

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Review of 2022-2031 Storm Protection  
Plan, pursuant to Rule 25-6.030, F.A.C., Duke  
Energy Florida, LLC

DOCKET NO.: 20220050-EI

FILED: September 06, 2022

**JOINT POST-HEARING BRIEF OF THE OFFICE OF PUBLIC COUNSEL, THE  
FLORIDA INDUSTRIAL POWER USERS GROUP, WHITE SPRINGS  
AGRICULTURAL CHEMICALS, INC. D/B/A PCS PHOSPHATE, AND NUCOR STEEL  
FLORIDA, INC.**

The Citizens of the State of Florida, through the Office of Public Counsel, (“OPC”), The Florida Industrial Power Users Group (“FIPUG”), White Springs Agricultural Chemicals d/b/a PCS Phosphate (“PCS”), and Nucor Steel Florida, Inc. (“Nucor”), collectively the Joint Parties, (“Joint Parties”) pursuant to the Order Establishing Procedure in this docket, Order No. PSC-2022-0119-PCO-EI, issued March 17, 2022, the Amended Order Establishing Procedure, and Order No. PSC-2022-0226-PCO-EI, issued June 24, 2022, and Order No. PSC-2022-0292-PCO-EI (striking testimony) (“Motion Order”), issued August 1, 2022, hereby submit this Post-Hearing Brief.

**STATEMENT OF BASIC POSITION**

The Joint Parties’ basic position in this case is that the Commission’s determinations regarding the Storm Protection Plans (SPP) that have been filed are inconsistent with the public policy contained in Section 366.96, Florida Statutes (“SPP Statute”) and Rule 25-6.030, Florida Administrative Code (F.A.C.) (“SPP Rule”). Among the Florida utilities filing Storm Protection Plans, the proposed plan of Duke Energy Florida (“DEF”) is an outlier in terms of its expansive scope, cost and consumer rate impacts. DEF failed to meet its burden of proof to demonstrate compliance with the statute and rules, or to demonstrate the reasonableness and prudence of the programs and their related costs. By challenging these programs, projects, and costs, the Joint Parties, including the OPC and its experts, have not assumed the burden of proof in this case. The

Joint Parties have focused on whether the programs proposed by DEF satisfy the statutory and rule requirements for permissible programs, whether the appropriate cost/benefit analyses have been performed, and whether that analysis supports the cost of the programs contained in the SPPs filed by the investor-owned utilities (“IOUs”). Within DEF’s 2023-2032 proposed SPP, some programs fail to meet the legal requirements of permissible SPP programs. No DEF program is cost-effective on a quantifiable and verifiable basis. The Commission should deny or significantly modify the programs that Joint Parties identify as impermissible and/or fiscally unjustifiable.

Very broadly, DEF told investors that this proposed SPP 2023 includes \$7 billion in capital investment or “CapEx.” Duke management informed investors in 2021 that DEF had been approved to recover up to \$6 billion SPP CapEx. TR 281-285, EX 105; 1416-1418, EX 110. The now proposed additional \$1.3 billion increase (21%) in the CapEx in one year comes at a time when the consumers are under enormous financial pressure and inflation is rampant. TR 371, 686. From the customers’ perspective, DEF’s focus on expanding its CapEx and increasing shareholder returns looms large over this proceeding.

The Commission should require DEF to implement a plan that exercises greater focus on the SPP Statute’s basic objectives, exercises considerably more fiscal restraint, and better balances customer interests in affordable service. Accordingly and specifically, the Commission should (1) scale back by \$500 million the Distribution Feeder Hardening program, and (2) scale back by \$700 million the Lateral Undergrounding sub-program and Lateral Hardening Overhead sub-program budgets over the 10-year horizon of the SPP. Other programs that are in the SPP pursuant to stipulation should remain in the program for the next two years but should exit the SPP for the remaining eight years. The Transmission Loop Radially-Fed Substation Program should not be included in the SPP when it comes on-line in 2025.

The Joint Parties have raised a threshold legal issue that was manifest only after the prehearing conference and after the time for raising issues would normal have ended. Because of the timing of the issuance of an order striking testimony (Order No. PSC-2022-0292-PCO-EI (“Motion Order”) and the Commission’s in-hearing affirmance of that order upon reconsideration (TR 817), the first opportunity to raise the issue and brief it is in this post hearing brief. This is addressed in the legal issue and argument set out below.

For the years 2023 and 2024, the Joint Parties’ recommendations for exclusion of program spending from the current SPP and Storm Protection Plan Cost Recovery Clause (“SPPCRC”) are subject to a provision in the 2021 Settlement Agreement approved in Order No. PSC-2021-0202A-AS-EI, as discussed in certain circumstances below. To the extent that the portions of Witnesses Mara and Kollen’s testimony containing their respective expert opinions are superseded by a stipulation approved by the Commission in Order No. 2021-0202A-AS-EI (“2021 Stipulation”), that testimony should not form the basis for an adjustment.<sup>1</sup>

### **ISSUES, POSITION AND ARGUMENT**

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

Joint Parties: \*No. Duke provided verifiable program costs; however, claimed benefits information was not properly presented for determination of plan approval, modification, or rejection. Societal benefits in the form of restoration cost avoidance are highly subjective estimates of customer value of avoided outages and should not be used for plan approval determinations. DEF also improperly seeks to

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<sup>1</sup> The Joint Parties are not seeking an adjustment to the DEF SPP for those programs, nor will it seek an adjustment in Docket No. 20220010-EI for the years 2023 and 2024 for the recovery of the revenue requirement associated with the six programs covered by the stipulation, absent evidence of imprudence or unreasonableness as permitted by the August 3, 2020 Updated Stipulation and Settlement Agreement entered into in Docket No. 2000069-EI and approved in Order No. PSC-0293-AS-EI. Specifically, the portions of Mr. Mara’s and Mr. Kollen’s testimony recommending rejection of programs or subprograms for the years 2023 and 2024, under the heading of “Does not comply with 25-6.030” as shown in the table on page 13 Mr. Mara’s Amended testimony, should not be considered in this Docket by the Commission *for the years 2023 and 2024* for disallowance where they conflict with the provisions of that order.

include fictitious “capital cost savings” in its cost-effectiveness analysis. DEF failed its burden of proving cost-effectiveness of proposed SPP programs.\*<sup>2</sup>

### **ARGUMENT**

As demonstrated in the discussion on Issues 2 and 5, DEF’s SPP superficially addresses the key elements for program cost-effectiveness and Two-Prong test evaluation. The proposed plan, however, relies on highly inflated and unsubstantiated societal benefits as well as incorrect statutory and rule interpretations. These flaws require substantial modifications to the DEF plan consistent with the recommendations provided by OPC witness Kollen and Mara. These plan defects are addressed in the arguments on those key issues.

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

Joint Parties: \*Some core proposed programs related to transmission, distribution and lateral hardening and/or undergrounding will have a better impact on reducing outage times and lowering restoration costs than will other programs. Several programs are routine maintenance and do not qualify as storm hardening functions and thus are not SPP-eligible. Staging-related storm restoration costs will not be reduced, forcing customers to continue bearing such costs in pursuit of diminishing returns of ever faster – but cost-ineffective – storm restoration time.\*[131]

### **ARGUMENT**

This issue highlights the statutory and rule test for approval of the overall plan that programs are required to both reduce storm restoration costs and outage times. DEF maintains that the standard is applied at the overall plan level and not on a program-by-program basis.<sup>3</sup> Such an approach is erroneous, inconsistent with the Statute, and, if adopted by the Commission, will lead

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<sup>2</sup> All positions on Issues 1-6, and 10 are subject to the agreement to allow costs shown at TR 685 of Kevin Mara’s amended Direct Testimony in the table with the notation “Does not comply with 25-6.030,” for the recovery periods 2023 and 2024.

<sup>3</sup> The Joint Parties have contested the wording of the issues in this case. At the prehearing conference, the intervenors agreed to argue their respective positions in the issues established by staff. At the end of the day, the case is controlled by the SPP Statute and SPP Rule and not the wording of the issues. Transcript of the July 21, 2022 Prehearing Conference at 22.

to unchecked spending and rate base building and will excessively burden Florida consumers without delivering the system hardening benefits that the Legislature sought for customers.

Section 366.96, Fla. Stat., states in relevant part:

(3) Each public utility shall file, pursuant to commission rule, a transmission and distribution storm protection plan that covers the immediate 10-year planning period. Each plan must explain the systematic approach the utility will follow to achieve the objectives of reducing restoration costs and outage times associated with extreme weather events and enhancing reliability. The commission shall adopt rules to specify the elements that must be included in a utility's filing for review of transmission and distribution storm protection plans.

(4) In its review of each transmission and distribution storm protection plan filed pursuant to this section, the commission shall consider:

(a) The extent to which the plan is expected to reduce restoration costs and outage times associated with extreme weather events and enhance reliability, including whether the plan prioritizes areas of lower reliability performance.

The Commission has implemented this provision in Rule 25-6.030(3)(d), F.A.C., by requiring:

(3) Contents of the Storm Protection Plan. For each Storm Protection Plan, the following information must be provided:

(a) A description of how implementation of the proposed Storm Protection Plan will strengthen electric utility infrastructure to withstand extreme weather conditions by promoting the overhead hardening of electrical transmission and distribution facilities, the undergrounding of certain electrical distribution lines, and vegetation management.

(b) A description of how implementation of the proposed Storm Protection Plan will reduce restoration costs and outage times associated with extreme weather conditions therefore improving overall service reliability.

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(d) A description of each proposed storm protection program that includes:

1. A description of how *each proposed storm protection program* is designed to enhance the utility's existing transmission and distribution facilities *including an estimate of the resulting reduction in outage times and restoration costs* due to extreme weather conditions... .

(Emphasis added.) This provision of 25-6.030(d)1., F.A.C., contains what will be referred to as the “Two-Prong” test, requiring each program to accomplish *both* a reduction in outage times and restoration costs in order to be eligible for inclusion in the SPP.

The SPP Rule sets forth a logical determination requiring a program-by-program demonstration of the legislatively mandated test for inclusion as a necessary element to hold SPP spending in check. The Legislature mandated that the SPPs focus on core transmission, distribution and lateral hardening and equipment undergrounding, stating:

(c) It is in the state's interest to strengthen electric utility infrastructure to withstand extreme weather conditions by promoting the overhead hardening of electrical transmission and distribution facilities, the undergrounding of certain electrical distribution lines, and vegetation management.<sup>4</sup>

DEF's expanded proposed SPP has sought to load up on aging infrastructure, general system betterments and almost anything that could conceivably be postulated to make the grid “better resist” severe weather or make facilities and equipment “simply perform better.” TR 1270. DEF included all manner of grid upgrades and replacements in the SPP and proposed for evaluation on what it describes as a holistic, “integrated” basis. TR 1269, 1270, 1288. What it should have done, and the Commission should now order it to do, is design an SPP that conforms to the more narrow objectives described in the statute. Notably, FPL, in its proposed SPP, retreated from a similar “kitchen sink” approach, when it first proposed and then abandoned including

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<sup>4</sup> Section 366.96(1)(c), Fla. Stat.

capital and O&M costs under the guise of “winterization” storm hardening in its SPP.<sup>5</sup> The Commission must resist the massive mission creep reflected in the DEF proposed plan and re-direct DEF to adhere to the statutory standards.

The Joint Parties have objected to this bloating effect because, left unabated, the SPP plan filed by DEF will generate effectively an incremental \$75 million base rate increase every *year!* TR 266, 287. As noted above, the SPP and the SPPCRC should ultimately be preserved for the types of programs that the Legislature clearly mandated to be recovered from customers.<sup>6</sup> Tellingly, DEF has already asserted that all aging infrastructure can be included in the SPP and SPPCRC. TR 1270 -1273, 1293, 1298. They have further agreed that all equipment is aging TR 1298. This logic suggests that all transmission and distribution infrastructure replacement and maintenance capital costs are clause-eligible, which definitely is not what Section 366.96 looks to achieve. The Commission should strictly apply the test laid down by the Legislature. Implementing a reasonable cost-effectiveness standard will ensure that on programs that truly meet the needs of Floridians in an affordable manner will be implemented. The open-ended process currently advocated by DEF means that there is no downside to asking to include in the SPP a project that is part of their routine maintenance obligation.

Applying the Two-Prong test on a *plan-only* level will also lead to improper enlargement of the clause at times when base rates may be frozen. This phenomenon can occur when capital and O&M costs associated with ordinary base rate prudence obligations are shifted out of a rate-frozen base rate recovery paradigm and into a free-for-all, streamlined clause proceeding. DEF

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<sup>5</sup> See, Order No. PSC-2022-0194-PCO-EI; Order No. PSC-2022-0291-PHO-EI, at 30, 38 (footnote 2) (Winterization issues 7 & 8 withdrawn.)

<sup>6</sup> The OPC and certain of the Joint Parties did agree to inclusion of five programs to be located in the SPPCRC portion of the bill (while simultaneously reducing the corresponding base rate impact) in a negotiated resolution of two cases. This compromise accommodation clearly provided no precedent for eternal inclusion, or agreement that the programs were cost-effective or meet the statutory- and rule-based Two-Prong test for SPP inclusion.

witness testimony illustrates this well and a discussion of it is required.

Against the backdrop of the public's witness Kollen being barred from giving his expert opinion on the logical and appropriate interpretation of the rule, DEF witnesses in the proceeding were permitted an unfettered opportunity to "interpret" the SPP Statute and SPP Rule and reinterpret them as needed to shoehorn prohibited programs into the SPP. DEF joined in and adopted *in toto* the FPL motion to strike the majority of the testimony of Mr. Kollen. Therein,<sup>7</sup> DEF (by adopting the FPL language) effectively said that Mr. Kollen:

(1) [I]mproperly attempt[s] to relitigate the SPP Rule approved by this Commission and add new standards and criteria that are clearly not prescribed by the SPP Rule [and that] SPP programs must be economically justified; benefits must be quantified and monetized; economic benefit/cost criterion is required; benefits must be at least equal to the costs. (Motion at 4.)

(2) [A]sserts that the SPP projects and costs must be incremental to costs recovered in base rates. OPC witness Kollen's testimony further states [DEF]'s 2023 SPP should reflect avoided savings in operation and maintenance ("O&M") expense due to the SPP projects and reductions in depreciation expense from retired plant as offsets to the SPP costs either through reductions to the SPPCRC or through reductions in base rates. Finally, OPC witness Kollen's testimony makes specific recommendations on how the revenue requirements and rates for the SPP costs should be calculated." (Motion at 10-11.)

(3) [M]isapplies the reasonable and prudent standard of review in the above-reference [sic] portions of his testimony, contending that "[DEF]'s programs and costs are not prudent and reasonable unless they meet all of the requirements" proposed by OPC witness Kollen. OPC witness Kollen's reliance upon and application of the reasonable and prudent standard in this SPP proceeding is misplaced and inconsistent with the statutory standard of review for SPPs." (Motion at 15.)

DEF witness Howe urged the Commission to ignore the explicit language in the rule

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<sup>7</sup> The FPL Motion that was adopted by DEF is located in Docket No. 20220051 as Document No. 04722-2022.



requiring a showing of a “reduction in outage times and restoration costs” *by program*. Instead, DEF maintained the wholly unsupported notion that its SPP plan should be evaluated on a holistic basis. TR 211, 247, 291, 297, 1263. This concept or word “holistic” is not found in the statute and stands in stark contrast to the admonition to the public that their witness could not offer “new criteria” or improper legal arguments. Motion Order at 6-10. DEF witness Lloyd similarly sought to introduce the concept of evaluating an “integrated” SPP for approval purposes:

From DEF’s perspective, the Legislature directed the utilities to develop *integrated* storm protection plans that *as a whole* are intended to achieve the goals of reducing restoration costs and outage times to customers and improving overall service reliability.

TR 1335. (Emphasis added.)

Ms. Howe parroted Mr. Lloyd on this concept. TR 1274. The terms “holistic,” “integrated,” or “as a whole” are not found in the statute. Neither is DEF’s proposed concept that programs could fail one prong of the test but still be included into the SPP if the failing programs “play a part” in a “suite” of programs. TR 1269. Both Mr. Lloyd and Ms. Howe gloss over inconvenient requirements of the law and add words that are not in the statute or rule. All of these notions are offered by the DEF witnesses in support of the DEF plan, even though they fly in the face of the Commission’s own rule, which plainly mandates a program-by-program analysis.

Additional legal free-lancing designed to loosen the public’s purse strings can be seen in Witness Howe’s suggestion that instead of being required to meet the Two-Prong test, the Commission can include failing programs because they allow the system to “better resist” the impacts of extreme weather conditions. If adopted, this effort to rewrite and water down the statute and rule would mean that there would be very little, if any, new grid-related expenditure would be ineligible for SPPCRC recovery.

Perhaps the most egregious concept offered by Witness Howe is found in the contorted logic offered to bolster the notion that aging infrastructure is a legitimate component of the SPP:

As a result, “aging” infrastructure not yet at the end of its expected life and therefore still accomplishing its purpose could be replaced with a new component that will *simply perform better*, thereby strengthening the overall system relative to the status quo, which I believe is the goal of the SPP.

(Emphasis added.) TR 1270. Of course, there is nothing in the SPP Statute or SPP Rule that remotely embraces this “simply perform(s) better” concept.

The Commission cannot endorse DEF’s expansive interpretations designed to stuff as many dollars as possible into the SPP and SPPCRC process. Otherwise runaway ratemaking and skyrocketing consumer bills result over time without commensurate actual system hardening occurring. EX 105 at 34.

The Joint Parties urge the Commission to embrace the better approach that the SPP Rule requires program-level compliance with the Two-Prong. This means that each program stands on its own and must demonstrate that it reduces *both* outage time and restoration cost. Otherwise, utility SPPs will veer out of control. Remember, utilities are expected to continue to pursue worthwhile system replacements and upgrades that do not meet the statutory test for clause inclusion, even when they represent costs for responsible and prudent maintenance activities of the grid that are properly part of normal routine maintenance. Such cost would remain the subject of base rate recovery.

Six specific programs were challenged by the Joint Parties as failing to meet the requirements of the SPP Rule.<sup>8</sup> Five of these programs were the subject of two stipulations entered

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<sup>8</sup> The core programs of distribution and transmission feeder and lateral hardening and undergrounding as not being challenged as failing the Two-Prong test, though cost-effectiveness is a concern, as discussed elsewhere.

into in 2020 and 2021.<sup>9</sup> The first stipulation in the 2020 SPP Docket 20200069-EI (“SPP Stipulation”) between DEF and intervenors, including the OPC and certain of the Joint Parties, provided that for these programs:

The Parties agree that the record supports a Commission finding that [program name] is in the public interest and that DEF proceeding to implement the program (consistent with any action taken pursuant to paragraph 11)<sup>10</sup> is not evidence of imprudence.

That SPP Stipulation further provided in Paragraph 16 that “Nothing in the Agreement will have precedential value.” This means that DEF is not permitted to assert that it can rely on the inclusion of a program from the 2020 plan as a basis for its inclusion in the 2023 SPP update.

The second relevant stipulation, referred to as the 2021 Stipulation, approved in Order No. 2021-0202A-AS-EI, provides that:

The Parties agree that DEF has properly removed all costs associated with the Storm Protection Plan (“SPP”) from the costs included in DEF’s MFRs, as all such costs spent on approved SPP programs are properly recoverable through the SPP Cost Recovery Clause (“SPPCRC”).

The Joint Parties concur that the costs associated with these covered programs were reflected as removed from the MFRs for the years 2022 and 2023 and are thus included in the SPP for those years and includable in the SPPCRC for the same years – as long as they are not materially

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<sup>9</sup> The Loop Radially-Fed Substation program is not one of the stipulation-covered programs because, by definition, as a program with a 2025 start date it is not included in the 2022 or 2023 MFRs that effectively govern the scope of the 2021 Stipulation.

<sup>10</sup> Paragraph 11 of the 2020 Stipulation reads:

The Parties agree that, in 2022, DEF will file its updated SPP for the period 2023-2032, required by Section 366.96(6), F.S., to be filed at least every 3 years after approval of the Company’s SPP. DEF agrees that it will not materially expand the scope of the programs and associated expenditures it seeks to recover in the SPPCRC for the years 2020 – 2022 beyond those that are included in the estimates shown on page 40 of Exhibit JWO-2 (the DEF SPP) filed on April 10, 2020, updated on June 24, 2020, and as modified in the filing made on July 24, 2020, in the SPPCRC. DEF will base its requests for cost recovery through the SPPCRC for the years 2023, 2024 and 2025 on the SPP update to be filed in 2022.

enlarged in scope. The 2021 Stipulation, together with the SPP Stipulation, was designed to ensure that these costs were recovered in only one place on the customers' bills (another express requirement of Section 366.96). By placing the costs in the SPPCRC (and by implication including the programs in the then forthcoming SPP update) for recovery, they were not included in the base rates approved in Order No. PSC-202100202A-AS-EI. The SPP Stipulation's lack of precedential value (pursuant to Paragraph 16), along with its *proviso* in Paragraph 11 requiring the SPPCRC filing for 2023 – 2025 to be based on the SPP update, ensured that the current DEF SPP filing will stand on its own and that there is no momentum created by the agreement provisions in Paragraphs 3-9 of the SPP Stipulation.

There is no dispute that DEF properly included the five subject programs in its 2020 SPP filing and in the 2021 and 2022 SPPCRC. There also is no dispute that the costs associated with these programs as proposed in the pending SPP 2023 should be included in the 2023 and 2024 SPPCRC, as expressly provided in the 2021 Stipulation. The Joint Parties do not dispute that these programs have value or that they could be approved in a base rate proceeding. The 2021 Stipulation acknowledged as much. That agreement however only expressly covers the SPPCRC recovery years 2022 and 2023, since MFRs were only prepared and filed for those two years.<sup>11</sup> As a matter of fairness and since DEF's base rates are frozen for the years 2022 -2024, the Joint Parties will concede that even though the language of the SPP Stipulation does not expressly cover the year 2024, it is not practical to expect that the costs of the five programs can be reverted to base rate recovery before 2025.

Accordingly, the Joint Parties seek a determination that for the years 2025 and beyond that the subject programs do not meet the test established by the SPP Statute and SPP Rule and thus

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<sup>11</sup> See, Order No. PSC-2021-0202A at 7.

should not be authorized for recovery in the SPPCRC (via inclusion in the SPP). The Joint Parties seek a modification of the SPP to this extent for these programs.

For the determination about inclusion in the SPP – outside of stipulation – for the years 2025 and beyond, OPC’s expert Mara testified to several examples of SPP ineligibility in these programs for failure to meet the Two-Prong test and for other reasons. These programs or sub-programs should be excluded from the SPP for the years 2025-2033, as discussed below.

*Self-Optimizing Grid (“SOG”).*

This program is a sectionalizing<sup>12</sup> program that does not reduce the number of outages and it does not reduce restoration costs. TR 696. The SPP states that “adding the ability to reroute power during severe weather events reduces outage duration, frequency and number of customers affected.” Ex 4 at 37. While DEF did dispute Mr. Mara’s testimony that the SOG failed to reduce the number of outages (TR 1386-1387), it offered no pushback on the notion that there was no reduction in restoration costs. Witness Lloyd agreed that the SOG does not reduce the number of repairs that drive the outage restoration costs. TR 1363-1364. For this reason it flunks at least one prong of the Two-Prong test. It is only currently in the plan due to the stipulation that shuffled the dollars on the bill. The SOG is a classic example of a program that was implemented for “blue sky” reliability purposes and not because of the passage of Section 366.96, Fla. Stat. DEF acknowledged that the SOG predates the SPP and is a program that is well-suited for base rate treatment. TR 154-155. This program should be excluded from the SPP for the years 2025-2033.

*Transmission Structure Hardening.*

Mr. Mara demonstrated that several elements of this program did not meet the statutory

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<sup>12</sup> Equipment that uses automation to switch and isolate an outage to the smallest portion of the system. TR 738.

and rule tests for SPP inclusion and that they were essentially efforts to remediate aging infrastructure. This overall program is only currently in the plan due to the stipulation that shuffled the dollars on the bill between the SPPCRC and base rates. Mr. Mara highlighted among these measures, the Gang Operated Air Break (GOAB) Switch Automation, Tower Upgrade, Tower Cathodic Protection and Overhead Ground Wire sub-programs each failed to meet one or both of statutory and rule tests for ongoing SPP inclusion. TR 701-707. Notably these programs were almost entirely designed to replace aging infrastructure with like-for-like replacements of flawed towers (TR 702-703) or to retard the inevitable disintegration of tower structures. TR 704-705. These are not storm hardening projects.

a. *Gang Operated Air Break (GOAB) Switch Automation.*

Mr. Mara pointed to the similarity of the GOAB sub-program to the SOG program, in that it uses automation to switch and isolate outages to the smallest portion of the system. Thus, there is no reduction in restoration costs with the installation of the GOAB sub-program. TR 707. DEF even described it thus:

The GOAB line switch automation project is a 20-year initiative that will upgrade 160 switch locations with modern switches enabled with SCADA communication and remote-control capabilities.

EX 3 at 39. This sub-program should be excluded from the SPP after 2025.

b. *Tower Upgrade sub-program.*

With regard to the Tower Upgrade sub-program, Mr. Mara testified that if the towers were being replaced due to age or design flaws, then they should not be included in the SPP for the years 2025 and beyond. DEF transmission engineer Amy Howe disputed the existence of a design flaw in the tower at the time of installation. She nonetheless acknowledged that the towers were deficient in their design. TR 1292, 1293-1294. The SPP states that:

Tower Upgrade will prioritize towers based on inspection data and enhanced weather modeling. The upgrade activities will replace tower types that have previously failed during extreme weather events. Over 700 towers have been identified as having this design type.

EX 3 at 38. She further acknowledged that DEF has an independent engineering obligation to replace weak towers. TR 1292. This duty exists without regard to the SPP statute. Witness Howe's testimony contained an implicit concession that the towers were being replaced due to age as well. TR 1295.

While seeking to justify the continued inclusion of this and other programs in the SPP beyond the stipulation years, witness Howe made the rather astonishing and sweeping statement that "all assets on the system are aging in one capacity or another." TR 1298. The Commission should be concerned about this testimony and DEF's position on aging infrastructure because it illustrates the completely open-ended nature of the SPP the way DEF and others have pitched it, if accepted. This sub-program should be excluded from the SPP for the years 2025 – 2033.

*c. Tower Cathodic Protection sub-program.*

The SPP states that the purpose of the Cathodic Protection (CP) activities is to mitigate active groundline corrosion on the lattice tower system and will be done by installing passive CP systems comprised of anodes on each leg of lattice towers. The anodes serve as sacrificial assets that corrode in place of structural steel, preventing loss of structure strength to corrosion. EX 3 at 38-39; EX 4 at 18, 40. This activity only acts to extend the lives of the towers and fails the Two-Prong test s. TR 704.

*d. Overhead Ground Wire ("OHGW") sub-program.*

Mr. Mara testified that DEF has a continuing duty irrespective of the SPP to maintain its systems within the strength requirements of the National Electrical Safety Code ("NESC"). This

means that deteriorated OHGW needs to be replaced as part of routine maintenance. Replacing the conductor does not add strength or resiliency beyond what the original well-maintained structure would provide. TR 705. The SPP describes the program as “targeting deteriorated OHGW” and “upgrading to fiber optic OHGW.” EX 3 at 40. There is no evidence that this sub-program will provide both a reduction in outage restoration costs and no reduction in the outage times. This is simply an aging infrastructure replacement sub-program. DEF has failed to demonstrate that it will meet the Two-Prong test.

In sum, these four sub-programs of the Transmission Tower Hardening program discussed above should be excluded from the SPP for the years 2025 – 2033. DEF failed to demonstrate that these sub-program elements passed the Two-Prong test. The Commission should reject the effort to include infrastructure in the SPP merely because it is “aging.”

Substation Hardening Program.

This is an example of another aging infrastructure program that does not belong in the SPP. It is only currently in the plan due to the stipulation that shuffled the dollars on the bill between base rates and the SPPCRC. As Mr. Mara testified, the program neither reduces outage times nor reduces restoration costs. TR 712. It fails both prongs of the test. Rather, it is part of an industry-wide trend to change out relays from electromechanical to digital. TR 712. No doubt it is a legitimate maintenance project that would or should occur as a routine and expected maintenance program in the absence of the SPP process. DEF’s proposal to have it continue to be a part of the SPP, beyond the two-year horizon of the 2021 Stipulation, is emblematic the “kitchen sink” effect that will contribute to the incessant stair-stepping of a buildup of rates over the next 10 years, if left unabated. This sub-program should be excluded from the SPP for the years 2025 – 2033.

Loop Radial-Fed Substation Program.

This 2025 program does not reduce restoration costs. TR 710. It fails one prong of the



Two-Prong test. As pointed out by Mr. Mara, it is also should be a lesser priority compared to the hardening of transmission poles. TR 711. Mr. Mara recommended that the customers' money was better spent on the transmission pole hardening as opposed to spending \$82.4 million creating substation networking redundancy. *Id.* DEF Witness Howe offered a conclusory statement that restoration costs are reduced due to timing response and restoration; however no cost reductions were quantified. TR 1278. This fails to meet the requirements of the SPP Rule. The Commission should reject this cost reduction assertion for DEF's failure to meet its burden of proof. Given that this program is not currently being implemented, is not covered by the 2021 Stipulation, and will start no sooner than 2025 (TR 219), it should not be included in the SPP or authorized for recovery in the 2025 and beyond SPPCRC proceedings. This program should be excluded from the SPP for the years 2025 – 2033.

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

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

### **ARGUMENT**

This aspect of the plan did not factor into the Joint Parties' objections to the runaway spending plans that are the SPPs. In this proceeding the Joint Parties do not take significant issue with DEF's geographic prioritization efforts.

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

Joint Parties: \*A number of programs in flood zones that DEF has proposed for SPP inclusion would, absent the 2021 Stipulation, be more appropriately addressed in a base rate

case since they do not harden the system from extreme storm events. Many of these programs fail the Two-Prong test.\*

### **ARGUMENT**

The Joint Parties focused their evaluation and resulting objections on the lack of compliance with the SPP Rule and SPP Statute governing the scope and expense of DEF 2023 SPP update. Our efforts to identify excessive spending in the plan centered around projects that failed the Two-Prong test and ones that were not cost-effective, including projects that had inflated or non-verifiable costs.

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

**ISSUE 5:** What are the estimated costs and dollar benefits to the Company and its customers of the Storm Protection Plan programs and projects?

Joint Parties: \*DEF’s SPP costs are accepted only for qualification purposes, but no reliable, objective benefits are reasonably and accurately quantified in terms of dollars. None of the DEF programs present benefits that exceed the costs when the cost/benefit analyses are corrected. Programs not economically justified are not prudent, and their costs would be imprudent and unreasonable. These programs should not be allowed in the SPP, subject to the 2021 Stipulation, where applicable.\*

### **ARGUMENT**

DEF provides estimated costs and benefits for each of its proposed programs and claims that each is cost-effective. TR 1338. The record, however, reveals that DEF’s claimed benefits are

specious, utterly lacking in any reliable substantive support, and cannot be relied upon by the Commission for determining whether to approve any of the DEF proposed SPP programs.

The program benefits offered by DEF are almost entirely attributed to purported societal benefits converted into dollar values that are generated by a U.S. Department of Energy (“DOE”) model known as Interruption Cost Estimator (“ICE”). DEF could not begin to explain how the valuations produced by the ICE model were calculated or whether the values produced by the model were remotely relevant to its service area.

To begin, all utility customers want safe, adequate and reliable service, and would prefer shorter duration power outages or to avoid such outages altogether. Providing adequate quality of service is a basic element of a utility’s obligation to serve. The long accepted utility metrics for measuring service quality include the System Average Interruption Frequency Index (“SAIFI”), the System Average Interruption Duration Index (“SAIDI”) and the Customer Average Interruption Duration Index (“CAIDI”). TR 171.

In effect, ICE uses customer surveys and other anecdotal information to attempt to attach a dollar value to how much residential and non-residential users value avoided power outages or experiencing shorter ones (i.e., how important SAIFI, SAIDI and CAIDI are to them). Clearly, the actual importance to any individual residential customer will vary wildly. For some, an outage, even for an extended period, may amount to little more than the nuisance cost of re-setting clocks. For others, prolonged outages may have material economic costs, and others that may be caring for small children or house-bound elderly may find extended outages to be intolerable. Similarly, businesses may attach very different importance to avoided power outages for dozens of disparate reasons. TR 174.

DOE's Lawrence Berkeley laboratory and the consulting firm Nexant decided to create ICE as an informal guide for utility planning purposes. Neither LBNL nor Nexant vouches for the accuracy of their estimates in any way. The model attributes outage avoidance values from informal inputs provided by utilities, customer surveys and other anecdotal information. TR 170-175, 1338, 1358-1362. To calculate ICE values, a party simply enters 1) the pertinent state, 2) the number of residential and non-residential customers, and 3) target SAIFI, SAIDI or CAIDI values (2 of the 3). TR 171-172. The model then generates purported dollar values for residential, small and large non-residential customers. EX 105 at 7. DEF could not explain how the model converted anecdotal responses into quantified outage avoidance dollars, the pertinence of the state selection to the model results, how the number of customers affects model results, or any other element of the ICE model calculations. TR 173-175. In sum, ICE seems to be a circular assessment of SAIFI, SAIDI and CAIDI targets using an entirely opaque and completely unvetted quantification matrix. The disclaimer on the ICE Calculator at the site referenced in Witness Lloyd's Exhibit BML-2, states that it is not statistically-representative for all regions of the United States, and that it is not appropriate for estimating costs of widespread, long-duration (>24 hours) interruptions which in fact is what DEF attempted to do. EX 4 at 29 (<https://icecalculator.com/recent-updates>); EX 105 at 7.

DEF initially failed to provide the ICE quantification; doing so only in the filing of its rebuttal testimony. There DEF revealed that it spread \$21 billion dollars of benefit value across all of the proposed programs to give them the illusion of positive cost-effectiveness scores as shown in Table 1 of DEF witness Lloyd's rebuttal testimony. TR 1338. Mr. Lloyd conceded on the stand, however, that the company's estimated annual storm restoration cost savings estimate is \$56.5 million. When summed over 30 years, this produces a cumulative system cost savings of \$1.695 billion. When this cost savings is deducted from the \$21.4 billion "savings" shown in Table 1, the

remaining numerical benefits of approximately \$20 billion (\$19.7 billion) is made up entirely of ICE-generated societal benefit values. TR 1361. In essence, the ICE-generated values provide a veneer of cost-effectiveness to the programs that have been thrown into the SPP. Savings and benefits of \$19.7 billion may seem impressive and cinching the deal when cost-effectiveness is considered. But as a sports commentator and former Tallahassee resident once said (many times) “Not so fast, my friend.” The ICE-generated values have no substantive under-pinning. Duke cannot explain how the model produces quantified dollars values, or whether those values can reasonably be considered relevant to its Florida customers. They cannot and should not be taken seriously in this docket. The Commission should reject them as not providing competent, substantial evidence of the benefits required to be considered in the statutes and its own rule in determining cost-effectiveness of the programs individually and the plan as a whole.

In rebuttal, Mr. Lloyd claimed that the ICE values were conservative, but conceded that he could not explain how the values were derived in the first place. Witness Lloyd confirmed that at a high level, ICE “evaluates, based on surveys that were provided by customers, what the value of continuous power is.” Mr. Lloyd acknowledged that its own contractor – Guidehouse – plugged in the state location, and DEF’s own standards for reliable service in the form of a SAIFI value and either a SAIDI or CAIDI value, and then ran the model to determine societal benefits of vetting or verifying for accuracy or applicability to the Florida programs.

The joint review process the DEF claimed to have performed with its consultant for verifying the model results for accuracy and application to specific programs was explained this way:

When we looked at the results of the model, we compared that to information that we have from our customers, anecdotal information of, you know, the value that customers see from electric service to determine if the numbers were directionally in line with what our

customers have told us through their previous discussions and benchmarks.

TR 173. Mr. Lloyd further acknowledged the circular nature of the input and verification process when he conceded that:

[I]t is providing information based on the inputs that we provide in this-- you know, the ICE model from the Department of Energy is based on surveys from utilities across the country and is utilized by utilities across the country to evaluate the effectiveness and the value of programs.

TR 174.

After revealing the soft underbelly of the ICE program, Mr. Lloyd further acknowledged that the ICE benefits provide an average for residential customers versus commercial customers and industrial customers industrial using surveys. From that, Duke claimed that project-specific numbers were derived from ICE but in a reversion to the feedback loop process admitted that calculation of the allocated benefits and verification was based on “the information of the estimated amount of outage reductions that [DEF] would see from those programs.” TR 175-176.

At the end of the day, the ICE model was proven to be a soft, societal benefit plug that props up a cost-effectiveness presentation that is inconsistent with the way the Commission determines prudence of investment. Real dollars of costs are compared to real, verifiable and quantifiable dollars of savings value to determine whether a capital expenditure is in the customers’ interest and the public interest. Witness Lloyd acknowledged that the vast majority of benefits are in conflict with a responsibility for service continuity from which DEF has absolved itself, in the absence of gross negligence. TR 177-178; EX 102.

Program cost-effectiveness is a crucial bedrock element of the SPP. That foundational element of the SPP Statute and SPP Rule is cracked in the DEF filing and the information that DEF presented does not support adoption of the plan. By adopting Rule 25-6.030(3)(d)4., F.A.C.,

the Commission correctly interpreted the SPP statute to require a comparison of costs and benefits. Unless the Commission attaches credence to the outage avoidance ICE “plug” in the DEF tables, there is no comparison that yields a positive cost-effectiveness ratio for any of the proposed programs. In the absence of verifiable proof that \$19.7 billion in societal savings benefits will materialize, the plug benefit value must be rejected, and DEF SPP must be denied. Accordingly, the DEF SPP cannot be approved as filed. Having stricken the recommendations of the public’s witness Mr. Kollen on methods or evidence that could be used to support moving past this roadblock, the Commission is stuck with no option but to deny the programs contained in the SPP.

Despite the apparent lack of demonstrated cost-effectiveness, Witness Mara has testified that the core feeder and lateral related programs that do not fail the Two-Prong test should be included in the SPP at an authorization level that is no greater than the 2020 SPP levels. This means that the Distribution Feeder Hardening and the Lateral Undergrounding sub-program and Lateral Hardening Overhead sub-program are recommended for inclusion at the 2020 levels. TR 691-694.

Specifically Mr. Mara recommends reducing the budget for the Distribution Feeder Hardening sub-program by \$500 million over 10-years and eliminating the scope of work related to encroachment problems. TR 690-692, 692. As pointed out by Mr. Mara, the clearance encroachments are ongoing independent responsibilities of a utility based on construction standards (NESC) or they are the landowners’ responsibility and not a storm hardening function.

For the Distribution Lateral Undergrounding sub-program and Distribution Lateral Hardening Overhead sub-program, despite the fact that its cost-effectiveness ratio is less than 1.0, Mr. Mara recommends reducing the budgets for both, but allowing their inclusion in the SPP. This means that the 10-year combined budget of \$2.5 billion should be reduced by \$700 million to approximately \$1.8 billion. He does not recommend any changes to DEF’s budgets for pole inspection and pole replacement in 2023 SPP. TR 694-695.

The Joint Parties also note that part of the DEF cost-effectiveness demonstration involved the inclusion of avoided capital expenditures as benefits to justify programs. EX 4 at 30. The public's accounting expert Kollen observed:

In addition, DEF included the avoided future cost of replacing an asset that was replaced pursuant to the SPP programs as a capital cost savings in its benefit/cost analyses. This is nothing more than legerdemain, a tactful term for the magical assertion that a capital expenditure incurred for an SPP program results in future capital expenditure savings in a base rate program. There are no savings in capital expenditures. When these fantastical savings are properly removed from DEF's benefit/cost analyses, *none* of its programs or projects are economic.

TR 905. The Joint Parties urge the Commission to order that avoided capital costs are not contemplated as a benefit to customers in the required cost benefit analyses.

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

Joint Parties: \*The rate impacts are estimated in the proposed Updated Plan. To the extent that they included inappropriate costs or exclude cost savings they are overstated. The Commission should consider these impacts and associated revenue requirements in the context of coming rate increases and adopt the Joint Parties' recommendations.\*

### **ARGUMENT**

DEF's calculated the rate impacts as shown in Exhibit BML-1. EX 4 at 56. TR 255-256. The Joint Parties do not take issue with these rate impacts except to the extent that they include improper costs. To the extent that they are inflated with improper costs, they should not be seen as a ceiling to allow for extra spending to be authorized in the SPPCRC. Evidence of this overestimation was stricken over the continuing objection of the Joint Parties. Motion Order at 9. These rate impacts are determined based on the revenue requirements shown alongside the impacts. TR 255-256. The revenue requirement calculations indicate that from 2023 to 2024 the revenue requirements will increase by \$71.9 million. From 2024 to 2025 will increase by \$75.5



million, from 2025 to 2026 the revenue requirement will increase by \$84.6 million. This increase in revenue requirements is significant when compared to the 2022, 2023 and 2024 base rate increases included in the 2021 DEF rate case settlement of \$67.246 million, \$48.933 million and \$79.199 million, respectively. A review of the remaining seven years of the proposed SPP indicates annual rate increases of similar magnitudes.

Another way to conceptualize the steady and steep trajectory of these increases is to look at the same document that DEF management did when it considered the design of SPP 2023. EX 105. After telling investors in 2021 about the \$6 billion in CapEx authorized by the Commission, the DEF CEO informed investors in 2022 that the number being sought from the Commission was up to \$7 billion for its updated plan. TR 1418, 283. This increase is 21.6% given that DEF is seeking a CapEx approval in this plan of \$7.318 billion and the currently authorized level is \$6 billion. TR 1418, 277, 689. A review of the document that management used to approve the SPP spending plan reveals that DEF was not obligated to seek approval at the \$7.3 billion level, because it had a lower cost option available.

DEF also acknowledged that it provided “directional targets” to its contractor Guidehouse for developing recommended spending plans, and that DEF considered several different spending options. TR 168-170. This process is shown in Exhibit 105 at pp. 16-18. In short, DEF designed the proposed SPP with its own financial objectives in mind rather than its incremental system needs and customer impacts, and DEF did not choose the lower cost option. EX 105 at 16-17.

DEF Witness Menendez acknowledged that the \$6 billion CapEx spend that was touted to investors in 2021 was consistent with the original (and current) 2020 SPP spending authorization. TR 1418. Notably, the \$1.2 billion adjustment recommended by OPC witness Mara is slightly less than the difference between the current spending level and the proposed level. The Commission

can review the options considered by senior management as shown in EX 105 and determine for itself the consistency of Mr. Mara's recommendation with the options that were available and considered by DEF senior management.

The Commission cannot consider consumer rate impacts associated with the proposed SPP in a vacuum. Two of the three annual base rate increases approved in Commission Order are yet to come. In January, there will be an enormous rate shock to DEF customers in the form of a \$73.361 million base rate increase (\$48.933 million plus a \$24.428 million ROE Tigger increase). TR 265-269; Order No. PSC-2021-0202A at 9, 10. Further, as the Commission is well aware from DEF filings in Docket No. 22000001-EI, DEF acknowledges it has a \$1.303 billion fuel cost under-recovery true-up that will be dramatically affect all customers in 2023. TR 261-262.

It is obvious that DEF's customers will be awash in a tsunami of rate increases when the 2023 new year rolls around. The only part of that tidal wave that the Commission has control over is the SPP spending and the resulting SPPCRC rate levels. Given the evidence of a lack of cost-effectiveness and statutory compliance coupled with the clear choice that DEF had to hold spending levels at the 2020 levels, the Commission should take the opportunity to follow the admonition of the current Governor in his widely reported April 27, 2022 veto message:

Given that the United States is experiencing its worst inflation in 40 years and that consumers have seen steep increases in the price of gas and groceries, as well as escalating bills, the state of Florida should not contribute to the financial crunch that our citizens are experiencing.<sup>13</sup>

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

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<sup>13</sup> <https://www.flgov.com/wp-content/uploads/2022/04/4.27.22-Veto-Transmittal-Letter.pdf>

Joint Parties: \*No, the DEF SPP 2023 should not be approved without modification. The programs are not cost-effective, compliant or prudent to undertake. Except for the programs/projects that are subject to the, the plan should not be approved as filed. Subject to 2021 Stipulation for 2023 and 2024, the adjustments recommended by Kevin J. Mara at TR 685 are required.\*

### **ARGUMENT**

As set out in the argument on Issues 2 and 5, DEF has not demonstrated that its proposed SPP programs pass a cost-effectiveness test. Several of the non-core programs fail the Two-Prong test. The Commission should nevertheless allow the company to proceed with the Distribution Feeder Hardening and Distribution Lateral Hardening programs at the levels shown in the table on page 685, as discussed in Issue 5 and included below.

As demonstrated in the argument in Issue 2 for the Distribution Self Optimizing Grid, Distribution Underground Flood Mitigation, Transmission Structure Hardening, Transmission Substation Flood Mitigation, and Transmission Substation Hardening programs, the Commission should only authorize inclusion of these programs, which fail the Two-Prong test, to continue in the SPP for the years 2023 and 2024. For the years 2025 and beyond, they should be excluded. The Transmission Loop Radial-Fed Substation program fails the Two-Prong test and should be excluded from the SPP for its initial year of operation in 2025 and beyond.

The Transmission and Distribution Vegetation Management programs should remain in the plan as proposed by DEF.

Capital	Total 2023-2032 SPP \$Millions	Reductions Proposed by Mara	Net 2023-2032 SPP \$Millions	Reason for Reduction
Distribution - Feeder Hardening	\$ 2,027	\$ (500)	\$ 1,527	Limit impact to customers
Distribution - Lateral Hardening	\$ 2,931	\$ (700)	\$ 2,231	Limit impact to customers
Distribution - Self-Optimizing Grid (SOG)	\$ 340	\$ (340)	\$ -	Does not comply with 25-6.030
Distribution - UG Flood Mitigation	\$ 15	\$ (15)	\$ -	Does not comply with 25-6.030
Distribution - Vegetation Management	\$ 23	\$ -	\$ 23	
Transmission - Structure Hardening	\$ 1,603	\$ (200)	\$ 1,403	Does not comply with 25-6.030
Transmission - Substation Flood Mitigation	\$ 38	\$ (38)	\$ -	Does not comply with 25-6.030
Transmission - Loop Radially Fed Substation	\$ 82	\$ (82)	\$ 0	Does not comply with 25-6.030
Transmission - Substation Hardening	\$ 133	\$ (133)	\$ -	Does not comply with 25-6.030
Transmission - Vegetation Management	\$ 126	\$ -	\$ 126	
<b>Total Capital</b>	<b>\$ 7,318</b>	<b>\$ (2,008)</b>	<b>\$ 5,310</b>	

### **JOINT PARTIES' POST-HEARING LEGAL ISSUE**

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

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

This issue emanates from the Commission's decision to adopt *in toto* the Prehearing Officer's Order granting FP&L's Motion to Strike certain portions of the testimony of the public's witness Lane Kollen testifying on behalf of the OPC, which, as noted above, is referred to as the Motion Order. The Motion Order fundamentally compromised the hearing process, and likely the outcome, due to the exclusion of the public's expert testimony that would have otherwise aided the Commission in interpreting and implementing the SPP Statute and SPP Rule for the benefit of customers. By not considering the full testimony of the public's witnesses, the Commission also lost the opportunity to protect customers from an endless escalation of costs, year-over-year. The SPP Rule implemented the Legislature's expectation that the Commission take a role in ensuring that the rate trajectory was reasonable, and that there was an appropriate benefit to cost relationship resulting from the plan approval. Rule 25-6.030(3)(d)1., F.A.C. The Motion Order additionally

runs afoul of Article II, Section 3 of the Florida Constitution which requires a delegation of legislative authority to contain adequate guidelines to protect against unbridled agency discretion.

During the DEF portion of the hearing, counsel for FPL interjected during the cross-examination of DEF witness Lloyd. Despite his objection that the DEF testimony should not contaminate the FPL record, by interjecting his comments, he voluntarily highlighted a contrast among utilities in the interpretation of the statute and rules. The testimony in this docket reflected a significantly different take on the actual implementation of the SPP Statute and SPP Rule that contrasts to the positions taken in support of the Motion Order. The sharp contrast between DEF's recognition that benefits and costs should be compared (TR 135-136) grinds harshly against the company's adoption of the FPL thesis that no such requirement exists. Likewise, DEF's agreement that claimed benefits should be given a monetary value (TR 136-139) is sharply at odds with the objection lodged by FPL, adopted by DEF, and incorporated in the Motion Order ruling.

While these inconsistencies cannot be reconciled across the siloed records of the consolidated hearing that was governed by a common set of guidelines established by FPL, echoed by DEF and adopted by the Commission, they do highlight a fatal flaw in the decision-making. By blocking out only the public's views and its ability to put on a significant portion of its case due to the stricken testimony, the Commission has crippled its own ability to follow the law. By pre-emptively deciding that only the IOUs are entitled to introduce testimony which interprets the SPP Statute and SPP Rule – and inconsistently at that – the agency has greatly disadvantaged the ratepaying public they are required by law to protect.

FPL's Motion to Strike cast a long, dark cloud over the hearing and injected a level of harm and exclusion that prejudged the outcome due to the exclusion of the public's expert testimony that would aid the Commission in interpreting and implementing the SPP Statute and

SPP Rule for the benefit of customers. This outcome exposes the Commission's action and the statute itself to running afoul of Article II, Section 3 of the Florida Constitution which requires delegation of legislative authority to contain adequate guidelines protecting against unbridled agency discretion.

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

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

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

Since that the SPPCRC is not an authorization to proceed and the SPP approval before the Commission in this proceeding seeks such authorization, the Commission cannot summarily deem

prudence to exist merely by fiat or waving a public interest wand over the SPPs. The Florida Supreme Court has said as much recently:

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

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

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

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

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

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

(Emphasis added.) This correlation is specifically confirmed for this docket in Duke Energy Florida's Motion to Strike Testimony, filed July 19, 2022, at pages 2-3:

2. DEF has had an opportunity to review FPL's motion and arguments and has determined that FPL's arguments apply equally to Mr. Kollen's amended testimony filed in this docket, which includes virtually identical passages and arguments to the testimonies filed by Mr. Kollen in each of the Storm Protection Plan dockets. *See* doc. no. 04308-2022.

3. As the SPP dockets have been consolidated for purposes of hearing, *see* Order No. PSC- 2022-0119-PCO-EI (the "OEP"), and to eliminate any confusion in the common record that will be developed at hearing, DEF believes that the Commission's action on FPL's motion should consistently apply to Mr. Kollen's testimony in DEF's and the other companies' dockets as well. To that end, DEF hereby incorporates FPL's Motion and Arguments by reference as if fully set forth herein.

(Footnotes omitted). Accordingly, the table was set for an asymmetrical hearing where the Commission ordered that no testimony would be taken from the public's witness Kollen on issues of the proper way to interpret and apply the statute and rules while granting DEF and other companies free reign to provide their varying opinions of different ways to read and apply the SPP Statute and SPP Rule.

The imbalance was evident in the way IOU witnesses were allowed to put forward varying (and contrary) interpretations of the areas of the regulatory interpretations. This conflict in interpretation and implementation was interjected into the DEF docket<sup>14</sup> by counsel for FPL when

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<sup>14</sup> The point at which FPL belatedly and improperly sought to intervene in Docket 20220050-EI was specifically during the cross examination (but immediately preceding DEF counsel's opportunity to conduct re-direct examination) of DEF witness Lloyd after that witness had explained his and DEF's view that that the SPP Rule required quantification of benefits and a comparison of them. Inexplicably, while seeking to keep the facts of there being differing and reasonable interpretations of the statute and rules from evincing arbitrary exclusion of OPC expert Kollen's testimony in Docket No, 20220051-EI, FPL counsel exquisitely made the case in this docket that there are multiple interpretations of Section 366.96, Fla. Stat. and Rule 25-6.030, F.A.C. In relevant part, FPL counsel stated:



he asserted, nay demanded, the right to cross-examine DEF witnesses on their disagreement with FPL.<sup>15</sup> When combined with the rulings in the Motion Order, the FPL Motion to Strike that was brought into this docket by DEF adopting it *in toto*, this tactic by FPL reveals that the Commission acted arbitrarily when allowing utility testimony on the matter, but excluding the public's testimony on the same matter. Both companies were allowed to opine freely and broadly on the interpretation of the pertinent statute and rules, the public's expert Kollen, a 40 year operational and consulting participant in the world of interpreting and implementing utility regulatory requirements, was prevented from providing expert testimony on a different but entirely reasonable regulatory interpretation of the same statute and rules on which the utility witnesses testified.

This fundamentally flawed hearing process will likely require reversal of any decision that fails to consider this testimony. Section 120.68(7)(a), (d), and (e).<sup>16</sup>

*The Commission made preordained outcome determination on an essential element of the case prior to hearing in contravention of Section 120.68(7)(a), Fla. Stat.*

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

TR 189.

<sup>15</sup> Intervention is not allowed after a point 20 days before the start of the hearing. Rule 28-106.205(1), F.A.C.

<sup>16</sup> In relevant part the law provides that:

(7) The court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:

(a) There has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts;

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(d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action; or

(e) The agency's exercise of discretion was:

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4. Otherwise in violation of a constitutional or statutory provision;

but the court shall not substitute its judgment for that of the agency on an issue of discretion.

The Commission violated this subsection (a), first by the Prehearing Officer's issuance of the Motion Order and then by the full Commission rejecting reconsideration. These two erroneous decisions resulted in the public's expert Kollen not being allowed to provide his expert opinion evidence that supports a reasonable – but different – regulatory interpretation of the SPP requirements than the one the IOUs wish the Commission to adopt. By barring the introduction of such evidence by the public's witness into evidentiary record, the Commission in essence took agency action and made its decision prior to hearing. The Commission took no record evidence from the public<sup>17</sup> on disputed facts regarding the necessary determinations of prudence of the proposed programs, the valuation of statutorily required benefits, the statutorily required cost-effectiveness of programs, or an objective measure of the proper balancing of costs and benefits and the proper accounting that should underlie the appropriate estimation of rate impacts. The Commission now does not have the option to resort to the excluded, yet proffered testimony, since it was taken for the extremely narrow and limited purposes of preserving the appellate record.<sup>18</sup>

*The Commission failed to interpret Section 366.96, Fla. Stat., in contravention of Section 120.68(7)(d).*

Substantively, the Commission has failed to conform its actions to subsection (d) by arbitrarily, and thus erroneously, failing to effectively interpret Section 366.96, Fla. Stat. The error is that the Commission, without the benefit of the stricken testimony of Mr. Kollen, was thwarted when interpreting the statutes. Specifically, this error occurred when the full Commission barred consideration of the portion of Mr. Kollen's testimony – based on the facts surrounding the SPP –

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<sup>17</sup> The allowance of proffered testimony and some limited cross examination as a proffer did not provide the public a full opportunity to provide evidence on disputed facts.

<sup>18</sup> See, TR 1093, “[W]hat is being proffered for appellate purposes...” Also see, TR 1187 “[F]or purposes of preserving a proffered record for appellate review ...”

that would have provided facts and a renowned expert's common-sense regulatory interpretation that meets a reasonable man standard about methods that the Commission can utilize to limit rate increase. The Legislature mandated that the Commission consider costs and benefits of the programs and projects in making the determinations of the plans. Section 366.96(4), Fla. Stat.

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

The approach taken by the Commission cannot be considered an "interpretation" as contemplated by Section 366.96(a) and (d), Fla. Stat if the agency blocks the public's evidence and perspective. The Motion Order foreclosed the Commission from (1) receiving evidence of a spectrum of views, (2) considering that evidence, and then (3) seriously weighing it before making a reasoned interpretation and application of the SPP statute. This calls into question the Commission's ability to faithfully interpret the statute. The short record reference below underscores the point the public's witness Kollen's testimony directed to whether DEF's SPP complied with the pertinent statutory and rule should have been allowed:

*The SPP 2023 is consistent with and complies with all the requirements of both Section 366.96, Florida Statutes ("SPP statute"), and Rule 25-6.030, F.A.C. ("SPP rule"). TR 122.*

*My testimony presents DEF's Storm Protection Plan for the planning period of 2023 through 2032 and shows that DEF's SPP 2023 meets the requirements of both the SPP statute and rule. TR 123.*

The Guidehouse experts' deep level of industry experience in the Distribution and Transmission systems, climate resilience, risk mitigation, benefits-cost analysis, and predictive analytical techniques provide *the expert support necessary to build a comprehensive Storm Protection Plan that meets the requirements of the SPP statute and rule.* TR 124.

Without the prospect of conflicting testimony from OPC witness Kollen, DEF witnesses were emboldened to opine that programs could be included in the SPP if they would make the grid “better resist” severe weather, or “simply perform better.” TR 1270. They asserted that these programs could be included in the SPP and proposed for evaluation on a holistic, “integrated” basis. TR 1269, 1270, 1288.

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

Article II, Section 3 provides that:

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

The leading case of *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla 1978), stands for the proposition that it is unlawful for the Legislature to delegate its powers to an agency without providing adequate guidance. This provision has been applied to the statutes governing the Commission. *Microtel Inc. v. Florida Public Com.*, 464 So. 2d 1189; *Microtel Inc. v. Florida Public Com.*, 483 So. 2d 415. In short, the Commission's hands are not tied. It does not have to accept virtually anything that the utilities can squeeze into the SPP recovery. Indeed, such a narrow view of the Commission's options could be seen as the agency interpreting its mandate without an effective or complete delegation of authority. This may indicate that the Legislature did not provide sufficient guidance, or direction about the rate setting related to the SPP cost incurrence and

recovery (re: cost-effectiveness, benefit determination, public interest and prudence). The statutory interpretation offered by the company's non-lawyers is an incorrect and unwarranted invitation to unbridled ratemaking with no legislative guidance provided to limit the amount or trajectory of the expenditures and rates. This would be especially problematic if the Commission concludes it is required to set aside the limitations found elsewhere in Chapter 366, Fla. Stat., that require it to only approve fair, just and reasonable rates and prudent costs. See, Sections 366.06, 366.041, 366.05, and 366.06, Fla. Stat.

The errors described above have fundamentally and negatively impacted the fairness of the proceeding and the neutral and unbiased consideration of the DEF SPP. The Joint Parties request that the Commission re-open the record and provide all parties a full opportunity to present evidence, offer expert opinion testimony and to conduct cross-examination, consistent with Section 120.57(1)(b), Fla. Stat., on the aspects of the case that were erroneously subjected to the Motion Order.

**ISSUE 11:** Should this docket be closed

Joint Parties: \*The Docket should remain open for DEF to amend their filing consistent with the modifications the commission orders. OPC has raised a legal issue regarding the Order striking Mr. Kollen's testimony. The legal issue requires resolution before the docket is closed. In connection with the legal issue, both parties have made evidentiary proffers which must be considered if OPC prevails on the legal issue.\*

Dated this 6<sup>th</sup> day of September, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**  
**DOCKET NO. 20220050-EI**

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

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