368-69, 3373, 3377-78, 3356-57, 3368-69, 3413-14,

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- The record evidence demonstrated an engineering consensus that vibrations associated with high energy loadings were the primary cause of the L-0 blade failures. DEF failed to satisfy its burden of showing its actions in operating the steam turbine in Period 1 did not cause or contribute significantly to the vibrations that repeatedly damaged the L-0 blades. To the contrary, the preponderance of the evidence pointed to DEF's operation of the steam turbine in Period 1 as the most plausible culprit. R.O., C.O.L. ¶114; R. 6106; F.O., at 13; R. 6257; R. 3140, 3148, 3156, 3160-62, 3164, 3176, 3351-54, 3377-78, 4776, 4989, 5148-53, 5698, 5716, 5722, 5732, 5751, 5759, 5767, 5815, 5829, 5845, 5857, 5871, 5908, 5925, 5965-96; Joint App. p. 33, 54.

- It is not speculative to state that the events of Periods 2 through 5 were precipitated by DEF's actions during Period 1. R.O., C.O.L. ¶119; R. 6107; F.O., at 14; R. 6258; R. 3151, 3156-57, 3192, 3352-57, 3368-69, 3382, 3400, 3409-10, 3773, 4062, 5699, 5716, 5722, 5732, 5751, 5759, 5767, 5779, 5789, 5801, 5815, 5829, 5843, 5857, 5872, 5908; Joint App. p. 34, 55. See also Hearing Exhibit 73 at 3; R. 3418.

- The greater weight of the evidence supports the conclusion that DEF did not exercise reasonable care in operating the steam turbine in a configuration for which it was not designed and under circumstances which DEF knew, or should have known, that it should have proceeded with caution, seeking the cooperation of Mitsubishi to devise a means to operate the steam turbine above 420 MW. R.O., C.O.L. ¶121; R. 6108; F.O., at 17; R. 6261; Joint App. p. 35, 58.

- DEF failed to carry its burden to show that the Period 5 blade damage and the required replacement power costs were not consequences of DEF's imprudent operation of the steam turbine in Period 1. R.O., C.O.L. ¶123; R. 6109; F.O., at 18; R. 6262; Joint App. p. 36, 59.

- Because it was ultimately responsible for the de-rating, DEF should refund replacement costs incurred from the point the steam turbine came back online in May 2017 until the start of the planned fall 2019 outage that allowed the replacement of the pressure plate with the redesigned Type 5 40" L-0 blades in December 2019. R.O., C.O.L. ¶124; R. 6109; F.O., at 19; R. 6263, 3409; Joint App. p. 36, 60.

This Court has defined competent, substantial evidence as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred...such relevant evidence

as a reasonable mind would accept as adequate to support a conclusion." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). Furthermore, any type of competent evidence may support a finding of fact if it is substantial in light of the record as a whole, taking into account whatever in the record fairly detracts from its weight. *Miller v. State, Div. of Ret.*, 796 So. 2d 644, 646 (Fla. 1st DCA 2001).

It is the sole prerogative of the ALJ to consider the evidence presented, to resolve conflicts in the evidence, to judge the credibility of witnesses, to draw permissible inferences from the evidence, and to reach ultimate findings of fact based on the competent substantial evidence of record. *Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. & Prof'l Regulation*, 146 So. 3d 1175 (Fla. 1st DCA 2014), citing *Heifetz v. Dep't of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

The ALJ and Commission determined, based on the preponderance of competent, substantial evidence, that DEF's imprudent action in Period 1 was the source of the forced outage in Period 5. The ALJ and Commission also determined that DEF failed to carry its burden of proof to demonstrate, by a preponderance of

the evidence, that the replacement power costs DEF seeks to recover were not consequences of its actions that were found to constitute imprudent operation of the steam turbine in Period 1. This conclusion is based on competent, substantial evidence of record, including the competent, substantial evidence detailed above.

II. THE COMMISSION APPLIED THE CORRECT LEGAL STANDARD IN DISPOSING OF DEF'S EXCEPTIONS TO THE ALJ'S CONCLUSIONS OF LAW.

The Final Order and Record plainly reflect that the Commission was fully apprised and aware of the scope of its authority when reviewing the Recommended Order, including the provisions of § 120.57(1)(l), Fla. Stat., which provides in pertinent part:

> (l) The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law

> may not form the basis for rejection or modification of findings of fact.

Duke speculates, without basis, that the Commissioners misunderstood the law by perceiving non-existent limitations on the agency's review. DEF postulates that the Commission felt it was constrained and unable to reject a conclusion of law when the utility's proffered conclusion of law was "as or more reasonable." (DEF's Initial Brief p. 37). To the contrary, both the Final Order and the transcripts of the Commission [September 1, 2020 Agenda Conference] below reflect that the Commission was well aware of the scope of its authority to reject or modify the ALJ's Recommended Conclusions of Law upon a determination that a proposed substituted conclusion of law is "as or more reasonable." R. 6248-6249, 758, 765; Joint App. p. 41-146. The Commission's authority was expressly discussed by Commissioners during the Agenda Conference:

> "I think the legal standard is clear for a conclusion of law, and I think it states that it can be as or more reasonable to base that decision on. And so I just want to make sure, from my perspective, that I am clear that acceptance of a proposed order of the DOAH judge does not in itself essentially mean that the Commission does not have authority to make a determination that they deem as

> reasonable for a conclusion of law. I actually think it's the opposite. *It's very clear that we do have that authority to make that decision.*"

September 1, 2020 Agenda Conference; R. 771 (emphasis added).

Duke's claim on appeal that the Commission did not understand the scope of its authority is inconsistent with the facts in the record and should be rejected. The Commission's Final Order below clearly states with respect to Duke's exception to ¶119 of the Recommended Order that DEF's exception "fail[ed] to demonstrate that [Duke's proposed substituted] conclusion is as or more reasonable than the ALJ's." R. 6258-6265; Joint App. p. 55. The Commission's rejection of DEF's exceptions does not mean that the Commission misunderstood or misapplied the relevant standards. To the contrary, the agency simply found DEF's proposed conclusions to be unpersuasive, much less "as or more reasonable."

Regardless, Duke's argument that there is a purported gap in direct causal linkage was flatly contradicted by Duke's own experts. The ALJ's Finding of Fact ¶71—to which Duke took no exception—that Duke Engineering described the Period 1 unit operation actions unequivocally as a "significant contributing factor[s]" to the Period 5

outage is supported by competent substantial evidence of record. R. 6097, 4269. This undisputed factual finding by the ALJ, which supports the ALJ's conclusion of law as set forth in ¶119 of the Recommended Order, cannot now be modified or rejected. Nor can Duke's post hoc claim that its theory is "as or more reasonable" than the Commission's record-supported, adopted determination be accepted and the counter-factual alternative theory be substituted by the reviewing court.

Moreover, contrary to Duke's suggestion, the Commission is not required to adopt a conclusion of law that Duke asserts is "as or more reasonable." Section 120.57(1)(l), Fla. Stat., provides that when reviewing the recommended order of an ALJ, the agency may reject or modify the conclusions of law and that if the agency does so, the substituted conclusion must be as or more reasonable than that which was rejected or modified. The Commission is not required to adopt a party's proposed substituted conclusion of law. In this case, the Commission affirmatively rejected each of the proposed substituted conclusions of law put forward by DEF. Accordingly, DEF

has failed to demonstrate any erroneous interpretation which requires reversal under § 120.68(7)(d), Fla. Stat. (2020).

CONCLUSION

This Court should affirm the Final Order determining that DEF acted imprudently and prohibiting the recovery of DEF's replacement power costs associated with the February 2017 forced outage at the Bartow Plant in the amount of $16,116,782.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **JOINT ANSWER BRIEF** has been furnished by electronic mail on this 19th day of July, 2021, to the following:

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I HEREBY CERTIFY, pursuant to Rule 9.045, Florida Rules of Appellate Procedure, that the JOINT ANSWER BRIEF was prepared using Bookman Old Style 14-point font and contains 5,748 words, not exceeding the word limit of 13,000 and therefore complies with the requirements of Rule 9.045 and 9.210(a)(2), Florida Rules of Appellate Procedure.

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