

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of 2022-2031 Storm Protection
Plan, pursuant to Rule 25-6.030, F.A.C.,
Florida Public Utility Company.

DOCKET NO.: 20220049-EI

FILED: September 06, 2022

POST-HEARING BRIEF OF THE OFFICE OF PUBLIC COUNSEL

The Citizens of the State of Florida, through the Office of Public Counsel (“OPC”), pursuant to the Order Establishing Procedure in this docket, Order No. PSC-2022-0119-PCO-EI, issued March 17, 2022, the Amended Order Establishing Procedure, and Order No. PSC-2022-0226-PCO-EI, issued June 24, 2022, and Order No. PSC-2022-0292-PCO-EI (striking testimony), issued August 1, 2022, hereby submit this Post-Hearing Brief.

STATEMENT OF BASIC POSITION

Section 366.96(5), Fla. Stat., requires that the Commission determine whether the SPP is in the public interest. After a hearing, the Commission determines fair, just and reasonable rates based on the money honestly and prudently invested in the utility’s property pursuant to the SPP. See, Section 366.06 (1) and (2), Fla. Stat. OPC witness Kollen testified that certain ratemaking determinations required by the SPPCRC Rule necessarily start with an assessment of the SPP programs and projects that can only be performed in the SPP proceeding, and then are confirmed and refined in the SPPCRC proceeding for cost recovery purposes. TR 1025. Rule 25-6.030(4)4, F.A.C., requires “[a] comparison of the costs identified in subparagraph (3)(d)3 (a **cost** estimate including capital and operating expenses) and the benefits identified in subparagraph (3)(d)1 (estimate of the resulting reduction in outage times and restoration **costs** due to extreme weather conditions). (Emphasis added). FPUC witness Waruszewski agreed that it would appropriate to compare dollars to dollars to get a valid comparison, but would not concede benefits have to be quantified despite the Rule referring to costs. TR 1646. However, the implementation of these sections of the SPP Rule requires an economic analysis in the form of a comparison of dollar benefits to dollar costs that can be used by the Commission in the SPP and SPPCRC proceedings. The Commission must also determine whether the utility has quantified the revenue requirement and customer rate impacts in an accurate and comprehensive manner, although the final SPPCRC rate quantifications will be performed in the SPPCRC proceeding. TR 1025-1026. Further, the

SPP Rule requires a description of any implementation alternatives that could mitigate the resulting rate impact for each of the first three years of the proposed SPP and any other factors the utility request the Commission consider. See, Rule 25-6.030(3)(i)(j), F.A.C.

As part of this public interest determination, the Company should have provided the following: (1) expected reduction in restoration costs and outage times; (2) feasibility, reasonableness, and practicality of implementing the SPP; (3) the estimated costs and benefits to the utility and its customers of making the improvements in the SPP; (4) and the estimate annual rate impact for the first three years. See, Section 366.96(4)(a)-(d), Fla. Stat. As discussed in the Issues, FPUC has failed to provide all the necessary information to meet these required determinations. FPUC should be required to amend their filing and provide the necessary data for each program as required by Rule 25-6.030, F.A.C., with an opportunity for intervenors to provide review and testimony. TR 763.

Short of a new filing, at a minimum, FPUC's SPP should be modified to reduce the rate impact. Based on OPC witness Mara's review, he recommends limiting the cost expenditures for certain programs and elimination of other programs. Even though reducing the overall capital expenditures in the first 10-years may reduce the immediate benefit of the program to customers, the program costs must be balanced against the rate impacts to customers. TR 765. OPC witness Mara specifically recommends limiting the 10-year capital budget in the SPP for the Overhead Lateral Hardening Program and the Overhead Lateral Undergrounding Program. TR 770, 772. He also recommends eliminating the 138 kV transmission line project and 69 kV line project from the 10-year capital budget in the SPP's Transmission and Substation Resiliency Program. TR 777, 778. Additionally, OPC witness Mara recommends eliminating the Future Transmission and Distribution Enhancements Program from the 10-year capital budget in the SPP. TR 780.

The OPC also raises a threshold legal issue that was manifest only after the Prehearing Conference and after the time for raising issues would normal have ended. Because of the timing of the issuance of an order striking testimony (Order No. PSC-2022-0292-PCO-EI ("Motion Order")) and the in-hearing affirmance of that order upon reconsideration (TR 817), the first opportunity to raise the issue and brief it is in this post hearing brief. This is addressed below in the legal issue and argument set out below.

POSITIONS AND ARGUMENT ON DISPUTED ISSUES

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

OPC: *No. Rule 25-6.030, F.A.C., establishes the necessary content of the SPP. Based on the failure to provide all the required information in SPP Rule, FPUC should be required to amend their filing and provide the necessary data for each program with opportunity for intervenors to provide review and testimony.*

ARGUMENT:

Rule 25-6.030, F.A.C., Criteria

Rule 25-6.030 (3), F.A.C., (“SPP Rule”), requires that certain content be provided in each plan. Rule 25-6.030 (3)(a), F.A.C., requires a description of how implementation of the SPP will strengthen the 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. FPUC’s SPP contains sections that describe its programs and benefits, costs, and cost/benefit comparison. H.E. 12. The plan has descriptions of its proposed overhead hardening, undergrounding, and vegetation management programs and projects. H.E. 12.

Rule 25-6.030 (3)(b), F.A.C., requires a description of how implementation of the proposed Storm Protection Plan will reduce restoration costs and outage times associated with extreme weather conditions, therefore improving overall service reliability. As discussed in detail below, the Company’s compliance with this requirement is inadequate. Specifically, the cost/benefit comparison is inadequate for the reasons discussed in the Issues below.

Rule 25-6.030 (3)(c), F.A.C., requires a description of the utility's service area, including areas prioritized for enhancement and any areas where the utility has determined that enhancement of the utility's existing transmission and distribution facilities would not be feasible, reasonable, or practical. Such description must include a general map, number of customers served within each area, and the utility's reasoning for prioritizing certain areas for enhanced performance and for designating other areas of the system as not feasible, reasonable, or practical. For the reasons discussed in Issue 4, the Company's compliance with this requirement is inadequate.

Rule 25-6.030 (3)(d), F.A.C., requires 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; and 2. [i]f applicable, the actual or estimated start and completion dates of the program. For the reasons discussed in several other issues, FPUC's plan is inadequate and does not contain estimates of reductions in outage times and restoration costs or any meaningful cost/benefit analysis.

Rule 25-6.030 (3)(e), F.A.C., requires certain information for each of the first three years of the SPP for each proposed storm protection program. Rule 25-6.030 (3)(f), F.A.C., requires certain information for each of the first three years of the SPP for vegetation management. Rule 25-6.030 (3)(g) and (h), F.A.C., requires the estimated annual jurisdictional revenue requirement for each year and rate impacts for each of first three years of the SPP. FPUC's SPP contains descriptions for each of these elements, but their SPP is deficient in providing all the required information as discussed in issues below.

Rule 25-6.030 (3)(i), F.A.C., requires FPUC to provide a description of any implementation alternatives that could mitigate the resulting rate impact for each of the first three years of the proposed Storm Protection Plan. There is no section in FPUC's SPP that identifies and discusses alternatives that could mitigate the rate impacts of the SPP. H.E. 12. Rule 25-6.030 (3)(j), F.A.C., allows for the Company to provide for any other factors it wants the Commission to consider. FPUC did not provide any additional factors in its SPP. H.E. 12. Rule 25-6.030, F.A.C., establishes the necessary content of the SPP. Based on the failure to provide all the required information in SPP Rule, FPUC should be required to amend their filing and provide the necessary data for each program with opportunity for intervenors to provide review and testimony.

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

OPC: *FPUC refused to even try to quantify the costs and benefits of its programs and projects. Thus, the reduction in restoration costs and outage times and enhancement in reliability cannot be determined. Moreover, several programs and projects failed to meet the criteria to reduce restoration costs and outage times. *

ARGUMENT:

Rule 25-6.030, F.A.C., Criteria

Rule 25-6.030, F.A.C., ("SPP Rule") mandates a storm protection program, which is a group of storm protection projects to enhance the utility's existing infrastructure for "the purpose of reducing restoration costs and reducing outage times associated with extreme weather conditions . . ." TR 756. A storm protection project is defined as a specific activity designed for enhancement of the system "for the purpose of reducing restoration costs and reducing outage times associated with extreme weather conditions . . ." TR 757. This two-pronged test set forth in Rule 25-6.030, F.A.C., to reduce restoration costs and reduce outage times must be applied to

proposed storm protection programs and projects to determine if they accomplish both benefits, reduction in costs and outage times to be included in the SPP. TR 757. The Rule also requires the utility to provide budgets for the programs and to provide the estimated reduction in restoration costs. TR 757.

FPUC acknowledges in its SPP Petition that Commission shall consider its SPP based on estimated costs and benefits to the utility and customers of implementing its SPP. TR 761. FPUC's witness Cutshaw claimed that SPP included an estimate of the resulting reduction in outage times. TR 610. However, nowhere in the 2022-2031 SPP does FPUC provide anything other than vague language about reducing restoration costs. TR 761. Further, FPUC did not include any estimate of the reductions in the outage times. TR 762. OPC witness Mara opined that the outage times should be monetized on a basis consistent with the other utilities to help determine the benefits compared to the costs of the proposed storm hardening programs. TR 762. He observed that FPUC simply states in many of the programs that "FPUC believes the Overhead Feeder Hardening program will achieve the desired objectives outline in Rule 25-6.030 of 'reducing restoration costs and outage times associated with extreme weather events and enhancing reliability.'" TR 762. There is no cost reduction estimate provided; only a statement of belief by FPUC, this is inadequate for the Commission to make a proper determination. TR 762. The same blanket statement was made for the Overhead Feeder Hardening Program, Distribution Pole Inspection and Replacement Program, Transmission Wood Pole Replacement Program, and T&D Vegetation Management Program. TR 762.

FPUC witness Cutshaw essentially claims that FPUC cannot calculate the perceived financial benefit to customers because the availability of power varies by customer, circumstances, and personal choice. TR 1578. He also asserts that quantifying value solely on a perceived savings

compared to a potential future storm event yields illusory results as there are no established parameters that accurately measure avoided cost values, quantitatively or otherwise to its customers. TR 1579. FPUC witness Cutshaw further claims that the Company cannot logically attempt to quantify the perceived economical value of reduced outages or outage restoration times for each of its 30,000 plus customers. TR 1579

However, FPUC's assertions are flawed. First, while there has been no established parameters of how to quantify the avoided costs yet, this is only the second time these SPP have been before the Commission and the first time for FPUC. FPUC did not file a plan and the other Companies settled during the first three year cycle. The methods for quantifying the costs and benefits to customers for each Company will be developed in the SPP proceedings as each Company put forth its methodology. Moreover, in its SPP, FPUC acknowledged it used the Interruption Cost Estimate (ICE) calculator. H.E. 12 at p. 23. This ICE tool is designed to estimate interruption costs and/or benefits associated with reliability improvements for electric utilities. H.E. 12 at p. 23. In FPUC's SPP on page 23, FPUC indicates that one of the inputs into their Risk Resiliency Model was an ICE calculation. H.E. 12. This ICE calculator was publicly available and was used by FPUC to estimate the financial societal impact for each analyzed scenario using the Risk Resiliency Model. H.E. 12 at pp. 23-24. It appears that this tool could have been used to address this requirement and not just as an input into its Risk Resiliency Model. H.E. 12 at pp. 18-23.

Second, attempting to provide estimated restoration costs savings is not illusory, it is required pursuant to Section 366.96(4)(a), Fla. Stat., and Rule 25-6.030(d), F.A.C. FPUC witness Waruszewski agreed that a dollar-to-dollar comparison would demonstrate that the programs are prudent and the cost of the programs are reasonable if you were able to quantify the cost and have a meaningful quantification of the benefits. TR 1649. He disagreed that the Rule

required a quantification of customer benefits, even though he agreed that it would be appropriate to compare dollars-to-dollars to get a valid comparison. TR 1646. Although quantification of the costs and benefits to customers of implementing the plan may be difficult, it is not illogical to make such comparison. Moreover, the Statute requires it be done.

However, this analysis was not provided to the Commission. The Company refused to even try to quantify the costs and benefits of its programs and projects. Thus, without even the attempt at quantification, the extent to which the Company's Storm Protection Plan is expected to reduce restoration costs and outage times associated with extreme weather events and enhance reliability of reduction in restoration cannot be determined.

In addition, this two-pronged test must be applied to proposed storm protection programs and projects to determine if they accomplish both benefits, reduction in costs and outage times to be included in the SPP. TR 757. As OPC witness Mara testified an electric utility has as a core responsibility to maintain a safe operating system. TR 760. To this end, aging infrastructure and deteriorated equipment needs to be maintained in safe operating condition. TR 760. OPC witness Mara further testified that simply replacing old equipment does not constitute storm hardening. TR 760. He stated logically, strengthening the electric utility infrastructure is a storm plan requirement and simply replacing like-for-like equipment with the same strength and functionality does not meet the requirements of the SPP Rule. TR 757. The point of the SPP is to enhance the strength of the grid to withstand extreme weather conditions that result in high wind. TR 757. OPC witness Mara testified that each project must accomplish both benefits, reduction in restoration costs, and reduction in outage time to be included in the SPP. TR 757.

Programs and Projects that fail the two-prong criteria

Transmission lines

FPUC is proposing to implement what they call a Transmission & Substation Resiliency program. H.E. 12, TR 613. In this program, FPUC is proposing to construct an additional 138 kV transmission line for a cost of \$86.07 million, the upgrade of one 69 kV transmission line, and the construction of one substation for a costs of \$5.4 million to improve the electrical redundancy and resiliency to Amelia Island. TR 613. Currently, FPUC has a dual circuit 138 kV transmission line that interconnects with FPL transmission system and extends the line across the Amelia River to Amelia Island using concrete poles, steel poles and steel power. TR 613. FPUC claims that current location makes access challenging and an extended outage could happen if it was damaged or destroyed. TR 613. However, as OPC witness Mara testified that the existing dual transmission line is adjacent to a four-lane highway proving better access than most transmission lines in Florida. TR 774. OPC witness Mara also noted that Florida PSC found very few non-wood poles failed during Hurricanes. TR 774. He also testified that using the good maintenance practices as described in the FPUC 2022-2031 SPP, the existing double circuit line will be hardened against extreme wind speeds of 120 mph with Grade B strength factors. TR 774. FPUC witness Cutshaw acknowledges that the current 138 kV line, concrete poles, and lattice steel towers are in good condition and otherwise do not require replacement today. TR 1611. Despite the good condition of the current transmission line, FPUC witness Cutshaw points to a failed steel structure from New Orleans Parish, Louisiana in Hurricane Ida which were “somewhat” similar to FPUC’s structure. TR 1587. This is not a valid comparison and should not be relied on to approve this resiliency program. In major hurricanes, any structure can fail due to circumstances that have nothing to do with good maintenance practices or age. It is important to note FPUC did not claim that these structures have prior failures.

Moreover, as OPC witness Mara testified the proposed new 10.8 miles of new 138 kV transmission line and cable route is a very poor right-of-way which is why a submarine cable is

proposed. TR 775. He testified that the poles would be in low lying areas with no access roads currently in place. TR 775. As he stated this line will access an alternate power source that is presently available to FPUC through JEA's transmission system and therefore adds no value under the standards of the SPP Statute and Rule. TR 775. OPC witness Mara further testified the this project is not a prudent investment because the existing line is relatively short with limited exposure and is built with 100% concrete poles and lattice steel tower specifically designed for extreme wind. TR 775. He recommends that the proposed 138 kV transmission line through low-lying area around Amelia Island is not a prudent option when the existing transmission system is already hardened for extreme weather. TR 775. Thus, FPUC has not demonstrated that this project is necessary to reduce outage times or is normal business operation and should be evaluated as a normal business operation project.

FPUC is also proposing to upgrade an existing 69 kV line including reconductoring the line for increased capacity and construction of a substation interconnection to connect to a paper mill that has generation resources that could be leveraged by FPUC during normal and emergency conditions. TR 776. FPUC witness Cutshaw stated this is to upgrade the interconnection with the WestRock papermill. The papermill uses steam turbines driven by boilers fed by coal and natural gas that are not black start capable. TR 1589. Mr. Cutshaw asserted his belief that with the CHP technology, these units can be up and running in as little as four hours after operators are allowed back on the island. TR 1589. However, OPC witness Mara testified that this 69 kV line is not necessary for storm hardening. He stated that this project will increase the capacity of the line to gain access to more electricity from CHP generation. Mr. Mara indicated that this is an investment to access alternate power source and is not a storm hardening issue. TR 777. Moreover, OPC witness Mara testified that there is no analysis that suggests that the CHP will be operational within 5-6 hours of hurricane making landfall. TR 777. He noted that for the CHP to aid in resiliency,

the CHP must be viable with full capacity when needed which is outside the control of FPUC and outside the scope of the SPP Statute and Rule. TR 777. OPC witness Mara stated that the capacity increase for interconnection of a co-generation plant needs to be analyzed from a power supply cost perspective and not based on storm hardening, especially since there are no guarantees that the plant will be operational when most needed by the FPUC. TR 778. Thus, FPUC has not demonstrated that this project is necessary to reduce outage times or is a project is normal business operation and evaluated as a normal business operation project.

SCADA

FPUC is proposing to add a Supervisory Control and Data Acquisition (SCADA) system which is a software tool that enables either a Distribution System Operator or software systems such as Distribution Management System (DSM) to initiate commands for the remote control grid devices. TR 614. FPUC stated they are considering distribution automation or “smart grid” type technology to detect a fault in the system, automatically isolate the faulted section, and reroute power to restore power to affected areas of the grid. TR 614. FPUC current SCADA system configuration does not allow for remote control of the grid devices. TR 614. FPUC had a SCADA system in their northwest territory that was decommissioned in 2015. TR 1616. FPUC witness Cutshaw acknowledged that this SCADA system was including in base rates and most SCADA systems are a typical business investment in the grid operations. TR 1616.

As OPC witness Mara indicated, this program is supposed to be done at some time in the future using some type of distribution automation or smart grid technology which can create a self-healing system. TR 778. Since this is a future program, the specific costs and details on full deployment are not yet available. TR 779. OPC witness Mara testified that this type of distribution automation or smart grid will not reduce restoration costs, even if reduces and isolates the number

of customers affected by the outage. TR 779. He gives the example that the repair costs to remove a tree off a line and perhaps replace a pole are the same whether a fuse is on the lateral or not. TR 779. FPUC witness Cutshaw asserts that because there is less time patrolling lines between grid isolation points this is an example of how it reduces the chargeable hours to restore power. TR 1590. Under cross-examination, however, he acknowledged that only one person locates damage and problems post-hurricane. TR 1607. However, FPUC witness Cutshaw claimed that the dispatched crew has to do the sectionalizing in the area to make it safe and with certain types of self-healing system it could be done when they get there, thus reducing cost. TR 1608. Yet, FPUC failed to provide any details of the proposed system and does not include any monetized value for reduction in outage cost or outage times. TR 779. In fact, FPUC has not determined the type of system they will install. TR 779. OPC witness Mara testified that without any details about the type of system, or the actual monetized benefits of the system, this program does not meet the requirements of the SPP Rule. TR 779-780.

ISSUE 3: To what extent does the FPUC’s Storm Protection Plan prioritize areas of lower reliability performance?

OPC: *FPUC did include prioritization of areas of lower reliability performance as an input in its Risk Resiliency Model, but there is not description of what weight it was given.*

ARGUMENT: As acknowledged on page 4 of its Petition for Approval of Storm Protection Plan, the Commission shall consider the extent to which the plan is expected to reduce restoration costs and outage times associated with extreme weather events and enhance reliability, including whether the plan prioritized areas of lower reliability performance. See, Section 366.96(4)(a), Fla. Stat. In FPUC’s SPP there is a section that describes FPUC’s prioritization methodology. H.E. 12. Essentially, the Risk Resiliency Model uses data inputs to evaluate risk rank scenarios

based on a balance of Probability, Response and Impact. The results are presented in a quantitative format with projects representing the highest risk amongst the analyzed scenarios, represented with a higher risk resiliency score. H.E. 12. According to the FPUC SPP, their model used historical reliability performance of its system under extreme and non-extreme weather events. H.E. 12. FPUC leveraged the model's recommendation and supplemented it with other (non-disclosed) variables to identify projects for the first three years of the plan. H.E. 12 at pp. 40, 41. However, there is no description of the weighting in the model was given to areas of lower reliability performance. Thus, it is unclear to what extent areas of lower reliability performance were prioritized over other areas for other reasons.

ISSUE 4: To what extent is the FPUC'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?

OPC: *Many of the programs fail the two-prong test: (1) to reduce restoration costs, and (2) to reduce outage times. Moreover, new 138 kV transmission line is not feasible, reasonable, or practical in the area proposed by FPUC.*

ARGUMENT: The OPC focused its evaluation and resulting objections on the lack of strict compliance with the rule and statute governing the FPUC's 2022 SPP. Our efforts to identify excessive spending in the plan centered around the 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. Many of the programs fail the two-prong test: (1) to reduce restoration costs, and (2) to reduce outage times.

Moreover, the proposed new 138 kV transmission line is not feasible, reasonable, or practical in the area proposed by FPUC. Specifically, the 10.8 miles of the new 138 kV

transmission line and cable route is in a very poor right-of-way which is why a submarine cable is proposed. TR 775. OPC witness Mara testified that the poles in the new route would be in low lying areas with no access roads currently in place. TR 775. He further noted that this proposed new line will access an alternate power source that is presently available to FPUC through JEA's transmission system and therefore add no value under the standards of the SPP Statute and Rule. TR 775. For this reason, and the other reasons discussed in Issue 2, this project should be eliminated from the SPP.

The OPC would 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 5: What are the estimated costs and benefits to FPUC and its customers of making the improvements proposed in the Storm Protection Plan?

OPC: *The Company refused to even try to quantify the costs and benefits of its programs and projects. Thus, without even the attempt at quantification, the extent the Company's Storm Protection Plan is expected to reduce restoration costs and outage times associated with extreme weather events cannot be determined.*

ARGUMENT:

Rule 25-6.030, F.A.C., Criteria

The Rule requires the utility to provide budgets for the programs and to provide the estimated reduction in restoration costs. TR 757. These amounts must be balanced against the benefits to the utility's customers. TR 757. These two amounts allow the Commission and stakeholders to understand the benefits of the capital investments for storm hardening relative to the "reasonableness" of the costs. TR 757. As OPC witness Mara testified, any program can claim

to reduce outage cost and outage time; however, the program must be cost effective for customers to benefit. TR 757.

OPC witness Kollen testified the SPP Rule requires the utility to provide “[a] comparison of the costs identified in subparagraph (3)(d)3, F.A.C., and the benefits identified in subparagraph (3)(d)1.” TR 1029. He stated that the context and juxtaposition of the terms “costs” and “benefits” strongly imply a comparison of dollar costs and dollar benefits, not a comparison of dollar costs and qualitative benefits. TR 1029. FPUC witness Waruszewski agreed that a dollar-to-dollar comparison would demonstrate that the programs are prudent and the cost of the programs are reasonable if you were able to quantify the cost and have a meaningful quantification of the benefits. TR 1649. Yet he disagreed that the Rule required a quantification of customer benefits, even though he agreed that it would be appropriate to compare dollars-to-dollars to get a valid comparison. TR 1646. OPC witness Kollen testified that the comparison of quantified costs to qualitative benefits provides no useful decision making information because it does not provide a useful threshold decision criterion to qualify programs and projects, does not provide a framework for ranking programs and projects, and does not allow a rational quantitative basis for the magnitude of programs and projects. TR 1029-1030.

FPUC SPP cost/benefits

FPUC is proposing to incur the following capital costs:

Florida Public Utilities Company SPP Program Expenditures \$ Millions											
SPP Costs by Year	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	Total
Capital Total	2.3	6.7	16.9	54.2	53.2	19.9	19.6	19.8	25.3	25.2	243.1
O&M Expense Total	1.4	1.6	1.9	3.0	2.9	1.8	1.8	1.8	1.9	1.9	20.0
Overall Total	3.7	8.3	18.7	57.2	56.1	21.8	21.4	21.6	27.2	27.1	263.1

TR 829. The revenue requirement for these programs are as follows:

Florida Public Utilities Company SPP Program Revenue Requirements \$ Millions											
SPP Revenue Requirements By Year	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	Total
Capital Total	0.3	0.6	2.0	6.0	12.5	17.0	19.0	21.0	23.2	25.7	127.3
O&M Expense Total	1.4	1.6	1.9	3.0	2.9	1.8	1.8	1.8	1.9	1.9	20.0
Overall Total	1.7	2.2	3.9	9.0	15.4	18.9	20.8	22.8	25.1	27.6	147.3

TR 1018. Another way to measure the rate impact is to consider different analysis. FPUC is proposing a 33% increase in revenues to pay for the 2022-2031 SPP programs compared to total net plant in service and revenues actual results for the 12 months ended December 31, 2021. TR 1018. The 2022-2031 SPP will cost at least \$7,369 per customer for the 10-year capital cost investments. TR 763.

OPC witness Kollen testified that the estimated costs are much greater than the benefits from potential saving for each utility and for nearly all of the programs and projects, although FPUC did not, and refused to, provide quantifications of the benefits from potential saving in storm damage and restoration costs. TR 1018-1019. Since no information was provided, \$0 dollars in benefits from potential saving was shown. TR 1019.

FPUC Compliance SPP cost/benefit criteria

FPUC’s SPP failed to comply with all the elements and criteria required by the SPP Rule to provide the costs and benefits. As set forth above, the utility is required to provide the cost reductions for restoration costs of its proposed programs and projects. TR 761. FPUC acknowledges in its SPP Petition that Commission shall consider its SPP based on estimated costs and benefits to the utility and customers of implementing its SPP. TR 761. Nowhere in the 2022-2031 SPP does FPUC provide anything other than vague language about reducing restoration costs. TR 761. Without an estimate of the cost reduction for outages, it is impossible for any party to make a judgement on prudence. TR 761. In a regulatory setting with the need to comply with

specific statutes, it is necessary and expected that monetized values of these outage restoration costs during extreme weather events be provided. TR 761-762.

Further, FPUC did not include any estimate of the reductions in the outage times. TR 762. OPC witness Mara opined that the outage times should be monetized on a basis consistent with the other utilities to help determine the benefits compared to the costs of the proposed storm hardening programs. TR 762. He observed that FPUC simply states in many of the programs that “FPUC believes the Overhead Feeder Hardening program will achieve the desired objectives outline in Rule 25-6.030 of ‘reducing restoration costs and outage times associated with extreme weather events and enhancing reliability.’” TR 762. FPUC’s witness Cutshaw claimed that SPP included an estimate of the resulting reduction in outage times. TR 610. However, there is no cost reduction estimate provided; only a statement of belief by FPUC, this is inadequate for the Commission to make a proper determination. TR 762. The same blanket statement was made for the Overhead Feeder Hardening Program, Distribution Pole Inspection and Replacement Program, Transmission Wood Pole Replacement Program, and T&D Vegetation Management Program. TR 762. OPC witness Mara looked at the ratio of capital spending to number of customers for implementing the 2022-2031 SPP. TR 763. He found a cost of \$7,369 per customer in capital cost investment over the ten years which is 3.5 times higher than the next smallest company, Tampa Electric Company. TR 763, 764. This higher cost per customer will result in an excessive increase in rates for all customers. TR 764. Based the failure to comply with the elements and criteria required by the SPP Rule, OPC witness Mara recommends that FPUC be required to amend their filing and provide the necessary data for each program as required by the SPP Rule with opportunity for intervenors to provide review and testimony. TR 763.

Yet, the Company refused to even try to quantify the costs and benefits of its programs and projects. Thus, without even the attempt at quantification, the extent the Company's Storm Protection Plan is expected to reduce restoration costs and outage times associated with extreme weather events cannot be determined.

ISSUE 6: What is the estimated annual rate impacts resulting from implementation of the FPUC's Storm Protection Plan during the first 3 years addressed in the plan?

OPC: *The \$6.60, \$6.58, and \$15.21 per 1,000 kWh for residential customers, 5.50%, 5.50%, and 12.72% increase for typical Commercial customers, and 2.15%, 2.20%, and 5.06% increase for typical Industrial customers first three years is too high during this period of high inflation. Alternates need to be implemented to reduce rate impacts.*

ARGUMENT:

Rate Impact

The proposed programs and their related costs will have significant incremental effects on the present customer rates over multiple ratemaking metrics, including SPP revenue requirements, net plant in service, annual electric revenues, and cost per customer. TR 1016. FPUC is proposing to incur the following capital costs over the first years: \$2.3 million in 2022; \$6.7 million in 2023; \$16.9 million in 2024; which will increase dramatically to \$54.2 million in 2025. TR 1015. FPUC is proposing to incur the following in Operate and Maintenance Expense (O&M): \$1.4 million in 2022; \$1.6 million in 2023; \$1.9 million in 2024; which will also increase dramatically to \$3.0 million in 2025. TR 1015. The revenue requirement for these programs are as follows: \$1.7 million for 2022; \$2.2 million for 2023; \$3.9 million for 2024; which will increase dramatically to \$9.0 million in 2025. TR 1016.

Another way to measure the rate impact is to consider a different analysis. FPUC is proposing a 33% increase in spend and revenues to pay for the 2022-2031 SPP programs compared

to total net plant in service and revenues actual results for the 12 months ended December 31, 2021. TR 1018. The 2022-2031 SPP will cost at least \$7,369 per customer in capital costs for the 10-year investment. TR 763.

OPC witness Kollen testified that the estimated costs are much greater than the benefits from potential saving for each utility and for nearly all of the programs and projects, although FPUC did not, and refused to, provide quantifications of the benefits from potential saving in storm damage and restoration costs. TR 1018-1019. Since no information was provided, \$0 dollars in benefits from potential saving shown. TR 1019.

On page 39 of FPUC's SPP, the Company has included a table with the estimated rate impacts for the first three years of the SPP. For a 1,000 kWh, residential customers would expect the following incremental rate impacts: \$6.60 for 2023; \$6.58 for 2024; and \$15.21 for 2025. H.E. 12. FPUC witness Cutshaw confirmed that the proposed 138 kV transmission line would affect rates starting in 2024, with the majority of its costs impacting 2025 and 2026 rates. TR 625. On the same page 39, FPUC provided the percentage increase for a typical Commercial bill: 5.50% in 2023; 5.50% in 2024; and 12.72% in 2025. Page 39 also has the percentage increase for a typical Industrial bill: 2.15% in 2023; 2.20% in 2024; and 5.06% in 2025. H.E. 12.

OPC witness Kollen testified that his summaries and comparison of revenues and cost per customers demonstrate that the costs of the SPP programs and projects far outweigh the benefits from savings in storm damage and restoration costs. TR 1020. He further stated that the Commission also should keep in mind that the impact of the SPP programs is yet another addition to the customer bill in an environment of high inflation, skyrocketing natural gas prices and other base rate increases. TR 1020. On top of the estimated \$6.60 per 1,000 kWh for the SPP, FPUC's residential customers are expected to pay for a 2022 under recovery due to natural gas price

increases of roughly \$83 dollars per 1,000 kWh. TR 1601, H.E. 112. FPUC witness Cutshaw conceded that FPUC has to collect this under recovery, even if there may be some mitigating methods available to reduce the impact. TR 1602. This is in addition to the current midcourse correction residential rate impact of \$14.87. See, Order No. PSC-2022-0280-PCO-EI, issued July 20, 2022, in Docket No. 20220001-EI, H.E. 111. Moreover, FPUC residential customers are still paying for a Hurricane Michael surcharge of \$12.80 per 1,000 kWh through 2025. H.E. 94.

Commercial and Industrial customers will also have significant rate impacts. Commercial customer will see a 5.50% increase from the SPP. H.E. 94. FPUC anticipates a \$9.59 increase for the SPP for a typical commercial, general service customer. H.E. 94. These same small to large commercial customers can expect a 10.8%-13.1% increase due to the midcourse correction. See, Order No. PSC-2022-0280-PCO-EI, issued July 20, 2022, in Docket No. 20220001-EI, H.E. 111. In addition, these small to large commercial customers can expect a roughly five and half times greater increase due to the 2022 under recovery. TR 1601. Industrial customers can expect a 2.15% increase from the SPP. H.E. 94. FPUC anticipates a \$4,490.00 increase for the SPP for a typical Industrial service customer. H.E. 94. The factors of the midcourse correction and looming 2022 under recovery is emanate for the Industrial customers.

Starting in January 2023, the residential customers with have \$124.71 per 1,000 kWh bill without the addition of the 2022 under recovery. With the 2022 under recovery, the residential bill could be as high as \$207.71 per 1,000 kWh, a 60% increase. Commercial and Industrial customers face similarly significant increases in their electric bills. While the customers cannot avoid paying for the 2022 under recovery whether recovered over a one or two year period, customers can avoid unnecessary SPP costs. In today environment, every opportunity to reduce the rate impact to customer bills should be employed.

Alternatives consider reduce rate impact

Rule 25-6.030(3)(i), F.A.C., requires “[a] description of any implementation alternatives that could mitigate the resulting rate impact for each of the first three years of the proposed Storm Protection Plan.” FPUC’s SPP did not include a section discussing implementation of alternatives that could mitigate rate impacts. H.E. 12. Three programs are legacy storm hardening programs, Distribution Wood Pole Inspection and Replacement, Transmission Structure Inspection and Hardening, and Vegetation Management Initiatives, whose costs are currently somewhat embedded in base rates. H.E. 12 at pp. 3-4. Therefore, there is no significant rate impact anticipated due to these programs. However, the other proposes SPP programs and projects will have direct rate impacts and the Commission should implement alternatives to mitigate the pending rate impacts.

As OPC witness Kollen testified, the Commission should apply rational and specific decision criteria to the selection, ranking, and magnitude of the proposed programs and projects and apply those decision criteria consistently to all four utilities. TR 1021. The decision criteria should include justification in the form a benefit/cost analysis in addition to the qualitative assessments of whether the programs and projects will reduce restoration costs and outage times. TR 1021. This SPP framework, which provides important customer safeguards, should be enforced to require the utility to: 1) identify new program and projects or expansion of existing programs and projects that are not within the scope of its existing base rate programs and cost recoveries in normal course of business; 2) limit requests to programs and projects that are prudent and reasonable; 3) justify the selections, rankings, and magnitude of SPP program, projects, and costs; 4) ensure there is a comparison of benefits to costs; 5) effectively consider the rate impact on customers; and 6) ensure that the utility only recovers incremental costs, net of decremental (avoided) costs or reductions in costs (savings), through the SPPCRC. TR 1023.

Despite FPUC's failure to provide a meaningful cost/benefit analysis, OPC witness Mara provided alternatives to the proposed implementation of FPUC's SPP that would mitigate rate impacts. He recommends limitations on the expenditure of certain programs and elimination of other programs. TR 764. These modifications are discussed more fully in Issue 10. OPC witness Mara's recommended modifications would reduce the total capital budget from \$243.1 to \$83.4 million, a reduction of \$159.8 million. TR 764. This reduces the cost per customer over 10 years from at least \$7,369 to \$2,528 in capital cost investment which is still higher than most of the larger utilities in Florida. TR 763-734. OPC witness Mara's reviewed the reported costs from Named Tropical Storms from 2016-2020 for FPUC and he found FPUC had a total \$71.4 million in storm costs. TR 766. Implementing OPC witness Mara's alternatives to FPUC's SPP will provide a more reasonable level of expenditures on hardening. He noted that unless the Commission acts to limit the expenditures, the unchecked spending on the SPP programs will result in an excessive burden on the ratepayer. TR 765. Reducing the capital expenditures to an \$83.4 million level is more in line with the historical risk exposure of storm costs of \$71.4 million that have been incurred by customers. As OPC witness Mara testified, the United States is experiencing its worst inflation in 40 years and consumers have seen steep increases in the price of gas and groceries, as well as escalating electric bills specifically in Florida. TR 765.

ISSUE 7: WITHDRAWN BY FPL.

ISSUE 8: WITHDRAWN BY FPL.

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

OPC: This issue is not applicable to FPUC.

ARGUMENT: This issue is not applicable to FPUC.

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

OPC: *The SPP should be denied and refiled. Alternatively, modify the SPP to limit the 10-year capital budget for the Overhead Lateral Hardening Program and the Overhead Lateral Undergrounding Program and eliminate the 138 kV transmission line project and 69 kV line project, and the Future Transmission and Distribution Enhancements Program.*

ARGUMENT:

Public Interest

Section 366.96(5), Fla. Stat., requires that the Commission determine whether the SPP is in the public interest. After a hearing, the Commission determines fair, just and reasonable rates based on the money honestly and prudently invested in the utility's property pursuant to the SPP. See, Section 366.06 (1) and (2), Fla. Stat. As OPC witness Kollen testified, certain ratemaking determinations required by the SPPCRC Rule necessarily start with an assessment of the SPP programs and projects that can only be performed in the SPP proceeding, and then are confirmed and refined in the SPPCRC proceeding for cost recovery purposes. TR 1025. He further notes that the Commission must also determine whether the utility has quantified the revenue requirement and customer rate impacts in an accurate and comprehensive manner, although the final SPPCRC rate quantifications will be performed in the SPPCRC proceeding. TR 1025-1026. Further, the SPP Rule requires a description of any implementation alternatives that could mitigate the resulting rate impact for each of the first three years of the proposed SPP and any other factors the utility request the Commission consider. See, Rule 25-6.030(3)(i)(j), F.A.C. As part of this public interest determination, the Company should have provided the following: (1) expected

reduction in restoration costs and outage times; (2) feasibility, reasonableness, and practicality of implementing the SPP; (3) the estimated costs and benefits to the utility and its customers of making the improvements in the SPP; (4) and the estimate annual rate impact for the first three years. See, Section 366.96(4)(a)-(d), Fla. Stat. As discussed in prior Issues, FPUC has failed to provide all the necessary information to meet these required determinations. OPC witness Mara testified that FPUC should be required to amend their filing and provide the necessary data for each program as required by Rule 25-6.030, F.A.C., with an opportunity for intervenors to provide review and testimony. TR 763.

Short of a new filing, at a minimum, FPUC's SPP should be modified to reduce the rate impact. OPC witness Kollen testified that the Commission should apply rational and specific decision criteria to the selection, ranking, and magnitude of the proposed programs and projects and apply those decision criteria consistently to all four utilities. TR 1021. The decision criteria should include justification in the form a benefit/cost analysis in addition to the qualitative assessments of whether the programs and projects will reduce restoration costs and outage times. TR 1021. This SPP framework, which provides important customer safeguards, should be enforced to require the utility to: 1) identify new program and projects or expansion of existing programs and projects that are not within the scope of its existing base rate programs and cost recoveries in normal course of business; 2) limit requests to programs and projects that are prudent and reasonable; 3) justify the selections, rankings, and magnitude of SPP program, projects, and costs; 4) ensure there is a comparison of benefits to costs; 5) effectively consider the rate impact on customers; and 6) ensure that the utility only recovers incremental costs, net of decremental (avoided) costs or reductions in costs (savings), through the SPPCRC. TR 1023. The SPP and SPPCRC Rules are both sequential and interrelated. TR 1025. Despite FPUC's failure to provide

a meaningful cost/benefit analysis, OPC witness Mara provided alternatives to the proposed implementation of FPUC's SPP that would mitigate rate impacts.

Modifications

In the event the Commission does not outright deny the SPP as filed and require a whole new plan to be filed, OPC witness Mara reviewed the specific projects. TR 787. Based on his review, he recommends limiting the cost expenditures for certain programs and elimination of other programs. TR 764. Even though reducing the overall capital expenditures in the first ten-year may reduce the immediate benefits of these programs to customers, the program costs must be balanced against the rate impacts to customers. TR 765.

Overhead Lateral Hardening Program

The program is intended to upgrade certain laterals to NESC 250C extreme wind standards. TR 767. These upgrades include replacement of deteriorated poles, relocation of facilities to accessible areas, upgrade the conductor to one higher tensile strength, adequate BIL insulation, additional guying, environmental upgrades such as avian protection and animal mitigation, and upgrading fuses to reclosers. TR 767. The prioritization of hardening was based on a Risk Resiliency Model. TR 767. FPUC's SPP proposes a ten-year capital budget for this program of \$24.75 million. TR 769. While the only information provided demonstrating better performance was limited to feeder hardening and thus not directly applicable to hardening laterals, OPC witness Mara is just recommending reducing the budget. TR 769. He recommends limiting a 10-year capital budget to roughly \$12.1 million using FPUC's proposed budget for first three years and capping the annual spending to roughly \$1.5 million from 2025-2031. TR 769-770.

Overhead Lateral Undergrounding Program

The program is intended to address undergrounding of single phase overhead electric facilities many of which are located in heavily vegetated areas, environmentally sensitive areas or in areas where hardening the Overhead Laterals to NESC 250C extreme wind standards is not practical. TR 771. The prioritization of hardening was based on a Risk Resiliency Model, and specific priority will be assigned to laterals on a risk ranked feeders. TR 771. FPUC's SPP proposes a ten-year capital budget for this program of \$63.35 million. TR 769. While FPUC only relied on the Florida PSC Review of *Florida's Electric Utility Hurricane Preparedness and Restoration Actions 2018* report without providing any restoration cost and outage estimations, OPC witness Mara is merely recommending reducing the budget. TR 772. He recommends limiting a 10-year capital budget to roughly \$32.2 million using FPUC's proposed budget for first three years and capping the annual spending to roughly \$4.2 million from 2025-2031. TR 772.

The Transmission and Substation Resiliency Program

The program is intended to improve the electrical redundancy and resiliency to Amelia Island through the construction of an additional 138 kV transmission line and the upgrade of one of the 69 kV transmission lines and the construction of one substation which may include upgrades to existing substations. TR 773. OPC witness Mara recommends that 138 kV transmission line project is not a prudent investment and should be excluded from the SPP. TR 775. The rationale for exclusion of the 138 kV transmission line project is more fully discussed in Issues 2 and 4. OPC witness Mara also recommends that 69 kV transmission line project should be excluded from the SPP since it is simply not storm hardening, but rather is an energy delivery/energy access project. TR 777. The rationale for exclusion of the 69 kV transmission line project is more fully discussed in Issue 2. He recommends eliminating from the 10-year capital budget roughly \$86.07 million for these projects. TR 778.

Future Transmission and Distribution Enhancements Program

The program will, at some time in the future, include some kind of distribution automation or smart grid technology which can create a self-healing system. TR 778. A SCADA will be part of this system, but since this is a “future” program, no specific costs or details on full deployment is available. TR 778-779. This program is ill-defined, but would generally functions on a fault isolation system, which does not reduce outage costs and does not meet the two prong criteria of Rule 25-6.030, F.A.C. TR 778. Additional rationale for exclusion of this project is more fully discussed in Issue 2. OPC witness Mara recommends eliminating this program from the 10-year capital budget estimated to be roughly \$30 million.

OPC’ 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?

OPC: *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 Order granting FPL’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. While FPUC did not file a Motion to Strike portions of the public witness Kollen’s testimony, FPUC did ask for similar treatment via letter if the other utilities’ Motions to Strike were granted. 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 SPP 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 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. 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. FPUC's request for similar treatment via letter if the other utilities' Motions to Strike were granted, shows its desire to reap the benefits of these Motion to Strike. FPUC had a similar approach to FPL, in that, it did not provide any cost/benefit analysis in its testimonies. However, the testimonies in the Duke and TECO dockets reflected a significantly different take on the actual implementation of the statute and rules that contrasts to their positions taken in support of the Motion Order. For instance, the sharp contrast between DEF's and TECO's recognition that benefits and costs should be compared as a threshold decision criterion (TR 1027) grinds harshly against these companies' adoption of the FPL and FPUC thesis that no such requirement exists. Likewise, as another example, DEF's agreement that claimed benefits should be given a monetary value (TR 136-139) is sharply at odds with the objection lodged by FPL, adopted by the other utilities including FPUC, 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 FPUC and other utilities 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 investor-owned utilities (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 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), Fla. Stat., 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 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 FPUC, will be given a free pass in the form of a presumption of prudence since that very word has been effectively 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, FPUC 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:

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

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, 2022, 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 FPUC's Letter, filed July 20, 2022:

On July 13, 2022, FP&L filed its Motion to Strike Portions of the Testimony of Office of Public Counsel Witness Kollen in Docket No. 20220051-EI. Thereafter, on July 19, 2022, Duke Energy Florida ("DEF") filed a similar Motion to Strike Portions of Witness Kollen's Testimony in Docket No. 20220050-EI, followed by a similar Motion to Strike filed by TECO on July 20, 2022. The instant docket, Docket No. 20220049-EI, has been consolidated with Dockets Nos. 20220050-EI and 20220051 -EI, as well as Docket No. 20220048, for purposes of hearing by Order No. 2022-0119- PCO-EI, issued March 17, 2022. While FPUC has not joined in the other electric utilities' Motions to Strike, nor does it intend to file a similar motion in this docket, FPUC does respectfully suggest that, in the event portions of Witness Kollen's testimony are stricken in Dockets Nos. 20220048-EI, 20220050-EI and 20220051-EI, the Commission should consider taking a similar approach in this Docket in order to ensure consistency and reduce confusion when the consolidated hearing takes place beginning August 2, 2022.

(Footnote omitted). 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 FPUC 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 IOU witnesses were allowed to put forth varying (and contrary) interpretations of the areas of the regulatory interpretations. For example, this conflict in interpretation and implementation was interjected into the DEF docket¹ by counsel for FPL when he asserted, nay demanded, the right to cross-examine DEF witnesses on their disagreement with FPL.² When combined with the rulings in the Motion Order, the FPL Motion to Strike that was brought into this docket by FPUC requesting similar treatment, this tactic by FPL reveals 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.

¹ 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. Stat. 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.

² Intervention is not allowed after a point 20 days before the start of the hearing. Rule 28-106.205(1), F.A.C.

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.

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

The Commission violated this subsection (a), 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 Kollen not being allowed to provide his expert opinion that supports a reasonable – but different – regulatory interpretation of the SPP requirements than the one the IOUs wish the Commission to adopt. By barring the introduction of such evidence by public's witness into evidentiary record, the Commission in essence took agency action and made its decision prior to hearing. The Commission took no record evidence from the public⁴ 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,

³ In relevant part the law provides that:

(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;

(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:

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.

⁴ 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.

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 the excluded, yet proffered testimony since it was taken for the extremely narrow and limited purposes of preserving the appellate record.⁵

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 increase. 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 Kollen’s expert testimony on the undefined term of “benefits” that is juxtaposed to the word “costs” in the statute, 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 cost and the benefits evidence by disregarding, and thus not considering, any objective cost-effectiveness standard is arbitrary.

⁵ 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.

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

As such, FPUC’s SPP reflects a robust storm protection plan, which is critical to maintaining and improving grid resiliency and storm restoration *as contemplated by the Legislature in Section 366.96, F.S.* TR 608-609.

The FPUC SPP and the information contained *does comply with all the legislative requirements contained within Section 366.96, F.S., and Rule 25-6.030, F.A.C.* TR 616.

Without the prospect of conflicting testimony from OPC witness Kollen, FPUC witness was emboldened to opine that the Company felt they accomplished that, although being qualitative as opposed to a quantitative amount, and their belief they did describe those costs and benefits. TR 622.

The Commission should consider whether its application of Section 366.96, Florida Statutes is evidence that the non-delegation provision of Article II, Section 3 of the Florida Constitution, 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. It 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 would 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 and 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 FPUC SPP. OPC 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), Fla. Stat., on the aspects of the case that were erroneously subjected to the Motion Order.

ISSUE 11: Should this docket be closed?

OPC: *The Docket should remain open for FPUC to amend their filing and provide the necessary data for each program as required by Rule 25-6.030, F.A.C., with an opportunity for intervenors to provide review and testimony. *

ARGUMENT: The Docket should remain open for FPUC to amend their filing and provide the necessary data for each program as required by Rule 25-6.030, F.A.C., with an opportunity for intervenors to provide review and testimony.

Dated this 6th day of September, 2022

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CERTIFICATE OF SERVICE
DOCKET NO. 20220049-EI

I **HEREBY CERTIFY** that a true and correct copy of the Office of Public Counsel's Post-Hearing Brief has been furnished by electronic mail on this 6th day of September 2022, to the following:

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