BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Storm Protection Plan, pursuant to Rule 25-6.030, F.A.C., Tampa Electric Company.	DOCKET NO. 20220048-EI FILED: September 6, 2022

JOINT POST-HEARING BRIEF OF THE OFFICE OF PUBLIC COUNSEL AND THE FLORIDA INDUSTRIAL POWER USERS GROUP

The Citizens of the State of Florida, through the Office of Public Counsel and The Florida Industrial Power Users Group ("FIPUG"), collectively the Joint Parties ("Joint Parties"), pursuant to the Order Establishing Procedure in this docket, Order No. PSC-2022-0119-PCO-EI, issued March 17, 2022, hereby submit this Joint Post Hearing Brief.

STATEMENT OF BASIC POSITION

The Joint Parties' basic position in this case is that the Commission's determinations regarding the Storm Protection Plans (SPP) that were filed must be consistent with the public policy contained in Section 366.96, Florida Statutes and Rule 25-6.030, Florida Administrative Code (F.A.C.) Additionally, Tampa Electric Company (TECO) had the burden of proof to justify compliance with the statute and rules, as well as to demonstrate the reasonableness and prudence of the programs and projects and their related costs. In this docket, the Joint Parties have focused on whether the programs and projects proposed by TECO satisfied the statutory and rule requirements for permissible programs and projects as well as whether the appropriate cost/benefit analyses were performed and whether that analysis supports the cost of the programs and projects contained in the SPP filed by TECO. Unfortunately, there were a variety of instances within TECO's 2022-2031 SPP where programs and projects do not meet the legal requirements of permissible SPP programs and projects, and there are also some instances where the analysis of the cost and benefits do not justify the programs and projects. The Commission should exclude the

programs and projects that the Joint Parties identified as impermissible and/or fiscally unjustifiable.

STATEMENT OF FACTUAL ISSUES AND POSITIONS

ISSUE 1A: **Does TECO's Storm Protection Plan contain all of the elements required by Rule 25-6.030, Florida Administrative Code?**

Joint Parties: *Yes, TECO's SPP does include the requisite comparison of the costs and dollar benefits of the proposed programs and projects; however, the Joint Parties do not agree with the analysis, which, among other things, includes subjective estimates of the value to customers of avoided outages.*

ARGUMENT:

While TECO's 2022-2031 Storm Protection Plan does contain all of the elements required by Rule 25-6.030, F.A.C. TECO's comparison of costs and benefits was flawed.

Rule 25-6.030(3)(d), F.A.C. states:

> (3) Contents of the Storm Protection Plan. For each Storm Protection Plan, the following information must be provided:
> …
>
> (d) A description of each proposed storm protection program that includes:
>
> 1. A description of how each proposed storm protection program is designed to enhance the utility's existing transmission and distribution facilities including an estimate of the resulting reduction in outage times and restoration costs due to extreme weather conditions;
>
> 2. If applicable, the actual or estimated start and completion dates of the program;
>
> 3. A cost estimate including capital and operating expenses;

4. A comparison of the costs identified in subparagraph (3)(d)3. and the benefits identified in subparagraph (3)(d)1.; and

5. A description of the criteria used to select and prioritize proposed storm protection programs.

TECO's witness David L. Plusquellic testified as to TECO's regulatory interpretation of the requirements of subparagraphs 1-4 of the Rule, while witness David A. Pickles testified as to TECO's regulatory interpretation of subparagraph 5 of the Rule. Tr. 525. In order to perform the cost/benefit analysis, TECO retained 1898 & Co., a consulting firm, to assist with the prioritization of projects. Tr. 526. Specifically, TECO hired the firm to calculate the customer benefit of hardening projects through reduced utility restoration costs and impacts to customers, prioritize hardening projects with the highest resilience benefit per dollar invested into the system, and establish an overall investment level that maximizes customers' benefit while not exceeding Tampa Electric's technical execution constraints. Tr. 389. Then, Tampa used 1898 & Co.'s model to conduct the cost/benefit analysis required by Rule. 25-6.030. Tr. 526. Using 1898 & Co.'s models and projections, TECO has requested approval of a 10-year capital investment plan with a cost of approximately $1.59 billion dollars. Ex. 9, Pg. 70; Ex. 9, Appendix F, p. 71.

However, when 1898 & Co. attempted to monetize the value of the benefits to customers, they calculated excessive dollar benefits by including the societal value of customer interruptions in addition to their estimates of avoided damages and restoration costs. Tr. 966. The societal value of customer interruptions is a highly subjective quantitative measure based on a range of customer survey results. Tr. 966. Additionally, the societal value of customer interruptions is not a cost that is actually incurred or avoided by the utility or customer; therefore, it should be excluded from the justification of SPP programs and projects. TR. 966-67.

ISSUE 2A: **To what extent is TECO's Storm Protection Plan expected to reduce restoration costs and outage times associated with extreme weather events and enhance reliability?**

Joint Parties: *Some of TECO's proposed programs and projects will have a better impact on reducing outages times and lowering restoration costs than others. Additionally, several programs and projects are not extreme weather storm hardening programs but rather routine maintenance responsibilities of any electric utility and should not be included in TECO's SPP.*

ARGUMENT:

At least two of TECO's proposed programs and projects clearly fail to achieve the dual requirements of Rule 25-6.030, F.A.C. Specifically, the Distribution Feeder Sectionalizing and Automation program and the Transmission Access Enhancement program will not result in a decrease in outage times and a decrease in outage costs as required by the rule. Other programs, like the Distribution Lateral Undergrounding program and the Distribution Overhead Feeder Hardening Program, are too aggressive as proposed, and the Substation Extreme Weather Hardening Program includes projects that should have been addressed by TECO earlier during the normal course of business.

TECO's has proposed their Distribution Feeder Sectionalizing and Automation program, which is a fault isolation system TECO says will allow for the automatic transfer of load to neighboring feeders in the event of unplanned outages during extreme weather events as well as on "blue sky" day. Ex. 9, p. 44-5. TECO also states that this program will allow for the network to be reconfigured automatically to minimize the number of customers experiencing prolonged outages during extreme weather, as well as on "blue sky" days. Finally, TECO argues that this program will reduce restoration times by isolating only those parts of the electrical system that

contain faults that require assessment, investigation and follow-up repair. Ex. 9, p. 45. Even if all of TECO's arguments about this program are true, this program will not reduce outage costs since whatever caused the outage (wind damage, tree damage, etc…) will still need to be cleaned up and repaired in order to restore service. Tr. 592, 737-738. In fact, if this technology is added to the lines, then the restoration costs may even increase every time a repair to the line becomes necessary if the fault isolation technology equipment will need to be restored, too. Additionally, this type of equipment does not harden an electric system. Tr. 724. Since this project does not harden the system and will not reduce restoration costs, this program must be excluded from Tampa's Storm Protection Plan. Tr. 737-38.

Similarly, the Commission must also exclude the Transmission Access Enhancement program from TECO's approved storm protection plan. TECO asserts that the $31.5 million price tag for the access road and bridges in this program will "ensure that TECO has access to its transmission facilities for the purpose of restoration." Ex. 9, p. 47. However, the evidence in both TECO's storm protection plan as well as the TECO's testimony at the hearing show that this program does not meet the requirements of the rule.

TECO has a responsibility as a utility company to maintain its roads and bridges as part of its day-to-day operations. However, TECO stated that, "Increased power demands and changes in topography and hydrology related to customer development, along with several years of active storm seasons, have negatively impacted the company's access to its transmission infrastructure," and that TECO needs to "restore access" to at least some of these areas. Tr. 564; Ex. 9, pg. 47. TECO also acknowledged they have only made "temporary" repairs to their access bridges following several active storm seasons. Ex. 9, p. 49. TECO even admitted at the SPP hearing that TECO currently has either challenging access or no access at all to some of its transmission infrastructure, even on blue sky days. Tr. 586-87. Further, TECO has also acknowledged that these

proposed access road and bridges will also be used on blue sky days to conduct routine maintenance and repair responsibilities on TECO's transmission system. Tr. 589-91. The Commission should not authorize TECO to charge its customers through the SPP clause to restore access to TECO's own transmission infrastructure when customers are already paying for TECO's routine maintenance expenses through base rates and when TECO will benefit from these projects year-round, not just during brief periods of extreme weather.

Additionally, any reductions in outage times or restoration costs associated with this program should be measured against a well-maintained infrastructure of roads and bridges. Tr. 745. Since TECO is only bringing the existing status of inadequate or poor-quality roads and bridges to a well-maintained state, there is no reduction in storm restoration costs or outage times. Therefore, this program does not meet the requirements of the rule.

TECO's proposed total ten-year budget for the Distribution Lateral Undergrounding Program is just over $1 billion, which represents over 60% of the capital costs for all of TECO's 2022-2031 SPP programs. Tr. 741. TECO has increased the capital expenditure for this program by 10% since TECO's last SPP. Tr. 741. While lateral undergrounding does achieve both of the SPP rule's requirements of reducing restoration costs and outage times, TECO's lateral undergrounding project is simply too aggressive. TECO admits that the legislature did not prescribe a particular rate that utility companies must engage in storm hardening activities. Tr. 355. Using TECO's own estimates, OPC witness Kevin Mara pointed out that if TECO's overall capital expenditures were reduced from $1.5 billion to $850 million, customers would still receive 92% of the benefits. Tr. 730. Since this program is by far the largest in TECO's SPP, and since TECO is not required to harden the system at any specific rate, the Commission can and should reduce the magnitude of this program. Doing so would balance the importance of storm hardening with the financial impact of storm hardening activities on customers.

TECO's Distribution Overhead Feeder Hardening Program is another example of a program that is too aggressive, as proposed. The Joint Parties support TECO's proposal to harden selected feeders to meet Grade B criteria, as long as that is cost-effective. Ex. 9, pg. 44; Tr. 737. However, the Joint Parties believe that the budget for this program should remain at the budget level included in TECO's 2020-2029 SPP, so approximately $10 million per year, or $100 million for the total 10-year project budget. Tr. 737.

TECO states that the primary objective of the Substation Extreme Weather Hardening Program is, "to harden and protect the company's substation assets that are vulnerable to flood and storm surge." Tr. 552. Since TECO's last SPP, they conducted another study that ultimately led to the identification of 9 specific substations which TECO believes will benefit most from storm hardening activities while also having the biggest impact on grid stability, as well as reliability of service, safety, and environmental risks if an extended outage from an extreme weather event occurred. Tr. 553. Included in the 9 substations are the South Gibsonton 230/69kV Substation and the Skyway 69kV Substation. The Joint Parties have concerns about the inclusion of these two substations in TECO's SPP, since both of these substations should have already been upgraded to address storm surge and flooding concerns. Between 1999 and 2002, TECO upgraded the South Gibsonton 230/69kV Substation. Ex. 39, page 2. Similarly, the Skyway 69kV Substation also had a new control house installed between 2005 and 2006. Ex. 39, pg. 3. Since flood maps have been available since 1973, and since the *Standard ASCE-24-14 Flood Resistant Design and Construction* provides minimum requirements for design and construction of structures located in flood hazard areas, TECO's proposed SPP hardening projects for these two substations should have been accomplished during their most recent upgrades. T. 648-649.

The Commission should modify and/or exclude these programs as recommended by witness Mara from TECO's SPP since customers are already paying for many of these programs through base rates and since many of these programs do not meet the requirements of the rule.

ISSUE 3A: **To what extent does TECO's Storm Protection Plan prioritize areas of lower reliability performance?**

Joint Parties: *TECO has several proposed projects that prioritize areas of lower reliability performance; however, many of those programs and projects either do not qualify as permissible SPP programs or projects and/or are not economically justifiable.*

ARGUMENT:

TECO's states that the company's methodology for prioritizing its SPP projects incorporates reliability performance. (Prehearing Order, p. 19) TECO also states that SPP projects were prioritized based on their benefit-to-cost ratio. (Prehearing Order, p. 19). As previously identified, the cost/benefit analysis conducted by TECO's consultant and relied upon by TECO is flawed because it inflated the projected benefits by including the highly subjective concept of societal value. Tr. 966. Since the analysis contained such a subjective factor in the calculations, TECO's prioritization of projects is similarly skewed.

Additionally, to the extent that TECO suggests that the Distribution Feeder Sectionalizing and Automation project will enhance the performance of the overall distribution system, the project does not reduce restoration costs and outage times (as argued in Issue 2A). Therefore, this project does not satisfy the SPP statute or rule, and the Commission should exclude this project from TECO's SPP.

ISSUE 4A: **To what extent is TECO's Storm Protection Plan regarding transmission and distribution infrastructure feasible, reasonable, or practical in certain areas of the Company's service territory, including, but not limited to, flood zones and rural areas?**

Joint Parties: *A number of programs and projects in flood zones that DEF has proposed for SPP inclusion would, absent the 2021 Stipulation, be more appropriately addressed in a base rate case since they do not harden the system from extreme storm events. Many of these programs fail the two-prong test.*

ARGUMENT:

The Joint Parties focused their evaluation and resulting objections on the lack of strict compliance with the rule and statute governing the TECO 2023 SPP update. Our efforts to identify excessive spending in the plan centered around projects that did not meet the two-prong test and ones that were not cost effective, including projects that had inflated or non-verifiable costs.

The Joint Parties note that the phrase "feasible, reasonable, or practical" is a test of the physical viability of the plan components. It is not a statutory test for whether the public interest has been met, nor does it exclude the consideration of prudence in the determinations mandated by the Legislature.

ISSUE 5A: **What are the estimated costs and benefits to TECO and its customers of making the improvements proposed in the Storm Protection Plan?**

Joint Parties: *While TECO has presented a cost/benefit analysis, none of the incremental costs of the expanded or new SPP programs have benefits that exceed the costs when the cost/benefit analyses are corrected. If the programs and projects are not economically justified, then the programs and projects cannot be prudent and the costs would be imprudent and unreasonable.*

ARGUMENT:

While it is clear that TECO's SPP will cost ratepayers approximately $1.59 billion dollars over the next 10 years, the quantified benefit that customers will receive from that investment is not as clear. Ex. 9, Pg. 70; Ex. 9, Appendix F, p. 71. As discussed earlier, TECO and their consultant included the ambiguous concept of societal value into their benefit calculation formula, which leaves their result untrustworthy. By including such a fictitious concept, TECO and their consultant are attempting to give to customers, the "sleeves off their vest" since societal value is not a cost that is actually incurred or avoided by the utility or customer. Tr. 966-67. Additionally, even if the Commission accepts TECO's benefit calculations as accurate, the Commission should not impose such a burdensome cost on customers when, using TECO's own figures, the Commission could reduce the overall SPP cost by almost half and have customers still receive 92% of the benefits. Tr. 730; Ex. 9, Appendix F, p. 71.

<u>ISSUE 6A:</u> **What is the estimated annual rate impact resulting from implementation of TECO's Storm Protection Plan during the first 3 years addressed in the plan?**

Joint Parties: *Since TECO improperly included certain programs and projects in its proposed SPP, TECO's customer rate impacts are not properly calculated.*

ARGUMENT:

Unfortunately, this issue reflects one of the biggest flaws within TECO's SPP. In essence, TECO's SPP has failed to truly appreciate the financial impact that such a voracious spending plan will have on their customers, and that failure has only been exacerbated by the worsening state of our economy. No matter how many benefits TECO's storm hardening activities might bring to their customers, if customers can't afford it, then none of those benefits matter. TECO's approach to evaluating customer rate impacts is concerning because they seem to have treated customer rate impacts as an afterthought rather than as the crucial, required element that it is.

TECO's SPP did provide estimates of the rate impacts for the first three years of their SPP, in compliance with the requirement of Rule 25-6.030(h), F.A.C. Ex. 9, pp. 74-5. Witness Richard Latta's testimony also contains the rate impacts. T. 503. Mr. Latta's is TECO's controller, which means that he "is in charge of the company's financial reporting, some of the budgeting and forecasting, as well as the plant and tax calculations, as well as the regulatory accounting department." Tr. 508. Mr. Latta's testimony makes clear that Mr. Latta's role in the SPP process was, among other things, to calculate the rate impacts, and that he did not do so until after the capital expenditure levels for the entire plan were finalized. Tr. 508-09. The fact that TECO did not calculate the specific rate impacts until after the capital expenditure level for the plan was determined is corroborated by several discovery responses, including the following:

> "Tampa Electric evaluated customer rate impacts at the Plan level, as opposed to the individual Program or Project level. This means that specific rate impacts were calculated after the company decided on an overall level of investment for the Plan."
>
> Ex. 81, p. 56.
>
> "Customer rate impacts are examined…as an end result of the entire SPP."
>
> Ex. 81, p. 65

TECO asserts that they were "acutely aware" of the potential rate impacts to customers throughout the planning process, and that potential rate impacts were "given significant weight." Tr. 594, 1503; Ex. 81, p. 56. However, TECO relied on 1898 & Co.'s flawed quantification of customer benefits as their method of weighing potential rate impacts and seemingly decided that as long as there were net benefits to the customer, then the program was justifiable. Ex. 81, p. 56. As previously discussed, 1898 & Co.'s quantification of customer benefits is inflated, and therefore unreliable. Furthermore, even if there is a net benefit to a storm hardening program or project, that does not make the program or project affordable. Mr. Plusquellic also attempted to

prove that potential rate impacts were considered throughout the SPP development process, suggesting that TECO was analyzing several different factors, including potential rate impact, simultaneously, and that all of those analyses came together with the final SPP. However, TECO's discovery responses contradict this claim that rate impacts played any part in the determination of the overall expenditure levels of TECO's SPP:

> "…[C]ustomer rate impacts are examined as an end result and is not used to determine the total level, either up or down, of (1) capital (2) O&M expense contained in each of the first three years of the company's 2022-2031 SPP." (*sic)*
>
> Ex. 81, p.66

Mr. Plusquellic admitted that neither the filed SPP nor the Resilience Benefit Report created by 1898 & Co. contained any proof of TECO's consideration or awareness of the potential rate impacts prior to determination of the final budget levels for the plan. Tr. 1521-22. Despite TECO's insistence at the hearing that TECO considered potential customer rate impacts prior determining the overall budget levels, there is no support for that assertion in the SPP or resilience benefits report, and TECO's own discovery responses suggest otherwise. Similarly, TECO also failed to consider the reasonableness of the customer rate impact until after deciding upon the final level of overall expenditure, or cost, of the plan.[1]

TECO's decision to treat customer rate impacts as an afterthought when developing their SPP is disappointing, especially in light of the many known rate increases headed customers way and the rapidly worsening economic climate. To have an accurate understanding of the rate impact that this SPP will have on TECO's customers, the Commission must not consider this in a vacuum. On July 27, 2022, TECO filed their actual/estimated fuel and purchased power cost recovery and capacity cost recovery true-up amounts for the period of January 2022-December 2022, and in that

[1] "Once the proposed budget level was set, the company calculated the actual rate impact of the Plan to determine whether those rate impacts were reasonable compared to the expected benefits." Tr.1503-04, 1524.

filing, TECO indicates that they are on track for a massive $411,964,625 under-recovery. Ex. 107, p. 1. If the Commission approves this amount, the cost for this expense will likely start showing up on customer's bills in January, 2023. That is also when customers will see their portion of a base rate increase of $89,754,622 as result of the settlement from 20210034-EI. Another term of the settlement entitles TECO to another one-time base rate increase of $10 million, which will begin to be collected from TECO customers with this month's bill.[2] On top of all of these bill increases and the impact that they will have on customers, the Commission must also factor in the recession in which we all find ourselves, and the high inflation making everything else, not just our electric bills, more expensive.

Given TECO's disappointing level of consideration of customer rate impacts and all of the other financial hits that customers are facing, the Joint Parties implore the Commission to modify TECO's SPP as the Joint Parties recommend so that customer rate impacts are given the weight that they deserve. The Commission should take this opportunity to follow the admonition of the current Governor in his widely reported April 27, 2022 veto message:

> Given that the United States is experiencing its worst inflation in 40 years and that consumers have seen steep increases in the price of gas and groceries, as well as escalating bills, the state of Florida should not contribute to the financial crunch that our citizens are experiencing.[3]

ISSUE 7: **WITHDRAWN BY FPL**

ISSUE 8: **WITHDRAWN BY FPL**

ISSUE 9A: **Should the Commission approve, approve with modification, or deny FPL's new Transmission Access Enhancement Program?**

[2] See Docket No. 20220122-EI.
[3] https://www.flgov.com/wp-content/uploads/2022/04/4.27.22-Veto-Transmittal-Letter.pdf.

Joint Parties: *The Commission should not approve FPL's Transmission Access Enhancement Program without the modifications recommended by the Joint Parties.*

ARGUMENT:

The Commission should not approve FPL's Transmission Access Enhancement Program without the modifications recommended by the Joint Parties.

ISSUE 10A: **Is it in the public interest to approve, approve with modification, or deny the Company's Storm Protection Plan?**

Joint Parties: The Commission should approve TECO's SPP with the modifications recommended by the Joint Parties. The Commission should make the adjustments as reflected in the table from page 13 of the Direct Testimony of Kevin J. Mara.

ARGUMENT:

The Commission should approve TECO's SPP with the modifications recommended by the Joint Parties. The Commission should make the adjustments as reflected in the table from page 13 of the Direct Testimony of Kevin J. Mara.

JOINT PARTIES' POST-HEARING LEGAL ISSUE:

ISSUE: **Has the Commission unlawfully excluded testimony and evidence related to the reasonable and customary principles for application of ratemaking methods by the Florida Public Service Commission?**

Joint Parties: *Yes. The Commission's exclusion of the public's testimony submitted by Lane Kollen amounts to a denial of due process and reversible error.*

ARGUMENT:

This issue emanates from the Commission's decision to adopt *en toto* the Prehearing Officer's granting FP&L's Motion to Strike certain portions of the testimony of the public's witness Lane Kollen testifying on behalf of the OPC, which, as noted above, is referred to as the

Motion Order. The Motion Order fundamentally compromised the hearing process, and likely the outcome, due to the exclusion of the public's expert testimony that would have otherwise aided the Commission in interpreting and implementing the SPP statute and its rules for the benefit of customers. By not considering the full testimony of the public's witnesses, the Commission also lost the opportunity to protect customers from an endless escalation of costs, year-over-year. The SPP Rule implemented the Legislature's expectation that the Commission take a role in ensuring that the rate trajectory was reasonable, and that there was an appropriate benefit to cost relationship resulting from the plan approval. Rule 25-6.030(3)(d)1., F.A.C. The Motion Order additionally runs afoul of Article II, Section 3 of the Florida Constitution which requires a delegation of legislative authority to contain adequate guidelines to protect against unbridled agency discretion.

During the DEF portion of the hearing, counsel for FPL interjected during the cross-examination of DEF witness Lloyd. Despite his objection that the DEF testimony should not contaminate the FPL record, by interjecting his comments, he voluntarily highlighted a contrast among utilities in the interpretation of the statute and rules. The testimony in this docket reflected a significantly different take on the actual implementation of the statute and rules that contrasts to the positions taken in support of the Motion Order. The sharp contrast between TECO's recognition that benefits and costs should be compared (TR 430-433) grinds harshly against the company's adoption of the FPL thesis that no such requirement exists. Likewise, TECO's agreement that claimed benefits should be given a monetary value (TR 430-433) is sharply at odds with the objection lodged by FPL, adopted by DEF, and incorporated in the Motion Order ruling.

While these inconsistencies cannot be reconciled across the siloed records of the consolidated hearing that was governed by a common set of guidelines established by FPL, echoed by TECO and adopted by the Commission, they do highlight a fatal flaw in the decision-making. By blocking out only the public's views and its ability to put on a significant portion of its case

due to the stricken testimony, the Commission has crippled its own ability to follow the law. By pre-emptively deciding that only the IOUs are entitled to introduce testimony which interprets the SPP statute and rules – and inconsistently at that – the agency has greatly disadvantaged the ratepaying public they are required by law to protect.

FPL's Motion to Strike cast a long, dark cloud over the hearing and injected a level of harm and exclusion that prejudged the outcome due to the exclusion of the public's expert testimony that would aid the Commission in interpreting and implementing the SPP statute and its rules for the benefit of customers. This outcome exposes the Commission's action and the statute itself to running afoul of Article II, Section 3 of the Florida Constitution which requires delegation of legislative authority to contain adequate guidelines protecting against unbridled agency discretion.

Consequently, the Commission left itself in a take-it-or-leave-it posture that robs it of the opportunity to protect customers from an endless escalation of costs, year-over-year. The Legislature expected to the Commission to take a role in ensuring that the rate trajectory was reasonable and that there was an appropriate benefit to cost relationship resulting from the plan approval. Yet the Commission, with its Motion Order, removed significant evidence offered to mitigate the requested rate increases.

Given that the approval of the plan is a prerequisite to the Commission's ability to approve inclusion of SPP costs in customer rates through the SPPCRC and that prudence of the actual expenditures is only judged ***after*** a final accounting is given two years later, the prudence of the programs embedded in SPP's overall design, the project and funding prioritization, location selections and cost-effectiveness determinations are required elements of the Commission's authorization, at this stage of the proceedings, for utilities to proceed to expend funds initially. This interpretational posture is confirmed by the provision in section 366.96(7), Florida Statutes,

that attaches prudence to the plan – once approved – for purposes of subsequently proceeding with its implementation:

> (7) After a utility's transmission and distribution storm protection plan has been approved, proceeding with actions to implement the plan shall not constitute or be evidence of imprudence.

Since that the SPPCRC is not an authorization to proceed, and the SPP approval before the Commission in this proceeding seeks such authorization, the Commission cannot summarily deem prudence to exist merely by fiat or waving a public interest wand over the SPPs. The Florida Supreme Court has said as much recently:

> Naturally, the prudence of large capital investments is a relevant consideration in the Commission's review of a settlement under its public interest standard because imprudent investments of millions of dollars would likely clash with a public interest finding.

Sierra Club v. Brown, 243 So. 3d 903, 911 (Fla 2018).

The agency must provide an opportunity to each intervenor to cross examine the petitioner's evidence and provide its own evidence on the existence (or lack) of prudence in the plan if it is to be in the public interest. In this case, the Commission failed to provide that opportunity. Instead, the IOUs, like TECO, will be given a free pass in the form of a presumption of prudence since that very term has been banned from usage by the public's witnesses in this proceeding as confirmed by the Motion Order.

As reflected in the Motion Order at 3, TECO and FPL were indistinguishable in seeking to block the public's expert from testifying about prudence, cost effectiveness, common monetary bases for benefit and cost comparisons:

> <u>DEF's and TECO's Motions to Strike and FPUC's Letter Requesting the Same Matters be Stricken from Witness Kollen's Testimony in its Docket</u>

> On July 19, 2022, DEF, and on July 20, 2022, TECO filed Motions to Strike certain portions of OPC's Witness Kollen's testimony, and while noting that except for one unique error in FPL's SPP, ***all testimony to be stricken is identical in all four dockets***. FPUC filed a letter on July 20, 20222, requesting that, in the event similar portions of Witness Kollen's testimony were stricken by the Motions to Strike filed in the FPL, DEF, and TECO dockets, then those same matters should be stricken from the FPUC docket as redundant and immaterial. All four IOUs provided a marked-up version indicating the portions of Witness Kollen's testimony to be stricken.

(Emphasis added.) This correlation is specifically confirmed for this docket in TECO's Motion to Strike Testimony, filed July 20, 2022, at page 3:

> 11. If the Commission grants FPL's Motion to Strike, it would have the effect of striking portions of Mr. Kollen's testimony that are identical to, and are included in, Mr. Kollen's testimony as filed in the other three SPP dockets, including this docket.
>
> 12. Given that Mr. Kollen's testimony is virtually identical in all four dockets, which the Commission has consolidated for hearing, the four dockets will share common portions of the evidentiary record. Treating Mr. Kollen's testimony consistently across the dockets would "promote the just, speedy, and inexpensive determination of all aspects of the case" pursuant to Rule 28-106.211, F.A.C.
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> 13. The reasoning in FPL's motion applies with equal force in this docket. Accordingly, Tampa Electric requests that, if the Commission grants FPL's Motion to Strike, the Commission also strike the equivalent portions of Mr. Kollen's testimony in this Docket No. 20220048-EI. Mr. Kollen's testimony is functionally identical in both dockets, meaning the Commission could strike that testimony for the same grounds set forth in FPL's Motion to Strike. A copy of FPL's Motion to Strike is accordingly attached as Exhibit A and is incorporated herein by reference.

Accordingly, the table was set for an asymmetrical hearing where the Commission ordered that no testimony would be taken from the public's witness Kollen on issues of the proper way to interpret

and apply the statute and rules while granting DEF and other companies free reign to provide their varying opinions of different ways to read and apply the statute and rules.

The imbalance was evident in the way investor-owned utility (IOU) witnesses were allowed to put forward varying (and contrary) interpretations of the areas of the regulatory interpretations. This conflict in interpretation and implementation was interjected into the DEF docket[4] by counsel for FPL when he asserted, nay demanded, the right to cross-examine DEF witnesses on their disagreement with FPL.[5] When combined with the rulings in the Motion Order, the FPL Motion to Strike that was brought into this docket by TECO adopting it *in toto*, as well as the tactic by FPL reveal that the Commission acted arbitrarily when allowing utility testimony on the matter, but excluding the public's testimony on the same matter. Both companies were allowed to opine freely and broadly on the interpretation of the pertinent statute and rules while the public's expert Kollen, a 40 year operational and consulting participant in the world of interpreting and implementing utility regulatory requirements, was prevented from providing expert testimony on a different but entirely reasonable regulatory interpretation of the same statute and rules on which the utility witnesses testified.

This fundamentally flawed hearing process will likely require reversal of any decision that fails to consider this testimony. Section 120.68(7)(a), (d), and (e)4. Fla. Stat.[6]

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[4] The point at which FPL belatedly and improperly sought to intervene in Docket 20220050-EI was specifically during the cross examination (but immediately preceding DEF counsel's opportunity to conduct re-direct examination) of DEF witness Lloyd after that witness had explained his and DEF's view that that the rule required quantification of benefits and a comparison of them. Inexplicably, while seeking to keep the facts of there being differing and reasonable interpretations of the statute and rules from evincing arbitrary exclusion of OPC expert Kollen's testimony in Docket No, 20220051-EI, FPL counsel exquisitely made the case in this docket that there are multiple interpretations of section 366.96, Fla. Sat. and rule 25-6.030, F.A.C. In relevant part, FPL counsel stated:

> And I think we are put in a situation where all the utilities have taken different approaches to accomplish what they believe is required by the rule.

TR 189.

[5] Intervention is not allowed after a point 20 days before the start of the hearing. Rule 28-106.205(1), F.A.C.

[6] In relevant part the law provides that:

The Commission made a preordained outcome determination on an essential element of the case prior to the hearing in contravention of section 120.68(7)(a), Florida Statutes.

The Commission violated this subsection (a) statutory language first by the Prehearing Officer's issuance of the Motion Order and then by the full Commission rejecting reconsideration. These two erroneous decisions resulted in the public's expert, Mr. Kollen, not being allowed to provide his expert opinion evidence that supports a reasonable – but different – regulatory interpretation of the SPP requirements rather than the one the IOUs wish the Commission to adopt. By barring the introduction of such evidence by the public's witness into the evidentiary record, the Commission in essence took agency action and made its decision prior to hearing. The Commission took no record evidence from the public[7] on disputed facts regarding the necessary determinations of prudence of the proposed programs, the valuation of statutorily required benefits, the statutorily required cost-effectiveness of programs, or an objective measure of the proper balancing of costs and benefits and the proper accounting that should underlie the appropriate estimation of rate impacts. The Commission now does not have the option to resort to

(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;

***

(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:

***

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.

[7] The allowance of proffered testimony and some limited cross examination as a proffer did not provide the public a full opportunity to provide evidence on disputed facts.

the excluded, yet proffered testimony since it was taken for the very limited purposes of preserving the appellate record.[8]

The Commission failed to interpret Section 366.96, Florida Statutes, in contravention of Section 120.68(7)(d).

Substantively, the Commission has failed to conform its actions to subsection (d) by arbitrarily, and thus erroneously, failing to effectively interpret section 366.96, Fla. Stat. The error is that the Commission, without the benefit of the stricken testimony of Mr. Kollen, was thwarted when interpreting the statutes. Specifically, this error occurred when the full Commission barred consideration of the portion of Mr. Kollen's testimony – based on the facts surrounding the SPP – that would have provided facts and a renowned expert's common-sense regulatory interpretation that meets a reasonable man standard about methods that the Commission can utilize to limit rate increases. The Legislature mandated that the Commission consider costs and benefits of the programs and projects in making the determinations of the plans. Section 366.96(4), Fla. Stat.

By striking the Kollen's expert testimony on the undefined term of "benefits" that is juxtaposed to the word "costs" in the statute and rule, the Commission arbitrarily foreclosed hearing anything but IOU testimony about how to measure benefits. This one-sided interpretation was effectively no interpretation at all and thus error. Likewise, striking evidence of the public's expert on what to do with both the costs and benefits evidence by disregarding, and thus not considering, any objective cost-effectiveness standard is arbitrary.

The approach taken by the Commission cannot be considered an "interpretation" as contemplated by section 366.96(a) and (d), Fla. Stat., if the agency blocks the public's evidence and perspective. The Motion Order foreclosed the Commission from (1) receiving evidence of a

[8] See, TR 1093, "[W]hat is being proffered for appellate purposes…" Also see, TR 1187 "[F]or purposes of preserving a proffered record for appellate review …"

spectrum of views, (2) considering that evidence, and then (3) seriously weighing it before making a reasoned interpretation and application of the SPP statute, calling into question the Commission's ability to faithfully interpret the statute. The short record references below underscore the point that the public's witness Kollen's testimony, directed to whether TECO's SPP complied with the pertinent statutory and rule should have been allowed:

> As Tampa Electric's direct testimony in this docket demonstrates, the continued Storm Protection Plan is based on a rigorous analysis of possible methods *to achieve the goals of Section 366.96 of the Florida Statutes.* Tr. 341.
>
> This Plan was developed in a manner *consistent with the requirements of Section 366.96, Florida Statutes and the implementing Rule 25-6.030, F.A.C., adopted by the Commission.* Tr. 349.
>
> …[T]he Plan will continue to accelerate the company's existing hardening efforts *to achieve the objectives of Section 366.96(3) of the Florida Statutes.* Tr. 350.
>
> My testimony describes the eight storm protection programs that comprise the proposed SPP, and *how the company's plan fully meets the requirements of the statute* to strengthen electric utility infrastructure to withstand extreme weather conditions by promoting the overhead hardening of electrical transmission and distribution facilities, the undergrounding of certain electrical distribution lines and vegetation management. In my testimony, it clearly demonstrates the proposed plan complies with Rule 25-6.030. Tr. 352.
>
> … [M]y testimony demonstrates that the Tampa Electric hardening investment plan is reasonable, maximizes customer benefits and developed *with a complete alignment to the statute and rule.* Tr. 461.

(Emphasis added).

The Commission should consider whether its application of Section 366.96, Fla. Stat. is evidence that the non-delegation provision of Article II, Section 3 of the Florida Constitution is violated, in contravention of Section 120.68(7)(e)4.

Article II, Section 3 provides that:

> Branches of government. The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The leading case of *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla 1978), stands for the proposition that it is unlawful for the Legislature to delegate its powers to an agency without providing adequate guidance. This provision has been applied to the statutes governing the Commission. *Microtel Inc. v. Florida Public Com., 464 So. 2d 1189; Microtel Inc. v. Florida Public Com., 483 So. 2d 415.* In short, the Commission's hands are not tied. The Commission does not have to accept virtually anything that the utilities can squeeze into the SPP recovery. Indeed, such a narrow view of the Commission's options could be seen as the agency interpreting its mandate without an effective or complete delegation of authority. This may indicate that the Legislature did not provide sufficient guidance or direction about the rate setting related to the SPP cost incurrence and recovery (re: cost-effectiveness, benefit determination, public interest and prudence). The statutory interpretation offered by the company's non-lawyers is an incorrect and unwarranted invitation to unbridled ratemaking with no legislative guidance provided to limit the amount or trajectory of the expenditures and rates. This would be especially problematic if the Commission concludes it is required to set aside the limitations found elsewhere in chapter 366, Fla. Stat., that require it to only approve fair, just, reasonable, and prudent costs. See, sections 366.06.041, 366.05, and 366.06, Fla. Stat.

The errors described above have fundamentally and negatively impacted the fairness of the proceeding and the neutral and unbiased consideration of the TECO SPP. The Joint Parties request that the Commission re-open the record and provide all parties a full opportunity to present evidence, offer expert opinion testimony and to conduct cross-examination, consistent with

Section 120.57(1)(b), Florida Statutes, on the aspects of the case that were erroneously subjected to the Motion Order.

ISSUE 11A: Should this docket be closed?

Joint Parties: *Not at this time.*

Dated this 6th day of September, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE
DOCKET NO. 20220048-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 6th day of September 2022, to the following:

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