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Commission Conference Agenda
August 18, 2020

Item 1

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: August 6, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Office of Industry Development and Market Analysis (Deas, Williams) CH
Office of the General Counsel (Passidomo, Dziechciarz) THT

RE: Applications for Certificate of Authority to Provide Telecommunications Service

AGENDA: 8/18/2020 - Consent Agenda - Proposed Agency Action - Interested Persons May Participate

SPECIAL INSTRUCTIONS: None

Please place the following Applications for Certificate of Authority to Provide Telecommunications Service on the consent agenda for approval.

DOCKET NO.	COMPANY NAME	CERT. NO.
20200154-TX	Gigamonster Networks, LLC	8952
20200165-TX	Light Source Communications, LLC	8953

The Commission is vested with jurisdiction in this matter pursuant to Section 364.335, Florida Statutes. Pursuant to Section 364.336, Florida Statutes, certificate holders must pay a minimum annual Regulatory Assessment Fee if the certificate is active during any portion of the calendar year. A Regulatory Assessment Fee Return Notice will be mailed each December to the entities listed above for payment by January 30.

Item 2

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: August 6, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (Cowdery) *SMC*
Division of Economics (Coston, Guffey, Hampson) *EJD*
Division of Industry Development & Market Analysis (Hinton, Vogel) *CH*

RE: Docket No. 20200175-EU – Petition for emergency variance from or waiver of Rule 25-6.049(5)-(6), F.A.C., by Casa Devon Venture, LP.

AGENDA: 08/18/20 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Polmann

CRITICAL DATES: August 18, 2020 (30-day statutory deadline for the Commission to grant or deny the petition or determine it is not an emergency has been waived until this date)

SPECIAL INSTRUCTIONS: None

Case Background

On July 1, 2020, Casa Devon Venture, LP (Casa Devon) filed an emergency petition for a variance from or waiver of the individual electric metering requirement of Rule 25-6.049(5) and (6), Florida Administrative Code (F.A.C.), so that it can master meter its Casa Devon apartment building. As alternative relief, Casa Devon asks that if the Commission does not grant the variance, it should find that Casa Devon does not need a rule variance or waiver because the Casa Devon apartment falls within one of the individual metering requirement exceptions described in Rule 25-6.049(5)(c) or (d), F.A.C.

Rule 25-6.049, F.A.C.

Rule 25-6.049(5), F.A.C., requires individual electric metering by the utility for each separate occupancy unit of new commercial establishments, residential buildings, condominiums, cooperatives, marinas, and trailer, mobile home and recreational vehicle parks. The purpose of these provisions is to promote energy conservation in Florida by directly linking the amount customers pay for electricity to the amount of electricity the customer uses.

The rule states that the individual metering requirement does not apply to certain listed situations, including:

> (c) For electricity used in specialized-use housing accommodations such as hospitals, nursing homes, living facilities located on the same premises as, and operated in conjunction with, a nursing home or other health care facility providing at least the same level and types of services as a nursing home, convalescent homes, facilities certificated under chapter 651, F.S., college dormitories, convents, sorority houses, fraternity houses, and similar facilities; and
>
> (d) For lodging establishments such as hotels, motels, and similar facilities which are rented, leased, or otherwise provided to guests by an operator providing overnight occupancy as defined in paragraph (8)(b).

In addition, individual metering is not required for condominiums that meet certain criteria set out in sections (5)(g) and (6) of the rule. These exceptions are based on the concept that the individual metering requirement no longer achieves the Florida Energy Efficiency and Conservation Act's purpose when a customer, such as a condominium or nursing home owner, rents the unit or charges for the room on a short-term basis for a flat per-night or per-week fee. In those cases, the customer cannot control how much electricity is used in the unit or room.

The individual metering requirement in Rule 25-6.049(5), F.A.C., is based on the Commission's authority under Sections 366.05(1) and 366.06(1), Florida Statutes (F.S.), to prescribe rate classifications and service rules for investor-owned electric utilities. The rule also implements the conservation policies in the Florida Energy Efficiency and Conservation Act. Section 366.81, F.S., of that act states the Legislature's finding that it is critical to utilize the most efficient and cost-effective conservation systems in order to protect the health, prosperity, and general welfare of Florida and its citizens. The statute states that since solutions to Florida's energy problems are complex, the Legislature intends that the use of solar energy should be encouraged. Section 366.81, F.S., further states that the Legislature finds and declares that the statute should be liberally construed in order to meet the complex problems of reducing and controlling the growth rates of electric consumption, increasing the overall efficiency and cost-effectiveness of electricity, and conserving expensive resources.

Casa Devon's Petition

Casa Devon states that it is the owner and developer of the Casa Devon apartment building, an existing 210-unit apartment in Miami that provides low-income, affordable housing to senior citizens through the Federal Department of Housing and Urban Development (HUD). Casa Devon seeks a variance or waiver from the individual electric metering requirement of Rule 25-

6.049, F.A.C., so that it can convert its apartment building from individually metered apartments to being master metered. Casa Devon requests that the variance or waiver be permanent with the condition that Casa Devon continue to operate as a specialized-use HUD housing facility with a solar energy system achieving energy conservation through reduced electricity purchases from the utility.

Casa Devon states that it has a Housing Assistance Payment contract with HUD that sets rental rates such that tenants pay thirty percent of their gross income toward rent and the remainder is paid for by HUD or a Public Housing Agency through subsidies or vouchers. According to Casa Devon, under the current arrangement, rent amount includes a utility allowance for water, wastewater, and electricity that varies by individual unit owner, but that Casa Devon estimates to average about $58 per unit. The petition shows that the Casa Devon apartment tenants are currently individually metered by Florida Power & Light Company (FPL).

Casa Devon states that on January 1, 2020, the Housing Assistance Payment contract was renewed by HUD for a new twenty-year term with an agreement to automatically renew for an addition 16 years, guaranteeing affordable housing at the facility until December 31, 2055. In addition to other renovation conditions, the contract renewal requires that:

> The Owner [Casa Devon] will also convert the Project [Casa Devon apartment building] to be master metered, which will result in tenants no longer paying for electricity. After completing the master meter conversion, the Owner will then add a solar panel system that will offset approximately 75% of the total electrical load.

Petition, Exhibit A.

Casa Devon states that it agreed to this arrangement, whereby it covers the cost of electricity, because of the benefits of installing the planned solar energy system. Casa Devon will get a Solar Investment Tax Credit for installing the solar energy system, through which it expects to receive a tax deduction of more than $300,000. Further, the solar energy system is predicted to offset 65 to 75 percent of the total annual electrical load to the Casa Devon apartment building. Casa Devon states that this arrangement gives the residents a significant benefit of not having to pay electric bills. Casa Devon alleges that it is required by HUD to finish the construction, installation, and approval of permitting of the solar energy system by December 31, 2020.

As an alternative request, if the Commission does not grant its request for variance or waiver, Casa Devon asks the Commission to find that it should be allowed to master meter the apartment building under either the "specialized-use housing" exception of paragraph (c) of Rule 25-6.049(5) or because it is similar to a hotel or hotel-condominium and therefore falls under the Rule 25-6.049(5)(d) exception. Casa Devon argues that the apartment building should be considered a specialized-use exception because it is not an ordinary housing arrangement, but is a specialized arrangement provided through the Federal government to provide housing for fixed-income or low-income senior citizens who will not be paying for electricity usage. Casa Devon argues that the load characteristics and usage patterns of the Casa Devon apartments will be more similar to other specialized-use housing or hotels than those of typical residential customers because the residents will not be paying for utilities.

Florida Power & Light Company's Comments

On July 27, 2020, FPL filed comments regarding Casa Devon's petition. FPL states that Casa Devon's "purported need" for a waiver and "professed economic hardship" were caused by Casa Devon's own action because it entered into the HUD agreement to master meter and install a solar energy system without first consulting the Commission's rules. FPL states that if the Commission were to grant the waiver, it would establish a factual predicate for others to ignore Commission rules, engage in a prohibited activity, and then ask the Commission for relief.

FPL believes that, instead of master metering and installing its planned solar energy system, Casa Devon could allow its 210 residents the option to either individually net meter using solar through the use of micro-inverters or string inverters, or keep their current individually metered service with FPL. In addition, FPL states that there is no way to determine whether all 210 residents have agreed to terminate their service with FPL, or whether FPL could safely deliver electricity to the apartment building if master metering is permitted.

With regard to Casa Devon's alternative request for relief, FPL argues that the Casa Devon apartment building does not qualify for master metering as specialized-use housing or housing similar to a hotel or hotel-condominium under Rule 25-6.049(5)(c) or (d), F.A.C. FPL argues that the Casa Devon apartment residents are permanent occupants and therefore the rationale for allowing master metering for overnight or temporary occupancy is simply not present.

Procedural Matters

Under Section 120.542, F.S., and Uniform Rule of Procedure Rule 28-104.005(1), F.A.C., an agency must give notice of receipt of a petition for emergency variance or waiver on its website within 5 days of receipt. On July 1, 2020, the Commission published notice of receipt of the emergency petition on its website. Notice of the emergency petition was also published in the July 2, 2020 edition of the Florida Administrative Register (FAR), Vol. 45, No. 80, as required by Section 120.542(3), F.S., and Uniform Rule of Procedure Rule 28-104.005(1), F.A.C. Rule 28-104.005(1), F.A.C., provides that interested persons may submit comments within 5 days after publication of the notice in the FAR. Even though FPL filed its comments after this 5-day period, there was sufficient time for staff to review the comments and address them in this recommendation. In addition, this item is noticed that interested persons may participate at the Agenda Conference.

Pursuant to Rule 28-104.005(2), F.A.C., a petition for emergency variance or waiver must be granted or denied, or the request must be determined not to be an emergency, within 30 days of its receipt by the agency, or it is deemed approved, unless the time limit is waived by the petitioner. Casa Devon waived the 30-day deadline until the August 18, 2020 Commission Conference. Thus, the petition will be deemed approved if the Commission does not grant or deny the petition or determine that it is not an emergency by August 18, 2020.

This recommendation addresses whether the Commission should grant the emergency petition for variance or waiver by Casa Devon. The Commission has jurisdiction under Sections 120.542, 366.04, 366.05, and 366.81, F.S.

Discussion of Issues

Issue 1: Should the Commission grant the petition for emergency variance from or waiver of Rule 25-6.049(5), Measuring Customer Service, F.A.C., by Casa Devon Venture, LP?

Recommendation: Yes, Casa Devon's petition for emergency variance from or waiver of Rule 25-6.049(5), F.A.C., should be granted subject to the condition that Casa Devon install the solar energy system in the apartment building substantially as described in the petition and the system remains in operation and achieves energy conservation through reduced electricity purchases from the utility. If these conditions are not met, the variance or waiver should cease to be effective. Casa Devon should be put on notice that if the variance or waiver ceases to be effective, it will be responsible for the cost of converting the Casa Devon apartment building from master metering to individual metering pursuant to Rule 25-6.049(7), F.A.C. (Cowdery, Coston, Guffey, Hampson, Hinton, Vogel)

Staff Analysis: Casa Devon is asking the Commission for an emergency variance from or waiver of Rule 25-6.049(5) and (6), F.A.C., so that it can convert the Casa Devon apartment building from individual metering to master metering. If the Commission does not grant it a variance or waiver from the rule, Casa Devon requests as alternative relief that the Commission find that the Casa Devon apartment building falls under an exception to individual metering under Rule 25-6.049(5)(c) and (d), F.A.C. Casa Devon asks the Commission to consider its petition on an emergency basis.

Legal Standard for Rule Variances and Waivers

Section 120.542(1), F.S., states that the purpose of a rule variance or waiver[1] is to provide relief to persons subject to regulation in cases where strict application of rule requirements can lead to unreasonable, unfair, and unintended results in particular circumstances. Section 120.542(2), F.S., sets forth a two-prong test for granting variances or waivers to rules. If the petitioner satisfies both prongs of the test, the agency must grant the variance or waiver.

First, the petitioner must show that "application of [the] rule would create a substantial hardship or would violate principles of fairness." A "substantial hardship" is a "demonstrated economic, technological, legal, or other type of hardship." Principles of fairness are violated when "the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule." Second, the petitioner must demonstrate that it will achieve the purpose of the underlying statutes by other means.

Each petitioner for rule variance or waiver has the burden of proving its entitlement to a variance or waiver under its particular circumstances. Thus, the Commission's determination as to whether a petitioner should be granted a variance or waiver is based on whether the legal test has been met under the specific circumstances of each petitioner.[2]

[1] A waiver is a decision by an agency not to apply all or part of a rule to a person who is subject to the rule. Section 120.52(22), F.S. A variance is an agency decision to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule. Section 120.52(21), F.S.

[2] Compare this to declaratory statements by agencies under Section 120.565, F.S., where an agency gives its opinion as to the applicability of a statute, rule, or order of the agency to the petitioner's particular set of circumstances.

Section 120.542(2), F.S., authorizes the filing of emergency petitions for rule variances and waivers. In order to be considered on an emergency basis, Uniform Rule of Procedure Rule 28-104.004(2), F.A.C., requires a petition for emergency variance or waiver to identify:

> (a) The specific facts that make the situation an emergency; and
>
> (b) The specific facts to show that the petitioner will suffer an immediate adverse effect unless the variance or waiver is issued more expeditiously than the time frames provided in Section 120.542, F.S.

The time frame for processing an emergency petition for variance requires that the agency publish notice of the petition in the FAR within 5 days of filing, compared to 15 days for a non-emergency petition. For an emergency petition, an agency must grant, deny, or find that a petition is not an emergency within 30 days of the petition's filing, unless the 30 days is waived by the petitioner. In contrast, a non-emergency petition must be granted or denied within 90 days after receipt of the original petition, the last item of timely requested additional information, or the petitioner's written request to finish processing the petition.

Request to Consider the Petition on an Emergency Basis

Casa Devon states that in May 2020, FPL advised Casa Devon that it would not permit master metering of the apartment building. Casa Devon states that since that time, the apartment renovation project has been on hold because Casa Devon cannot move forward with master metering the apartment or installing the solar energy system. Casa Devon is requesting that its petition be considered on an emergency basis because rehabilitation and renovation to the Casa Devon apartments must be completed by December 31, 2020 under HUD requirements, and those renovations cannot be completed without the variance or waiver of the individual metering requirement. Casa Devon states that if its petition is heard on an emergency basis, Casa Devon and the solar subcontractor believe that the two-month delay caused by Casa Devon's inability to master meter can be made up and the project finished on time. However, Casa Devon states that it does not believe there will be enough time to complete the installation of the solar energy system by December 31, 2020, if its petition is not heard on an emergency basis.

Staff believes that Casa Devon has demonstrated that an emergency situation exists. The petition alleges that rehabilitation and renovation to Casa Devon apartments must be completed by December 31, 2020 under HUD requirements and that there will not be enough time to complete the installation of the solar energy system by that date if the petition is not heard on an emergency basis. The Commission has recognized that a contract deadline can be a factor forming the basis for considering a petition for waiver on an emergency basis. E.g. In re Petition for emergency temporary waiver by BellSouth Telecommunications, Inc., Docket No. 20040659-TL, Order No. PSC-04-0793-PAA-TL, issued August 12, 2004 (granting emergency consideration of a rule waiver petition where an upcoming contract termination date and potential work stoppage would impact BellSouth's ability to comply with certain Commission rules).

Unlike a proceeding on a petition for variance or waiver, substantially affected persons may intervene in a declaratory action proceeding. This is because the agency's interpretation of the applicability of its statute, rule, or order has precedential effect and may determine the substantial interests of other persons in similar circumstances.

Casa Devon states that it would suffer an immediate adverse effect if the petition is not heard expeditiously because by failing to meet the December 31, 2020 completion date, it would be in default of its agreement with HUD, causing HUD to potentially terminate the contract or seek other relief such as rescinding or reducing its monthly rental payments to the property. Further, Casa Devon alleges that it would also fail to meet the energy savings requirements it agreed to in order to receive the tax incentives, which could result in a financial loss of in excess of $200,000. Casa Devon states that failure to finish the project by December 31, 2020, would also impact senior citizens in Miami-Dade County who need the 210 affordable housing-units that the Casa Devon apartments provide. Staff agrees that these facts demonstrate that Casa Devon will suffer an immediate adverse effect unless the variance or waiver is issued expeditiously.

Based on the specific facts provided, staff recommends that the Commission consider the petition for rule variance or waiver on an emergency basis. Staff notes that even if Casa Devon had not requested emergency treatment of its petition, staff would have brought this petition to the August 18, 2020 Commission Conference.[3] The petition contains the information required by Rule 28-104.002, F.A.C., and staff did not need any additional written information to complete its review. Further, given the nature of the apartment building at issue, low income housing for senior citizens in Miami that Casa Devon is restoring and renovating to include an extensive solar energy system, staff believes it is in the public interest to consider the petition in a timely manner.

The Purpose of the Underlying Statutes

Casa Devon states that the purpose of the underlying statutes implementing Rule 25-6.049, F.A.C., is to give the conditions under which individual metering and master metering must be used to ensure fair and reasonable rates/charges and energy conservation. Casa Devon states that it believes the underlying purpose of this law, promotion of energy conservation, will be achieved through its requested variance or waiver because master metering the apartment building and installation of the solar photovoltaic system will offset 65 to 75 percent of the apartment building's total annual electric load, therefore reducing electricity purchases from the utility.

Casa Devon further states that "[without] master metering, Casa Devon cannot install the solar energy system and would not be able to offer the fair and reasonable rates it is offering to these residents - $0 for utilities." FPL disagrees with this statement, arguing that Casa Devon could install solar panels without master metering, possibly using micro-inverters or string inverters, to allow each of the 210 residents to make their own choice to net meter, or to keep their current service with FPL through their existing individual meter.

FPL's suggested alternative does not show that Casa Devon's petition does not meet the purposes of the rule's underlying statutes. Instead, FPL's argument seems to take issue with whether the installation of solar is technically feasible without master metering. But whether or not the installation of solar is technically feasible without master metering is not relevant to deciding whether Casa Devon's proposed master metering project meets the purpose of the underlying statutes. Further, the HUD project is dependent on master metering, the primary

[3] If Casa Devon's petition for variance was not considered on an emergency basis, the Commission would need to grant or deny the petition within 90 days of the filing of the petition, which would be September 29, 2020.

energy source of which is solar, which is dependent on receiving the Solar Investment Tax Credit for the solar energy system installation. The Solar Investment Tax Credit and estimated energy cost savings are the basis for Casa Devon's agreement to pay all the apartment building's electric utility costs, instead of apartment renters paying for their individually metered electricity. In the absence of master metering, it appears that Casa Devon would not be able to economically undertake the restoration project as designed or economically offer solar energy.

Casa Devon has demonstrated that it will achieve the conservation purpose of the Florida Energy Efficiency and Conservation Act by means other than the individual metering requirement of Rule 25-6.049(5), F.A.C. Under Section 366.81, F.S., of the Florida Energy Efficiency and Conservation Act, the Legislature finds that it is critical to utilize the most efficient and cost-effective conservation systems in order to protect the health, prosperity, and general welfare of Florida and its citizens. The statute states that the Legislature intends that the use of solar energy should be encouraged and that the statute should be liberally construed in order to meet the complex problems of reducing and controlling the growth rates of electric consumption, increasing the overall efficiency and cost-effectiveness of electricity, and conserving expensive resources. Staff believes the underlying purpose of the Florida Energy Efficiency and Conservation Act will be achieved through master metering because installation of the solar photovoltaic array is projected to offset 65 to 75 percent of the apartment building's load resulting in lower electricity purchases from the utility.

Substantial Hardship

Casa Devon alleges that it will incur a substantial hardship if Rule 25-6.049, F.A.C., is applied to require individual metering because that would cause Casa Devon to violate its agreement with HUD, in which Casa Devon agreed to pay for the apartment building's electricity through master metering. Casa Devon states that the inability to master meter will constitute a default under the Housing Assistance Payment contract that would cause HUD to potentially terminate the contract or seek other relief such as rescinding or reducing its monthly rental payments to the apartment building.

Additionally, Casa Devon states that the decision to pay for the apartment building's electricity was predicated on Casa Devon's ability to master meter the project so that it could install a solar energy system that would offset 65 to 75 percent of the total electrical load. Casa Devon states that, by installing the solar energy system, it would receive a Solar Investment Tax Credit which would offset the cost of it paying for the residents' electricity. Casa Devon states that if the apartment building is required to keep the existing individual metering, the solar energy system planned to be installed – for which engineering fees have been paid and panels already procured – will not offset the tenant electrical loads. Casa Devon alleges that the solar energy system cannot be installed without master metering because the planned size of the solar energy system is necessary to achieve the 65 to 75 percent reduction in electric load.

If master metering is not allowed, Casa Devon states that it will need to develop a new solar energy approach to include individual systems for each apartment's meter to ensure that the peak monthly generation of each system does not exceed the consumption of its corresponding meter. Casa Devon alleges that this would also require additional costs for electrical cable management, smaller inverters to be installed at the individual meters, and a multitude of other considerations

and components that will offset any cost savings realized through the system. Casa Devon alleges that if it were to operate the solar energy system on individual meters, there would be decreased energy conservation and increased operation reporting requirements. Casa Devon alleges that individual metering would result in a loss of roughly 60 to 70 percent of the planned energy load reduction because the only financially viable solar energy system to use with individual metering would offset only the electricity load in common areas instead of the entire apartment building.

Casa Devon states that individual metering would result in the loss of the Solar Investment Tax Credit that was a huge factor in incentivizing investors to fund the comprehensive rehabilitation of the Casa Devon apartment building. Casa Devon states that if this much smaller solar energy system were installed, the tax credit deduction would be reduced to around $24,000, which would be completely nullified by the significant financial commitments Casa Devon has made for the restoration and rehabilitation of the Casa Devon apartment building. Additionally, there would be a negative financial impact on the current operating budget projections that currently assume a 65 to 75 percent load reduction.

FPL states that Casa Devon's alleged economic hardship was caused by its own actions of entering into the HUD agreement without first consulting the Commission's rules to determine whether it could master meter. FPL states that if the Commission were to grant the waiver, it would establish a factual predicate for others to ignore Commission rules, engage in a prohibited activity, and then ask the Commission for relief. FPL states that the Florida Supreme Court addressed this very situation in affirming the Commission's denial of a rule waiver in Panda Energy International v. Jacobs, 813 So. 2d 46 (Fla. 2002).

The Commission proceeding giving rise to the Panda Energy appeal was a need determination case.[4] On the day after the prehearing conference, Panda filed a petition to intervene in the proceeding. After being granted intervention, and two days before the hearing, Panda filed a motion for a continuance of the hearing. As part of its motion, Panda addressed Rule 25-22.080, F.A.C., which requires that the hearing be conducted within 90 days of the filing of the need petition. Panda argued that because Rule 25-22.080, F.A.C., was a procedural rule, the Commission could waive its requirements for good cause.

Florida Power Corporation (FPC) filed a Response in Opposition to Panda's Motion for Continuance. As part of FPC's response, it argued that granting the continuance would violate Rule 25-22.080, F.A.C., and that the requirements of Rule 25-22.080, F.A.C., could be waived only through a variance procedure of Section 120.542, F.S., and Rule 28-104.002, F.A.C., which, it stated, Panda did not address in its motion.

The motion for continuance was heard by the Commission at the beginning of the need determination hearing. The Commission denied Panda's motion for continuance on the ground that Panda did not show good cause for a continuance as required by Rule 28-106.210, F.A.C.
In denying Panda's motion for continuance, the Commission did not address FPC's argument about the need for a Rule 25-22.080, F.S., rule waiver under Section 120.542, F.S.

[4] Petition for determination of need for Hines Unit 2 Power Plant by Florida Power Corporation, Docket No. 20001064-EI.

On appeal, the Court held that the Commission did not abuse its discretion in denying Panda's motion for continuance. In addition, the Court stated that in order to obtain a continuance, Panda would need a waiver from the Commission's rule implementing the statutory deadlines for need proceedings. The Court found that because the limited amount of time for preparing for hearing was a direct result of Panda's decision to delay intervening, Panda did not demonstrate either a substantial hardship or a violation of principles of fairness. Panda Energy, 813 So. 2d at 51.

Staff disagrees with FPL's statement that "the Supreme Court addressed this very situation in affirming the Commission's denial of a rule waiver" in Panda Energy. As explained above, the Florida Supreme Court in Panda Energy affirmed the Commission's denial of Panda's motion for continuance on the basis that Panda had not shown good cause as required by Rule 28-106.210, F.A.C. The Court's additional finding that Panda did not meet the requirements of a rule waiver was based on the fact that Panda chose to delay intervening in the case, which was why Panda had a limited amount of time to prepare for the hearing. The fact pattern in Panda Energy concerning a motion for continuance of a hearing is very different from Casa Devon's facts showing substantial hardship if a rule variance is not granted to allow master metering.

Staff also disagrees with FPL's statement that if the Commission were to grant the waiver, it would establish a factual predicate for others to ignore Commission rules, engage in a prohibited activity, and then ask the Commission for relief. To begin with, there is no indication that Casa Devon engaged in any prohibited activity. Further, as explained above, petitions for rule waivers are decided based upon whether a petitioner meets the statutory requirements of Section 120.542, F.S. If Casa Devon demonstrates that application of the individual metering requirement of Rule 25-6.049(5), F.A.C., would create a demonstrated economic, technological, legal, or other type of hardship and that it will achieve the purpose of the underlying statutes by other means, then a waiver or variance must be granted. See Section 120.542(2), F.S. Each petitioner for rule variance or waiver has the burden of proving its entitlement to a variance or waiver under its particular circumstances.

Further, FPL appears to conflate Casa Devon's request that the Commission consider the petition on an emergency basis with Casa Devon's showing of substantial hardship to obtain a rule waiver or variance. The determination of substantial hardship in this case is not based upon the emergency nature of the filing or when the filing of the petition occurred. It does not matter whether Casa Devon filed a petition for waiver or variance before it entered into the HUD contract or afterwards. What matters is whether the facts presented by Casa Devon meet the requirements for a rule waiver or variance, including a showing of substantial hardship or violation of principles of fairness and that the underlying purpose of the statutes will be met.

In addition to its other comments, FPL states that based upon the materials filed with the Commission, along with information provided by Casa Devon to FPL during the past few months, FPL cannot say with any degree of certainty that the apartment building can be master metered, noting that FPL has not received any electrical engineering plans and that the local building official would need to sign off on the delivery system beyond FPL's point of delivery. These issues are not relevant to the Commission's decision as to whether the petition meets the statutory requirements for a rule waiver, that is, whether Casa Devon has shown that application

of the rule would create a substantial hardship or would violate principles of fairness and that the purpose of the underlying statutes will be achieved by other means.

Staff believes that Casa Devon has demonstrated that it will incur substantial hardship if it is not granted a variance from or waiver of the individual metering requirement of Rule 25-6.049(5), F.A.C. If Casa Devon is not granted a variance and is not allowed to master meter its apartment building, it will not be feasible to install the solar energy system it has contracted for, the estimated 65 to 75 percent load reduction will not occur, and it will not qualify for the Solar Investment Tax Credit that was intended to offset Casa Devon's agreement to cover the cost of tenant utilities through master metering. This argument for substantial hardship would have been essentially the same if the petition for variance had been filed before Casa Devon entered into the HUD contract. In addition, under the facts of this case, the inability to master meter will constitute a default under the Housing Assistance Payment contract, which requires master metering and the installation of a solar panel system that will offset approximately 75% of the total electrical load, that would cause HUD to potentially terminate the contract or seek other relief such as rescinding or reducing its monthly rental payments to the property.

Conclusion

Staff recommends that Casa Devon's petition for emergency variance from or waiver of Rule 25-6.049(5), F.A.C., should be granted subject to the condition that Casa Devon install the solar energy system in the apartment building substantially as described in the petition and the system remains in operation and achieves energy conservation through reduced electricity purchases from the utility. If these conditions are not met, the variance or waiver should cease to be effective. Casa Devon should be put on notice that if the variance or waiver ceases to be effective, it will be responsible for the cost of converting the Casa Devon apartment building from master metering to individual metering pursuant to Rule 25-6.049(7), F.A.C.

However, by granting the rule waiver, it does not mean that FPL is required to master meter the Casa Devon apartment building if it is not technically feasible and safe to do so. It is up to Casa Devon and FPL to work together to determine the technical feasibility of master metering the apartment building based upon electrical engineering plans and other relevant information.

Casa Devon also requested a variance of or waiver from Subsection (6) of Rule 25-6.049, F.A.C. However, Subsection (6) applies only to master-metered condominiums, so it does not apply to Casa Devon's apartment building.

Further, Casa Devon requested, alternatively, that if the Commission does not grant a variance or waiver from the individual metering requirement, it should interpret the exemptions from individual metering in paragraphs (c) and (d) of Rule 25-6.049(5), F.A.C., as applying to Casa Devon's apartment building so that it can master meter. If the Commission grants Casa Devon's petition for variance/waiver, this request for alternative relief is moot and should not be considered. Moreover, Casa Devon's alternative request for the Commission to give its opinion as to the applicability of the provisions of Rule 25-6.049(5)(c) and (d), F.A.C., to Casa Devon's particular set of circumstances is, in effect, a request for a declaratory statement. See Section 120.565, F.S. Casa Devon's petition for variance or waiver did not request a declaratory statement and does not meet the Rule 25-105.002, F.A.C., filing requirements for a petition for

declaratory statement. For this additional reason, the Commission should not consider Casa Devon's alternative relief request.

Issue 2: Should this docket be closed?

Recommendation: Yes. If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, a consummating order should be issued and this docket should be closed. (Cowdery)

Staff Analysis: If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, a consummating order should be issued and this docket should be closed.

Item 3

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: August 6, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (Crawford, Stiller)
Division of Accounting and Finance (Cicchetti)
Division of Engineering (Ballinger)

RE: Docket No. 20200001-EI – Fuel and purchased power cost recovery clause with generating performance incentive factor.

AGENDA: August 18, 2020 – Regular Agenda – Post-Hearing Decision – Participation is Limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Fay

CRITICAL DATES: 90 days from the date of delivery of Recommended Order. Section 120.569(1)(l)2, F.S.

SPECIAL INSTRUCTIONS: None

Case Background

The Commission opened Docket No. 20190001-EI, *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, referred to as the Fuel Clause, on January 2, 2019. The Fuel Clause is a perennial docket closed, reopened, and renumbered every year in which the Commission processes all petitions filed by investor-owned electric utilities seeking to recover the cost of fuel and fuel-related activities needed to generate electricity.

Duke Energy Florida, LLC (DEF) is an investor-owned electric utility operating in the State of Florida. DEF reaffirmed its party status in Docket No. 20190001-EI on January 3, 2019. Likewise, the Office of Public Counsel (OPC), authorized by Section 350.0611, Florida Statutes (F.S.), to provide legal representation to Florida electric utility customers before the

Commission, reaffirmed its party status in Docket No. 20190001-EI on January 4, 2019. The Florida Industrial Power Users Group (FIPUG), an association of utility customers who consume large amounts of electricity, and White Springs Agricultural Chemicals, Inc., d/b/a PCS Phosphate – White Springs (PCS Phosphate), a fertilizer company, reaffirmed their party status on January 4, 2019 and January 15, 2019, respectively.

The Commission issued Order No. PSC-2019-0059-PCO-EI on February 13, 2019, establishing the procedures to be followed. On March 1, 2019, DEF filed its Petition for approval of fuel cost recovery and capacity cost recovery with generating performance incentive factor actual true-ups for the period ending December 2018. At that time DEF also filed the direct testimony of Jeffrey Swartz which incorporated Exhibit JS-1, filed in the 2018 Fuel Clause. On September 13, 2019, OPC filed the direct testimony and exhibits of Richard A. Polich, non-confidential Exhibits RAP-1 through RAP-2, and confidential Exhibits RAP-3 through RAP-9. On September 26, 2019, DEF filed the rebuttal testimony of Jeffrey Swartz with confidential Exhibits JS-2 through JS-4.

A Prehearing Conference was held on October 22, 2019, and Prehearing Order No. PSC-2019-0466-PHO-EI was issued on October 31, 2019. At that time two issues associated with the testimony of witnesses Swartz and Polich were identified: Issues 1B and 1C. Issue 1B and 1C state as follows:

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

It became readily apparent that large portions of the testimony and exhibits of both witnesses Swartz and Polich associated with these issues, as well as the Commission staff's proposed trial exhibits, were highly confidential in nature. This fact made it impossible to conduct meaningful direct or cross examination without reference to, and discussion of, confidential material. The only way to conduct a hearing based substantially on confidential material would be to close the hearing to the public. Because the Commission must conduct all of its proceedings in the sunshine under the law[1] the Commission does not have the ability to close a hearing, even one which deals extensively with confidential materials and testimony. Therefore, in order to maintain the confidentiality of these materials, DEF Bartow Unit 4 Issues 1B and 1C were referred by the Commission to the Division of Administrative Hearings (DOAH) on November 8, 2019.

[1] Section 286.011, F.S.

Administrative law judge (ALJ) Lawrence P. Stevenson conducted a closed final evidentiary hearing on February 4-5, 2020. At the hearing, DEF presented the confidential testimony of Jeffrey Swartz, with his prefiled direct and rebuttal testimony inserted into the record as though read. DEF's Exhibit Nos. 80-82 were admitted into evidence. OPC presented the confidential testimony of Richard A. Polich, with his prefiled testimony inserted into the record as though read. OPC's Exhibit Nos. 68-75, 101-109, and 115-117 were admitted into evidence. Commission staff Exhibit Nos. 110 and 111 were admitted into evidence. FIPUG's Exhibit No. 118 and PCS Phosphate's Exhibit Nos. 112 and 113 were also admitted into evidence. The revised Comprehensive Exhibit List (CEL) was admitted into evidence by stipulation as Exhibit No. 114.

A three-volume transcript of the final hearing was filed with the Commission Clerk on February 18, 2020, and was provided to the DOAH Clerk on February 24, 2020. DEF, Commission staff, and OPC, jointly with PCS Phosphate and FIPUG, timely filed confidential proposed recommended orders on March 20, 2020. The ALJ issued his Recommended Order[2] on April 27, 2020. A redacted version of the Recommended Order is found in Attachment A to this recommendation.

On May 12, 2020, DEF submitted exceptions to the Recommended Order. A redacted version of DEF's exceptions is found in Attachment B to this recommendation. OPC, jointly with PCS Phosphate and FIPUG (collectively, the Intervenors), filed a Response to DEF's Exceptions, a redacted version of which is found in Attachment C to this recommendation.

Overview of the Recommended Order

This case involves the operation of DEF's Bartow Unit 4 combined cycle natural gas plant and whether DEF operated the plant prudently from the time it was brought on line in June 2009 until February 2017. Bartow Unit 4 is comprised of a steam turbine manufactured by Mitsubishi Hitachi Power Systems (Mitsubishi) with a gross output of 420 MW connected to four M501 Type F combustion turbines. The steam turbine is an "after-market" unit which was originally designed for Tenaska Power Equipment, LLC (Tenaska) to be used in a 3x1 configuration with three M501 Type F combustion turbines with a gross output of 420 MW. Prior to purchasing the steam turbine, DEF's predecessor, Progress Energy Florida, LLC contracted with Mitsubishi to evaluate the steam turbine design conditions and to update the [redacted] for a 4x1 configuration. As required by its contract, [redacted]

The Bartow plant has experienced five outages since it was brought on line in June 2009: March 2012 (planned), August 2014 (planned), April 2016 (planned), October 2016 (forced), and February 2017 (forced).

In March 2012 during a scheduled outage, DEF discovered that the [redacted] L-0 blades in the low pressure section of the steam turbine were damaged. The [redacted] L-0 blades were replaced with

[2] "Recommended Order" is defined in Section 120.52(15), F.S., as the official recommendation of the ALJ assigned by DOAH or of any other duly authorized presiding officer, other than the agency head or member thereof.

[redacted] and the plant was operated until August 2014 when the plant was taken out of service to [redacted] The plant came back on line in December 2014 and ran until April 2016 when it was taken off line for routine valve work and L-0 blade inspection. The plant was placed back in service in May 2016 with a [redacted] and operated until October 2016, when DEF shut the plant down due to excessive vibration and loss of [redacted] In December 2016 the plant was put back in service with the [redacted], and was taken out of service in February of 2017 due to a [redacted] DEF brought the plant back on line in April 2017 with a pressure plate installed in the low pressure section of the steam turbine, which effectively decreased the output of the plant from 420 to 380 MW. DEF continued to operate the plant with the pressure plates until September 28, 2019.

There are two amounts that are associated with the initial prudence question: 1) replacement power costs for the February 2017 outage in the amount of $11.1 million, and 2) May 2017 through September 2019 unit derating[3] costs in the amount of $5,016,782 million.

Petitioner, DEF, has the burden of proving by a preponderance of the evidence, that it acted prudently in the operation of Bartow Unit 4 up to and restoring the unit to service after the February 2017 forced outage. Additionally, DEF must prove by a preponderance of the evidence that no adjustment to replacement power costs should be made to account for the fact that after March 2017, and the installation of a pressure plate, Bartow Unit 4 could no longer produce its rated nameplate capacity of 420 MW. The standard for determining whether replacement power costs are prudent is "what a reasonable utility manager would have done, in light of the conditions and circumstances that were known, or should [have] been known at the time the decision was made." [4]

In his Recommended Order, the ALJ detailed the relevant facts and legal standards required to determine whether DEF acted prudently in its operation of Bartow Unit 4 from June 2009 until February 2017. In his conclusion, the ALJ recommended that the Commission find that DEF failed to demonstrate that it acted prudently in the operation of its Bartow Unit 4 plant and in restoring the unit to service after the February 2017 forced outage, and that DEF should refund a total of $16,116,782 to its customers.

Legal standards for review of recommended orders

Section 120.57(1)(l), F.S., establishes the standards an agency must apply in reviewing a Recommended Order following a formal administrative proceeding. The statute provides that the agency may adopt the Recommended Order as the Final Order of the agency or may modify or reject the Recommended Order. An agency may only reject or modify an ALJ's findings of fact if, after a review of the entire record, the agency determines and states with particularity that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.[5]

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[3] "Derating" is the reduction in MW output due to installing pressure plates in place of the L-0 blades in the low pressure section of the steam turbine.
[4] *Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013).
[5] Section 120.57(1)(l), F.S.

Section 120.57(1)(l), F.S., also states that an agency in its final order may reject or modify conclusions of law over which it has substantive jurisdiction and interpretations of administrative rules over which it has substantive jurisdiction. When rejecting or modifying a conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying the conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.[6]

In regard to parties' exceptions to the ALJ's Recommended Order, Section 120.57(1)(k), F.S., provides that the Commission does not have to rule on exceptions that fail to clearly identify the disputed portion of the Recommended Order by specific page numbers or paragraphs or that do not identify the legal basis for the exception, or those that lack appropriate and specific citations to the record.[7] Section 120.57(1)(l), F.S., requires the Commission's final order to include an explicit ruling on each exception and sets a high bar for rejecting an ALJ's findings.

This recommendation, which is based upon a review of the entire record of the hearing and post-hearing submissions, addresses whether the Commission should adopt the ALJ's Recommended Order as filed, make any changes to the order, or act on any of the matters raised in DEF's exceptions to the Recommended Order. Issue 1 addresses the post-hearing submissions by DEF and Issue 2 addresses the adoption of the ALJ's Recommended Order. The Commission has jurisdiction over this matter pursuant to Sections 120.57, 366.04, 366.05, and 366.06, F.S., and substantive jurisdiction over the conclusions of law discussed below.

[6] *Id.*
[7] Section 120.57(1)(k), F.S.

Discussion of Issues

Issue 1: Should the Commission accept any of the exceptions to conclusions of law filed by DEF?

Recommendation: No. DEF has not presented any legally sufficient basis for rejecting or modifying any portion of the Recommended Order. Therefore, staff recommends that the Commission should deny DEF's exceptions to Conclusions of Law 110-114 and 119-125. (Crawford, Stiller)

Staff Analysis: DEF filed exceptions to the ALJ's Conclusions of Law 110-114 and 119-125.

DEF Exception to Conclusion of Law 110

DEF takes exception with the ALJ's Conclusion of Law 110, which states:

> 110. DEF failed to demonstrate by a preponderance of the evidence that its actions during Period 1 were prudent. DEF purchased an aftermarket steam turbine from Mitsubishi with the knowledge that it had been manufactured to the specifications of Tenaska with a design point of 420 MW of output. Mr. Swartz's testimony regarding the irrelevance of the 420 MW limitation was unpersuasive in light of the documentation that after the initial blade failure, DEF itself accepted the limitation and worked with Mitsubishi to find a way to increase the output of the turbine to [redacted]

First, as a general criticism, DEF argues that when weighing the facts presented at hearing, although stating the correct legal standard of review - what a reasonable utility manager should have done based on what he knew or should have known at the time - the ALJ did not apply that standard but instead evaluated DEF's actions from the perspective of what is currently known. DEF states that this type of "hindsight" and "Monday-morning quarterbacking" prudence analysis has been found to be inappropriate under *Florida Power Corporation v. Public Service Comm. (Florida Power),* 456 So. 2d 451, 452 (Fla. 1984).

Second, DEF disagrees with the ALJ's conclusion that the 420 MW design point was a limitation on the steam turbine. DEF argues that the record supports the conclusion that the 420 MW design point is a fall out number based on various combinations of operating parameters provided by Mitsubishi. DEF argues that operating within the parameters given by Mitsubishi was prudent given what DEF knew or should have known during Period 1. At that time, DEF contends that there was no reason to believe that increasing the output above 420 MW would damage the unit as long as the operating parameters were complied with. Thus, DEF concludes that the fact that the [redacted] in February 2017 does not mean that the plant operator reasonably should have known that would happen in June 2009.

Third, DEF argues that DEF's compliance with lower than 420 MW output after Period 1 and its [redacted] to operate the unit at [redacted] do not logically support the conclusion that DEF agreed the unit originally could not be operated above 420 MW. These actions, according to DEF, allowed the unit to continue to be operated to produce the most power

possible while research into the cause of the Period 1 outage was conducted. DEF argues that getting the unit back on line producing as much power as possible is implementation of long standing Commission policy that utilities operate generating units for maximum efficiency. DEF asserts that these actions are not evidence of DEF's acceptance of 420 MW as a limitation on the output of the unit.

Intervenors' Response

Intervenors contend that DEF, while conceding that the ALJ referenced the correct legal standard for prudence review, never explains or demonstrates exactly how the ALJ applied "Monday-morning quarterbacking" to reach any of the conclusions in Conclusions of Law 110. In the determination of what a utility knew or should have known at any past point in time, Intervenors state that there is necessarily a review of contemporaneous prior actions and documents. They contend that that review was done here. Intervenors note that DEF has not argued that there is no competent substantial evidence supporting the ALJ's conclusions in Conclusions of Law 110 and cites nine separate parts of the record that do logically support the ALJ's conclusion that DEF did not act prudently in running the unit above 420 MW in Period 1.

Intervenors further argue that the *Florida Power* case relied upon by DEF is not applicable here for several reasons. In *Florida Power*, the Commission classified "non-safety related" repair work as "safety-related" repair work and then applied the higher standard of care for "safety-related" repair work to determine if Florida Power had conducted the repairs prudently. Finding that the record indicated that the extensive repair work was not *per se* safety-related, the Court found that the Commission could not apply the higher standard of care. *Florida Power,* 456 So. 2d at 451. Intervenors argue that in this case, the facts upon which the ALJ relied regarding the repair of the unit are supported by competent substantial evidence and are not in dispute, nor does DEF argue that the inferences drawn from the facts by the ALJ are unreasonable. Intervenors state that DEF would simply draw different conclusions from the same set of facts, i.e., would have the Commission weigh the evidence differently, an action prohibited by Chapter 120, F.S.

Staff Analysis and Conclusion:

Here DEF is asking the Commission to modify a conclusion of law. When rejecting or modifying a conclusion of law, the Commission must state with particularity its reasons for doing so, and must make a finding that the substituted conclusion of law is as or more reasonable than the one rejected or modified.[8] Rejection or modification of a conclusion of law may not form the basis for rejection or modification of a finding of fact.[9] With respect to DEF's exception to Conclusion of Law 110, staff recommends that DEF has failed to provide an adequate basis for rejecting or modifying the Conclusion of Law, and DEF's exception should therefore be denied.

[8] Section 120.57(1)(l), F.S.; *Prysi v. Department of Health,* 823 So. 2d 823, 825 (Fla. 1st DCA 2002)
[9] Section 120.57(1)(l), F.S.

Further, DEF has not raised exceptions to any of the 102 factual findings made by the ALJ in his Recommended Order. As its rationale for not doing so, DEF cites the high standard that must be met to set aside an ALJ's finding of fact.[10] The failure to file exceptions to findings of fact constitutes a waiver of the right to object to those facts on appeal. *Mehl v. Office of Financial Regulation,* 859 So. 2d 1260 (Fla. 1st DCA 2003); *Environmental Coalition of Florida v. Broward County,* 586 So. 2d 1212 (Fla. 1st DCA 1991). Nor has DEF argued that the proceedings conducted by the ALJ that produced those facts did not comply with the essential requirements of law. Thus, for all practical purposes, DEF has accepted all of the ALJ's 102 factual findings.

If the ALJ's findings of fact are supported by competent substantial evidence, the agency may not reject or modify them even to make alternative findings that are also supported by competent substantial evidence. *Kanter Real Estate, LLC v. Department of Environmental Protection (Kanter),* 267 So. 3d 483, 487-88 (Fla. 1st DCA 2019), *reh'g denied* (Mar. 19, 2019), *review dismissed sub nom. City of Miramar v. Kanter Real Estate, LLC,* SC19-636, 2019 WL 2428577 (Fla. June 11, 2019)(citing *Lanz v. Smith,* 106 So. 3d 518, 521 (Fla. 1st DCA 2013)).

Finally, an agency is not authorized to substitute its judgment for that of the ALJ by taking a different view of, or placing greater weight on, the same evidence, reweighing the evidence, judging the credibility of witnesses, or otherwise interpreting the evidence to fit its desired conclusion. *Prysi v. Department of Health,* 823 So. 2d 823, 825 (Fla. 1st DCA 2002); *Heifetz v. Department of Business Regulation,* 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

Staff agrees with DEF and the Intervenors that the standard for determining whether replacement power costs are prudent is "what a reasonable utility manager would have done, in light of the conditions and circumstances that were known, or should [have] been known at the time the decision was made."[11] However, in reaching the conclusion of law that DEF failed to show by a preponderance of the evidence that it acted prudently in Period 1, DEF contends that the ALJ did not follow this standard but instead evaluated DEF's actions in light of present knowledge. However, DEF never specifically identifies the facts it could not have known which were relied upon by the ALJ in reaching his conclusion of imprudence. Without identifying the facts upon which the ALJ improperly relied, it is impossible to evaluate this contention and it must be rejected.

The ALJ bases his conclusion that a preponderance of the evidence established the actions of DEF in Period 1 were imprudent on three facts. First, the Mitsubishi aftermarket steam turbine was manufactured with a design point of 420 MW of output. Second, witness Swartz's testimony that the 420 MW was not an operational limitation was unpersuasive. Third, DEF accepted this limitation in Periods 2-5 and worked with [redacted]

With regard to the first point, DEF does not contest that the steam turbine was aftermarket manufactured with a design point of 420 MW. This conclusion is supported by Findings of Fact Nos. 14-26. With regard to the second point, the ALJ extensively discusses the arguments

[10] DEF Exceptions at 2.
[11] *Southern Alliance for Clean Energy v. Graham,* 113 So. 3d 742, 750 (Fla. 2013).

presented by DEF witness Swartz that the 420 MW is not an operational limitation for this steam turbine in Findings of Fact Nos. 16-32 which culminate in Finding of Fact No. 33. Finding of Fact No. 33, a finding that DEF did not contest, states: "The greater weight of the evidence establishes that the Mitsubishi steam turbine was designed to operate at 420 MW of output and that 420 MW was an operational limitation of the turbine." Since DEF did not take exception to the identical statement in Finding of Fact No. 33, DEF has waived its ability to contest Conclusion of Law 110 on the grounds that the design point did not act as an operational limitation. However, even if DEF had taken exception to Finding of Fact 33, it is clear that the ALJ considered and rejected witness Swartz's arguments that DEF did not act imprudently by operating the steam turbine for extended periods of time at more than 420 MW.

With regard to the third point, DEF does not dispute that in Periods 2-5 it complied with the [redacted] placed on it by Mitsubishi and worked with Mitsubishi to [redacted] DEF disputes the significance of having done so. DEF argues that by working with Mitsubishi in Periods 2-5 it was acting to maximize the steam turbine's output for the benefit of its customers. As a general matter, DEF has argued that if a conclusion of law is "infused with overriding policy considerations," the agency, not the ALJ, should decide that issue.[12] Although not specifically identified, apparently, DEF believes that "maximization of output" is such an "overriding policy consideration" which should be given agency deference when determining operational prudence. However, DEF has not identified any statute, rule or Commission order that identifies "maximization of output" as a Commission policy. Additionally, the idea of agency deference, even in the interpretation of an agency's own rules and statutes, is now highly questionable given the passage of Amendment 6 to the Florida Constitution.[13]

Additionally, staff does not find the *Florida Power* decision cited by DEF on the issue of hindsight to be relevant. In *Florida Power,* the Commission made a finding of fact that was not supported by the record - that "non- safety related" repair work was "safety-related" repair work - and then improperly applied the higher standard of care for "safety-related" repair work. The crux of the problem in *Florida Power* was this unsupported finding of fact. Here DEF is not contesting any of the ALJ's 102 findings of fact as being unsupported by competent substantial evidence. Nor is DEF arguing that the legal conclusions the ALJ has drawn from these uncontested facts are unreasonable. Here there is no mistake of fact triggering the misapplication of a legal standard. In this case all parties agree on the standard to be applied, DEF simply does not like the result reached by the ALJ.

Because DEF has failed to establish that its exception to Conclusion of Law 110 is as or more reasonable that that of the ALJ, staff recommends that DEF's Exception to Conclusion of Law 110 be denied.

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[12] *Pillsbury v. State, Department of Health & Rehabilitative Services,* 744 So. 2d 1040, 1042 (Fla. 2d DCA 1999).

[13] "Section 21. Judicial interpretation of statutes and rules. – In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo."

DEF Exception to Conclusion of Law 111

DEF takes exception with the ALJ's Conclusion of Law 111, which states:

> 111. DEF's RCA [Root Cause Analysis] concluded that the blade failures were caused [redacted] This conclusion is belied by the fact that [redacted] Mitsubishi cannot be faulted for [redacted] n a way that would allow an operator to run the turbine consistently beyond its capacity.

DEF takes exception to the conclusion that the L-0 blade failures were not caused by [redacted] on the L-0 blades and that the turbine was consistently run above its capacity. DEF argues that Mitsubishi was contracted specifically to assess whether this particular steam turbine could handle the proposed 4x1 steam configuration. DEF states that Mitsubishi did not originally identify [redacted] and it was reasonable for DEF in Period 1 to rely upon Mitsubishi's assessment. The better comparison, according to DEF, is not with other [redacted], but with blade failures in Periods 2-5 when the unit was run at less than 420 MW. Finally, DEF notes that the exact time that the L-0 blades were damaged in Period 1 cannot be established. DEF states that the damage could have occurred during the half of the time in Period 1 when the steam turbine was operated at less than 420 MW.

Intervenors' Response

Intervenors respond that the conclusions of law in Paragraph 111 are supported by competent substantial evidence of record. Further, to the extent that a finding is both a factual and legal conclusion, Intervenors state that it cannot be rejected when there is competent substantial evidence to support the conclusion and the legal conclusion necessarily follows. *Berger,* 653 So. 2d at 480; *Strickland,* 799 So. 2d at 279; *Dunham,* 652 So. 2d at 897. Additionally, Intervenors contend that it is the ALJ, not the Commission, who is authorized to interpret the evidence presented and to decide between two contrary positions supported by conflicting evidence. *Heifetz v. Dept. of Business Regulation,* 475 So. 2d 1277, 1281-2 (Fla. 1st DCA 1985). With regard to DEF's reliance on the fact that it is impossible to tell when the L-0 blades were damaged in Period 1, Intervenors find this to be irrelevant since the ALJ does not address that fact in Paragraph 111.

Staff Analysis and Conclusion:

This conclusion of law constitutes the ALJ's rejection of DEF's Root Cause Analysis (RCA) conclusion that [redacted] The ALJ cites the fact that in [redacted] steam turbines with a [redacted] of the same [redacted] only Bartow Unit 4 has had [redacted] Further, Bartow Unit 4 had the [redacted] loading in

[14] Finding of Fact No. 67.

the entire fleet, in [redacted] for the rest of the fleet.[15] Additionally, the ALJ found that as late as June 2017 DEF agreed with [redacted] was one of "the most significant contributing factors" toward the L-0 blade failure.[16] Given these facts, none of which are disputed by DEF, the ALJ found DEF's exclusion of [redacted] from its final RCA to be troubling, as does staff.

The ALJ's Conclusion of Law was adequately supported by the relevant findings of fact. DEF has failed to demonstrate that its conclusion is as or more reasonable than that of the ALJ. For this reason, staff recommends that DEF's Exception to Conclusion of Law 111 be denied.

DEF Exception to Conclusion of Law 112

DEF takes exception with the ALJ's Conclusion of Law 112, which states:

112. [redacted]

DEF states that Mitsubishi did not ultimately attribute the blade failure in Period 1 to operation in excess of 420 MW but found in September 22, 2017, that [redacted] DEF argues that given the fact that the turbine was not operated above 420 MW in Periods 2 through 5, it is more reasonable to conclude that the damage to the blades in Period 1 was the result of [redacted]

Intervenors' Response

Intervenors contend that DEF does not contest that there are findings of fact supported by competent substantial evidence in the record to support the ALJ's conclusion of law. Thus, Intervenors conclude that the Commission, under those circumstances, can't reject the ALJ's conclusion of law or substitute its own judgment for that of the ALJ.

Staff Analysis and Conclusion:

This conclusion of law constitutes the ALJ's acceptance of Mitsubishi's RCA which concluded [redacted] After [redacted] on the steam turbine in December 2014, Mitsubishi concluded that the damage to the L-0 blades in all

[15] Finding of Fact No. 83.
[16] Finding of Fact No. 70.

five Periods was attributable to [redacted][17] Mitsubishi published its RCA findings in September of 2017. As late as June 2017 DEF agreed with Mitsubishi that [redacted] was one of "the most significant contributing factors" toward the L-0 blade failure.[18] Finally, Mitsubishi has stayed with its assessment that the blade damage was created by [redacted] which did not allow the [redacted]

DEF is simply rearguing its case that its RCA should be substituted for that of Mitsubishi. DEF has not contested the facts upon which Conclusion of Law 112 is based. Conclusion of Law 112 is the companion to Conclusion of Law 111 and staff recommends that it should be upheld for the same reasons – that there is competent substantial evidence to support this conclusion and the conclusion is reasonable given the facts proven by a preponderance of the evidence presented. DEF has failed to demonstrate that its conclusion is as or more reasonable than that of the ALJ. Thus, staff recommends that DEF's Exception to Conclusion of Law 112 be denied.

DEF Exception to Conclusion of Law 113

DEF takes exception with the ALJ's Conclusion of Law 113, which states:

> 113. Mr. Polich persuasively argued that it would have been simple prudence for DEF to ask Mitsubishi about the ability of the turbine to operate continuously in excess of 420 MW output before actually operating it at those levels. DEF understood that the blades had been designed for the Tenaska 3x1 configuration and should have at least explored with Mitsubishi the wisdom of operating the steam turbine with steam flows in excess of those anticipated in the original design.

DEF defends not contacting Mitsubishi by citing the following evidence in the record: 1) [redacted] 2) the MW output of a steam turbine is not an "operating parameter"; and 3) Mitsubishi knew DEF would operate the plant in excess of 420 MW. For these reasons, DEF argues that it is "as or more reasonable" to conclude that DEF did not need to contact Mitsubishi.

Intervenors' Response

Intervenors argue that DEF is simply rehashing the evidence presented and urging the Commission to make new findings that are "as or more reasonable" than the findings made by the ALJ. The ALJ states that he found OPC's expert persuasive on this point and it is the exclusive prerogative of the ALJ, not the Commission, to evaluate the credibility of a witness and the weight to be given to his/her testimony. Intervenors contend that since there is competent substantial evidence supporting the conclusion that DEF should have called Mitsubishi, this conclusion cannot be modified.

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[17] Finding of Fact Nos. 37, 63.
[18] Finding of Fact No. 70.
[19] Finding of Fact No. 78.

Staff Analysis and Conclusion

When viewed as a whole, the ALJ has based his analysis of this case by focusing on several areas. First, the nature of the after-market steam turbine and what limitations, if any, were inherent in its original 3x1 design. Second, the type and meaning of guarantees given by Mitsubishi for its current use in a 4x1 configuration. Third, the cause of the damage to the low pressure L-0 40" blades. Analysis of these three areas results in a finding regarding whether DEF acted prudently in the operation of the steam turbine which in turn drives the decision of whether replacement power costs for the April 2017 outage should be recovered or denied.

The ALJ's findings of fact establish that the steam turbine was originally designed to be used in a 3x1 configuration with a design point maximum of 420 MW. The 3x1 configuration used three M501 Type F combustion turbines connected to the steam turbine.[20] The 4x1 design configuration used by DEF used four M501 Type F combustion turbines connected to the same steam turbine.[21] [redacted] with a [redacted].[23] These guaranteed outputs were based on [redacted] calculated using only three combustion turbines and heat recovery steam generators with duct firing. Of the [redacted] run by [redacted] to predict how the steam turbine would operate, not one showed it producing more than 420 MW.[24]

Under these circumstances it is reasonable to believe that Mitsubishi would have instructed its consultant to run [redacted] if it thought the steam turbine could handle it.[25] This is especially true since DEF was proposing the use of an additional 501 Type F combustion turbine and heat recovery steam generator, giving DEF's proposed configuration the ability to produce far more steam than needed to generate 420 MW of output when compared to the original 3x1 application for which the steam turbine was designed.[26] Additionally, neither DEF nor Mitsubishi had any experience running a 4x1 combined cycle plant prior to commencing operation of Bartow Unit 4.[27] In sum, for these reasons the ALJ found that Mitsubishi did not contemplate DEF's operation of the steam turbine beyond the [redacted] scenarios set out in the Purchase Agreement.[28]

Given these extremely unique circumstances, the ALJ concluded that DEF's failure to contact Mitsubishi before pushing output beyond 420 MW was not prudent. Contacting Mitsubishi would have allowed DEF to receive written verification from Mitsubishi that the steam turbine could be safely operated above 420 MW and would have effectively [redacted] to

[20] Finding of Fact No. 14.
[21] Finding of Fact No. 6.
[22] Entitled the [redacted] executed between Florida Progress and Mitsubishi.
[23] Finding of Fact No. 26.
[24] Finding of Fact No. 87.
[25] Finding of Fact No. 87.
[26] Finding of Fact No. 31.
[27] Finding of Fact No. 85.
[28] Finding of Fact No. 102.

reflect the higher MW output.[29] The ALJ's conclusion of law is supported by competent substantial evidence of record. Because DEF has failed to demonstrate that its conclusion of law is as or more reasonable than the ALJ's, staff recommends that DEF's Exception to Conclusion of Law 113 be denied.

DEF Exception to Conclusion of Law 114

DEF takes exception with the ALJ's Conclusion of Law 114, which states:

> 114. The record evidence demonstrated an [redacted] that [redacted] associated with [redacted] DEF failed to satisfy its burden of showing its actions in operating the steam turbine in Period 1 did not cause or [redacted] To the contrary, the preponderance of the evidence pointed to DEF's operation of the steam turbine in Period 1 as the most plausible culprit.

DEF argues that it is "as or more reasonable" to conclude from the evidence presented that DEF's actions did not cause or contribute significantly to the vibrations that damaged the L-0 blades. DEF contends this is true because the L-0 blades were damaged in Periods 2-5 when the unit was not run above 420 MW as well as Period 1 when it was. DEF further states that the ALJ is imposing the impossible standard of proving a negative. DEF argues that it does not have the burden to prove that damage did not occur as a result of its actions. Rather, DEF states that it is only required to show that it acted as a reasonable utility manager would have done given the facts known or reasonably knowable at the time without the benefit of hindsight review.

Intervenors' Response

Intervenors argue that Conclusion of Law 114 summaries the findings of fact that support the ALJ's ultimate determination. Intervenors state that these findings of fact are supported by competent substantial evidence and the Commission may not reject them. With regard to the contention that the ALJ required DEF to prove a negative, Intervenors argue that DEF has the burden of proof to demonstrate that it acted prudently in the operation of Bartow Unit 4 which requires it to establish a *prima facie* case that it did act prudently and to rebut evidence of its imprudence. The Intervenors assert that DEF did neither here and the ALJ's conclusion may not be disturbed.

Staff Analysis and Conclusion

As discussed in staff's analysis of Conclusions of Law 110-113 above, the ALJ found that a preponderance of the evidence supported the finding that the L-0 blade damage was caused by [redacted] Further, the ALJ found that the weight of the evidence supported the conclusion that the [redacted] was the result of excessive steam flow through the low pressure section of the steam turbine caused by

[29] Factual Finding No. 93.

operating the steam turbine above 420 MW. DEF does not contest that these findings of fact are supported by competent substantial evidence of record.

Commission staff agrees with the ALJ that DEF has the burden of proving that it acted prudently in the operation of its steam turbine, i.e., the burden to make a *prima facie* case supported by competent substantial evidence that it acted prudently. The burden of proof also requires DEF to rebut evidence produced that it acted imprudently. Here under the unique circumstances of this case, DEF has failed to prove it acted prudently in light of the information that was available to it at the time as found by the ALJ in Conclusion of Law 110. DEF's exception to Conclusion of Law 114 reargues DEF's factual position and fails to demonstrate that its conclusion is as or more reasonable than the ALJ's. For these reasons, staff recommends that DEF's Exception to Conclusion of Law 114 be denied.

DEF Exception to Conclusion of Law 119

DEF takes exception with the ALJ's Conclusion of Law 119, which states:

> 119. It is speculative to state that the original Period L-0 blades would still be operating today had DEF observed the [redacted] of 420 MW. It is not speculative to state that the events of Periods 2 through 5 were precipitated by DEF's actions during Period 1. It is not possible to state what would have happened from 2012 to 2017 if the excessive loading had not occurred, but it is possible to state that events would not have been the same.

Specifically, DEF disputes the ALJ's conclusion that it is not speculative to state that the events of Periods 2 through 5 were precipitated by DEF's actions during Period 1. DEF argues that there is no causal link between the operation of the unit in Period 1 and the forced outage that occurred in Period 5. DEF contends that the lack of a causal link is proven by the fact that there was no residual damage done to the steam turbine itself in Period 1 and all parties agreed that DEF's operation of the plant subsequent to Period 1 was prudent.

Intervenors' Response

Intervenors state that the conclusions in Paragraph 119 are based on the ALJ's findings of fact in Paragraphs 84 and 89 which are supported by competent substantial evidence and OPC's expert's credible testimony. Intervenors argue that to the extent that this conclusion is an inference from the ALJ's factual findings, the ALJ is permitted to draw reasonable inferences from competent substantial evidence in the record. *Amador v. School Board of Monroe County*, 225 So. 3d 853, 858 (Fla. 3d DCA 2017). Further, Intervenors state that the fact that more than one reasonable inference can be drawn from the same evidence of record is not grounds for setting aside the ALJ's conclusion. *Id.*

Staff Analysis and Conclusion

This conclusion of law is in response to OPC witness Polich's testimony that the low pressure L-0 blades would still have been in use but for the operation of the steam turbine in excess of 420

MW.[30] While the ALJ rejected that conclusion as too speculative, he did accept witness Polich's testimony that the damage to the blades was most likely cumulative during Period 1, making it irrelevant exactly when during the operation of the unit in Period 1 the damage occurred.[31] DEF's witness Swartz testified that the damage to the blades could have occurred in Period 1 during the 50% of the time that the steam turbine was operated under 420 MW, i.e., when by Intervenors' standards, the unit was being operated prudently. Where reasonable people can differ about the facts, an agency is bound by the hearing officer's reasonable inferences based on the conflicting inferences arising from the evidence. *Amador v. School Board of Monroe County,* 225 So. 3d 853, 857-8 (Fla. 3d DCA 2017). Additionally, the hearing officer is entitled to rely on the testimony of a single witness even if the testimony contradicts the testimony of a number of other witnesses. *Stinson v. Winn,* 938 So. 2d 554, 555 (Fla. 1st DCA 2006).

DEF's exception to Conclusion of Law 119 reargues DEF's factual position and fails to demonstrate that its conclusion is as or more reasonable than the ALJ's. For these reasons staff recommends that DEF's Exception to Conclusion of Law 119 be denied.

DEF Exception to Conclusion of Law 120

DEF takes exception with the ALJ's Conclusion of Law 120, which states:

> 120. In his closing argument, counsel for White Springs summarized the equities of the situation very well:
>
> > You can drive a four-cylinder Ford Fiesta like a V8 Ferrari, but it's not quite the same thing. At 4,000 RPMs, in second gear, the Ferrari is already doing 60 and it's just warming up. The Ford Fiesta, however, will be moaning and begging you to slow down and shift gears. And that's kind of what we're talking about here.
> >
> > It's conceded as fact that the root cause of the Bartow low pressure turbine problems is [redacted] caused repeatedly over time. The answer to the question is was this due to the way [DEF] ran the plant or is it due to a [redacted] Well, the answer is both.
> >
> > The fact is that [DEF] bought a steam turbine that was already built for a different configuration that was in storage, and then hooked it up to a configuration . . . that it knew could produce much more steam than it needed. It had a generator that could produce more megawatts, so the limiting factor was the steam turbine.
> >
> > On its own initiative, it decided to push more steam through the steam turbine to get more megawatts until it broke.

[30] Finding of Fact No. 84.
[31] Finding of Fact No. 89; Footnote 4.

* * *

> So from our perspective, [DEF] clearly was at fault for pushing excessive steam flow into the turbine in the first place. The repair which has been established . . . may or may not work, but the early operation clearly impeded [DEF's] ability to simply claim that Mitsubishi was entirely at fault. And under those circumstances, it's not appropriate to assign the cost to the consumers.

DEF argues that Conclusion of Law 120 is a slightly edited, verbatim recitation of PCS Phosphate counsel's final argument which the ALJ adopts, characterizing it as summarizing "the equities of the situation very well." DEF takes exception to that portion of the final argument stating that under the circumstances presented in this case, it is not appropriate to assign the cost of the February 2017 forced outage to DEF's customers. DEF argues that it is as or more reasonable to conclude that here, where DEF consistently acted prudently, DEF should not be forced to bear replacement power costs.

Intervenors' Response

As demonstrated in its response to Paragraphs 110-114 above, Intervenors argue that there is more than adequate competent substantial evidence to support the ALJ's ultimate determination that DEF did not act prudently and should bear replacement power costs. Intervenors state that DEF is simply rearguing the case it presented to the ALJ which the ALJ found to be unpersuasive.

Staff Analysis and Conclusion

As noted above, this conclusion of law is an edited version of PCS Phosphate counsel's final argument which the ALJ agrees has summarized the "equities of the situation very well." The ALJ agrees that excessive vibrations over time caused the steam turbine problems. Further, whether the vibration was due to the way the plant was run or due to a[redacted] is that both are true. The ALJ concludes that DEF was at fault for pushing excessive steam flow into the turbine. The ALJ further agrees that by operating the unit above 420 MW, without contacting Mitsubishi, DEF impeded its ability to claim that Mitsubishi was entirely at fault. Under these circumstances, PCS Phosphate's counsel, and the ALJ, conclude that consumers should not bear replacement power costs.

Upon review of this material, it is clear that it is a summary of Conclusions of Law 110-114 above. These conclusions are supported by competent substantial evidence of record and staff has recommended that they be accepted. Again, DEF reargues the factual underpinnings of the ALJ's Conclusion of Law without adequately demonstrating that DEF's conclusion is as or more reasonable. Therefore, DEF's Exception to Conclusion of Law 120 should be denied.

DEF Exception to Conclusion of Law 121

DEF takes exception with the ALJ's Conclusion of Law 121, which states:

> 121. The greater weight of the evidence supports the conclusion that DEF did not exercise reasonable care in operating the steam turbine in a configuration for which it was not designed and under circumstances which DEF knew, or should have known, that it should have proceeded with caution, seeking the cooperation of Mitsubishi to devise a means to operate the steam turbine above 420 MW.

Specifically, DEF takes exception with the ALJ's conclusion that it did not exercise reasonable care in operating the steam turbine and should have sought the cooperation of Mitsubishi prior to operating the steam turbine above 420 MW. DEF again argues that it is as or more reasonable to conclude that operation within the express parameters given by Mitsubishi was prudent and did not require further consultation with the manufacturer.

Intervenors' Response

As demonstrated in their response to Paragraphs 110-114 above, Intervenors argue that there is more than adequate competent substantial evidence to support the ALJ's ultimate determination that DEF did not exercise reasonable care operating the plant in excess of 420 MW without consulting Mitsubishi first. Intervenors assert that the Commission is not free to reject or modify conclusions of law that are supported by competent substantial evidence and logically flow from that evidence.

Staff Analysis and Conclusion

This conclusion is a statement of the ALJ's ultimate conclusion that DEF did not exercise reasonable care in the operation of the steam turbine given its configuration and design without consulting Mitsubishi. This ultimate conclusion is supported by competent substantial evidence as discussed in Conclusions of Law 110-114 above. Because DEF has failed to demonstrate that its conclusion is as or more reasonable than the ALJ's, staff recommends that DEF's Exception to Conclusion of Law 121 be denied.

DEF Exception to Conclusion of Law 122

DEF takes exception with the ALJ's Conclusion of Law 122, which states:

> 122. Given DEF's failure to meet its burden, a refund of replacement power costs is warranted. At least $11.1 million in replacement power was required during the Period 5 outage. This amount should be refunded to DEF's customers.

DEF takes exception to the ALJ's conclusion that DEF should refund replacement power costs to its customers. Citing the arguments made in its exceptions to Paragraphs 110-114 and 119, DEF states that DEF did act prudently in the operation of its Bartow Unit 4 plant and, therefore, it is as or more reasonable to conclude that no replacement power costs should be refunded to customers.

Intervenors' Response

Intervenors argue that the ALJ's conclusion is supported by competent substantial evidence of record and is consistent with applicable law. Therefore, the Intervenors conclude that the Commission cannot, under these circumstances, reject the ALJ's conclusion of law by reweighing the evidence and substituting new and directly contrary findings that are favorable to DEF.

Staff Analysis and Conclusion

This conclusion of law is based on the ALJ's Conclusions of Law 110-114, supported by competent substantial evidence of record, that DEF acted imprudently in its operation of the steam turbine in Period 1. Since DEF disagrees that it acted imprudently in incurring the replacement power costs, it argues that the $11.1 million should not be refunded to customers. The amount of the refund is not contested. The findings of fact underlying Conclusion of Law 122 are not in dispute. Ultimately, the conclusion is supported by competent substantial evidence. Because DEF has failed to demonstrate that DEF's conclusion was as or more reasonable that the ALJ's, staff recommends that DEF's Exception to Conclusion of Law 122 be denied.

DEF Exception to Conclusion of Law 123

DEF takes exception with the ALJ's Conclusion of Law 123, which states:

> 123. DEF failed to carry its burden to show that the Period 5 blade damage and the required replacement power costs were not consequences of DEF's imprudent operation of the steam turbine in Period 1.

For the reasons stated in its exception to Paragraph 110, DEF argues that it did demonstrate by a preponderance of the evidence that it operated the steam turbine prudently in Period 1. Thus, DEF contends that it is as or more reasonable to conclude that DEF carried its burden of proof that the steam turbine was operated prudently in Period 1.

Intervenors' Response

Intervenors contend that the ALJ's conclusion is supported by competent substantial evidence of record as detailed in Intervenors' responses to DEF's exceptions to Paragraphs 110-114 and 119, and is consistent with applicable law. Therefore, Intervenors argue that the Commission cannot, under these circumstances, reject the ALJ's conclusion of law by reweighing the evidence and substituting new and directly contrary findings that are favorable to DEF.

Staff Analysis and Conclusion

A review of DEF's exception reveals that it is simply re-argument of its position taken in Conclusion of Law No. 110 discussed above. For the reasons stated therein, staff recommends

that DEF's Exception to Conclusion of Law be denied because DEF has failed to demonstrate that its conclusion is as or more reasonable that the ALJ's.

DEF Exception to Conclusion of Law 124

DEF takes exception with the ALJ's Conclusion of Law 124, which states:

> 124. The de-rating of the steam turbine that required the purchase of replacement power for the 40 MW loss caused by the installation of the pressure plate was a consequence of DEF's failure to prudently operate the steam turbine during Period 1. Because it was ultimately responsible for the de-rating, DEF should refund replacement costs incurred from the point the steam turbine came back on line in May 2017 until the start of the planned fall 2019 outage that allowed the replacement of the pressure plate with the [redacted] in December 2019. Based on the record evidence, the amount to be refunded due to the de-rating is $5,016,782.

DEF argues that the operation of the steam turbine in Period 1 was proven by DEF by a preponderance of the evidence to be prudent. DEF contends that this fact, coupled with the undisputed evidence that DEF also operated the steam turbine prudently in Periods 2-5, demonstrates that it is as or more reasonable to conclude that the Period 5 blade damage and resulting replacement power costs were not a consequence of DEF's operation of the steam turbine during Period 1.

Intervenors' Response

Intervenors argue that the ALJ's conclusion is supported by competent substantial evidence of record as detailed in Intervenors' responses to DEF's exceptions to Conclusions of Law 110-114 and 119. Intervenors contend that DEF's is simply rearguing its case that its operation of the steam turbine was prudent, and therefore no refunds associated with the installation of the pressure plate are required. Intervenors assert that the basis for the ALJ's conclusion that derating costs of $5,016,782 should be refunded to customers is his finding of DEF's imprudence in operation of the steam turbine in Period 1. For these reasons, Intervenors conclude that there is no basis to set aside that finding or to set aside this conclusion of law.

Staff Analysis and Conclusion

There is no question that installation of the pressure plate caused the derating of the steam turbine from 420 to 380 MW.[32] Likewise, the parties have agreed that the period of time associated with the derating is April 2017 through the end of September 2019.[33] Nor do the parties disagree that the amount associated with the derating is $5,016,782.[34] DEF is simply rearguing its position that its operation of the steam turbine was not responsible for blade damage in Period 5, a position considered and rejected by the ALJ.[35] As discussed in

[32] Finding of Fact No. 60.
[33] Finding of Fact No. 61.
[34] Finding of Fact No. 80.
[35] Finding of Fact No. 119.

Conclusions of Law 110-114 and 119 above, there is competent substantial evidence to support the ALJ's conclusion that DEF's imprudent actions in Period 1 resulted in the derating. That being the case, staff recommends that DEF's Exception to Conclusion of Law 124 be denied because DEF has failed to demonstrate that its conclusion is as or more reasonable than that of the ALJ.

DEF Exception to Conclusion of Law 125

DEF takes exception with the ALJ's Conclusion of Law 125, which states:

> 125. The total amount to be refunded to customers as a result of the imprudence of DEF's operation of the steam turbine in Period 1 is $16,116,782, without interest.

DEF takes exception to this conclusion on the grounds that DEF did prove by a preponderance of the evidence that it acted prudently in the operation of the steam turbine in Period 1. That being the case, DEF contends that it is as or more reasonable to conclude that no refund to its customers of any amount is required.

Intervenors' Response

Intervenor's argue that the ALJ's conclusion is supported by competent substantial evidence of record as detailed in Intervenors' responses to DEF's exceptions to Conclusions of Law 110-114 and 119. Intervenors state that DEF is simply rearguing its case that its operation of the steam turbine was prudent and therefore no refunds are required. Intervenors assert that the Commission cannot, under these circumstances, reject the ALJ's conclusion of law by reweighing the evidence and substituting new and directly contrary findings that are favorable to DEF.

Staff Analysis and Conclusion

This is a fall-out conclusion based upon Conclusions of Law 110-114 and 119 discussed above, which results in the ultimate conclusion of law that DEF acted imprudently. Conclusions of Law 110-114 and 119 are based on competent substantial evidence of record. For that reason, staff recommends that DEF's Exception to Conclusion of Law 125 should be denied, because DEF has failed to demonstrate that its conclusion is as or more reasonable than that of the ALJ.

Conclusion

DEF has failed to show that the ALJ's conclusions are not reasonable or that the facts from which his conclusions are drawn are not based on competent substantial evidence of record. Further, DEF has not argued that the proceeding did not comport with the essential requirements of law. Finally, DEF has not specifically stated how the ALJ's conclusions of law are contrary to prior Commission policy statements for utility operation. For these reasons, staff recommends that the Commission deny DEF's exceptions to Conclusions of Law 110-114 and 119-125 since

DEF has failed to demonstrate that its proposed modifications to those conclusions are as or more reasonable than that of the ALJ.

Issue 2: Should the Commission approve the Recommended Order submitted by the Administrative Law Judge?

Recommendation: Yes. The Commission should approve the attached Recommended Order (Attachment A) as the Final Order in this docket. (Crawford, Stiller)

Staff Analysis: Upon review of the entire record in this case, staff has recommended that DEF has failed to demonstrate that its exceptions to the ALJ's conclusions of law are as or more reasonable that the ALJ's. The conclusions of law to which DEF has filed exceptions are based upon competent substantial evidence of record and the proceedings held before the ALJ comported with the essential requirements of law. Further, DEF has not filed exceptions to any of the factual findings in this case. That being the case, under the provisions of Section 120.57(1)(l), F.S., the ALJ's Recommended Order should not be modified.

That being said, it is important to note that this case is highly fact specific and for that reason will have limited precedential value. There is literally no other plant in DEF's system that has four combustion turbines connected to one steam turbine nor any other plant in DEF's system that uses an after-market steam turbine designed for a 3x1 configuration in a 4x1 configuration. The ALJ was persuaded by OPC witness Polich's testimony that because Bartow Unit 4 was operated to produce more than 420 MW, too much steam was forced into the low pressure section of the steam turbine damaging the L-O blades. Adoption of the Recommended Order with this conclusion of law should not translate into a general policy decision by the Commission that under any set of circumstances it is imprudent to run a unit above its nameplate capacity.

Based on the foregoing, staff recommends that the Commission adopt the ALJ's Recommended Order, found in Attachment A, as it Final Order, regarding this petition. Accordingly, DEF should be required to refund $11.1 million in replacement power associated with its April 2017 Bartow Unit 4 outage and $5,016.782 for the de-rating of the unit from May 2017 until December of 2019, for a total refund of $16,116,782.

Issue 3: Should this docket be closed?

Recommendation: No. While the Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor docket is assigned a separate docket number each year for administrative convenience, it is a continuing docket and should remain open. (Crawford, Stiller)

Staff Analysis: While the Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor docket is assigned a separate docket number each year for administrative convenience, it is a continuing docket and should remain open.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: FUEL AND PURCHASED POWER COST RECOVERY CLAUSE WITH GENERATING PERFORMANCE INCENTIVE FACTOR,

Case No. 19-6022

/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on February 4 and 5, 2020, in Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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[1] References to DEF include Progress Energy, DEF's predecessor in interest in the Bartow power plant that is the subject of this proceeding. DEF purchased Progress Energy in 2011.

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STATEMENT OF THE ISSUES

Two issues have been referred by the Commission to DOAH for a disputed-fact hearing:

ISSUE 1B: Was DEF prudent in its actions and decisions leading up to and in restoring the unit to service after the February 2017 forced outage at

the Bartow plant and, if not, what action should the Commission take with respect to replacement power costs?

ISSUE 1C: Has DEF made prudent adjustments, if any are needed, to account for replacement power costs associated with any impacts related to the de-rating of the Bartow plant? If adjustments are needed and have not been made, what adjustment(s) should be made?

PRELIMINARY STATEMENT

On January 2, 2019, the Commission opened Docket No. 20190001-EI, *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor,* commonly referred to as the "Fuel Clause" docket. The Fuel Clause docket is a recurring, annual docket to which all investor-owned electric utilities serving customers in Florida are parties. Through the Fuel Clause docket, utilities are permitted to recover reasonably and prudently incurred costs of the fuel and fuel-related activities needed to generate electricity. Among the issues raised in the 2019 Fuel Clause docket was DEF's request to recover the replacement power costs incurred in connection with an unplanned outage to the steam turbine at DEF's Bartow Unit 4 combined cycle power plant (the "Bartow Plant") in February 2017. Issues 1B and 1C were raised as part of the 2019 Fuel Clause docket.

On November 5, 2019, the Commission held a final hearing in the 2019 Fuel Clause docket. All issues related to DEF's request to recover its fuel and purchased power costs were addressed, except for Issues 1B and 1C. Both Issues 1B and 1C involved extensive claims of confidentiality with respect to the pre-filed testimony of DEF witness Jeffrey Swartz, OPC witness Richard Polich, and the proposed trial exhibits.

The Commission found that it was impracticable to conduct direct or cross-examination in an open hearing without extensive reference to

confidential material. Despite its apparent authority under section 366.093, Florida Statutes, to declare documents confidential, the Commission took the position that it lacked authority to close a public hearing to protect materials and topics it had previously determined to be confidential. The Commission therefore referred Issues 1B and 1C to DOAH for a closed evidentiary hearing and issuance of a Recommended Order.

On November 26, 2019, a telephonic status conference was held to set hearing dates, establish the procedures for handling confidential material, the need for discovery, the use of written testimony, and the use of the Comprehensive Exhibit List ("CEL") admitted into evidence at the Commission's November 5, 2019, hearing. At the status conference, the parties agreed to the hearing dates of February 4 and 5, 2020. The undersigned requested the parties to confer and file a motion setting forth proposed procedures for the handling of confidential material before, during, and after the hearing. The parties filed a Joint Motion on Confidentiality on December 6, 2019, which was adopted by Order issued December 9, 2019.

On December 23, 2019, the Commission's record was transmitted to DOAH on two CD-ROM discs. Disc One contained non-confidential information and Disc Two contained information held as confidential.

The final hearing was convened and completed as scheduled on February 4 and 5, 2020. At the outset of the hearing, the parties submitted an updated CEL from the November 2019 proceeding before the Commission. The revised CEL listed 114 exhibits. The revised CEL was numbered as Exhibit 114 and admitted by stipulation.

DEF presented the direct and rebuttal testimony of Jeffrey R. Swartz, its Vice President of Generation. DEF moved for the admission of Exhibits 80 through 82, which were admitted into the record.

OPC presented the testimony of Richard Polich, an engineer with expertise in the design of power generation systems, including steam turbines. OPC moved for the admission of Exhibits 68 through 75 and 101 through 109, which were admitted into the record. At the hearing, OPC Exhibits 115 through 117 were marked, moved, and admitted into the record.

The Commission moved for the admission of Exhibits 110 and 111, which were admitted into the record.

FIPUG moved for the admission of Exhibit 118, which was admitted into the record.

White Springs moved for the admission of Exhibits 112 and 113, which were admitted into the record.

The three-volume Transcript of the final hearing was filed with DOAH on February 24, 2020. Pursuant to an agreement approved by the undersigned, the parties timely filed their Proposed Recommended Orders on March 20, 2020. DEF and the Commission filed separate Proposed Recommended Orders. OPC, FIPUG, and White Springs submitted a joint Proposed Recommended Order (unless otherwise specified, references to OPC as to positions stated in its Proposed Recommended Order should be understood to include FIPUG and White Springs). All three Proposed Recommended Orders have been duly considered in the writing of this Recommended Order.

Unless otherwise indicated, statutory references are to the 2019 edition of the Florida Statutes.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

THE PARTIES

1. The Commission is the state agency authorized to implement and enforce Chapter 366, Florida Statutes, which governs the regulation of every "public utility" as defined in section 366.02(1).

2. DEF is a public utility and is therefore subject to the Commission's jurisdiction. DEF is a subsidiary of Duke Energy, one of the largest energy holding companies in the United States.

3. OPC is statutorily authorized to represent the citizens of the state of Florida in matters before the Commission, and to appear before other state agencies in connection with matters under the Commission's jurisdiction. § 350.0611(1), (3), and (5), Fla. Stat.

4. FIPUG is an association comprising large commercial and industrial power users within Florida. A substantial number of FIPUG's members are customers of DEF.

5. White Springs operates energy intensive phosphate mining and processing facilities in Hamilton County and is one of DEF's largest industrial customers.

THE BARTOW PLANT

6. The Bartow Plant is a 4x1 combined cycle power plant composed of combustion turbine generators whose waste heat is used to produce steam that powers a steam turbine manufactured by Mitsubishi Hitachi Power Systems ("Mitsubishi"). "4x1" references the fact that there are four Siemens

180 megawatt ("MW") Type 501 F combustion turbines, each connected to one of four heat recovery steam generators ("HRSG"), all of which in turn are connected to one steam turbine.

7. A combined cycle power plant uses gas and steam turbines together to produce electricity. Combustion of natural gas in the combustion turbine turns a generator that produces electricity. The waste heat from the combustion turbine is routed to an HRSG. The HRSG produces steam that is then routed to the steam turbine which, in turn, generates extra power.

8. Combined cycle plants can be set up in multiple configurations, providing considerable operational flexibility and efficiency. It is not necessary for all four HRSGs to provide steam to the steam turbine at the same time. The Bartow Plant can operate on all possible configurations of 4x1, i.e., 1x1, 2x1, 3x1, or 4x1. It also has the ability to augment heat through the use of duct burners. The combustion turbines can operate in "simple cycle" mode to generate electricity when the steam turbine is off-line.

9. The steam turbine is made up of a high pressure ("HP")/intermediate pressure ("IP") section and a low-pressure ("LP") section. Each of these turbine sections has a series of blades. As the steam passes through the blades, the steam exerts its force to turn the blades which, in their turn, cause a rotor to spin. The rotor is connected to a generator, and the generator produces electricity.

10. Steam leaving the HRSGs is introduced to the steam turbine at a high-pressure inlet into the HP turbine. The steam is returned to the HRSG for reheating, then enters the IP turbine. Finally, steam exiting the IP turbine is directed into the LP turbine.

11. The LP section of the steam turbine is dual-flow. The steam is admitted in the middle and flows axially in opposite directions through two opposing mirror-image turbine sections, each of which contains four sets of blades. After passing through the LP section, the steam exhausts into a condenser.

12. The sets of blades increase in size from the front to the back of the LP section. The blades get longer as the steam flows through the turbine. The steam loses energy as it passes through the machine and thus more surface area of blade is needed for the weaker steam to produce the force needed to spin the rotor. The final stage of blades in the LP section consists of 40" L-0 blades, the longest blades in the steam turbine.

13. [redacted]

14. The Mitsubishi steam turbine was originally designed for Tenaska Power Equipment, LLC ("Tenaska"), to be used in a 3x1 combined cycle configuration with three M501 Type F combustion turbines connected to the steam turbine with a gross output of 420 MW of electricity. For reasons unexplored at the hearing, Tenaska never took delivery of the turbine. It was stored in a Mitsubishi warehouse under controlled conditions that kept it in like-new condition.

15. During the design and planning process for the Bartow Plant, DEF's employees responsible for obtaining company approval to build the plant, reported to senior executives that they had found this already-built steam turbine. The Business Analysis Package of DEF's project authorization documents stated that the Mitsubishi steam turbine "proved to be a very good fit for the 4 CT and 4 HRSG combinations."

16. Prior to purchasing the steam turbine, DEF contracted with Mitsubishi to evaluate the design conditions to ensure the steam turbine was compatible with the Bartow Plant's proposed 4x1 combined cycle configuration. [redacted]

[redacted]

17. A "heat balance" is an engineering calculation that predicts the performance and output of power plant equipment based on different variables of ambient conditions and operating parameters. Any change in a variable causes a distinct "heat balance" and calculation of the expected plant output and performance.

18. One such variable was "power factor," a measure of the efficiency of how current is converted to useful power. A power factor of 1.0 indicates "unity," i.e., the most efficient possible conversion of load current. [redacted]

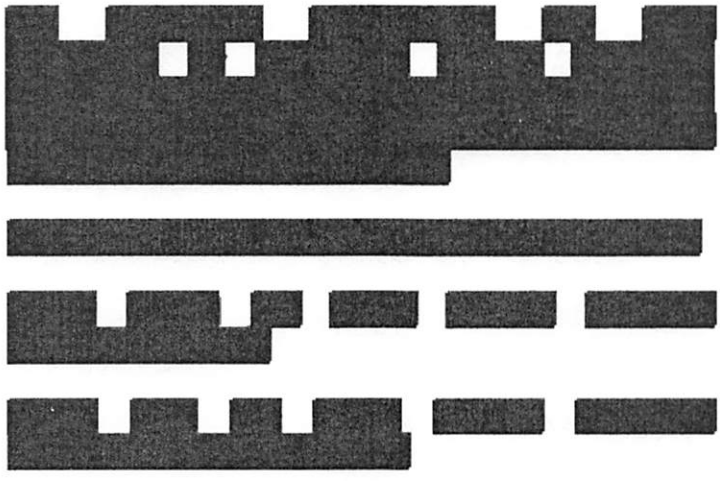
19. Jeffrey R. Swartz, DEF's Vice President of Generation, testified that DEF in fact operates the Bartow Plant at a power factor number that falls between .97 and .995.

20. [redacted]

[redacted]

24. Mr. Swartz further asserted that, prior to completion of the Purchase Agreement, Mitsubishi understood that DEF intended to operate the steam turbine in a 4x1 configuration with a power factor exceeding [redacted] which would result in the generation of more than 420 MW of electrical output.

25. Section 3.2 of the Purchase Agreement, titled [redacted] states, in relevant part:



26. The plain language of section 3.2.1 establishes [redacted]

[2] MPS stands for Mitsubishi Power Systems, Inc.

[redacted] It is unclear how Mr. Swartz translated this language into a [redacted]

27. In any event, the parties disagree as to the significance of the 420 MW maximum output designation. DEF and the Commission contend that the designated megawatt capacity of a steam turbine is not a control mechanism or a limit that the operator must stay below, but is the byproduct of operating the unit within the design parameters provided by the manufacturer at various combinations of such factors as steam flows, steam temperatures, steam pressures, exhaust pressures, ambient temperatures, and humidity.

28. DEF and the Commission contend that the numbers stated in the [redacted] are calculated estimates of the conditions that will achieve [redacted] output. If DEF was able in practice to operate the steam turbine within the design parameters and achieve output in excess of [redacted] then it was simply delivering maximum value to its ratepayers.

29. OPC asserts 420 MW is an operational limitation. [redacted] OPC points out that Mitsubishi conducted extensive [redacted] (from December 2014 until April 2016) that resulted in a document titled, [redacted]" dated March 18, 2015 (the "Report"). The Report expressly stated that the [redacted] The Report also stated that the [redacted] These statements were supported by section 3.2.1.2 of the Purchase Agreement, which states that [redacted] of the steam turbine.

30. OPC points out that section 4.1 of the Purchase Agreement, titled [redacted] expressly states: [redacted]

[redacted]

31. OPC notes that [redacted] reached [redacted] of output using only [redacted] OPC further notes that the Bartow Plant had a [redacted] meaning that it had the ability to produce [redacted] of output when compared to the [redacted] for which the steam turbine was originally designed.

32. The Mitsubishi steam turbine converts steam energy into rotational force (horsepower) that in turn drives an electric generator. The generator purchased by DEF for the Bartow Plant that was attached to the Mitsubishi steam turbine was manufactured by a different vendor and is rated at 468 MW. The generator thus was capable of reliably producing more electrical output than Mitsubishi stated its steam turbine was designed to supply.

33. The greater weight of the evidence establishes that the Mitsubishi steam turbine was designed to operate at 420 MW of output and that 420 MW was an operational limitation of the turbine.

OUTAGES AND BLADE FAILURES

34. DEF has classified the periods during which the Bartow Plant has been operational as: Period 1-- from June 2009 until March 2012; Period 2-- from April 2012 until August 2014; Period 3-- from December 2014 until April 2016; Period 4-- from May 2016 until October 2016; and Period 5-- from December 2016 until February 2017.

35. DEF placed the Bartow Plant into commercial service in June 2009. Later that year, DEF began operating the steam turbine above 420 MW

under varying system conditions. Mr. Swartz estimated that DEF operated the steam turbine above 420 MW about half the time between June 2009 and March 2012, the time span that has been designated as Period 1 of the five periods in question in this proceeding. The Bartow Plant operated for a total of 21,734 hours during Period 1.

36. In March 2012, while conducting a routine inspection of the steam turbine during a planned power outage, DEF found that [redacted] DEF consulted with Mitsubishi regarding the damage. Mitsubishi inspected the blades and recommended [redacted]

37. Mitsubishi concluded that the damage to the blades was caused by [redacted] Up to this point, Mitsubishi had [redacted] DEF and Mitsubishi had assumed that if [redacted] of the steam turbine, then the [redacted] would be acceptable. After discovery of the blade failure in March 2012, [redacted][3]

38. Period 2 commenced in April 2012 and ended in August 2014, a period of 28 months. At the beginning of Period 2, DEF and Mitsubishi replaced all of the L-0 blades on the affected end of the LP turbine with [redacted]

39. During Period 2, DEF operated the steam turbine a total of 21,284 hours. For all but two hours of this period, DEF operated the steam turbine

[3] [redacted]

at less than 420 MW and complied with Mitsubishi's [redacted]

40. During a planned outage beginning in August 2014, Mitsubishi replaced the [redacted] used in Period 2 with [redacted] thus beginning Period 3. During this planned outage, DEF and Mitsubishi conducted an inspection of the Period 2 [redacted] blades. The inspection revealed a [redacted] consistent with ordinary usage over the course of Period 2. There was no damage noted to [redacted] There was some [redacted] described as [redacted]

41. Between Period 2 and Period 3, Mitsubishi and DEF installed [redacted] in the steam turbine to allow for [redacted] which they expected would help them to understand why the L-0 blades were experiencing damage and to [redacted] protect the equipment.

42. It was undisputed that DEF's operation of the steam turbine was prudent at all times during Period 2.

43. Period 3 commenced in December 2014 and ended in April 2016. During Period 3, DEF operated the steam turbine a total of 10,286 hours. DEF never exceeded 420 MW of output, except for a [redacted]

44. During Period 3, Mitsubishi [redacted] on the steam turbine. The [redacted]

calculated that the Bartow steam turbine experienced approximately [redacted] and Mitsubishi's fleet experience had been [redacted] on last stage blades including the 40" L-0 blades. Mitsubishi was uncertain what impact the L-0 blades would experience at [redacted]

45. Mitsubishi concluded that [redacted]

46. It was undisputed that DEF's operation of the steam turbine was prudent at all times during Period 3.

47. Despite DEF's having [redacted] DEF and Mitsubishi's examination of the steam turbine at the end of Period 3 revealed that [redacted] DEF and Mitsubishi decided that [redacted] were installed.

48. Period 4 commenced in June 2016 and ended five months later in October 2016. During Period 4, DEF operated the steam turbine a total of 2,942 hours. DEF did not exceed 420 MW of output during this period and [redacted]

49. Just five months after the commencement of Period 4, DEF detected vibration changes in the LP turbine and stopped operation of the steam turbine to inspect the L-0 blades. During this inspection, DEF and Mitsubishi once again found several damaged L-0 blades. At the time of this blade damage, DEF was operating the steam turbine below 420 MW and observing the operating parameters established by Mitsubishi [redacted]

50. It was undisputed that DEF's operation of the steam turbine was prudent at all times during Period 4.

51. Period 5 began in December 2016 and ended two months later in February 2017.

52. At the beginning of Period 5, DEF and Mitsubishi [redacted] of 1,561 hours. DEF never exceeded 420 MW of output during this period and operated the steam turbine within the operating parameters established by Mitsubishi [redacted]

54. On February 9, 2017, the steam turbine was removed from service when DEF detected the presence of sodium in the steam water cycle. The cooling water used for the condenser is salt water from Tampa Bay. Mr. Swartz testified that any indication of sodium inside the condenser above minute amounts is alarming. During this shutdown, DEF performed an inspection of the steam turbine and discovered that a [redacted]

device known as a rupture disk had failed in the LP turbine and that the L-0 blades were damaged. DEF concluded that [redacted] the rupture disk. This forced outage lasted until April 8, 2017.

55. Based on the sequence of events, DEF was able to determine with certainty that the blade damage during Period 5 occurred on February 9, 2017. At that time, DEF was operating the steam turbine below 420 MW and within the operating parameters established by Mitsubishi [redacted]

56. It was undisputed that DEF's operation of the steam turbine was prudent at all times during Period 5.

57. During the February 2017 forced outage of the steam turbine, DEF continued to operate the Bartow Plant with the gas turbines running in simple cycle mode.

58. DEF took three primary actions in the wake of the Period 5 outage: a root cause analysis ("RCA") team, established after the first blade failure in Period 1, continued its mission to investigate and prepare an RCA; a restoration team was formed to bring the steam turbine back online; and a team was formed to evaluate a long-term solution for the steam turbine.

[redacted]

60. Instead, DEF and Mitsubishi installed pressure plates in place of the L-0 blades as an interim solution that would bring the steam turbine back into operation quickly and give Mitsubishi and DEF time to develop a permanent solution. A pressure plate is a non-rotating plate that has holes drilled into it. The pressure plate reduces the pressure of the steam passing through a steam turbine, keeping the steam from damaging the unit's condenser. A pressure plate does not use the steam passing through it to produce electricity and therefore decreases the efficiency of a steam turbine.

The pressure plate applied by DEF limited the output of the steam turbine to 380 MW.

61. The parties have agreed and the undersigned accepts that the period of the steam turbine's "de-rating" from 420 MW to 380 MW should be calculated as running from April 2017 through the end of September 2019.

THE MITSUBISHI AND DEF ROOT CAUSE ANALYSES

62. Mitsubishi's [redacted] during Period 3 [redacted] of its RCA in a 35-page "Bartow RCA Summary" ("Mitsubishi RCA"). The Mitsubishi RCA documented the [redacted]

64. The Mitsubishi RCA also stated that an [redacted]

65. After the discovery of the blade damage in March 2012, DEF formed an RCA team and began a years-long RCA process that ended with its own February 6, 2018, RCA report ("DEF RCA").

66. DEF's RCA [redacted]

67. [redacted]

team produced between 2012 and the final DEF RCA in February 2018. Mr. Swartz declined to call these documents "drafts" of the RCA, preferring to say they were "working papers" that provided snapshots of the RCA team's investigation at a given time. Mr. Swartz emphasized that only the February 2018 RCA report stated DEF's official position as to the cause of the blade failures.

69. The working papers indicate that as late as October 15, 2016, DEF [redacted]

70. The working papers show that as late as June 26, 2017, DEF maintained that one of "the most significant contributing factors toward root

cause of the history of Bartow Unit 4 L-0 events" was [redacted]

71. OPC accurately states that the DEF working documents demonstrate that during the RCA process, before and after the Period 5 event, DEF consistently identified excessive steam flow in the LP turbine as one of the "most significant contributing factors" toward blade failure over the history of the steam turbine, the [redacted].

72. Mr. Swartz attempted to minimize the significance of the working papers by stating that DEF was obliged to investigate the issue of excessive steam flow because [redacted]

73. DEF's final RCA did not include a statement that excessive steam flow was a significant contributing factor in the blade failures. The final DEF RCA instead noted that "excessive steam flow" had been a "potential" operational factor that DEF examined during the RCA process. The RCA states that DEF had been unable to find a correlation between [redacted] and the five failure periods. In particular, the RCA pointed out that [redacted]

74. OPC concludes that the final DEF RCA was DEF's self-serving attempt to exonerate its own overloading of the steam turbine and to shift responsibility onto Mitsubishi for [redacted] DEF contends that it simply followed the data throughout the RCA process and arrived at the only conclusion consistent with the findings of its engineers.

POST-RCA ACTIONS

75. As noted above, pressure plates were installed in place of the L-0 blades at the conclusion of Period 5. The pressure plates allowed DEF to keep the steam turbine running at a lower level of output while it sought a permanent solution to the blade damage problem.

76. In 2018, DEF solicited proposals to implement a long-term solution that would allow it to reliably operate the steam turbine to support 450 MW of electrical output from the generator. Three vendors responded. [redacted] DEF selected the Mitsubishi proposal.

77. In December 2019, Mitsubishi installed [redacted] As of the hearing date, DEF had operated the Bartow Plant with the [redacted] L-0 blades without incident on a 1x1, 2x1, and 3x1 configuration, but had yet to operate with all four combustion turbines.

78. OPC points out that in proposing its [redacted] blades, Mitsubishi did not waver from the conclusion of its RCA. Mitsubishi stated the following as the first three bullet points in the introduction to its paper describing the testing of the [redacted] blades:

[redacted]

REPLACEMENT POWER AND DE-RATING COSTS

79. The record evidence established that the replacement power costs stemming from the February 2017 outage are $11.1 million.

80. Further, the record evidence established that DEF incurred replacement power costs from May 2017 through September 2019, the period of the "de-rating" of the steam turbine, i.e., the reduction in output from 420 MW to 380 MW while it operated with the pressure plate. Those costs, calculated by year, are $1,675,561 (2017), $2,215,648 (2018), and $1,125,573 (2019), for a total of $5,016,782.

81. Therefore, the total replacement power costs incurred as a result of DEF's operation of the steam turbine are $16,116,781, without considering interest.

DISCUSSION

82. As noted above, the parties have a fundamental disagreement as to the significance of the 420 MW maximum output designation that Mitsubishi placed on the steam turbine. The Energy Information Administration of the U.S. Department of Energy defines "generator nameplate capacity" as the "maximum rated output of a generator, prime mover, or other electric power production equipment under specific conditions designated by the manufacturer." There was no dispute that 420 MW was the "nameplate capacity" of the Mitsubishi steam turbine. OPC argues that the nameplate capacity of 420 MW is by definition an operational limitation and that operation of the steam turbine beyond the maximum rated output of 420 MW threatened safe operation.

83. OPC points to the fact that there are 3 [redacted]

[redacted] OPC notes that the DEF RCA report does not explain why a [redacted]

84. As to DEF's argument that [redacted] OPC replies that had DEF operated the turbine within its original operating limitations during Period 1, there is every reason to believe that the original L-0 blades would still be functioning, consistent with [redacted] In other words, there would have been no Periods 2, 3, 4, or 5 but for DEF's actions during Period 1.

85. OPC points out that neither DEF nor any other subsidiary of Duke Energy had experience running a 4x1 combined cycle plant prior to purchasing the Mitsubishi steam turbine and commencing operation of the Bartow Plant. Further, neither DEF nor Mitsubishi had any experience operating a steam turbine at the [redacted]

86. Given the lack of experience on either side, OPC contends that DEF should have consulted Mitsubishi before purchasing the steam turbine to ask whether Mitsubishi believed it was capable of an output in excess of its nameplate capacity of 420 MW. [redacted]

87. OPC's expert witness, Richard Polich, pointed out that Mitsubishi's consultant ran over [redacted]

88. Mr. Polich testified that the Mitsubishi steam turbine was an aftermarket unit designed for a [redacted] To support his opinion, Mr. Polich pointed out that when DEF finally did ask whether the turbine could run past 420 MW, [redacted]

89. DEF ran the unit beyond 420 MW without consulting Mitsubishi. Mr. Polich found it a tribute to the design of the [redacted] 40" L-0 blades that they did not suffer damage sooner than they did. The steam turbine operated from June 2009 until March 2012 before the blade damage was noted. It was impossible to state exactly when the blade damage occurred in Period 1, but Mr. Polich opined that the damage was most likely cumulative.[4]

90. Mr. Polich noted that the blade failure in Period 5 was the fastest of any period, though the [redacted] Mr. Polich further noted that the DEF RCA did not address why the blades lasted longer in Periods 1 and 2 than in the other three periods. Mr. Polich reasonably concluded that there had to be something about the blades' [redacted]

[4] DEF made much of the fact that it could not be said precisely when during Period 1 the damage to the blades occurred, pointing out that there was a 50-50 chance that the blades were damaged when the turbine was operating below 420 MW. This argument fails to consider the cumulative wear caused by running the unit in excess of its capacity half of the time. The exact moment the damage occurred is beside the point.

that allowed them to last longer, and something in the [redacted] that caused them to fail quickly.

91. Mr. Polich believed that the [redacted] He noted that there were 28 months of operation below 420 MW during Period 2 and that there was basically no damage to the blades beyond the usual [redacted]

92. Mr. Polich thought that [redacted] Mr. Polich did not believe the five periods could be correlated, [redacted]

93. Mr. Polich testified that DEF would have acted prudently from both a warranty and a regulatory perspective by requesting written verification from Mitsubishi that the steam turbine could be safely operated above 420 MW of output.

94. Mr. Swartz countered that it would not be a "typical conversation" in the industry to ask Mitsubishi whether and how long the unit could be operated above 420 MW. He pointed out that pounds per hour per square foot of steam flow is not a parameter that can be measured during operation. It is a calculated number that DEF could not possibly have used to govern operation of the turbine.

95. Mr. Swartz testified that "420 MW" is the electrical output of the generator, which is coupled to the steam turbine. The steam turbine's operation is governed by parameters such as pressures, steam flows, and temperatures. Mr. Swartz stated that it is common in the industry to speak in terms of megawatts to get a feel for the size of the unit, but that generator output is dependent on many factors.

96. Mr. Swartz stated that when Mitsubishi criticized DEF for operations above 420 MW, it was using that term as a proxy for [redacted] It was his opinion that 420 MW was not an operational limit on the steam turbine.

97. Mr. Swartz testified that the [redacted] He stated that operation of the steam turbine above 420 MW could be correlated with [redacted] but many other factors are involved in determining what a generator can produce.

98. Mr. Swartz stated that the power factor was the key to DEF's ability to operate the steam turbine above 420 MW. Mitsubishi used [redacted] with a power factor of [redacted] to predict an output of 420 MW. Using the same operating factors, DEF was able to run the steam turbine at a power rating between .97 and .995. Mr. Swartz testified that this increased efficiency enabled the Bartow generator to operate above 420 MW.

99. Mr. Swartz conceded that the [redacted] at least from DEF's perspective. If DEF was able to obtain more, such was to the ultimate benefit of its ratepayers and was consistent with the operating limitations set forth in the Purchasing Agreement.

100. OPC responds that the record of this proceeding contains no indication that at any time during the five-year long, continuous, iterative RCA process did DEF's engineers suggest that the power factor of [redacted] in [redacted] an indication that the steam turbine output of 420 MW could be safely exceeded.

101. OPC points to several statements recorded during the RCA process indicating that DEF's engineers and Mitsubishi alike acknowledged that 420 MW was the design limit of the steam turbine: [redacted]

[redacted]

102. OPC's essential criticism was that DEF pushed the Mitsubishi steam turbine beyond its operational limits, whether the issue is framed in terms of megawatts of electrical output beyond the design point or in terms of steam flow [redacted] The evidence was clear that Mitsubishi did not contemplate DEF's operation of the steam turbine beyond the [redacted] The evidence was also clear that DEF made no effort before the fact to notify Mitsubishi of its intended intensity of operation or to ask Mitsubishi whether it could safely exceed the [redacted] Mr. Swartz was unable to explain away this criticism and thus DEF failed to meet its burden of demonstrating that it prudently operated the Bartow Plant during the times relevant to this proceeding.

CONCLUSIONS OF LAW

103. DOAH has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

104. The Commission has the authority to regulate electric utilities in the State of Florida pursuant to the provisions of chapter 366, including sections 366.04, 366.05, and 366.06.

105. An "electric utility" is defined as "any municipal electric utility, investor-owned electric utility, or rural electric cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state." § 366.02(2), Fla. Stat.

106. DEF is an investor-owned electric utility operating within the State of Florida subject to the jurisdiction of the Commission pursuant to chapter 366.

107. OPC, FIPUG, and White Springs are parties to the Fuel Clause docket, which included the issues to be resolved here, and as such are entitled to participate as parties in this proceeding.

108. This is a de novo proceeding. § 120.57(1)(k), Fla. Stat. Petitioner, DEF, has the burden of proving, by a preponderance of the evidence, that it acted prudently in its actions and decisions leading up to and in restoring the unit to service after the February 2017 forced outage at the Bartow Plant. Additionally, DEF must prove by a preponderance of the evidence that no adjustment to replacement power costs should be made to account for the fact that after the installation of a pressure plate in March 2017, the Bartow Plant could no longer produce its rated nameplate capacity of 420 MW. *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 788 (Fla. 1st DCA 1981); § 120.57(1)(j), Fla. Stat.

109. The legal standard for determining whether replacement power costs are prudent is "what a reasonable utility manager would have done, in light of the conditions and circumstances that were known, or should [have] been known, at the time the decision was made." *S. Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013).

110. DEF failed to demonstrate by a preponderance of the evidence that its actions during Period 1 were prudent. DEF purchased an aftermarket steam turbine from Mitsubishi with the knowledge that it had been manufactured to the specifications of Tenaska with a design point of 420 MW of output. Mr. Swartz's testimony regarding the irrelevance of the 420 MW limitation was unpersuasive in light of the documentation that after the initial blade failure, DEF itself accepted the limitation and worked with Mitsubishi to find a way to increase the output of the turbine to [redacted]

111. DEF's RCA concluded that the blade failures were caused [redacted] This conclusion is belied by the fact that [redacted] Mitsubishi cannot be faulted for

[redacted] in a way that would allow an operator to run the turbine consistently beyond its capacity.

112. [redacted]

113. Mr. Polich persuasively argued that it would have been simple prudence for DEF to ask Mitsubishi about the ability of the turbine to operate continuously in excess of 420 MW output before actually operating it at those levels. DEF understood that the blades had been designed for the Tenaska 3x1 configuration and should have at least explored with Mitsubishi the wisdom of operating the steam turbine with steam flows in excess of those anticipated in the original design.

114. The record evidence demonstrated an [redacted] that vibrations associated with high energy loadings were the primary cause of the L-0 blade failures. DEF failed to satisfy its burden of showing its actions in operating the steam turbine in Period 1 did not cause or contribute significantly to the vibrations that repeatedly damaged the L-0 blades. To the contrary, the preponderance of the evidence pointed to DEF's operation of the steam turbine in Period 1 as the most plausible culprit.

115. DEF demonstrated by a preponderance of the evidence that its actions during Periods 2 through 5 were prudent.

116. DEF argues that even if it failed to exercise prudence during Period 1, those actions were so attenuated by DEF's subsequent actions during Periods 2 through 5 that the outage and de-rating that began in 2017 cannot be fairly attributed to DEF's failures from 2009 through March 2012. If the imprudent operation in Period 1 did not cause the Period 5 outage, then the imprudent operation cannot be a basis for disallowance of the replacement power costs at issue.

117. OPC argues that Periods 2 through 5 would not have been necessary had DEF operated the turbine within its original operating limitations during Period 1. OPC contends that, based on [redacted], there is every reason to believe that the original L-0 blades would still be functioning but for DEF's overstressing them in Period 1.

118. OPC states that the applicable standard for prudence review is how a prudent and reasonable utility manager would have operated a new steam turbine under the conditions and circumstances which were known, or reasonably should have been known, when decisions were made in 2008 through 2012. OPC argues that it was imprudent and unreasonable for DEF to regularly supply steam to the steam turbine at levels causing the steam turbine to operate above the design point of 420 MW, especially given the fact that the steam turbine was not designed for the Bartow Plant and was sold to DEF with an [redacted]

119. It is speculative to state that the original Period 1 L-0 blades would still be operating today had DEF observed the [redacted] of 420 MW. It is not speculative to state that the events of Periods 2 through 5 were precipitated by DEF's actions during Period 1. It is not possible to state what would have happened from 2012 to 2017 if the excessive loading had not occurred, but it is possible to state that events would not have been the same.

120. In his closing argument, counsel for White Springs summarized the equities of the situation very well:

> You can drive a four-cylinder Ford Fiesta like a V8 Ferrari, but it's not quite the same thing. At 4,000 RPMs, in second gear, the Ferrari is already doing 60 and it's just warming up. The Ford Fiesta, however, will be moaning and begging you to slow down and shift gears. And that's kind of what we're talking about here.
>
> It's conceded as fact that the root cause of the Bartow low pressure turbine problems is [redacted]

> [redacted] caused repeatedly over time. The answer to the question is was this due to the way [DEF] ran the plant or is it due to a [redacted] Well, the answer is both.
>
> The fact is that [DEF] bought a steam turbine that was already built for a different configuration that was in storage, and then hooked it up to a configuration ... that it knew could produce much more steam than it needed. It had a generator that could produce more megawatts, so the limiting factor was the steam turbine.
>
> On its own initiative, it decided to push more steam through the steam turbine to get more megawatts until it broke.
>
> * * *
>
> So from our perspective, [DEF] clearly was at fault for pushing excessive steam flow into the turbine in the first place. The repair which has been established ... may or may not work, but the early operation clearly impeded [DEF's] ability to simply claim that Mitsubishi was entirely at fault. And under those circumstances, it's not appropriate to assign the cost to the consumers.

121. The greater weight of the evidence supports the conclusion that DEF did not exercise reasonable care in operating the steam turbine in a configuration for which it was not designed and under circumstances which DEF knew, or should have known, that it should have proceeded with caution, seeking the cooperation of Mitsubishi to devise a means to operate the steam turbine above 420 MW.

122. Given DEF's failure to meet its burden, a refund of replacement power costs is warranted. At least $11.1 million in replacement power was required during the Period 5 outage. This amount should be refunded to DEF's customers.

123. DEF failed to carry its burden to show that the Period 5 blade damage and the required replacement power costs were not consequences of DEF's imprudent operation of the steam turbine in Period 1.

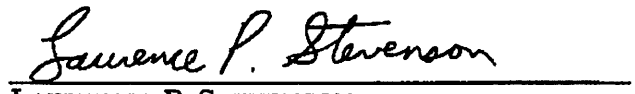
124. The de-rating of the steam turbine that required the purchase of replacement power for the 40 MW loss caused by installation of the pressure plate was a consequence of DEF's failure to prudently operate the steam turbine during Period 1. Because it was ultimately responsible for the de-rating, DEF should refund replacement costs incurred from the point the steam turbine came back online in May 2017 until the start of the planned fall 2019 outage that allowed the replacement of the pressure plate with the [redacted] in December 2019. Based on the record evidence, the amount to be refunded due to the de-rating is $5,016,782.

125. The total amount to be refunded to customers as a result of the imprudence of DEF's operation of the steam turbine in Period 1 is $16,116,782, without interest.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Public Service Commission enter a final order finding that Duke Energy Florida, LLC, failed to demonstrate that it acted prudently in operating its Bartow Unit 4 plant and in restoring the unit to service after the February 2017 forced outage, and that Duke Energy Florida, LLC, therefore may not recover, and thus should refund, the $16,116,782 for replacement power costs resulting from the steam turbine outages from April 2017 through September 2019.

DONE AND ENTERED this 27th day of April,2020, in Tallahassee, Leon County, Florida.



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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

IN RE: FUEL AND PURCHASED POWER COST RECOVERY CLAUSE WITH GENERATING PERFORMANCE INCENTIVE FACTOR / Case No. 19-6022

PSC Docket No. 20190001-EI

DUKE ENERGY FLORIDA, LLC'S, EXCEPTIONS TO THE RECOMMENDED ORDER

Duke Energy Florida, LLC ("DEF"), pursuant to section 120.57(1)(k), Florida Statutes, and rule 28-106.217, Florida Administrative Code, hereby submits its exceptions to the Administrative Law Judge's ("ALJ") Recommended Order dated April 27, 2020 ("RO").[1]

INTRODUCTION

When considering the RO, the Public Service Commission ("PSC") may reject or modify the conclusions of law recommended by the ALJ.[2] When rejecting or modifying a conclusion of law, the PSC must state with particularity its reasons for doing so and must make a finding that the PSC's substituted conclusion of law is as or more reasonable than that which was rejected or modified.[3] To be clear, on issues of law, the PSC is not required to defer to the ALJ,[4] and where the issue of law under review is infused with overriding policy considerations, the PSC, not the ALJ, should decide the issue of law.[5]

The PSC may also reject or modify a finding of fact contained in the RO if the PSC determines from a review of the entire record, and states with particularity in the final order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on

[1] The Hearing Transcript will be cited as "T. p.__." The Recommended Order will be cited as RO. ¶__. Joint exhibits will be cited as Jt. Ex. ___, p. ___. OPC's exhibits will be cited as "OPC Ex.__, p. __." FIPUG's exhibits will be cited as "FIPUG Ex.__, p.__." PCS Phosphate's exhibits will be cited as "PCS Phosphate Ex.__, p.__."
[2] Section 120.57(1)(l), Florida Statutes.
[3] *Id.*
[4] *State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998).
[5] *Pillsbury v. State, Dep't of Health & Rehabilitative Servs.*, 744 So. 2d 1040, 1042 (Fla. 2d DCA 1999) ("if the matter under review is susceptible of ordinary methods of proof, such as determining the credibility of witnesses or the weight to be given particular evidence, the matter should be determined by the hearing officer. If, however, the matter is infused with overriding policy considerations, the issue should be left to the discretion of the agency.") (citing *Bush v. Brogan*, 725 So. 2d 1237 (Fla. 2d DCA 1990)).

which the findings were based did not comply with essential requirements of law.[6]

As detailed in DEF's exceptions below, the ALJ has proposed several conclusions of law that should be rejected both because they are inconsistent with the PSC's overriding policy considerations regarding public utilities in Florida and because the ALJ has improperly interpreted the facts when making those conclusions of law. While DEF takes exception to multiple findings of fact, due to the standard of review discussed above, DEF will not relitigate those points here nor ask this Commission to reweigh evidence. As discussed below, even accepting the ALJ's findings of fact, this Commission should still reject the ALJ's legal and policy conclusions.

DEF'S EXCEPTIONS TO THE CONCLUSIONS OF LAW

Exception to RO ¶ 110

DEF takes exception to the ALJ's conclusion in paragraph 110 that DEF failed to demonstrate that its actions during Period 1 were prudent. First, it is helpful to re-state the standard this Commission routinely interprets and applies to determine whether a utility's actions are prudent. The ALJ correctly stated part of the test for prudence[7], but he left out an important factor. Namely, that hindsight cannot form the basis of a prudence determination. *Fla. Power Corp. v. Public Service Com'n*, 456 So. 2d 451, 452 (Fla. 1984). As support for the ALJ's conclusion, the ALJ relies on evidence that the steam turbine ("ST") DEF purchased for installation at the Bartow Plant had a nameplate rating of 420 MW and that DEF [redacted] after the initial blade failure.

[6] Section 120.57(1)(l), Florida Statutes.

[7] The standard for determining prudence 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) (RO ¶ 109).

Before committing to purchase the ST, DEF contracted with Mitsubishi to assess whether the ST design conditions were compatible with the Bartow Plant's proposed 4x1 combined cycle design configuration. As part of this assessment, DEF informed Mitsubishi that DEF intended to operate the Bartow Plant and the ST in 4x1 configuration with a power factor exceeding [redacted] which would result in the generation of more than 420 MW. T. 42, 135-136, 147-148, 213-215, 234, 258, 278, 356. During Period 1, DEF operated the ST in accordance with the operating parameters specified by Mitsubishi for operation of the ST, which did not include a parameter that prohibited DEF from operating the ST in excess of 420 MW. T. 272, 284, 346, 377-378. It was only after the initial blade failure during Period 1 that [redacted] T. 260. DEF operated the ST in accordance with [redacted] but asked Mitsubishi to determine whether anything could be done [redacted] during Period 1. In response, Mitsubishi [redacted] T. 152, 277. Mitsubishi did not determine it was necessary [redacted]

Significantly, Mitsubishi did not conclude that DEF operated the ST during Period 1 in violation of the operating parameters it provided DEF for the ST. Instead, MHPS surmised that [redacted]. T. 97, 386. Moreover, the fact that Mitsubishi [redacted] makes plain that Mitsubishi believed the ST was capable of operating above 420 MW [redacted]

In the utility industry, the nameplate rating of a steam turbine is not regarded as an

"operating parameter" above which the steam turbine may not be operated. T. 140-143, 281-282, 284. Instead, the general standard followed in the utility industry is to operate steam turbines within operating parameters provided by the original equipment manufacturer while also striving to achieve the most efficiency for utility customers. T. 141. Operating parameters provided by Mitsubishi for the ST included steam pressures, operating temperatures and other parameters common to steam turbines. T. 346, 377-378. Nothing in DEF's experience operating the Bartow Plant or in Mitsubishi's analysis of whether the ST design conditions were compatible with the Bartow Plant indicated that DEF's operation of the ST in accordance with the operating parameters established by Mitsubishi would result in damage to the L-0 blades. Based upon DEF's and Mitsubishi's combined prior knowledge, DEF had appropriate operating parameters in place, and DEF properly followed these parameters. Only an after-the-fact analysis determined the specific cause of the damage to the L-0 blades.

Indeed, the ALJ's conclusion that the 420MW nameplate rating was an operating parameter is based, at least in part, on DEF's alleged "acceptance" of the limitation. The ALJ states that DEF accepted the limit because it (1) [redacted] and (2) requested that Mitsubishi [redacted] This conclusion is nonsensical because it does not support that DEF accepted the 420 MW as a limitation. Rather, it shows that DEF was acting as a prudent utility would be expected to act in such a situation. As this Commission is well aware, a prudent utility operates its generating units to maximize output for the benefit of its customers. Working with the manufacturer to ensure that the unit can be operated as DEF always intended it to run is not an acceptance of a previous limitation; it is a sign that DEF was acting prudently to protect its investment. Taken to its logical conclusion, the ALJ would have preferred DEF to simply fix the blades and back down the operation to 420 MW and not make any efforts whatsoever to operate

the unit in the most beneficial manner for its customers. What DEF learned through subsequent periods, however, is that [redacted] the blades still suffered damage. In sum, even though it continued to follow all OEM provided guidance, DEF is still being subjected to "Monday-morning quarterbacking" and findings of imprudence.

A preponderance of the evidence adduced at the final hearing reflects, and the PSC should conclude, that DEF prudently operated the ST during Period 1 in accordance with each of the operating parameters provided by Mitsubishi. This conclusion is as or more reasonable than the conclusion reached by the ALJ, which relied upon hindsight and would arbitrarily limit a utility's operation of a steam turbine to the turbine's nameplate rating regardless of whether the steam turbine has the capacity to safely operate at greater efficiency. The conclusion would also inhibit a utility's ability to maximize output for the benefit of its customers.

Exception to RO ¶ 111

DEF takes exception to the ALJ's conclusion in paragraph 111 that DEF's determination that the L-0 blade failures were the result of [redacted] is belied by the fact that [redacted] As reflected by Mitsubishi's own root cause analysis, [redacted] T. 97, 386. Despite the fact that DEF contracted with Mitsubishi to assess whether the ST design conditions were compatible with the Bartow Plant's proposed design configuration, Mitsubishi did not identify [redacted] as a potential problem at the Bartow Plant. Under these circumstances, comparing the ST with other Mitsubishi facilities is not beneficial to the prudence analysis at hand.

It is more constructive to compare the blade failures that occurred at the ST during Period 1 (when the ST was operated above 420 MW) with the blade failures that occurred at the ST during Periods 2 through 5 (when the ST was operated below 420 MW). This comparison reveals that the L-0 blades may have failed when DEF was operating the ST above 420 MW but unequivocally suffered damage on four separate occasions when DEF was operating the ST below 420 MW. Indeed, the RO notes that it is not possible to determine when the damage occurred in period 1, and thus it is impossible to say how the unit was being operated at the time of damage; the RO mistakenly concludes that "the exact moment of damage is beside the point"[8] because it fails to account for cumulative wear to the machine. As a matter of law and regulatory policy, the ALJ's conclusion must be wrong – if the damage to the unit occurred prior to any alleged imprudence,[9] DEF cannot be held responsible for the consequences of the damage. It is as or more reasonable to conclude, therefore, that DEF's determination that the L-0 blade failures resulted from [redacted] is supported by a preponderance of evidence that the blades failed during prudent operation of the ST.

DEF takes further exception to the ALJ's conclusion in paragraph 111 that DEF operated the ST consistently beyond its capacity. As explained in DEF's exception to paragraph 110 above, the operating parameters provided by Mitsubishi for the ST were parameters common to steam turbines, including steam pressures and operating temperatures. T. 346, 377-378. DEF complied with these operating parameters. T. 272, 284, 346, 377-378. Mitsubishi provided DEF with no other operating parameters or capacities for the ST. It is, thus, as or more reasonable to conclude

[8] *See* RO, at fn. 11 ("DEF made much of the fact that it could not be said precisely when during Period 1 the damage to the blades occurred, point tout that there was a 50-50 chance that the blades were damaged when the turbine was operating below 420MW. This argument fails to consider the cumulative wear caused by running the unit in excess of its capacity half of the time. The exact moment the damage occurred is beside the point.").

[9] Again, DEF disputes that operation of a generation unit above nameplate capacity, but within all OEM provided operating parameters is imprudent or that the nameplate capacity is an operating parameter.

that DEF prudently operated the ST within each of the operating parameters provided by Mitsubishi.

Exception to RO ¶ 112

DEF takes exception to the ALJ's conclusion in paragraph 112 that Mitsubishi attributed the blade failure during Period 1 to [redacted] In fact, in its root cause analysis ("RCA") dated September 22, 2017, Mitsubishi determined that [redacted] (underscoring added) Jt. Ex. 82, p. 12 of 35. It is undisputed that DEF operated the ST below 420 MW during Periods 2 through 5. Jt. Ex. 80, P. 5; T. 285, 347-350, 352, 380. Because DEF always operated the ST below 420 MW during Periods 2 through 5 and the L-0 blades, nevertheless, suffered damage during each of those periods, it is more reasonable to conclude that the [redacted] that ultimately damaged the L-0 blades during Period 1 was not the result of DEF's operation of the ST above 420 MW, but was instead caused by L-0 blades that were not [redacted] by the Bartow Plant. T. 97, 386; Jt. Ex. 83. If the ST's manufacturer was not able anticipate that damage to the L-0 blades would result from operating the ST in accordance with the manufacturer's operating parameters, it would be unreasonable and contrary to the established prudence standard to expect DEF to have anticipated this. It is, therefore, as or more reasonable to conclude that the damage to the L-0 blades that occurred during Period 1 was the combined result of [redacted]

Exception to RO ¶ 113

DEF takes exception to the ALJ's conclusion in paragraph 113 that it would have been prudent for DEF to consult with Mitsubishi about the ability of the ST to operate above 420 MW

and above steam flows anticipated in the original design for the ST. With respect to steam flows within the low pressure turbine where the L-0 blades are located, it is important to note that Mitsubishi provided DEF [redacted] T. 377-378. As such, it would be as or more reasonable to conclude that prudence did not require DEF to consult with Mitsubishi in connection with steam flow limits within the low-pressure turbine during Period 1 operation of the ST. As indicated above, the output of a steam turbine is not an "operating parameter" provided by a manufacturer; rather the output is a product that follows from operation within the manufacturer-provided parameters. T. 140-143, 281-282, 284. As also indicated above, Mitsubishi understood that DEF intended to operate the Bartow Plant in a configuration that would generate in excess of 420 MW. T. 42, 135-136, 147-148, 213-215, 234, 258, 278, 356. Due to this, it is as or more reasonable to conclude that prudence did not require DEF to consult with Mitsubishi before operating the ST within the operating parameters supplied by Mitsubishi.

Exception to RO ¶ 114

DEF takes exception to the ALJ's conclusion in paragraph 114 that DEF failed to satisfy its burden of showing its actions in operating the ST during Period 1 did not cause or contribute significantly to the vibrations that repeatedly damaged the L-0 blades. DEF operated the ST during Periods 1 through 5 in accordance with the manufacturer's operating parameters. T. 346, 377-378. DEF's actions and decisions in operating the ST within Mitsubishi's operating parameters were prudent. Consequently, it is as or more reasonable to conclude that DEF's actions in operating the ST in Period 1 did not cause or contribute significantly to the L-0 blade damage that occurred during Periods 1 through 5. In addition, it appears that the ALJ, by stating that DEF failed its burden to show that its actions did NOT cause the damage, is imposing an impossible standard of proving a negative. A utility does not have the burden to prove that something did not occur; such a requirement would be nearly impossible to meet. Rather, DEF's burden in this case was to show

that it acted as a reasonable utility manager would, given the facts known or reasonably knowable at the time, and without the benefit of hindsight review. Under that standard, even assuming that nameplate capacity was some sort of operational condition (which is not the case), the more appropriate interpretation of the facts determined in the case is that, because there was damage to the blades even when operating below 420 MW in later periods, DEF's actions in operating the unit such that the output was higher than 420 MW were prudent and not the cause of the damage.

Exception to RO ¶ 119

DEF takes exception to the ALJ's conclusion in paragraph 119 that it is not speculative to state that the events of Periods 2 through 5 were precipitated by DEF's actions during Period 1. It is undisputed that DEF prudently operated the ST during Periods 2 through 5. T. 347-350. It is also not disputed that there was no residual damage to any component within the ST following Period 1. T. 103-105. In fact, the only damage that resulted from Period 1 operation of the ST was to the L-0 blades, [redacted] at the conclusion of Period 1. Jt. Ex. 80, p. 5; T. 148, 150-151, 330. Consequently, there is no causal link between the Period 1 operation of the ST and the damage experienced by the L-0 blades during subsequent periods. Such a groundless contention cannot form the basis for denying a utility's fuel cost recovery. *In Re: Fuel & Purchased Power Cost Recovery Clause with Generation Performance Incentive Factor (Crystal River 3 1989 Outage)*, 91 FPSC 12:165, *12 (Dec. 9, 1991).

Since there is no dispute that DEF prudently operated the ST during Periods 2 through 5 and since it is also undisputed that there was no residual damage to the ST following Period 1 operation, it is as or more reasonable to conclude that the damage to the L-0 blades that occurred during Periods 2 through 5 was not precipitated by DEF's operation of the ST during Period 1.[10]

[10] Even if one were to assume DEF's operation of the ST above 420 MW during Period 1 was imprudent, if such operation did not cause the Period 5 outage, then it makes no difference whether DEF was imprudent in its operation

To conclude, as the ALJ does, that DEF should be held responsible for the forced outage that occurred during Period 5 – despite any direct causal link between DEF's operation of the ST during Period 1 and the Period 5 outage – would set a dangerous precedent that would discourage utility operators from continuing to operate a power plant that may have been imprudently operated at some point for fear that any subsequent forced outage experienced by the power plant could be attributed to the earlier imprudence, regardless of how remote in time that earlier imprudence may have been.

Exception to RO ¶ 120

DEF takes exception to the ALJ's conclusion in paragraph 120 that it would not be appropriate to assign the cost of the February 2017 forced outage to the consumers. It is as or more reasonable to conclude that where, as here, a utility operates a power plant within the manufacturer's express operating parameters and does not know, or have reason to know, that such operation could result in a forced outage of the power plant, the utility should not be forced to bear the resulting replacement power costs.

Exception to RO ¶ 121

For the reasons explained above in its exceptions to RO ¶ 110, 111 and 113, DEF takes exception to the ALJ's conclusion in paragraph 121 that DEF did not exercise reasonable care in operating the ST and should have sought the cooperation of Mitsubishi prior to operating the ST above 420 MW. It is as or more reasonable to conclude that DEF was prudent in its decisions and actions leading up to, and in restoring the Bartow Plant to service after, the Bartow Plant's February 2017 forced outage and was not required to consult with Mitsubishi prior to operating the ST above 420 MW. There is also no record evidence to demonstrate that consulting with Mitsubishi prior to

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of the ST during portions of Period 1 because the replacement power costs at issue could not be said to be a result of the Company's mismanagement. See *Fla. Power Corp. v. Cresse*, 413 So. 2d 1187, 1190-1191 (Fla. 1982).

operating the ST above 420 MW would have resulted in any change in events.

Exception to RO ¶ 122

DEF takes exception to the ALJ's conclusion in paragraph 122 that DEF must refund power costs to DEF's customers. For the reasons explained above, DEF was prudent in its decisions and actions leading up to, and in restoring the Bartow Plant to service after, the Bartow Plant's February 2017 forced outage. Consequently, it is as or more reasonable to conclude that DEF is not required to refund power costs to its customers.

Exception to RO ¶ 123

For the reasons set forth in its exception to the ALJ's conclusion in paragraph 110, DEF takes exception to the ALJ's conclusion in paragraph 123 that DEF failed to show that it operated the ST prudently during Period 1. It is as or more reasonable to conclude that DEF carried its burden to show that it prudently operated the ST during Period 1 within each of the operating parameters provided by Mitsubishi.

DEF takes further exception to the ALJ's conclusion in paragraph 123 that DEF failed to meet its burden of showing that the Period 5 blade damage and the resulting replacement power costs were not the consequence of DEF's operation of the ST during Period 1. Because DEF proved by a preponderance of evidence that its operation of the ST during Period 1 was prudent and because it is undisputed that DEF's operation of the ST during Periods 2 through 5 was also prudent, it is as or more reasonable to conclude that the Period 5 blade damage and resulting replacement power costs were not the consequence of DEF's operation of the ST during Period 1.

Exception to RO ¶ 124

DEF takes exception to the ALJ's conclusions in paragraph 124 that the purchase of replacement power for the 40 MW loss caused by installation of the pressure plate was a consequence of DEF's failure to prudently operate the ST during Period 1. Because DEF proved

by a preponderance of evidence that its operation of the ST during Period 1 was prudent and because it is undisputed that DEF's operation of the ST during Periods 2 through 5 was also prudent, it is as or more reasonable to conclude that the installation of the pressure plate was not the consequence of DEF's operation of the ST during Period 1.

DEF takes further exception to the ALJ's conclusion in paragraph 124 that DEF should be required to refund replacement power costs related to the installation of the pressure plate. For the reasons explained above, DEF was prudent in its decisions and actions leading up to, and in restoring the Bartow Plant to service after, the Bartow Plant's February 2017 forced outage. Consequently, it is as or more reasonable to conclude that DEF is not required to refund power costs to its customers.

Exception to RO ¶ 125

DEF takes exception to the ALJ's conclusions in paragraph 125 that DEF was imprudent in its operation of the ST during Period 1 and, consequently, should be required to refund $16,116,782 to its customers. For the reasons discussed at length above, it is as or more reasonable to conclude that DEF operated the ST prudently at all times relevant to the replacement power costs and is, therefore, not required to refund any amount to its customers.

CONCLUSION

As detailed above, the above-referenced conclusions of law recommended by the Administrative Law Judge are inconsistent with the standard of prudence delineated in this Commission's precedent as well as the Commission's overriding policy considerations regarding public utilities in Florida. Adoption of the ALJ's conclusions would send negative operational signals to the state's utilities; specifically, adoption of the RO would signal that utilities should not

strive to maximize the efficient output of generating units, which, contrary to logic and economic principles, would result in limiting operations of the most efficient and economic sources of generation in favor of less efficient, less economic, and less environmentally friendly sources of generation (e.g., oil-fired peaker units). Moreover, it would send a signal to all utilities that, regardless of compliance with all industry-recognized operational parameters, they may still be found imprudent based on failure to comply with a later-established operational parameter (unrecognized at the time); this would upend the well-established prudence standard and subject all utilities to increased risk and increased costs which are eventually borne by customers. This Commission should reject these conclusions.

Respectfully submitted this 12th day of May 2020.

/s/ Matthew R. Bernier
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor	Docket No. PSC-20190001-EI DOAH Case No. 19-6022

OFFICE OF PUBLIC COUNSEL, PCS PHOSPHATE – WHITE SPRINGS, AND THE FLORIDA INDUSTRIAL POWER USERS GROUP JOINT RESPONSE TO DUKE ENERGY FLORIDA, LLC'S EXCEPTIONS TO RECOMMENDED ORDER

The Office of Public Counsel, PCS Phosphate – White Springs, and the Florida Industrial Power Users Group, pursuant to section 120.57(1)(k), Florida Statutes (2020), and Rule 28-106.217, Florida Administrative Code, jointly respond to the Exceptions submitted by Duke Energy Florida, LLC ("DEF") to the Recommended Order in the above-styled matter. This Response is being submitted confidentially only because it is required due to a claim of confidentiality DEF has made to the Commission on behalf of the original equipment manufacturer.

OVERVIEW

The Public Service Commission ("PSC" or "Commission") forwarded this matter to the Division of Administrative Hearings on November 8, 2019, and requested that an Administrative Law Judge ("ALJ") conduct a formal evidentiary hearing on the following issues of disputed material fact:

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

The Division of Administrative Hearings assigned an ALJ who conducted a formal evidentiary hearing on February 4 and 5, 2020. The parties collectively presented the live testimony of two expert witnesses, submitted extensive additional pre-filed testimony and 34 exhibits into evidence including a voluminous composite exhibit and other records. The official transcript of the final hearing is contained in three volumes, not including exhibits and additional pre-filed testimony admitted into evidence.

At the conclusion of the evidentiary hearing all parties, including the Commission, submitted detailed proposed recommended orders containing proposed findings of fact and conclusions of law. After duly considering the entirety of the record, applicable law, and the proposed recommended orders, the ALJ issued a detailed Recommended Order containing numerous Findings of Fact and Conclusions of Law, and recommending that the Commission enter a Final Order finding that:

> Duke Energy Florida, LLC, failed to demonstrate that it acted prudently in operating its Bartow Unit 4 plant and in restoring the unit to service after the February 2017 forced outage, and that Duke Energy Florida, LLC, therefore may not recover, and thus should refund, the $16,116,782 for replacement power costs resulting from the steam turbine outages from April 2017 through September 2019.

DEF submitted twelve exceptions to the Recommended Order. In spite of stating that it would "not relitigate those [factual] points ... nor ask this Commission to reweigh evidence," each of DEF's exceptions asks the Commission to reject findings of fact that, as demonstrated below, are supported by competent substantial evidence. The exceptions also ask the Commission to invade the exclusive province of the ALJ and make new findings of fact, often without citing to any portion of the record, and based on such new findings to overturn the ALJ's ultimate determination. For the reasons stated below, the Commission should reject each of the DEF exceptions and adopt the findings of the Recommended Order.

THE COMMISSION'S SCOPE OF AUTHORITY WHEN RULING ON EXCEPTIONS

The Commission has limited authority to reject or modify the ALJ's findings of fact and conclusions of law. Pursuant to section 120.57(1)(*l*), Florida Statutes,[1] the Commission may not reject or modify the ALJ's findings of fact unless the Commission "first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence, or that the proceedings on which the findings were based did not comply with essential requirements of law."

If the ALJ's findings of fact are supported by competent substantial evidence, the Commission cannot reject or modify them even to make alternate findings that are also supported by competent substantial evidence. *Kanter Real Estate, LLC v. Dep't of Envtl. Prot.*, 267 So. 3d 483, 487–88 (Fla. 1st DCA 2019), *reh'g denied* (Mar. 19, 2019), *review dismissed sub nom. City of Miramar v. Kanter Real Estate, LLC*, SC19-639, 2019 WL 2428577 (Fla. June 11, 2019), citing *Lantz v. Smith*, 106 So. 3d 518, 521 (Fla. 1st DCA 2013).

Moreover, the Commission may not "reject a finding that is substantially one of fact simply by treating it as a legal conclusion," regardless of whether the finding is labeled a conclusion of law. *Gross v. Dep't of Health*, 819 So. 2d 997, 1005 (Fla. 5th DCA 2002); *Gordon v. State Comm'n on Ethics*, 609 So.2d 125, 127 (Fla. 4th DCA 1992); *Kanter Real Estate*, 267 So. 3d at 487-88, citing *Abrams v. Seminole Cty. Sch. Bd.*, 73 So. 3d 285, 294 (Fla. 5th DCA 2011). Similarly, a finding that is both a factual and legal conclusion cannot be rejected when there is substantial competent evidence to support the factual conclusion, and where the legal conclusion necessarily

[1] All statutory and rule references are to the 2019 versions, unless otherwise indicated. The Transcript of the final hearing was filed on February 24, 2020. Citation to the Transcript herein will be the witness's last name followed by the abbreviation "Tr." followed by the citation to the page.

follows. *Berger v. Dep't of Prof. Reg.*, 653 So. 2d 479, 480 (Fla. 3d DCA 1995); *Strickland v. Florida A&M Univ.*, 799 So. 2d 276, 279 (Fla. 1st DCA 2001); *Dunham v. Highlands County Sch. Bd.*, 652 So. 2d 894, 897 (Fla. 2nd DCA 1995).

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

"Competent substantial evidence" is "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957). The Commission may reject an ALJ's findings of fact only where there is no competent substantial evidence from which the findings can reasonably be inferred. *Heifetz v. Dep't. of Bus. Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); *Belleau v. Dep't of Environmental Protection*, 695 So.2d 1305, 1306 (Fla. 1st DCA 1997); *Strickland v. Florida A&M Univ.*, 799 So.2d at 278. Absent such an express and detailed finding, the Commission is bound to accept the ALJ's findings of fact. *See Southpointe Pharmacy v. Dep't of Health & Rehab. Serv.*, 596 So. 2d 106, 109 (Fla. 1st DCA 1992).

The Commission is not authorized to substitute its judgment for that of the ALJ by taking a different view of, or placing greater weight on the same evidence, reweighing the evidence, judging the credibility of witnesses, or otherwise interpreting the evidence to fit its desired conclusion. *Prysi v. Dep't of Health*, 823 So. 2d 823, 825 (Fla. 1st DCA 2002); *Strickland*, 799 So.2d at 279; *Schrimsher v. Sch. Bd. of Palm Beach County*, 694 So. 2d 856, 860 (Fla. 4th DCA

1997); *Heifetz*, 475 So.2d at 1281; *Wash & Dry Vending Co. v. Dep't of Bus. Reg.*, 429 So. 2d 790, 792 (Fla. 3rd DCA 1983).

The Commission may reject or modify a conclusion of law over which it has substantive jurisdiction, but must state with particularity its reasons for rejecting or modifying such conclusion of law, and make a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. Section 120.57(1)(*l*), Fla. Stat.; *Prysi*, 823 So. 2d at 825. Rejection or modification of a conclusion of law may not form the basis for rejection or modification of a finding of fact. Section 120.57(1)(*l*), Fla. Stat.

RESPONSE TO DEF EXCEPTIONS

RESPONSE TO DEF EXCEPTION NO. 1.

DEF excepts to Paragraph 110 of the Recommended Order, which is set forth verbatim below:

> 110. DEF failed to demonstrate by a preponderance of the evidence that its actions during Period 1 were prudent. DEF purchased an aftermarket steam turbine from Mitsubishi with the knowledge that it had been manufactured to the specifications of Tenaska with a design point of 420 MW of output. Mr. Swartz's testimony regarding the irrelevance of the 420 MW limitation was unpersuasive in light of the documentation that after the initial blade failure, DEF itself accepted the limitation and worked with Mitsubishi to find a way to increase the output of the turbine to [redacted]

DEF acknowledges that the ALJ set forth the correct legal standard for determining prudence as established by the Florida Supreme Court. *See* DEF Exceptions, footnote 7. DEF nevertheless mistakenly argues that the ALJ applied the incorrect legal standard in determining that DEF failed to demonstrate that it acted prudently during the period leading up to and in restoring the unit to service after the February 2017 forced outage at the Bartow plant. DEF suggests, without basis or explanation, that the ALJ relied on "hindsight" in determining that DEF's actions were imprudent.

As evidenced by the Recommended Order, however, and consistent with the appropriate standard of legal review, the ALJ expressly assessed all evidence presented relating to the conditions and circumstances that were known, or should have been known, by DEF ***at the time DEF made the decision and took action*** to repeatedly and extensively operate the steam turbine ("ST") in excess of 420 MW and when DEF ***failed to take the action*** it should have taken to consult with Mitsubishi.

In Paragraph 109 of the Recommended Order, the ALJ expressly states the legal standard applied in the Recommended Order:

> 109. The legal standard for determining whether replacement power costs are prudent is "what a reasonable utility manager would have done, in light of the conditions and circumstances that were known, or should [have] been known, ***at the time the decision was made.***" *S. Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013).

(Emphasis added). Contrary to DEF's suggestion, and as evidenced by the entirety of the record, the ALJ thoroughly considered evidence of the conditions and circumstances known, or that should have been known, to DEF ***at the time the decisions were made***. The ALJ found, based on a detailed, systematic review of the competent substantial evidence of record, that DEF knew, or should have known, that its actions (including the failure to act) "***during period 1***" were imprudent.

DEF fails to provide any valid factual or legal basis for DEF's assertion that the ALJ improperly used "hindsight," or "Monday morning quarterbacking," in determining that DEF acted imprudently during Period 1. The determination of "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***" necessarily involves a review of prior actions and contemporaneous materials reflecting the conditions and circumstances that existed at the time the decision in question was made.

DEF does not dispute that the ALJ's findings of fact set forth in Paragraph 110 are supported by competent substantial evidence. Instead, DEF simply recasts its preferred version of the facts, which were duly considered and rejected by the ALJ.

The ALJ's determination that DEF acted imprudently is supported by numerous uncontested findings of fact set forth in the Recommended Order, each of which are supported by competent substantial evidence, including but not limited to:

- The Mitsubishi steam turbine was originally designed for Tenaska Power Equipment, LLC ("Tenaska"), to be used in a 3x1 combined cycle configuration with three M501 Type F combustion turbines connected to the steam turbine with a gross output of 420 MW of electricity. (Recommended Order, ¶ 14) (Polich, Tr. 305, 325, 329; Swartz, Tr. 42, 163, 212, 255; Ex. 80 at 2, 3; Ex. 111).
- The greater weight of the evidence establishes that the Mitsubishi steam turbine was designed to operate at 420 MW of output and that 420 MW was an operational limitation of the turbine. (Recommended Order, ¶ 33) (Polich, Tr. 303, 305, 325, 329, 330; Ex. 80 at 2; Ex. 108 at 2437-2561; Ex. 109 at 12432, 12438; Ex. 116 at 4, 21; Swartz, Tr. 42, 82-83; 127-28, 130-31, 137, 163, 212, 255; Ex. 111; Ex. 80 at 3).
- Mitsubishi concluded that the damage to the blades was caused by [redacted]

[redacted] (Recommended Order, ¶ 37) (Ex 82 at 5; Ex. 73 at 3; Ex. 116 at 4).

- The [DEF RCA] working papers indicate that as late as October 15, 2016, DEF agreed that the [redacted] (Recommended Order, ¶ 69) (Swartz, Tr. 90, 161-162, 82-83; Ex. 115 at 19; Ex. 116 at 4, 21; Ex. 109 at Bates 12432).
- OPC accurately states that the DEF working documents demonstrate that during the RCA process, before and after the Period 5 event, DEF consistently identified excessive steam flow in the LP turbine as one of the "most significant contributing factors" toward blade failure over the history of the steam turbine, [redacted] (Recommended Order, ¶ 71) (Swartz, Tr. 86-88, 112; Ex. 73 at 3; Ex. 115 at 23, 29, 39, 59, 67, 75, 87, 97, 109, 123, 137, 151, and 165; Ex. 73 at 3; Ex. 116 at 4).
- The Energy Information Administration of the U.S. Department of Energy defines "generator nameplate capacity" as the "maximum rated output of a generator, prime mover, or other electric power production equipment under specific conditions designated by the manufacturer." There was no dispute that 420 MW was the

"nameplate capacity" of the Mitsubishi steam turbine. (Recommended Order, ¶ 82) (Swartz, Tr. 224, 209-210; Ex. 111; Ex. 118).

- Given the lack of experience on either side, OPC contends that DEF should have consulted Mitsubishi before purchasing the steam turbine to ask whether Mitsubishi believed it was capable of an output in excess of its nameplate capacity of 420 MW. [redacted] (Recommended Order, ¶ 86) (Polich, Tr. 308-309, 320-321, 365-366; Ex. 109 at 12438; Ex. 108 at 2461; Ex. 104 at 44; Ex. 72; Ex. 80 at 5; Swartz, Tr. 73, 108, 137).
- The evidence was clear that Mitsubishi did not contemplate DEF's operation of the steam turbine beyond the [redacted] The evidence was also clear that

DEF made no effort before the fact to notify Mitsubishi of its intended intensity of operation or to ask Mitsubishi whether it could safely exceed the [redacted] Mr. Swartz was unable to explain away this criticism and thus DEF failed to meet its burden of demonstrating that it prudently operated the Bartow Plant during the times relevant to this proceeding. (Recommended Order, ¶ 102) (Polich, Tr. 308-309, 320-321, 365-366; Ex. 109 at 12438; Ex. 108 at 2461; Ex. 104 at 44; Swartz, Tr. 73, 108, 137: Ex. 72; Ex. 80 at 5).

- DEF purchased an aftermarket steam turbine from Mitsubishi with knowledge that it had been manufactured to the specifications of Tenaska with a design point of 420 MW of output. (Recommended Order, ¶ 110) (Polich, Tr. 305, 325; Swartz, Tr. 212, 255).

Contrary to DEF's suggestion, the ALJ stated and applied the correct legal standard to the evidence of record pertaining to the facts and circumstances that existed ***at the time that DEF made the decision and took action*** to operate the Bartow steam turbine repeatedly and extensively in excess of 420 MW. The ALJ found, based on the competent substantial evidence of record, that the operational limit of the Bartow steam turbine was "420 MW based on the Mitsubishi design point and the expected maximum electrical output," and that DEF's decision and action to operate the ST repeatedly and extensively in excess of 420 MW, based on information that DEF knew, or should have known, was imprudent. The ALJ found, based on competent substantial evidence of record, that DEF should have consulted with Mitsubishi before DEF operated the ST above the design point of 420 MW. (Recommended Order, ¶ 102) (Polich, Tr. 308-309, 320-321, 365-366;

Ex. 109 at 12438; Ex. 108 at 2461; Ex. 104 at 44; Swartz, Tr. 73, 108, 137; Ex. 72; Ex. 80 at 5). The ALJ found that DEF presented no evidence that DEF consulted with Mitsubishi prior to doing so, and further found that DEF's expert "was unable to explain away this criticism." *Ibid.* The ALJ's findings of fact and competent substantial evidence of record support the ALJ's ultimate determination set forth in Paragraph 110 of the Recommended Order that DEF failed to carry its burden of proof to demonstrate that DEF acted prudently during the period in question.

The case cited by DEF, *Fla. Power Corp. v. Public Service Com'n*, 456 So. 2d 451, 452 (Fla. 1984), relating to the application of "hindsight" is inapposite and readily distinguishable on its facts. In *Fla. Power Corp.*, the Florida Supreme Court held that the Commission could not retroactively, i.e., "in hindsight," re-designate "non-safety-related" repair work as "safety-related," and thus the Commission could not retroactively apply the higher standard of care applicable to "safety-related work" when determining whether the work at issue was prudently performed. *See Fla. Power Corp.* 456 So. 2d at 451 ("Our review of the record indicated that the extended repair work involved at the time was not per se safety-related," thus "a safety-related standard" that involved "a very different risk and a much higher standard of care," could not be retroactively applied.); *See also Fla. Power Corp. v. Public Service Com'n*, 424 So. 2d 745, 747 (Fla. 1982) ("Our independent review of the record discloses that the particular task which resulted in the accident was but a small part of the extended repairs to the fuel transfer mechanism. The record further indicates that the repair work, per se, was not safety-related, and this was, in part, why the use of the test weight was not recognized as being safety-related."). In essence, the Supreme Court held that the Commission could not change the standard of care "rules of the game," namely whether a task was or was not "safety-related" at the time it was performed, when the action in

question was later reviewed. Here, nothing supports the notion that any "rules of the game" were changed while the ALJ considered the disputed facts of the case.

DEF goes on to extensively reargue and rehash arguments that DEF previously presented to the ALJ and that the ALJ rejected. DEF improperly urges the Commission to make alternative findings that contradict the findings made by the ALJ, which the Commission may not do. DEF also urges the Commission to make new findings that, upon examination, are not supported by any evidence of record. DEF makes the following assertion on page 3 of its Exceptions:

> Before committing to purchase the ST, DEF contracted with Mitsubishi to assess whether the ST design conditions were compatible with the Bartow Plant's proposed 4x1 combined cycle design configuration. As part of this assessment, DEF informed Mitsubishi that DEF intended to operate the Bartow Plant and the ST in 4x1 configuration with a power factor exceeding [redacted] which would result in the generation of more than 420 MW. T. 42, 135-136, 147-148, 213-215, 234, 258, 278, 356.

A careful review of each of the pages cited by DEF fails to reveal any evidence remotely indicating that Mitsubishi had been informed that DEF intended to operate the ST above 420 MW. DEF presented no evidence at the final hearing to contest Mr. Polich's testimony that DEF did not inform Mitsubishi of its intent to operate the ST above 420 MW, much less that DEF intended to operate it at [redacted] (Polich, Tr. 329-330.)

DEF attempts to re-argue that "Mitsubishi believed the ST was capable of operating above 420 MW [redacted] The ALJ, however, found DEF's argument unpersuasive. See Recommended Order, Paragraphs 111, 112, 113, 114, 118, 119 and 121.

DEF further attempts to re-argue that "[i]n the utility industry, the nameplate rating is not regarded as an 'operating parameter,'" and that "the general standard followed in the industry is to operate steam turbines within operating parameters provided by the original equipment manufacturer while also striving to achieve the most efficiency for utility customers." The ALJ,

based on the entirety of the record, found DEF's arguments "unpersuasive" with respect to the prudence of DEF's decisions and actions during the period leading up to and in restoring the unit to service after the February 2017 forced outage at the Bartow plant.[2]

DEF next reargues that "DEF had appropriate operating parameters in place, and DEF properly followed these parameters," throughout Periods 1-5, and that the ALJ erred by viewing DEF's [redacted] of Mitsubishi's 420 MW operating parameter in Periods 2 - 5 as a concession that it was a "previous limitation." The ALJ, based on competent substantial evidence of record, concluded that DEF's actions after the first blade failures acknowledged and confirmed that the design point and operating limitation of the steam turbine was 420 MW. The competent substantial evidence relied on by the ALJ includes the [redacted] provided by Mitsubishi. (Swartz, Tr. 90, 161-162, 82-83; Ex. 115 at 19; Ex. 116 at 4, 21; Ex. 109 at Bates 12432). As evidenced by the Recommended Order, the then-contemporaneous evidence of the 420 MW design limitation that was available in 2006-2008 and DEF's consistent and ready acknowledgement of that operational limit in 2012 was more persuasive to the ALJ than the testimony and arguments presented by DEF at the final hearing. The ALJ expressly found the testimony of DEF's expert witness on this point "unpersuasive." (Recommended Order, Paragraph 110). It is the sole province of the ALJ to determine and weigh

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[2] The ALJ found that the concept of "nameplate" is but one of many indicia of the intended operational limit of the ST and, as set forth in the ALJ's findings of fact, that Mitsubishi clearly informed DEF of the limit of the ST through [redacted] The ALJ further found, based on competent substantial evidence of record, that DEF's operation of the ST for approximately half of the total 21,734 hours at 420 MW or above, with 2,973 of those hours ***above*** 420 MW in Period 1, was not an incidental exceedance of a number on a nameplate label, but instead was a failure to exercise reasonable care in operating the steam turbine in a configuration for which it was not designed. (Recommended Order, ¶ 35) (Swartz, Tr. 285, 137, 127-129, 130-131, 76-77, 82-83, 159-162, 169; Polich, Tr. 302-305, 330, 332; Ex. 115 at 19, 24; Ex. 116 at 4, 21; Ex. 108 at 2437-2561; Ex. 109 at Bates 12432-12439).

the credibility of witness testimony, and the Commission may not substitute its view of the evidence for that of the ALJ.

Finally, DEF suggests that the Commission should reject the ALJ's ultimate determination that DEF acted imprudently in this case, because the ALJ's determination of DEF's imprudence in this case "would also inhibit a utility's ability to maximize output for the benefit of its customers." DEF's assertion lacks merit. The ALJ's determination in this case is based on the evidence of record and is consistent with applicable law. The Recommended Order contains no findings of fact or conclusions of law that would inhibit a utility's ability or incentive to prudently maximize output for the benefit of its customers. The only thing a final order adopting the Recommended Order would inhibit or discourage is imprudent utility power plant operation and management, not prudently optimizing output.

Paragraph 110 of the Recommended Order applies the correct legal standard, is based on factual findings supported by competent substantial evidence and cannot be disturbed. DEF's exception to Paragraph 110 must be DENIED.

RESPONSE TO DEF EXCEPTION NO. 2.

DEF excepts to Paragraph 111 of the Recommended Order, which is set forth verbatim below:

> 111. DEF's RCA concluded that the blade failures were caused by [redacted] This conclusion is belied by the fact that [redacted] Mitsubishi cannot be faulted for [redacted] in a way that would allow an operator to run the turbine consistently beyond its capacity.

This paragraph of the Recommended Order contains factual findings that support the ALJ's ultimate conclusions of law. The Commission may not reject the findings of fact in Paragraph 111

unless there is no competent substantial evidence to support them. Similarly, a finding that is both a factual and a legal conclusion cannot be rejected when there is substantial competent evidence to support the factual conclusion and the legal conclusion necessarily follows. *Berger, 653 So. 2d at 480;* Strickland, 799 So. 2d at 279; *Dunham*, 652 So. 2d at 897.

The ALJ's findings of fact set forth in Paragraph 111 are supported by competent, substantial evidence and cannot be disturbed. (Swartz, Tr. 179; Ex. 82 at 5; Ex. 103 at 55; Ex. 104 at 14; Ex. 115 at 180). The ALJ is solely authorized to weigh and balance the evidence, determine the credibility of witnesses, and draw reasonable inferences from the evidence. *See Heifetz v. Dep't. of Bus. Reg.*, 475 So. 2d at 1281-2. DEF does not suggest any error of law, does not dispute that the findings of fact are supported by competent substantial evidence, and does not contend that the proceedings failed to comply with essential requirements of law. Instead, DEF simply re-argues the evidence of record and makes new arguments. Pursuant to section 120.57(1)(*l*), Florida Statutes, the Commission may not reweigh the evidence, consider "evidence" not of record, nor modify or reject an ALJ's factual finding when the finding is supported by competent substantial evidence of record. This is true even when the record may contain conflicting evidence, and when the Commission may disagree with the ALJ's view of the evidence. As noted by the court in *Heifetz*:

> If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other. The agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred. The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.

Finally, in its second Exception, DEF again re-argues the issue of the timing of when the damage occurred in Period 1; however, this issue is not addressed in Paragraph 111 of the Recommended Order. The findings of fact in Paragraph 111 of the Recommended Order are supported by competent, substantial evidence of record and may not be disturbed. (Swartz Tr. 108; 179; Ex. 80 at 6; Ex 82 at 5; Ex. 103 at 55; Ex. 104 at 14; Ex. 115 at 180). DEF's exception to Paragraph 111 must be DENIED.

RESPONSE TO DEF EXCEPTION NO. 3.

DEF excepts to Paragraph 112 of the Recommended Order, which is set forth verbatim below:

112. [redacted]

Paragraph 112 of the Recommended Order contains findings of fact that support the ALJ's conclusions of law. The Commission may not reject the findings of fact unless there is no competent substantial evidence of record to support them. The ALJ's findings of fact in Paragraph 112 are supported by competent substantial evidence of record, including:

- Mitsubishi prepared a root cause assessment, dated September 2017, in which it determined that [redacted] (Swartz, Tr. 100; Ex. 82 at 5-6).
- Mitsubishi concluded that [redacted]

[redacted] (Swartz, Tr. 111-12, 86-88; Ex 82 at 5; Ex. 73 at 3; Ex. 115 at 23, 29, 39, 59, 67, 75, 123, 137, 153, 165, and 179).

DEF does not dispute that the ALJ's findings of fact are supported by competent substantial evidence. DEF nevertheless re-argues its version of the evidence as to the "root cause" of the blade failures, and urges the Commission to find facts that contradict the facts found by the ALJ. The ALJ's findings of fact and conclusions in Paragraph 112 of the Recommended Order are supported by competent substantial evidence of record and cannot be disturbed. DEF's exception to Paragraph 112 must be DENIED.

RESPONSE TO DEF EXCEPTION NO. 4.

DEF excepts to Paragraph 113 of the Recommended Order, which is set forth verbatim below:

> 113. Mr. Polich persuasively argued that it would have been simple prudence for DEF to ask Mitsubishi about the ability of the turbine to operate continuously in excess of 420 MW output before actually operating it at those levels. DEF understood that the blades had been designed for the Tenaska 3x1 configuration and should have at least explored with Mitsubishi the wisdom of operating the steam turbine with steam flows in excess of those anticipated in the original design.

This paragraph of the Recommended Order contains factual findings that support the ALJ's conclusions. The Commission may not reject these findings of fact unless there is no competent substantial evidence to support them. DEF does not dispute that the findings of fact are supported by competent substantial evidence, nor proffer or support a different legal analysis or conclusion in its exception. Instead, DEF rehashes the evidence and urges the Commission to make new findings that contradict the findings made by the ALJ, arguing that its proposed new findings are

"as or more reasonable" than the findings made by the ALJ. Pursuant to 120.57(1)(*l*), Florida Statutes, the Commission may not substitute new findings of fact for those made by the ALJ even if the Commission views the proposed new findings "as or more reasonable" than those made by the ALJ. The legal standard for rejecting or modifying an ALJ's finding of fact is whether the ALJ's finding is supported by competent substantial evidence of record. In Paragraph 113 of the Recommended Order, the ALJ expressly finds the expert testimony of Mr. Polich credible and persuasive, and the testimony presented by DEF unpersuasive, with respect to the issue of whether DEF acted as 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. As noted above, the credibility of witnesses is wholly a factual determination within the sole province of the ALJ. *Strickland*, 799 So. 2d at 278 ("the weighing of evidence and judging of the credibility of witnesses by the Administrative Law Judge are solely the prerogative of the Administrative Law Judge as finder of fact.").

The ALJ determined, based on the competent, substantial evidence of record, that DEF failed to carry its burden of proof that it acted prudently during the period in question. (Swartz, Tr. 82-83, 116, 127-129, 130-131, 137; Polich, Tr. 308-309, 320-321; Ex. 105 at Bates 6875; Ex. 108 at 2437-2561; Ex. 109 at Bates 12432-12439; and Ex. 116 at 4 and 21).

The ALJ's findings of fact in Paragraph 113 of the Recommended Order are supported by competent substantial evidence of record and cannot be disturbed. DEF's exception to Paragraph 113 must be DENIED.

RESPONSE TO DEF EXCEPTION NO. 5.

DEF excepts to Paragraph 114 of the Recommended Order, which is set forth verbatim below:

> 114. The record evidence demonstrated an [redacted] that vibrations associated with high energy loadings were the primary cause of the L-0 blade failures. DEF failed to satisfy its burden of showing its actions in operating the steam turbine in Period 1 did not cause or contribute significantly to the vibrations that repeatedly damaged the L-0 blades. To the contrary, the preponderance of the evidence pointed to DEF's operation of the steam turbine in Period 1 as the most plausible culprit.

Paragraph 114 of the Recommended Order summarizes the findings of fact that support the ALJ's ultimate determination. The Commission may not reject these factual portions of the paragraph unless there is no competent substantial evidence supporting them. DEF does not dispute that the findings of fact and conclusions in Paragraph 114 of the Recommended Order are supported by competent, substantial evidence, nor does DEF proffer or support a different legal analysis or conclusion in its exception. Instead, DEF simply offers the conclusory statement that it would be "as or more reasonable to conclude that DEF actions did not cause or contribute significantly to the L-0 blade damage that occurred during Periods 1 through 5." The Commission's scope of review is whether the findings of fact are supported by competent substantial evidence of record. The ALJ's findings of fact in Paragraph 114 are supported by competent substantial evidence of record. (Swartz, Tr. 42, 73, 108, 163, 121-122, 126, 127, 132, 137; Polich, Tr. 303-306, 329-330; Ex. 72; Ex. 80 at 2, 3, and 5; Ex. 108 at Bates 2461; Ex. 109 at Bates 12432-12439; Ex. 115 at 23, 29, 39, 59, 67, 75, 123, 137, 153, 165, and 179 and Ex. 116 at 4 and 21).

In its exception DEF asserts that the ALJ's findings of fact and conclusions of law imposed an "impossible standard of proving a negative" on DEF, as the party with the burden of proof. DEF's argument does not fairly reflect the ALJ's findings of fact and conclusions of law. The ALJ

correctly determined, and DEF does not dispute, that the utility carries the burden of proof to demonstrate the prudence of DEF's decisions and actions during the period leading up to and in restoring the unit to service after the February 2017 forced outage at the Bartow plant. The ALJ determined, based on the competent substantial evidence of record that DEF failed to carry its burden of proof to demonstrate that it acted prudently during the period in question. The ALJ found, based on the competent substantial evidence of record that DEF acted imprudently, and further found that DEF failed to rebut the evidence of its imprudence. The Recommended Order reflects that DEF failed to establish a prima facie case that it acted prudently and failed to provide evidence to rebut the persuasive evidence of its imprudence. The ALJ applied the correct legal standards with respect to the burden of proof and the determination of prudence. The ALJ's findings of fact set forth in Paragraph 114 of the Recommended Order are based on competent substantial evidence of record and may not be disturbed. DEF's exception to Paragraph 114 of the Recommended Order must be DENIED.

RESPONSE TO DEF EXCEPTION NO. 6.

DEF excepts to Paragraph 119 of the Recommended Order, which is set forth verbatim below:

> 119. It is speculative to state that the original Period 1 L-0 blades would still be operating today had DEF observed the [redacted] of 420 MW. It is not speculative to state that the events of Periods 2 through 5 were precipitated by DEF's actions during Period 1. It is not possible to state what would have happened from 2012 to 2017 if the excessive loading had not occurred, but it is possible to state that events would not have been the same.

In its exception, DEF re-argues that there was no [redacted] to the ST following Period 1, and urges the Commission to reject the ALJ's finding of fact that "[i]t is not speculative to state that the events of Periods 2 through 5 were precipitated by DEF's actions during Period 1." DEF

asks the Commission to substitute a new finding that "the damage to the L-0 blades that occurred during Periods 2 through 5 was not precipitated by DEF's operation of the ST during Period 1." (DEF Exceptions, p. 9).

The findings and conclusions in Paragraph 119 of the Recommended Order summarize the ALJ's findings of fact in Paragraphs 84 and 89 of the Recommended Order that "[t]here would have been no Periods 2, 3, 4, or 5 but for DEF's actions during Period 1" and rejecting DEF's argument that DEF's operation of the unit at [redacted] bears no relation to the ultimate failure of the ST in Period 5. Indeed, in Paragraph 89 of the Recommended Order, the ALJ finds that:

> DEF ran the unit beyond 420 MW without consulting Mitsubishi. Mr. Polich found it a tribute to the design of the [redacted] 40" L-0 blades that they did not suffer damage sooner than they did. The steam turbine operated from June 2009 until March 2012 before the blade damage was noted. It was impossible to state exactly when the blade damage occurred in Period 1, but Mr. Polich opined that the damage was most likely cumulative.

In footnote 4 of the Recommended Order, the ALJ further finds that:

> DEF made much of the fact that it could not be said precisely when during Period 1 the damage to the blades occurred, pointing out that there was a 50-50 chance that the blades were damaged when the turbine was operating below 420 MW. This argument fails to consider the cumulative wear caused by running the unit in excess of its capacity half of the time. The exact moment the damage occurred is beside the point.

The ALJ's findings of fact are supported by competent substantial evidence of record, including the credible expert testimony of Mr. Polich relating to the cumulative operational effects on the Bartow facility. Moreover, as the finder of fact in a formal administrative proceeding, the ALJ is permitted to draw reasonable inferences from the competent substantial evidence in the record. *Amador v. Sch. Bd. of Monroe County*, 225 So. 3d 853, 858 (Fla. 3d DCA 2017) ("[w]here

reasonable people can differ about the facts, however, an agency is bound by the hearing officer's reasonable inferences based on the conflicting inferences arising from the evidence"), citing *Greseth v. Dep't of Health & Rehab. Servs*, 573 So. 2d 1004, 1006–1007 (Fla. 4th DCA 1991).

The ALJ's findings in Paragraphs 84, 89, and 119 of the Recommended Order are supported by competent substantial evidence of record, including:

- If DEF had operated the steam turbine at the Bartow Unit 4 in accordance with the design output of 420 MW or less, there is no engineering basis to conclude that the original L-0 blades would not still be in operation today. (Polich, Tr. 308-309, 320-321).
- [redacted] (Polich, T. 304-309, 334, 352; Swartz, Tr. 86-88, 112; Ex. 73 at 3; Ex. 115 at 23, 29, 39, 59, 67, 75, 87, 97, 109, 123, 137, 151, and 165; Ex. 73 at 3; Ex. 116 at 4).
- [redacted] (Swartz, T. 108, 179; Ex. 103 at 55; Ex.80 at 6; Ex. 104 at 14; Ex. 115 at 180).
- The installation of the pressure plate and associated de-rate were due to improper operation above 420 megawatts in Period 1. (Polich, Tr. 361).
- A prudent utility manager, from both a warranty and a regulatory perspective, would have requested written verification from

Mitsubishi that the steam turbine could be safely operated above 420 MW of output. (Polich, Tr. 361-362; 304-309).

The ALJ's findings of fact and conclusions in Paragraph 119 are supported by competent substantial evidence of record and the Commission is not free to substitute new or alternative findings urged by DEF. Moreover, DEF had the burden of proof to demonstrate that it acted prudently and that the costs incurred were not the result of DEF's imprudent actions or inactions. To the contrary, DEF failed to carry that burden and prove its actions in operating the plant were prudent and it failed to prove that the damages were the result of prudent operations and thus should be recovered from ratepayers. DEF's exception to Paragraph 119 of the Recommended Order must be DENIED.

RESPONSE TO DEF EXCEPTION NO. 7.

DEF excepts to Paragraph 120 of the Recommended Order, which is set forth verbatim below:

> 120. In his closing argument, counsel for White Springs summarized the equities of the situation very well:
>
> You can drive a four-cylinder Ford Fiesta like a V8 Ferrari, but it's not quite the same thing. At 4,000 RPMs, in second gear, the Ferrari is already doing 60 and it's just warming up. The Ford Fiesta, however, will be moaning and begging you to slow down and shift gears. And that's kind of what we're talking about here.
>
> It's conceded as fact that the root cause of the Bartow low pressure turbine problems is [redacted] caused repeatedly over time. The answer to the question is was this due to the way [DEF] ran the plant or is it due to a [redacted]? Well, the answer is both.
>
> The fact is that [DEF] bought a steam turbine that was already built for a different configuration that was in storage, and then hooked it up to a configuration ... that it knew could produce much more steam than it needed. It had a generator that could produce more megawatts, so the limiting factor was the steam turbine.

> On its own initiative, it decided to push more steam through the steam turbine to get more megawatts until it broke.
>
> * * *
>
> So from our perspective, [DEF] clearly was at fault for pushing excessive steam flow into the turbine in the first place. The repair which has been established ... may or may not work, but the early operation clearly impeded [DEF's] ability to simply claim that Mitsubishi was entirely at fault. And under those circumstances, it's not appropriate to assign the cost to the consumers.

In Paragraph 120 of the Recommended Order, the ALJ expresses agreement with counsel's summation of the "equities of the situation." As discussed in detail in the responses to DEF's Exceptions 1 – 6 above, the ALJ's numerous factual findings supporting the ALJ's ultimate determination that DEF acted imprudently and should be required to bear the resulting replacement power costs are supported by competent substantial evidence. (Polich, Tr. 304-309, 361-362; Swartz, Tr. 86-88, 112; Ex. 73 at 3; Ex. 115 at 23, 29, 39, 59, 67, 75, 87, 97, 109, 123, 137, 151, and 165; Ex. 73 at 3; Ex. 116 at 4).

In its Exception to Paragraph 120 of the Recommended Order, DEF does not dispute that the ALJ's findings of fact and ultimate determination are supported by competent substantial evidence. Instead, DEF offers a conclusory argument and improperly urges the Commission to reject the ALJ's findings of fact and to substitute contradictory findings. As set forth in the responses to Exceptions 1 through 6 above, the ALJ's findings that DEF acted imprudently and determination that DEF should be required to bear the resulting replacement power costs are supported by competent substantial evidence of record and are consistent with applicable law. The Commission is not free to reject the ALJ's finding that DEF acted imprudently and to thereby modify the ALJ's ultimate determination that the costs of the forced outage should be borne by DEF. DEF's exception to Paragraph 120 is without merit and must be DENIED.

RESPONSE TO DEF EXCEPTION NO. 8.

DEF excepts to Paragraph 121 of the Recommended Order, which is set forth verbatim below:

> 121. The greater weight of the evidence supports the conclusion that DEF did not exercise reasonable care in operating the steam turbine in a configuration for which it was not designed and under circumstances which DEF knew, or should have known, that it should have proceeded with caution, seeking the cooperation of Mitsubishi to devise a means to operate the steam turbine above 420 MW.

Paragraph 121 of the Recommended Order summarizes the ALJ's numerous findings relating to whether DEF acted imprudently. As reflected throughout the Recommended Order, and set forth in detail in the responses to Exceptions 1 - 6 above, the ALJ's ultimate determination that DEF did not exercise reasonable care in operating the steam turbine in a configuration for which it was not designed, is supported by competent substantial evidence. The Commission is not free to reject or modify findings of facts, or conclusions of law that logically flow from such findings, when the findings are supported by competent substantial evidence of record. DEF's exception to Paragraph 121 is without merit and should be DENIED.

RESPONSE TO DEF EXCEPTION NO. 9.

DEF excepts to Paragraph 122 of the Recommended Order, which is set forth verbatim below:

> 122. Given DEF's failure to meet its burden, a refund of replacement power costs is warranted. At least $11.1 million in replacement power was required during the Period 5 outage. This amount should be refunded to DEF's customers.

Paragraph 122 of the Recommended Order summarizes the ALJ's numerous findings relating to whether DEF acted imprudently, and should be required to bear the resulting replacement power costs. As reflected throughout the Recommended Order, and set forth in detail in the responses to

Exceptions 1 - 6 above, the ALJ's ultimate determination that DEF did not exercise reasonable care in operating the steam turbine in a configuration for which it was not designed, and therefore should be required to bear the resulting replacement power costs, is supported by competent substantial evidence of record. Because the ALJ's findings of fact are supported by competent substantial evidence of record and the ALJ has applied the correct law to the facts, DEF's exception is without merit and must be DENIED.

RESPONSE TO DEF EXCEPTION NO. 10.

DEF excepts to Paragraph 123 of the Recommended Order, which is set forth verbatim below:

> 123. DEF failed to carry its burden to show that the Period 5 blade damage and the required replacement power costs were not consequences of DEF's imprudent operation of the steam turbine in Period 1.

In its exception to Paragraph 123 of the Recommended Order, DEF does not dispute that the ALJ's conclusion in Paragraph 123 is supported by competent, substantial evidence and is consistent with applicable law. Instead, DEF improperly offers the conclusory argument that the Commission should reject the ALJ's findings, re-weigh the evidence, and substitute new and directly contrary findings that are favorable to DEF. As set forth in detail in the responses to DEF's Exceptions 1 - 6 above, the ALJ's findings of fact are supported by competent substantial evidence of record and the ALJ applied the correct legal standard to the evidence of record. DEF's exception is without merit and must be DENIED.

RESPONSE TO DEF EXCEPTION NO. 11.

DEF excepts to Paragraph 124 of the Recommended Order, which is set forth verbatim below:

> 124. The de-rating of the steam turbine that required the purchase of replacement power for the 40 MW loss caused by installation of the pressure plate was a consequence of DEF's failure to prudently operate the steam turbine during Period 1. Because it was ultimately responsible for the de-rating, DEF should refund replacement costs incurred from the point the steam turbine came back online in May 2017 until the start of the planned fall 2019 outage that allowed the replacement of the pressure plate with the [redacted] in December 2019. Based on the record evidence, the amount to be refunded due to the de-rating is $5,016,782.

The fundamental premise of DEF's exception to Paragraph 124 of the Recommended Order is DEF's conclusory re-argument that "DEF proved by a preponderance of the evidence that its operation of the ST during Period 1 was prudent." The ALJ found, based on the competent substantial evidence of record, that DEF's operation of the ST during Period 1 was ***not*** prudent.

DEF further excepts to the ALJ's conclusion that DEF should be required to refund replacement power costs related to the installation of the pressure plate. As set forth in detail in the Recommended Order, and in the responses to DEF's Exceptions 1 - 6 above, the ALJ's findings are supported by competent substantial evidence. The ALJ duly considered DEF's imprudent destruction of a portion of the full capability of the ST that required installation of the pressure plate. (Polich, Tr. 361). The basis for the ALJ's finding that ratepayers should be refunded replacement power costs is DEF's imprudence in operating the Bartow unit. The pressure plate bandage stopped the bleeding, resulting in a 40 MW de-rated output, but did not immunize DEF from the effects of its underlying imprudence.

Notably, DEF does not except to the ALJ's related findings and conclusions in Paragraph 108 of the Recommended Order, in which the ALJ sets forth DEF's burden of proof as it relates to any replacement power costs arising from installation of the pressure plate:

> 108. This is a de novo proceeding. § 120.57(1)(k), Fla. Stat. Petitioner, DEF, has the burden of proving, by a preponderance of the evidence, that it acted prudently in its actions and decisions leading up to and in restoring the unit to service after the February 2017 forced outage at the Bartow Plant. Additionally, DEF must prove by a preponderance of the evidence that no adjustment to replacement power costs should be made to account for the fact that after the installation of a pressure plate in March 2017, the Bartow Plant could no longer produce its rated nameplate capacity of 420 MW. *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 788 (Fla. 1st DCA 1981); § 120.57(1)(j), Fla. Stat.

DEF had the burden of proof to show that it acted prudently and that the costs incurred were not the result of DEF's imprudent actions. It did not carry that burden. To the contrary, DEF failed to prove its actions in operating the plant were prudent, and further failed to prove that the damages resulting from the de-rate were the result of prudent operations and thus should be recovered from ratepayers. Therefore, DEF should be required to refund the amounts determined in the Recommended Order. DEF's Exception to Paragraph 124 of the Recommended Order should be DENIED.

RESPONSE TO DEF EXCEPTION NO. 12.

DEF excepts to Paragraph 125 of the Recommended Order, which is set forth verbatim below:

> 125. The total amount to be refunded to customers as a result of the imprudence of DEF's operation of the steam turbine in Period 1 is $16,116,782, without interest.

DEF's exception to Paragraph 125 of the Recommended Order is a conclusory restatement of DEF's re-argument that DEF "operated the ST prudently at all times relevant to the replacement

power costs and is, therefore, not required to refund any amount to its customers." As set forth in detail in the Recommended Order and in the responses to DEF's Exceptions 1 - 6 above, the ALJ found, based on the competent substantial evidence of record, that DEF failed to carry its burden of proof to demonstrate that DEF acted prudently during Period 1 and that no adjustment to replacement power costs should be made to account for the fact that, after the installation of a pressure plate in March 2017, the Bartow Plant could no longer produce its rated nameplate capacity of 420 MW. DEF does not contend that the finding of fact and conclusion set forth in Paragraph 125 of the Recommended Order is not supported by competent substantial evidence, but instead urges the Commission to re-weigh the evidence and substitute a new conclusion without even proffering an alternative legal analysis, which the Commission may not do.

CONCLUSION

The Commission referred this matter to the Division of Administrative Hearings to conduct a formal evidentiary hearing on two questions of disputed fact. The ALJ conducted the formal evidentiary hearing, heard and reviewed extensive testimony of expert witnesses, reviewed voluminous documentary evidence, made numerous findings of fact that are supported by competent substantial evidence, and applied the correct legal standard to determine that DEF did not meet its burden of proof to show that that it acted prudently in operating its Bartow Unit 4 plant and in restoring the unit to service after the February 2017 forced outage; and that DEF therefore may not recover, and thus should refund, $16,116,782 to its customers for replacement power costs resulting from the steam turbine outages from April 2017 through September 2019. DEF's exceptions to the Recommended Order are without merit and should be denied, and the Commission should adopt the Recommended Order in full as the Final Order of the Commission.

DATED THIS 21st day of May 2020.

RESPECTFULLY SUBMITTED,

J.R. Kelly
Public Counsel

/s/ Charles J. Rehwinkel
Charles J. Rehwinkel
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following parties as indicated below, on this 21st day of May 2020.

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**Hand Filing with PSC Clerk
†Overnight delivery or electronic delivery

Item 4

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: August 6, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Division of Accounting and Finance (Sewards, Mouring) ALM BF
Office of the General Counsel (Stiller, Crawford) JC

RE: Docket No. 20200178-GU – Petition for approval to track, record as a regulatory asset, and defer incremental costs resulting from the COVID-19 pandemic, by Peoples Gas System.

AGENDA: 08/18/20 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Polmann

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

On July 2, 2020, Peoples Gas System (Peoples or Company) filed a petition for approval to establish a regulatory asset to record costs incurred due to Coronavirus Disease 2019 (COVID-19). Peoples has requested deferral of incremental bad debt expense and safety-related costs attributable to COVID-19. Given the ongoing nature of the COVID-19 pandemic, the total extent of Peoples' COVID-19-related costs is not known at this time. Commission consideration of the potential recovery of the regulatory asset will be addressed in a future proceeding.

This recommendation addresses the creation of a regulatory asset and the deferral of consideration of any potential recovery to a future proceeding. The Commission has jurisdiction over this matter pursuant to Sections 366.04 and 366.06, Florida Statutes (F.S.).

Discussion of Issues

Issue 1: Should the Commission approve Peoples Gas System's request for approval to establish a regulatory asset for recording costs attributable to COVID-19?

Recommendation: Yes. The Commission should approve Peoples' request to establish a regulatory asset for recording costs incurred due to COVID-19. The approval to establish a regulatory asset, for accounting purposes, does not limit the Commission's ability to review the amounts, recovery method, recovery period, and other related matters for reasonableness in a future proceeding in which the regulatory asset is included.

Peoples should be required to track any assistance or benefits received by the Company in connection with COVID-19, regardless of form, that would offset any COVID-19-related expenses. This would include, but is not limited to, any cost savings directly attributable to the suspension of disconnections or other activities during the emergency declaration. The regulatory asset costs and offsets should be recorded and maintained in a detailed manner that will allow incremental costs and any benefits and savings to be readily identifiable in a future proceeding. In addition, Peoples should be prepared to explain what actions and efforts it has undertaken to reduce or minimize these costs and to maximize the receipt of any available COVID-19 assistance or benefits. Finally, Peoples should be required to file monthly reports identifying the amounts of the costs incurred, any assistance or benefits received, and any cost savings realized which have been recorded in the regulatory asset. The first COVID-19 regulatory asset report should be filed on October 1 and every month thereafter until the Company presents the regulatory asset for Commission consideration. (Sewards)

Staff Analysis: The Commission is charged with the duty of ensuring that utilities provide safe, adequate, and reliable utility service at reasonable rates. By law, such rates must allow utilities the opportunity to recover the prudently incurred costs and a fair rate of return on capital invested by utilities for the purpose of providing such service. In turn, utilities have a responsibility, and are expected, to manage their business in a manner that addresses changes in costs and variability in sales.

On July 2, 2020, Peoples filed a petition for approval to establish a regulatory asset to defer certain costs incurred due to COVID-19. Peoples has requested approval to record incremental bad debt expense and safety-related costs attributable to COVID-19 in the requested regulatory asset.

Peoples states aged accounts receivable of 60 days or more exceeds 12 percent of its total accounts receivable balance, or approximately $2.3 million, exceeding the Company's normal level. Peoples anticipates that COVID-19-related bad debt expense will continue to increase in future months. An allowance for bad debt expense is included in base rates. In Peoples' last rate case, this allowance was based on a four-year average and was set at approximately $1.6 million per year.[1]

[1] Order No. PSC-2009-0411-FOF-GU, issued June 9, 2009, in Docket No. 080318-GU, *In re: Petition for rate increase by Peoples Gas System.*

Peoples has stated incremental safety costs attributable to COVID-19 related to the Company's efforts to follow all necessary guidelines and protocols include, but are not limited to, personal protective equipment, materials and supplies to protect employees' and customers' health and safety, additional cleaning and sanitization, employee health monitoring, COVID-19 testing of employees, transportation expense, and overtime expense related to safety preparations.

The concept of deferral accounting allows companies to defer costs due to events beyond their control and seek recovery through rates at a later time. If the subject costs are significant, the alternative would be for a company to seek a rate proceeding each time it experiences an exogenous event. The costs in the instant docket are attributed to the COVID-19 pandemic. Due to the uncertainty of this situation, Peoples states that it is not possible to fully anticipate the scope or timeframe of the financial impact on the Company and its customers related to COVID-19. Because of the unique circumstances resulting from the global pandemic, staff recommends that the Commission approve Peoples' request to establish a regulatory asset for recording costs incurred due to COVID-19 and defer Commission consideration of the potential recovery of the amounts recorded in the regulatory asset to a future proceeding. For the same reasons, it is too early to determine if the total amount and/or all types of the proposed costs will be permissible for recovery. The approval to establish a regulatory asset, for accounting purposes, does not limit the Commission's ability to review the amounts, recovery method, recovery period, and other related matters for reasonableness in a future proceeding in which the regulatory asset is included. If staff's recommendation herein is approved, the order that issues will be procedural and preliminary in nature. An adversely affected party's point of entry to request an evidentiary hearing before the Commission will be afforded in a future proceeding addressing cost recovery of the regulatory asset.

In addition, staff recommends that Peoples be required to track any assistance or benefits received by the Company in connection with COVID-19, regardless of form, that would offset any COVID-19-related expenses. This would include, but is not limited to, any cost savings directly attributable to the suspension of disconnections or other activities during the emergency declaration. The regulatory asset costs and offsets should be recorded and maintained in a detailed manner that will allow incremental costs and any benefits and savings to be readily identifiable in a future proceeding. In addition, Peoples should be prepared to explain what actions and efforts it has undertaken to reduce or minimize these costs and to maximize the receipt of any available COVID-19 assistance or benefits. Finally, Peoples should be required to file monthly reports identifying the amounts of the costs incurred, any assistance or benefits received, and any cost savings realized which have been recorded in the regulatory asset. The first COVID-19 regulatory asset report should be filed on October 1 and every month thereafter until the Company presents the regulatory asset for Commission consideration.

Issue 2: Should this docket be closed?

Recommendation: Yes. The docket should be closed upon the issuance of the procedural order. (Stiller)

Staff Analysis: The docket should be closed upon the issuance of the procedural order.

Item 5

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: August 6, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Division of Accounting and Finance (Cicchetti, Buys, Hightower) ALM MC
Office of the General Counsel (Brownless) JC

RE: Docket No. 20200148-WS – Consideration of the tax impacts associated with Tax Cuts and Jobs Act of 2017 for Gold Coast Utility Corp.

AGENDA: 08/18/20 – Regular Agenda – Proposed Agency Action - Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Graham

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

The Tax Cuts and Jobs Act of 2017 (TCJA) was signed into law on December 22, 2017, and became effective for the taxable year beginning January 1, 2018. On January 9, 2018, the Office of Public Counsel (OPC) filed a "Petition to Establish Generic Docket to Investigate and Adjust Rates for 2018 Tax Savings." On February 6, 2018, in Order No. PSC-2018-0104-PCO-PU,[1] the Florida Public Service Commission (Commission) established jurisdiction over utilities' tax savings if such a date was not contained in an applicable settlement agreement. Subsequently, the Commission opened separate dockets to address the tax savings for electric and natural gas utilities. At this time, all electric, natural gas, and water and wastewater utilities (WAW) tax savings dockets have been resolved except for two WAW utilities, Gold Coast Utility

[1]Order No. PSC-2018-0104-PCO-PU, issued February 6, 2018 in Docket No. 20180013-PU, *In re: Petition to establish a generic docket to investigate and adjust rates for 2018 tax savings, by Office of Public Counsel.*

Corporation (Gold Coast) and St. James Utility Company. The instant docket was opened to address tax savings associated with Gold Coast.

For WAW utilities that have income taxes included in their revenue requirement, the 2018 annual reports are necessary to determine each utility's earned return and if a utility earned in excess of its allowed return. Gold Coast recently provided the Commission with its 2018 annual report.

The Commission has jurisdiction in this case pursuant to Sections 367.011, 367.081, and 367.121, Florida Statutes.

Discussion of Issues

Issue 1: What is the appropriate disposition of the tax impacts resulting from the passage of the TCJA for Gold Coast?

Recommendation: Gold Coast is not earning above its allowed rate of return range. No adjustment to base rates is necessary regarding the tax impacts resulting from the passage of the TCJA for Gold Coast. (Cicchetti)

Staff Analysis: Gold Coast is earning significantly below its authorized rate of return. Attachment A shows Gold Coast's Net Operating Income, Rate Base, Achieved Rate of Return, and Approved Rate of Return Cap.

It is staff's opinion that it is reasonable for the Commission to consider the earnings position of the utility when deciding if base rates should be reduced for changes in tax rates. Reducing base rates would result in cash flow reductions for the utilities, put downward pressure on earnings, and accelerate the need for a rate case sooner versus later. Consequently, staff recommends that no adjustment to base rates is necessary regarding the tax impacts resulting from the passage of the TCJA for Gold Coast. Such treatment is consistent with the Commission's decisions in Docket Nos. 20180051-GU, 20180052-GU, 20180053-GU, 20180054-GU, and 20180013-PU.[2]

[2]Order No. PSC-2019-0076-FOF-GU, issued February 25, 2019, in Docket No. 20180051-GU, *In re: Consideration of the tax impacts associated with the Tax Cuts and Jobs Act of 2017 for Florida Public Utilities Company – Gas*; Order No. PSC-2019-0077-FOF-GU, issued February 25, 2019, in Docket No. 20180052-GU, *In re: Consideration of the tax impacts associated with the Tax Cuts and Jobs Act of 2017 for Florida Public Utilities Company – Indiantown Division*; Order No. PSC-2019-0079-FOF-GU, issued February 25, 2019, in Docket No. 20180053-GU, *In re: Consideration of the tax impacts associated with the Tax Cuts and Jobs Act of 2017 for Florida Public Utilities Company – Fort Meade Division*; Order No. PSC-2019-0078-FOF-GU, issued February 25, 2019, in Docket No. 20180054-GU, *In re: Consideration of the tax impacts associated with the Tax Cuts and Jobs Act of 2017 for the Florida Division of Chesapeake Utilities Corporation*. Order No. PSC-2019-0350-PAA-PU, issued August 22, 2019, in Docket No. 20180013-PU, *In re: Petition to establish a generic docket to investigate and adjust rates for 2018 tax savings by Office of Publc Counsel.*

Issue 2: Should this docket be closed?

Recommendation: Yes. Upon expiration of the protest period, if a timely protest is not received from a substantially affected person, the decision should become final and effective upon issuance of the Consummating Order and this docket should be closed. (Brownless)

Staff Analysis: Upon expiration of the protest period, if a timely protest is not received from a substantially affected person, the decision should become final and effective upon issuance of the Consummating Order and this docket should be closed.

Table 1-1
Tax Cuts and Jobs Act WAW Analysis

	Company	Net Operating Income	Rate Base	Achieved ROR	Approved ROR Cap
3	Gold Coast Utility Corporation	($144,575)	$387,557	-37.30%	7.53%

Source: 2018 Annual Report

Item 6

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: August 6, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Division of Accounting and Finance (Cicchetti, Buys, Hightower) ALM MC
Office of the General Counsel (Brownless) JC

RE: Docket No. 20200149-WS – Consideration of the tax impacts associated with Tax Cuts and Jobs Act of 2017 for St. James Utility Company.

AGENDA: 08/18/20 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Graham

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

The Tax Cuts and Jobs Act of 2017 (TCJA) was signed into law on December 22, 2017, and became effective for the taxable year beginning January 1, 2018. On January 9, 2018, the Office of Public Counsel (OPC) filed a "Petition to Establish Generic Docket to Investigate and Adjust Rates for 2018 Tax Savings." On February 6, 2018, in Order No. PSC-2018-0104-PCO-PU,[1] the Florida Public Service Commission (Commission) established jurisdiction over utilities' tax savings if such a date was not contained in an applicable settlement agreement. Subsequently, the Commission opened separate dockets to address the tax savings for electric and natural gas utilities. At this time, all electric, natural gas, and water and wastewater utilities (WAW) tax savings dockets have been resolved except for two WAW utilities, Gold Coast Utility

[1]Order No. PSC-2018-0104-PCO-PU, issued February 6, 2018 in Docket No. 20180013-PU, *In re: Petition to establish a generic docket to investigate and adjust rates for 2018 tax savings, by Office of Public Counsel.*

Corporation and St. James Utility Company (St. James). The instant docket was opened to address tax savings associated with St. James.

For WAW utilities that have income taxes included in their revenue requirement, the 2018 annual reports are necessary to determine each utility's earned return and if a utility earned in excess of its allowed return. St. James recently provided the Commission with its 2018 annual report.

The Commission has jurisdiction in this case pursuant to Sections 367.011, 367.081, and 367.121, Florida Statutes.

Discussion of Issues

Issue 1: What is the appropriate disposition of the tax impacts resulting from the passage of the TCJA for St. James?

Recommendation: St. James is not earning above its allowed rate of return range. No adjustment to base rates is necessary regarding the tax impacts resulting from the passage of the TCJA for St. James. (Cicchetti)

Staff Analysis: St. James is earning significantly below its authorized rate of return. Attachment A shows St. James' Net Operating Income, Rate Base, Achieved Rate of Return, and Approved Rate of Return Cap.

It is staff's opinion that it is reasonable for the Commission to consider the earnings position of the utility when deciding if base rates should be reduced for changes in tax rates. Reducing base rates would result in cash flow reductions for the utilities, put downward pressure on earnings, and accelerate the need for a rate case sooner versus later. Consequently, staff recommends that no adjustment to base rates is necessary regarding the tax impacts resulting from the passage of the TCJA for St. James. Such treatment is consistent with the Commission's decisions in Docket Nos. 20180051-GU, 20180052-GU, 20180053-GU, 20180054-GU, and 20180013-PU.[2]

[2]Order No. PSC-2019-0076-FOF-GU, issued February 25, 2019, in Docket No. 20180051-GU, *In re: Consideration of the tax impacts associated with the Tax Cuts and Jobs Act of 2017 for Florida Public Utilities Company – Gas*; Order No. PSC-2019-0077-FOF-GU, issued February 25, 2019, in Docket No. 20180052-GU, *In re: Consideration of the tax impacts associated with the Tax Cuts and Jobs Act of 2017 for Florida Public Utilities Company – Indiantown Division*; Order No. PSC-2019-0079-FOF-GU, issued February 25, 2019, in Docket No. 20180053-GU, *In re: Consideration of the tax impacts associated with the Tax Cuts and Jobs Act of 2017 for Florida Public Utilities Company – Fort Meade Division*; Order No. PSC-2019-0078-FOF-GU, issued February 25, 2019, in Docket No. 20180054-GU, *In re: Consideration of the tax impacts associated with the Tax Cuts and Jobs Act of 2017 for the Florida Division of Chesapeake Utilities Corporation*. Order No. PSC-2019-0350-PAA-PU, issued August 22, 2019, in Docket No. 20180013-PU, *In re: Petition to establish a generic docket to investigate and adjust rates for 2018 tax savings by Office of Publc Counsel.*

Issue 2: Should this docket be closed?

Recommendation: Yes. Upon expiration of the protest period, if a timely protest is not received from a substantially affected person, the decision should become final and effective upon issuance of the Consummating Order and this docket should be closed. (Brownless)

Staff Analysis: Upon expiration of the protest period, if a timely protest is not received from a substantially affected person, the decision should become final and effective upon issuance of the Consummating Order and this docket should be closed.

Table 1-1
Tax Cuts and Jobs Act WAW Analysis

	Company	Net Operating Income	Rate Base	Achieved ROR	Approved ROR Cap
3	St. James Utility Company	$ (196,755)	$ (1,638,999)	Loss	9.50%

Source: 2018 Annual Report

Item 7

State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: August 6, 2020

TO: Office of Commission Clerk (Teitzman)

FROM: Division of Engineering (Phillips) TB
Division of Accounting and Finance (Higgins, Mouring) MC ALM
Division of Economics (Forrest) CJD
Office of the General Counsel (Stiller, Trierweiler) JC

RE: Docket No. 20200144-EI – Petition for limited proceeding to true-up First and Second SoBRAs, by Tampa Electric Company.

AGENDA: 08/18/20 – Regular Agenda – Proposed Agency Action - Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Graham

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

By Order No. PSC-2017-0456-S-EI, issued on November 27, 2017, the Florida Public Service Commission (Commission) approved Tampa Electric Company's (TECO or Company) Amended and Restated Stipulation and Settlement Agreement (2017 Settlement).[1] The 2017 Settlement allows for the inclusion of solar projects that meet certain criteria into base rates through a Solar Base Rate Adjustment (SoBRA) mechanism.

[1]Order No. PSC-2017-0456-S-EI, issued November 27, 2017, in Docket No. 20170210-EI, *In re: Petition for limited proceeding to approve 2017 amended and restated stipulation and settlement agreement, by Tampa Electric Company*, and Docket No. 20160160-EI, *In re: Petition for approval of energy transaction optimization mechanism, by Tampa Electric Company*.

On June 5, 2018, the Commission approved TECO's First SoBRA in Order No. PSC-2018-0288-FOF-EI.[2] The First SoBRA consisted of two solar projects, Payne Creek and Balm, with a total installed capacity of 144.7 megawatts (MW). The base rate increase associated with the First SoBRA went into effect September 1, 2018. On December 7, 2018, the Commission approved TECO's Second SoBRA in Order No. PSC-2018-0571-FOF-EI.[3] The Second SoBRA consisted of five solar projects, Lithia, Grange Hall, Bonnie Mine, Peace Creek, and Lake Hancock, with a total installed capacity of 261.3 MW. The base rate increase associated with the Second SoBRA went into effect January 1, 2019.

On April 30, 2020, TECO filed a petition for a true-up of the First and Second SoBRAs. The Commission has jurisdiction pursuant to Sections 366.06 and 366.076, Florida Statutes (F.S.).

[2]Order No. PSC-2018-0288-FOF-EI, issued on June 5, 2018, in Docket No. 20170260-EI, *In re: Petition for limited proceeding to approve first solar base rate adjustment (SoBRA), effective September 1, 2018, by Tampa Electric Company.*

[3]Order No. PSC-2018-0571-FOF-EI, issued on December 7, 2018, in Docket No. 20180133-EI, *In re: Petition for limited proceeding to approve second solar base rate adjustment (SoBRA), effective January 1, 2019, by Tampa Electric Company.*

Discussion of Issues

Issue 1: What are the actual total costs for TECO's First and Second SoBRA projects?

Recommendation: Based on staff's review, the actual total costs for TECO's First and Second SoBRA projects are as listed in Table 1-3. None of the projects exceed the $1,500/kilowatt-alternative current (kW_{ac}) cost cap requirement of the 2017 Settlement. (Phillips)

Staff Analysis: The 2017 Settlement allows TECO to recover the cost of solar projects that meet certain criteria through a base rate adjustment, using estimated costs and in-service dates with a true-up mechanism. Paragraph 6(c) of the 2017 Settlement states that the SoBRA rate adjustment for each tranche will be implemented on the earliest in-service date specified in paragraph 6(b) and based on estimated installation cost. Each SoBRA rate adjustment will subsequently be trued-up based on actual in-service dates and installation costs. Paragraph 6(d) of the 2017 Settlement specifies a total installed capital cost cap for each project of $1,500/$kW_{ac}$.

Staff has reviewed the actual in-service dates and installed cost variances for TECO's First and Second SoBRA projects, which are discussed below. Based on staff's analysis, each project is below the cost cap.

In-Service Dates

Only two of the seven projects, Payne Creek and Lithia, entered commercial service on their estimated in-service dates. For the remaining five projects, TECO, under its engineering, procurement, and construction (EPC) contracts, sought and received liquidated damages from contractors for performance delays. TECO received a total of $9,170,565 in liquidated damages, which it used to offset lost revenue from delayed in-service dates and to reduce the actual installed costs for solar projects. The estimated and actual in-service dates for each solar project are listed in Table 1-1.

Table 1-1
In-Service Dates for First and Second SoBRAs

Project Name	Estimated In-Service Date	Actual In-Service Date
First SoBRA		
Payne Creek Solar	September 1, 2018	September 1, 2018
Balm Solar	September 1, 2018	September 27, 2018
Second SoBRA		
Lithia Solar	January 1, 2019	January 1, 2019
Grange Hall Solar	January 1, 2019	January 2, 2019
Peace Creek Solar	January 1, 2019	March 1, 2019
Bonnie Mine Solar	January 1, 2019	January 23, 2019
Lake Hancock Solar	January 1, 2019	April 25, 2019

Source: Exhibit JSC-1 from Document No. 02326-2020

Installed Costs

Pursuant to paragraph 6(d) of the 2017 Settlement, the allowable installed costs include all types of costs that have traditionally been allowed in rate base for solar projects, including EPC contracts. For TECO's First and Second SoBRAs, the EPC contracts include major equipment (i.e., solar modules, inverters), balance of system (i.e., racking, collection cables), and development. The EPC contract accounts for the majority of the project costs followed by land, transmission interconnection, and owner's costs. Each of the solar projects, excluding Payne Creek and Bonnie Mine, were below estimated installed costs. The cost variances for each category and the total cost variances are listed in Table 1-2.

Table 1-2
Total Installed Cost Variances by Project

Project Name	EPC Cost ($)	Land Cost ($)	Transmission Cost ($)	Owner's Cost ($)	Total ($)
First SoBRA					
Payne Creek Solar	938,410	(62,561)	(388,302)	1,142,852	1,630,400
Balm Solar	495,469	(1,697,613)	(837,914)	1,316,303	(723,755)
Second SoBRA					
Lithia Solar	(906,777)	(447,022)	(712,877)	650,184	(1,416,493)
Grange Hall Solar	(656,548)	(147,567)	(1,197,813)	478,840	(1,523,088)
Peace Creek Solar	40,841	(122,993)	(1,728,866)	559,812	(1,251,206
Bonnie Mine Solar	(190,578)	(142,724)	(361,837)	1,128,941	433,803
Lake Hancock Solar	(1,692,012)	(44,975)	(355,295)	1,020,143	(1,072,140)

Source: Exhibit MDW-1 from Document No. 02326-2020

EPC Costs

EPC costs represent approximately 83 percent of the total costs on average for the First and Second SoBRAs. Three of the seven solar projects' actual EPC costs were higher than estimated. Several factors contributed to the increased EPC costs, such as the requirement for the Balm and Peace Creek projects to install crushed concrete to improve road subgrade and design allowing for better access to solar substations, and for the Payne Creek project to purchase additional modules to account for those damaged during construction.

Land and Transmission Costs

The land and transmission costs represent approximately 11 and 3 percent of the total costs on average, respectively, and for each of the solar projects were below the original estimated costs. For example, the Balm and Lithia projects closing costs, legal fees, and broker fees were lower than expected causing the land cost to be lower than originally estimated. The largest variances for transmission costs were for the Grange Hall and Peace Creek projects. TECO's original transmission interconnection estimates were based on construction in or near wetlands, but the Company was able to avoid the wetlands, thereby lowering the transmission cost for each project.

Owner's Costs

The owner's costs represent approximately 2 percent of the total costs on average, and for all of the solar projects were higher than estimated. The projects required additional staff for safety

oversight to ensure safety protocols were followed due to a number of safety incidents that occurred during the construction of the first two SoBRA projects. Other owner's costs were associated with environmental or governmental requirements. For example, the Lithia project site was home to an atypical amount of gopher tortoises that required relocating, and the Lake Hancock project added a vegetation buffer to reduce visibility to nearby residential areas based on a requirement from the City of Bartow.

Total Costs

Pursuant to paragraph 6(d) of the 2017 Settlement, in addition to the installed costs discussed above, TECO is eligible to include allowance for funds used during construction (AFUDC) associated with SoBRA projects, which represent approximately 2 percent of the total costs on average. The actual cost for each project, inclusive of the variances above and AFUDC, are listed on a total cost and per kW_{ac} cost basis in Table 1-3. Based on staff's analysis, each project is below the cost cap specified in paragraph 6(d) of the 2017 Settlement of $1,500 per kW_{ac}. Staff has reviewed the total actual costs, and they appear reasonable and consistent with the 2017 Settlement.

Table 1-3
Total Costs for First and Second SoBRAs

Project Name	Total Cost ($)	Total Cost ($/$kW_{ac}$)
First SoBRA		
Payne Creek Solar	94,359,584	1,342
Balm Solar	109,963,383	1,478
Second SoBRA		
Lithia Solar	111,364,821	1,481
Grange Hall Solar	87,347,026	1,430
Peace Creek Solar	81,943,638	1,479
Bonnie Mine Solar	56,102,532	1,496
Lake Hancock Solar	46,403,012	1,459

Source: Exhibit MDW-1 from Document No. 02326-2020

Conclusion

Based on staff's review, the actual total costs for TECO's First and Second SoBRA projects are as listed in Table 1-3. None of the projects exceed the $1,500/$kW_{ac}$ cost cap requirement of the 2017 Settlement.

Issue 2: What is the adjusted annual revenue requirement for TECO's First and Second SoBRA projects?

Recommendation: The total adjusted cumulative annual revenue requirement associated with TECO's First and Second SoBRA projects is $70,213,000. (Higgins)

Staff Analysis: The 2017 Settlement established a framework for TECO to recover costs associated with the construction and operation of solar generating facilities meeting certain criteria. Under the framework, TECO can petition the Commission to implement project-specific estimated annual revenue requirements, beginning on specified dates, subject to certain agreed-upon conditions.[4] The revenue collected is subject to true-up. The actual annual revenue requirement and its difference from the currently-approved annual revenue requirement is the focus of staff's recommendation in this issue.[5]

The Company is requesting the Commission approve a revised cumulative annual revenue requirement based on the actual installed costs of the plants associated with its previously-approved First and Second SoBRA projects.[6] The revised cumulative annual revenue requirement for the First and Second SoBRA projects is specifically associated with the following generating plants: Balm, Payne Creek, Lithia, Grange Hall, Peace Creek, Bonnie Mine, and Lake Hancock.

The revised cumulative annual revenue requirement is formulated using the actual capital cost, shown in Table 1-3, in addition to incentives permitted under paragraph 6(m) of the 2017 Settlement, for each of the First and Second SoBRA projects in place of the originally-estimated capital cost. With regard to the incentive, according to subparagraph 6(m), if TECO's actual installed cost for a project is less than the cost cap of $1,500 per kWac, the Company and its customers share in the difference, 75 percent and 25 percent respectively.[7] TECO witness Jose A. Aponte describes the incentive's design and effect as serving to "encourage [TECO] to build solar projects for recovery under a SoBRA at the lowest possible cost." As necessitated by the updated base capital costs (Issue 1) of the individual First and Second SoBRA facilities, the relative incentives for all plants have been trued up from their estimated values as part of this issue. All other components of the estimated annual revenue requirement calculation remain the same, e.g., operation and maintenance expense, rate of depreciation, capital structure, and tax rates. The specific true-up produced by this change is the subject of Issue 3. The proposed revised cumulative annual revenue requirement of $70,213,000, as compared to the previously-estimated $70,290,000, represents a reduction of $77,000.

[4] 2017 Settlement, ¶6(b).
[5] Order Nos. PSC-2018-0288-FOF-EI and PSC-2018-0571-FOF-EI.
[6] *Id*.
[7] 2017 Settlement, ¶6(m).

Table 2-1 displays the estimated annual First and Second SoBRA revenue requirements by project and plant.

Table 2-1
First and Second SoBRA Estimated Annual Revenue Requirement[8]

Plant	Revenue Requirement ($000)
First SoBRA	
Balm Solar	$12,937
Payne Creek Solar	11,308
Subtotal	$24,245
Second SoBRA	
Lithia Solar	$13,291
Grange Hall Solar	10,611
Peace Creek Solar	9,868
Bonnie Mine Solar	6,601
Lake Hancock Solar	5,674
Subtotal	$46,045
Grand Total	$70,290

Source: Order No. PSC-2018-0288-FOF-EI, Order No. PSC-2018-0571-FOF-EI, and the Direct Testimony of TECO witness Jose A. Aponte, page 5.

Table 2-2 displays the proposed adjusted annual First and Second SoBRA revenue requirements associated with each project and plant.

Table 2-2
First and Second SoBRA Adjusted Annual Revenue Requirement

Plant	Revenue Requirement ($000)
First SoBRA	
Balm Solar	$12,934
Payne Creek Solar	11,408
Subtotal	$24,342
Second SoBRA	
Lithia Solar	$13,211
Grange Hall Solar	10,570
Peace Creek Solar	9,808
Bonnie Mine Solar	6,704
Lake Hancock Solar	5,578
Subtotal	$45,871
Grand Total	$70,213

Source: TECO's response to Staff's First Data Request, No. 1 (Document No. 02688-2020).

Conclusion

Staff recommends the total adjusted annual revenue requirement associated with the First and Second SoBRA projects is $70,213,000, or $77,000 less than originally estimated.

[8]Order Nos. PSC-2018-0288-FOF-EI and PSC-2018-0571-FOF-EI.

Issue 3: What is the appropriate true-up amount that should be reflected in the Capacity Cost Recovery Clause (CCRC), pursuant to paragraph 6(n) of the 2017 Settlement?

Recommendation: Staff recommends the appropriate true-up amount associated with the First and Second SoBRA projects that should be reflected in the CCRC, pursuant to paragraph 6(n) of the 2017 Settlement, is a credit of $5,096,041. Due to the inclusion of an estimated credit of $4,856,329 in TECO's mid-course correction filing, an outstanding credit balance of $239,712 remains and is to be incorporated in TECO's 2021 Capacity Cost Recovery factors. (Higgins)

Staff Analysis: The 2017 Settlement established a framework for TECO to recover costs associated with the construction and operation of solar generating facilities meeting certain criteria. Under the framework, the Company can petition the Commission to implement project-specific estimated annual revenue requirements beginning on specified dates subject to certain agreed-upon conditions.[9] The revenue collected is subject to true-up. The true-up amount (Total True-up) is the focus of staff's recommendation in this issue. The relevant time period used in formulating the Total True-up is September 1, 2018, through December 31, 2020.

As discussed in Issue 1, all actual capital costs and some in-service dates of the plants comprising the First and Second SoBRA projects differ from the values originally assumed. Relative to the revenue collected, these two differences inherently produce two distinct true-ups; a cost true-up, and an in-service date or "timing" true-up. The cost true-up is the difference between the revised annual revenue requirement that incorporates actual capital costs and the current annual revenue requirement based on estimated capital costs from the point of (actual) plant in-service through December 31, 2020. The timing true-up simply captures the effect of matching a specific plant's assumed in-service date to its actual in-service date. Staff notes that not all individual plants require a timing true-up. The net dollar impact/Total True-up, as required by paragraph 6(n) of TECO's 2017 Settlement is then flowed through the CCRC.[10]

Table 3-1 displays the components and associated amounts of the proposed First and Second SoBRA Projects Total True-up.

Table 3-1
First and Second SoBRA Projects Total True-up

Component	Amount (09/01/2018 through 12/31/2020)
Total Cost True-up	$93,176
Total Timing True-up	4,490,688
Total Interest[11]	512,177
Total	$5,096,041

Source: Direct Testimony of TECO witness Jeffery S. Chronister, page 19.

[9] 2017 Settlement, ¶6(b).
[10] *Id.*
[11] "Total Interest" is calculated at an annual AFUDC rate of 6.46 percent.

On March 25, 2020, the Company petitioned the Commission to reduce its then-approved CCRC rates.[12,13] Incorporated in its request was a First and Second SoBRA-related preliminary credit/refund of $4,856,329. The Commission approved TECO's request on May 14, 2020, thereby reducing the outstanding balance of the proposed Total True Up to $239,712 at year-end 2020.[14] According to TECO witness Chronister, the Company will include the remaining Total True-Up balance as part of its requested 2021 CCRC factors. TECO's CCRC petition for factors effective in 2021 is due to be filed by September 3, 2020.

Conclusion

Staff recommends the appropriate true-up amount associated with the First and Second SoBRA projects that should be reflected in the CCRC, pursuant to paragraph 6(n) of the 2017 Settlement, is a credit of $5,096,041. Due to the inclusion of an estimated credit of $4,856,329 in TECO's mid-course correction filing, an outstanding credit balance of $239,712 remains and is to be incorporated in TECO's 2021 Capacity Cost Recovery factors.

[12]Order No. PSC-2019-0484-FOF-EI, issued November 18, 2019, in Docket No. 20190001-EI, *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*.
[13]Commission Document No. 01597-2020.
[14]Order No. PSC-2020-0154-PCO-EI, issued May 14, 2020, in Docket No. 20200001-EI, *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*.

Issue 4: What is the appropriate base rate adjustment for TECO's First and Second SoBRA projects and how should the Company implement this adjustment?

Recommendation: The appropriate base rate adjustment for TECO's First and Second SoBRA projects is an annual revenue requirement reduction of $77,000, which should be reflected in the Company's Fourth SoBRA revenue requirement calculation. (Forrest)

Staff Analysis: Issue 3 addresses the true-up for the period September 1, 2018 through December 31, 2020. This issue addresses the adjustment of base rates effective January 1, 2021. As discussed in Issue 2, staff recommends that the revised annual revenue requirement is $77,000 less than originally estimated.

TECO witness Ashburn stated in his testimony that, per the 2017 Settlement, the base rate adjustments are to be spread over all the rate classes. Witness Ashburn stated that TECO applied the $77,000 reduction to its calculation of base rates for all customer classes and found that the true-up adjustment was *de minimis* and did not shift any of the last digits in current rates. As a result, TECO proposed to incorporate the $77,000 revenue requirement reduction in the revenue requirement calculation of the Fourth SoBRA filing.

TECO filed its Fourth SoBRA petition on July 31, 2020, to be effective with the first billing cycle in January 2021.[15] Additionally, the Company states that the First and Second SoBRA true-up amount is scheduled to take effect in January 2021. As such, TECO proposed in the Fourth SoBRA petition to deduct $77,000 from its Fourth SoBRA revenue requirement calculation to adjust for the First and Second SOBRA revenue requirement true-up amount. Staff believes this is an appropriate approach given that the true-up amount would not impact current rates.

Conclusion

The appropriate base rate adjustment for TECO's First and Second SoBRA projects is a reduction of $77,000, which should be reflected in the Company's Fourth SoBRA revenue requirement calculation. This proposal ensures that the general body of ratepayers benefits from the revised revenue requirement.

[15]Document No. 04171-2020, in Docket No. 202000064-EI, Petition by Tampa Electric Company for a limited proceeding to approve Fourth SoBRA effective January 1, 2021.

Issue 5: Should this docket be closed?

Recommendation: Yes. If no protest is filed by a person whose substantial interests are affected within 21 days of the issuance of the Order, this docket should be closed upon the issuance of a Consummating Order. (Stiller)

Staff Analysis: If no protest is filed by a person whose substantial interests are affected within 21 days of the issuance of the Order, this docket should be closed upon the issuance of a Consummating Order.