

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Fuel and purchased power cost recovery clause with generating performance incentive factor.

DOCKET NO. 20210001-EI

FILED: January 5, 2022

**CITIZENS' MOTION FOR RECONSIDERATION**

The Citizens of Florida, through the Office of Public Counsel (“Citizens” or “OPC”), pursuant to Rules 25-22.0376, and 25-22.060, Florida Administrative Code, request the Florida Public Service Commission (“FPSC” or “Commission”) to reconsider its decision in Order No. PSC-2021-0466-FOF-EI, Docket No. 20210001-EI (FPSC December 21, 2021) (“Order”). In support, Citizens provide the below arguments.

The standard of review on a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. *See e.g., In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, Docket No. 20060001-EI, Order No. PSC-06-0949-FOF-EI, 06 Fla. Pub. Serv. Comm’n Rep. 11:119, at 1-2 (Fla. P.S.C. Nov. 13, 2006).

**The Commission Should Reconsider its Decision to Order Duke Energy Florida, LLC (“DEF”) to Refund Customer’s only \$7.2 Million Instead of the full \$14.4 Million in Total Replacement Power Costs that Duke Should Have to Refund to Customers.**

In its Order, the Commission correctly determined that the DEF plant operator’s failure to follow established written procedures, without supervisory approval, directly led to the outage at Crystal River 4 (“CR4”). Pg. 5 of Order. However, citing two purported mitigating factors,<sup>1</sup> the

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<sup>1</sup> “However, the operator’s reliance on an unapproved procedure that had been successful at CR4 in the past, coupled with repeated testing establishing the reliability of the relay, are mitigating factors that must be taken into account.” Pg. 5 of Order.

Commission ordered that DEF should only be required to credit DEF customers half, or \$7.2 million, of the total \$14.4 million retail replacement fuel costs incurred as a result of the outage.

Prudence determinations are crucial decisions which often involve millions of dollars, and the Supreme Court of Florida has provided the framework that Commissioners must use in making those decisions. The standard of review for prudence determinations 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). Furthermore, DEF has the burden to prove that it met this standard by a preponderance of the evidence. *Dep’t of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

“Mitigation” is not a relevant factor in a prudence determination. The Commission is charged with determining if actions of the utility management were imprudent and, if so, whether those actions were the cause of the damage that required incurring replacement power costs. Prudence determinations are binary, “yes or no” decisions, not ones that can be made on a spectrum. In prudence cases, Utilities either meet their burden of proof, or they do not. With this Order and the consideration of “mitigating factors,” the Commission has effectively abrogated the burden on proof in all future prudence cases. The Commission must not allow this Order to stand.

**The Commission Should Reconsider its Decision to Order Duke Energy Florida, LLC (“DEF”) to Refund Customer’s only \$7.2 Million Instead of the full \$14.4 Million in Total Replacement Power Costs that Duke Should Have to Refund to Customers Due to the Inconsistent Mitigating Factors.**

Additionally, OPC submits that the Commission misapprehended or failed to consider that that the two cited mitigating factors do not actually mitigate anything.

As in all rate-setting matters, the utility bears the burden of demonstrating the reasonableness – and where questioned, the prudence – of its actions. Neither of the referenced

mitigating factors changed the proximate cause of the outage (operator error facilitated by inadequate supervision) or mitigated the consequences of the resulting plant outage. First, the Commission noted that the DEF operator relied on an unapproved procedure because it had worked in the past. Consistent failure to follow established startup procedures is not reasonable, and actually demonstrates that DEF's *management* failed to implement adequate operating and oversight procedures for DEF's employees to follow. The Commission cannot rationally consider this circumstance to be a mitigating factor in a prudence determination. This is an error.

Second, the Commission noted that DEF's testing of the check relay caused DEF employees to believe the relay was reliable and was not expected to fail when implementing the un-authorized startup synchronization procedure. However, even DEF's witness agreed that regardless of whether that relay was working or not, if the operator had performed his or her job properly, then no damage would have occurred. Tr. 339.

The Commission should reconsider the Order, find that there are no mitigating factors, and require DEF to refund the total of \$14.4 million to DEF's customers.

**The Commission Should Reconsider its Decision to Order Duke Energy Florida, LLC ("DEF") to Refund Customer's only \$7.2 Million in Total Replacement Power Costs Instead of the full \$14.4 Million that Duke Should Have to Refund Customers Since There is No Evidence or Precedent Upon Which to Apportion the Financial Responsibility.**

The Commission should reconsider its Order apportioning the financial responsibility for the CR4 damage between the customers and DEF. The Order overlooks a significant requirement of the law by adding additional elements to the standard of review as described by the Supreme Court of Florida.

The issue before the Commission in this case was to determine if DEF met its burden of proof to demonstrate by a preponderance of the evidence that DEF's actions related to CR4 were

prudent, not to determine to what degree DEF should be financially responsible for those actions if they failed to meet that burden.<sup>2</sup>

Once the Commission made the prudence determination that DEF's actions directly led to the outage, the Commission's decision-making responsibilities were complete. For example, on pages 4 and 5 of the Order, the Commission made factual determinations:

“As with all replacement power cases, our decision in this case is highly fact-specific. We find that the record is clear that if the operator had followed written procedures for either automatic or manual synchronization, the outage would not have occurred and the failed relay would have gone undetected until DEF performed an inspection. We also find that if the relay had not failed, then the operator's disregard of written procedures and use of an unapproved procedure would not have resulted in an outage. The record does not satisfactorily establish that either a thorough walkdown occurred after each synchronization attempt or that the operator received supervisory approval to deviate from the written procedure. Failure to follow approved written procedures for automatic or manual synchronization, coupled with the fact that although a supervisor was on site he was not consulted by the operator prior to using an unapproved procedure, is very troubling and does not constitute acceptable operational practices.”

The “but for” nature of these factual determinations cannot be reconciled with the notion of allocation of fault. Once DEF management is determined to be imprudent, based on what it knew or should have known at the time of (or prior to) the accident, there is no room for apportionment of the damage. If management is at fault, consequential damage in the form of replacement power costs are shareholder responsibility. The Commission is without precedent to allocate damages based on arbitrary feelings or instinct.

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<sup>2</sup> The introduction, *ab initio*, of a completely new legal “standard” akin to the concept of comparative negligence (with no citation to precedent in Florida or elsewhere) makes it difficult to formulate a reconsideration argument on that aspect of the order as parties were not on notice that the Commission would or could depart from the established framework for making a prudence determination.

Nevertheless, and without any quantifiable evidence, data, or case law<sup>3</sup> as support, the Commission decided to allocate<sup>4</sup> financial responsibility for management's imprudent actions between DEF and DEF's customers. The Commission's introduction of this novel "apportionment" decision-making process, which is subject simply to the "gut"<sup>5</sup> instinct of Commissioners, is not only a departure from the requirements of the established agency policy for the prudence standard of review and the resultant burden of proof, but also renders agency determinations whimsical and thus arbitrary and capricious.

The Commission should immediately reconsider this Order and require DEF to refund the total \$14.4 million in replacement fuel costs to DEF's customers since the Commission found that DEF's actions, in sum, directly led to the outage.

OPC has attempted to consult with counsel for DEF, Florida Industrial Power Users Group ("FIPUG"), White Springs Agricultural Chemicals d/b/a PCS Phosphate ("PCS"), Florida Retail Federation ("FRF"), and NuCor Steel Florida, Inc. ("NuCor") on this motion. FRF supports this motion. PCS does not oppose the motion. FIPUG and NuCor take no position at this time. OPC attempted to obtain DEF's position on this motion; however, no response was received by the time of filing.

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<sup>3</sup> OPC has been unable to find a single instance in Florida, or any other State, where the Commission has made such an apportionment of financial responsibility in a prudence case.

<sup>4</sup> The discussion among the Commissioners was framed thus: "I said, you know, this is one of those Solomon decisions, can you split the baby." December 7, 2021 Agenda Conference, Item 4B, Transcript at 4.

<sup>5</sup> "... [T]here's not a formula we can use here, we're going to have to lean on what our gut tells us in some of these regards." December 7, 2021 Agenda Conference, Item 4B, Transcript at 10.

WHEREFORE, the Citizens hereby request the Commission grant this Motion for Reconsideration of Order No. PSC-2021-0466-FOF-EI, and Citizens request the Commission issue an order assigning all of the \$14.4 million financial responsibility for the CR4 outage to DEF.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**  
**DOCKET NO. 20210001-EI**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished  
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