

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Storm protection plan cost recovery
clause.

DOCKET NO. 20230010-EI

FILED: October 13, 2023

POST-HEARING BRIEF OF THE OFFICE OF PUBLIC COUNSEL

The Citizens of the State of Florida, through the Office of Public Counsel (“OPC”), pursuant to the Order Establishing Procedure in this docket, Order No. PSC-2023-0090-PCO-EI, issued February 15, 2023, the First Order Revising Order Establishing Procedure, Order No. PSC-2023-0105-PCO-EI, issued March 20, 2023, and the Order Granting Staff’s Motion to Modify Order Establishing Procedure, Order No. PSC-2023-0178-PCO-EI, issued June 12, 2023, hereby submit this Post-Hearing Brief.

STATEMENT OF BASIC POSITION

The Storm Protection Plan Cost Recovery Clause (“SPPCRC”) is the second step of the two-step ratemaking process whereby the Commission sets the factors necessary for recovery for the annual costs for implementing the Companies’ approved Storm Protection Plans (“SPPs”) required as a prerequisite of recovering the SPP costs through a charge on the bill. The process of reviewing and implementing an SPP is an indispensable and necessary step in the ratemaking process within the meaning and intent of Sections 366.06(1) and 366.96, Florida Statutes. Section 366.06(1), Florida Statutes, establishes the Commission’s ratemaking procedure for public utilities in the State of Florida. Upon application for a change in rates by a utility:

The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for

ratemaking purposes and shall be the money honestly and **prudently** invested by the public utility company in such property used and useful in serving the public, less accrued depreciation, and shall not include any goodwill or going-concern value or franchise value in excess of payment made therefor.

Id. (emphasis added). Each utility made an application for change in rates by filing a petition in this case.

The requirement that the Commission evaluate the prudence of investments in all ratemaking requests before the Commission is embedded in the Commission's legislative mandate. This requirement to consider the prudence of the investments necessitates a two-step process which includes a prospective review during the Commission's evaluation of the utilities' SPPs and a retrospective review of the prudence of costs to implement an approved SPP. If the Commission is setting rates, it must consider, among other things, the prudence of making the investment at issue (including the decisions behind the timing, magnitude and location of the investment(s)), regardless of whether that requirement is explicitly stated in the other provisions of Chapter 366, Florida Statutes, or the Commission's rules. Section 366.96, Florida Statutes, sets forth the process for review and approval of proposed SPPs and the process for recovery of the prudent costs of implementing an approved SPP. Section 366.96(2)(c), Florida Statutes, defines "transmission and distribution storm protection plan costs" as "the reasonable and prudent costs to implement an approved transmission and distribution storm protection plan." The SPPCRC structure only allows the Commission to conduct a retrospective determination of the prudence of the costs expended to implement the utilities' approved SPPs.

The OPC facilitated Type 2 stipulations on *only* the SPPCRC *factors* in order to not stand in the way of the collection of costs authorized by the Commission in 2023. In other words, OPC takes no position on the *factors only* for the four utilities, nor does OPC have the burden of proof

related to them. As such, the OPC took no position on the Commission taking action in approving the proposed stipulations between the Company and another party or staff as to a final resolution of these factors.¹ Accordingly, OPC will be briefing our positions on Issues 1 through 4.

Further, OPC maintains positions in this docket consistent with and informed by the unresolved statutory interpretation issues currently pending before the Florida Supreme Court in Case No. SC 2022-1733 (consolidated). The challenge to the statutory interpretation underlying the orders on appeal in Florida Supreme Court Case No. SC 2022-1733 (consolidated) is not subject to a stay.

STATEMENT OF FACTUAL ISSUES AND POSITIONS

ISSUE 1: **What amounts should the Commission approve as the Utilities’ final 2022 prudently incurred costs and final jurisdictional revenue requirement true-up amount for the Storm Protection Plan Cost Recovery Clause?**

OPC: *The Commission failed to make findings that the SPP and the programs and projects contained therein are prudent to undertake and seek recovery pursuant to Section 366.06(1), Florida Statutes. Therefore, no amount of FPUC’s 2022 costs have yet been determined to be “prudent.” OPC has taken no position on the 2022 costs, which allowed the Commission to approve Type 2 stipulations on the *factors only*. For FPL, DEF, and TECO, OPC takes no position on the 2022 factors.*

ARGUMENT:

For Florida Power & Light (“FPL”), Duke Energy Florida (“DEF”), and Tampa Electric Company (“TECO”), OPC takes no position on the 2022 factors that are the subject of the 2020 Stipulation and Settlement Agreements approved in Order No. PSC-2020-0293-AS-EI. For Florida Public Utility Company (“FPUC”), OPC takes no position on the 2022 factors. For the

¹ No person is authorized to state that OPC is a participant in, or party to, a stipulation on these issues, either in this docket, in an order of the Commission or in a representation to a Court.

reasons discussed further in Issue 2 related to all utilities, FPUC has failed to meet its burden of proof that the costs of its SPP programs and projects incurred in 2022 were prudent.

Section 366.06(1), Florida Statutes, requires the Commission to evaluate the prudence of investments in all ratemaking requests before it, as this is embedded in the Commission's legislative mandate. The Commission failed to make a finding that the SPP and the programs and projects contained therein are prudent to undertake and seek recovery pursuant to Section 366.06(1), Florida Statutes. Therefore, no amount of FPUC's 2022 costs has yet been determined to be "prudent." OPC has taken no position on the 2022 factors, which allowed the Commission to approve Type 2 stipulations on the *factors only*. TR 233. For FPL, DEF, and TECO, OPC takes no position on the 2022 factors.

ISSUE 2: What amounts should the Commission approve as the Utilities' reasonably estimated 2023 costs and estimated jurisdictional revenue requirement true-up amount for the Storm Protection Plan Cost Recovery Clause?

OPC: *The Commission failed to make a finding that the SPP and the programs and projects contained therein are prudent to undertake and seek recovery pursuant to Section 366.06(1), Florida Statutes. Therefore, no amounts for the Utilities' 2023 costs have yet been determined to be "prudent." However, OPC has taken no position on these costs, which allowed the Commission to approve Type 2 stipulations on the *factors only*. *

ARGUMENT:

The SPPCRC is the step in the ratemaking process where the Commission sets the factors necessary to recover the annual costs for implementing the Companies' approved SPPs. The process of reviewing and implementing an SPP is an indispensable and necessary step in the ratemaking process within the meaning and intent of Sections 366.06(1) and 366.96, Florida

Statutes. Section 366.06(1), Florida Statutes, establishes the Commission's rate-making procedure for public utilities in the State of Florida. Upon application for a change in rates by a utility:

The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and **prudently** invested by the public utility company in such property used and useful in serving the public, less accrued depreciation, and shall not include any goodwill or going-concern value or franchise value in excess of payment made therefor.

Id. (emphasis added). Each utility made an application for change in rates by filing a petition in this case.

The requirement that the Commission evaluate the prudence of investments in all ratemaking requests before the Commission is embedded in the Commission's legislative mandate. This requirement to consider the prudence of the investments necessitates a two-step process which includes a prospective review during the Commission's evaluation of the utilities' SPPs and a retrospective review of the prudence of costs to implement an approved SPP. If the Commission is setting rates, it must consider, among other things, the prudence of making the investment at issue (including the decisions behind the timing, magnitude and locations of the investment(s)), regardless of whether that requirement is explicitly stated in the other provisions of Chapter 366, Florida Statutes, or the Commission's rules. Section 366.96, Florida Statutes, sets forth the process for review and approval of proposed SPPs and the process for recovery of the prudent costs of implementing an approved SPP. Accordingly, Section 366.96(2)(c), Florida Statutes, defines "transmission and distribution storm protection plan costs" as "the reasonable and prudent costs to implement an approved transmission and distribution storm protection plan." The SPPCRC

structure only allows the Commission to conduct a retrospective determination of the prudence of the costs expended to implement the utilities' SPPs.

The OPC facilitated Type 2 stipulations on *only* the SPPCRC *factors* in order to not stand in the way of the collection of costs authorized by the Commission in 2023. Each Company agreed to stipulate the entry of questions and their responses and objections in lieu of cross-examination as Hearing Exhibits 43 through 46.

Each Company was asked in two separate questions, Number 3 and Number 4, whether they would agree that when the Commission approved their SPP programs and projects, the Commission did not make specific findings that the approved projects and programs of that SPP are prudent or make any findings that the projects and programs of the SPP are prudent. H.E. 43-46. FPL objected on relevance to both questions. However, FPL witness Jarro agreed that the Commission did not make any specific prudence findings on the specific programs and projects, but found their SPP when taken as a whole was in the public interest to both questions. H.E. 45. DEF objected on the basis of relevance to both questions. Nevertheless, DEF witness Menendez testified that the Commission found the SPP was in the public interest and that Order No. PSC-2022-0388A-FOF-EI addressed any findings the Commission made to both questions. H.E. 46. TECO objected on grounds that the answer called for a legal conclusion to both questions and as well as relevance to “any findings” question. Yet, TECO witness Sweat stated that he was unaware of the Commission making any specific findings or any findings. He added under the “any findings” question that the SPP programs and projects are often detailed and challenging to assess. Witness Sweat asserted that TECO and their construction partner work closely to ensure projects are being completed in a cost-effective and prudent manner. H.E. 43. FPUC objected on the basis of relevance to both questions. Nonetheless, FPUC witness Bennett agreed that no specific

findings of prudence were made by the Commission for the SPP projects and programs. Rather, the Commission found the SPP was in the public interest with the exception of the programs found to be outside the storm protection activities to both questions. H.E. 44. The record testimony shows that no findings of prudence were found for the individual projects or programs prior to the implementation of SPP and seeking cost recovery. H.E. 43-46. Only TECO acknowledged an obligation to implement these programs in a cost-effective and prudent manner.

Next, the Companies were asked in Question 5 if they agreed that there is a difference between a Commission determination that a Company's managerial and operational actions were prudent and a Commission determination that a Company was prudent in how it spends funds. FPL objected on grounds the answer called for a legal conclusion. FPL witness Jarro testified that it would depend on specific facts, so he didn't agree generally; however, he did agree that the question of whether to do something, what that something should be, and how that something is performed are different questions. H.E. 45. DEF objected on grounds the answer called for a legal conclusion. Nevertheless, DEF witness Menendez testified that it was determined by Legislature to be in the state's interest to harden electric utility infrastructure from extreme weather events. He further stated that the SPPCRC Rule, Rule 25-6.031, (Florida Administrative Code ("F.A.C.")) addresses the determination of prudence to be made on the actual SPP costs as part of the SPPCRC proceeding. H.E. 46. TECO objected on grounds that the answer called for a legal conclusion. Yet, TECO witness Sweat stated he did not agree. He testified that it seemed reasonable that if the Commission determines that the Company's managerial and operational actions were prudent, then this would also translate into the Company being prudent in how it spends the funds. H.E. 43. FPUC objected on grounds the answer called for a legal conclusion. Nonetheless, FPUC witness Bennett agreed that there is a difference in the analysis, but perhaps not the ultimate determination

of prudence. To some extent, he said it depends on circumstances. He further added a determination that an expenditure was prudent can be a good indicator that the underlying managerial and operational actions were prudent, but the analysis of the prudence of actions as compared to the prudence of spending can be different. H.E 44. A close reading of the Companies' responses confirms that there is a difference or can be a difference in the determination of whether the managerial and operational actions to implement a plan are prudent than if the money was spent prudently. The most significant difference is that a "determination of prudence" of managerial and operation actions to implement a plan are prospective prudence reviews, rather than the retrospective prudence reviews once the money has been spent.

In Question 6, these Companies were asked if they would agree that there is a qualitative difference between a Commission determination that a Company's managerial decision(s) to include specific projects or programs in the submitted and approved SPP were prudent and a Commission determination that a Company was prudent in how it spent funds in implementing a specific project or program. H.E. 43-46. FPL objected on the basis of relevance and on grounds that the answer called for a legal conclusion. However, FPL witness Jarro agreed. DEF objected on grounds that the answer called for a legal conclusion. Nevertheless, DEF witness Menendez testified that it was determined by the Legislature to be in the state's interest to harden electric utility infrastructure from extreme weather events. He further stated that his understanding is that the SPPCRC Rule, Rule 25-6.031, (F.A.C.), addresses the determination of prudence to be made on the actual SPP costs as part of the SPPCRC proceeding. H.E. 46. TECO objected on grounds that the answer called for a legal conclusion. Yet, TECO witness Sweat stated his expertise was in the operation aspects, but it was his opinion that if the Commission were to determine a company was not prudent in how it spent funds on a specific project then the Commission would be able to

address that specific situation with that company. H.E. 43. FPUC objected on relevance. Nonetheless, FPUC witness Bennett agreed that there is a difference in the analysis, and therefore a difference in the determination, but he was not sure whether there is a “qualitative” difference. H.E. 44. Again, the responses to the question reaffirm that there is a different analysis to be done, one prospective in nature on managerial decisions, and one retrospective in nature on how the money was spent.

Question 7 addressed if it was the Company’s understanding that prudence of the Company’s decision-making to include specific projects or programs in the submitted and approved SPP is an issue in this SPPCRC docket. FPL objected on grounds that the answer called for a legal conclusion. However, FPL witness Jarro testified that no, that was not his understanding. DEF objected on grounds that the answer called for a legal conclusion. Nevertheless, DEF witness Menendez testified it was his understanding that the issues to be addressed in the current SPPCRC docket (20230010-EI) will be determined at the SPPCRC Prehearing. H.E. 46. TECO objected on grounds that the answer called for a legal conclusion. Yet, TECO witness Sweat stated he did not believe that the prudence of Tampa Electric’s decision-making to include specific projects or programs is an issue in the SPPCRC docket. He further stated that projects that were submitted and approved by the Commission undergo engineering by their contractor and TECO’s SPP team and are overseen during construction and have on-going management reviews throughout the project to ensure they are managed in a prudent manner. H.E. 43. FPUC witness Bennett testified that was not his understanding. Based on the Companies’ responses, it seems clear that it was not generally believed that the prudence of a Company’s decision-making, to include specific projects or programs in the submitted and approved SPP, was an issue in this SPPCRC docket.

The Companies were asked in Question 8 that if there is no opportunity to challenge the prudence of the Company's actions to implement the projects and programs of an approved SPP in the SPPCRC, would they agree that the appropriate docket to challenge the prudence of SPP projects and programs would have been the SPP docket where the programs and projects were approved. FPL objected on grounds the answer called for a legal conclusion. However, FPL witness Jarro testified that it was his understanding that the SPP docket is the appropriate place for the Commission to determine whether an SPP, taken as a whole, is in the public interest. He stated that any challenges to whether the SPP plan is in the public interest would be made in the SPP docket. He further testified that it was also his understanding that the SPPCRC docket is the appropriate place for the Commission to review and determine the reasonableness of the individual projects and associated costs included in FPL's SPPCRC filings. H.E. 45. DEF objected on grounds the answer called for a legal conclusion. Nevertheless, DEF witness Menendez testified that it was his understanding that the SPP docket is the appropriate venue for the Commission to determine whether DEF's SPP, as a whole, is in the public interest. He continued that any challenges to whether DEF's SPP is in the public interest are appropriately made in that proceeding. He also testified that the SPPCRC docket, consistent with Rule 25-6.031, F.A.C., is the appropriate docket for the Commission to review and determine the prudence of actual project costs and implementation. H.E. 46. TECO objected on grounds the answer called for a legal conclusion. Yet, TECO witness Sweat stated the in his opinion if the Commission determines a Company has not acted prudently, they have the authority to address it in the clause docket. H.E. 43. FPUC objected on relevance. Nonetheless, FPUC witness Bennett testified that it was his understanding that the SPP docket is the appropriate place for the Commission to determine if the SPP projects and programs are in the public interest, while the SPPCRC docket is where the

prudence of FPUC's actual spending and the reasonableness of its projected spend would be determined. H.E. 44. While the Companies do recognize that the Commission determines that SPP in whole is the "public interest" in the SPP docket, they, like the Commission, artificially bifurcated the prudence determination. The Commission has an obligation under the Section 366.06(1), Florida Statutes, to determine prudence in ratemaking, which is embedded in its obligation to determine if the SPPs are "in the public interest."

In closing the loop with Question 12, the Companies were asked if they would agree that any determination of prudence of the SPP costs in a SPPCRC hearing is limited to a hindsight determination by the Commission of whether the money was spent in accordance with an approved SPP, and will not be based in any way on an advance determination by the Commission whether it would be prudent to spend money to implement a specific project or program. FPL objected on grounds the answer called for a legal conclusion. However, FPL witness Jarro testified that it was his understanding that the determination of whether a project and its associated costs was executed in a reasonable and prudent manner is made in the SPPCRC docket. He disagreed that programs in the SPP are not reviewed by the Commission before the Company begins spending money on them. He asserted that those programs and FPL's SPP plan, as a whole, have been challenged by OPC, reviewed by the Commission, and have been deemed to be in the public interest in the SPP docket. H.E. 45. DEF objected on grounds the answer called for a legal conclusion. Nevertheless, DEF witness Menendez testified that it was his understanding that Rule 25-6.031, F.A.C., states that the projected SPP costs in the SPPCRC proceeding will be reviewed for reasonableness and a prudence determination is performed on actual costs. H.E. 46. TECO objected on grounds the answer called for a legal conclusion. Yet, TECO witness Sweat agreed that until a project is properly assessed in the clause, it is not feasible for the Commission to determine if a project is

prudent or not. H.E. 43. FPUC objected on relevance and on grounds the answer called for a legal conclusion. Nonetheless, FPUC witness Bennett testified that the review and determination of the reasonableness and prudence of the SPP spending is limited to the confines of the SPPCRC hearing. He did not believe it is an entirely hindsight review, though, because the SPP has been reviewed and approved by the Commission in a prior proceeding in which estimated costs were supplied per project and program. Thereafter, he stated that the Commission reviews and assesses whether projected costs are reasonable in the SPPCRC before determining the prudence of money actually spent to implement specific projects and programs as approved. He testified it was his understanding that costs not deemed reasonable and prudent will be disallowed for recovery. H.E. 44. At least the FPUC witness recognized that there is a prospective review where the Commission needs to consider the estimated costs of implementing the programs and projects as part of the ratemaking process. However, none of the Companies, nor the Commission, have done this prospective review of the prudence of the requested SPP programs and projects based on a determination of the cost-effectiveness of moving forward with them in the SPP docket. For the SPPs to be in the public interest, the rates produced from implementing the programs and projects need to be fair, just, and reasonable. Rates can only be determined to be fair, just and reasonable when the costs they are based on are determined to be prudent and cost-effective to implement before costs are incurred. The current hindsight review of costs without a robust, upfront prudence review of the programs and projects themselves has created a very real danger of allowing costs to become unaffordable for customers, because looking at costs after they have been incurred is too late.

Section 366.06(1), Florida Statutes, requires the Commission to evaluate the prudence of investments in all ratemaking requests before it, which is embedded in the Commission's

legislative mandate. The Commission failed to make a finding that the SPP and the programs and projects contained therein are prudent to undertake and seek recovery pursuant to Section 366.06(1), Florida Statutes. Therefore, no amounts for the Utilities' 2023 costs have yet been determined to be "prudent." However, OPC has taken no position on these costs, which allowed the Commission to approve Type 2 stipulations on the *factors only*. TR 233.

ISSUE 3: What amounts should the Commission approve as the Utilities' reasonably projected 2024 costs and projected jurisdictional revenue requirement amount for the Storm Protection Plan Cost Recovery Clause?

OPC: * The Commission failed to make a finding that the SPP and the programs and projects contained therein are prudent to undertake and seek recovery pursuant to Section 366.06(1), Florida Statutes. Therefore, no amounts for the Utilities' 2024 costs have yet been determined to be "prudent." However, OPC has taken no position on these costs, which allowed the Commission to approve Type 2 stipulations on the *factors only*. *

ARGUMENT:

As discussed in Issue 2 and incorporated herein, the SPPCRC is the step in the ratemaking process where the Commission sets the factors necessary for recovery for the annual costs for implementing the Companies' approved SPPs. However, the process of reviewing and implementing an SPP is an indispensable and necessary step in the ratemaking process within the meaning and intent of Sections 366.06(1) and 366.96, Florida Statutes. Section 366.06(1), Florida Statutes, requires that:

The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and **prudently** invested by the public utility company in such property used and useful in serving the public, less accrued depreciation, and

shall not include any goodwill or going-concern value or franchise value in excess of payment made therefor.

Id. (emphasis added).

The requirement that the Commission evaluate the prudence of investments in all ratemaking requests before the Commission is embedded in the Commission's legislative mandate regardless of whether that requirement is explicitly stated in the other provisions of Chapter 366, Florida Statutes, or the Commission's rules. This requirement to consider the prudence of the investments necessitates a two-step process, which includes a prospective review during the Commission's evaluation of the utilities' SPPs and a retrospective review of the prudence of costs to implement an approved SPP. Accordingly, Section 366.96(2)(c), Florida Statutes, defines "transmission and distribution storm protection plan costs" as "the reasonable and prudent costs to implement an approved transmission and distribution storm protection plan."

The OPC facilitated Type 2 stipulations on *only* the SPPCRC *factors* in order to not stand in the way of the collection of costs authorized by the Commission in 2023. Each Company agreed to stipulate the entry of questions and their responses and objections in lieu of cross-examination as Hearing Exhibits 43 through 46.

Each Company was asked in Question 9 whether they would agree that the projected 2024 SPP costs are based on programs or projects that have not been subjected to a prudence review of any type. FPL witness Jarro testified that he agreed. He further stated that the reasonableness and prudence of the 2024 projects and associated costs included in the Company's SPPCRC filing will be reviewed in the annual SPPCRC dockets. H.E. 45. DEF objected on grounds the answer called for a legal conclusion. Nevertheless, DEF witness Menendez testified it was his understanding that Rule 25-6.031, F.A.C., states that the projected SPP costs in the SPPCRC proceeding will be

reviewed for reasonableness. H.E. 46. TECO witness Sweat stated he agreed that when the projects costs for 2024 are actually completed, then they are subjected to a prudence review. H.E. 43. FPUC witness Bennett testified that he agreed that the projected 2024 SPP costs have not been subjected to a prudence review. He said that while he was not familiar with every type of prudence review, FPUC's projected 2024 costs are based upon programs determined by the Commission to be "in the public interest" rather than prudent. H.E. 44. All the utilities confirmed that programs and projects on which the 2024 costs are based have not been subject to any type of prudence review.

In Question 10, the Utilities were asked whether they agree that the projected 2024 SPP costs have not yet been determined to be prudent in amount. FPL witness Jarro testified that he agreed and referred to his response to Question 9. H.E. 45. DEF witness Menendez testified that he did not know what was meant by the phrase "prudent in amount," but reiterated his response to Question 9. H.E. 46. TECO witness Sweat stated again that he agreed that when the projects costs for 2024 are actually completed, then they are subjected to a prudence review. H.E. 43. FPUC witness Bennett simply agreed. H.E. 44. Again, the testimony confirms that no prudence review has occurred before the Companies seek recovery of 2024 SPP costs. This lack of any prudence review includes any prospective prudence determination that it is reasonable to incur these costs.

Finally, Question 11 addressed whether the Utilities would agree that projected 2024 SPP costs in this 2023 hearing cycle will not be subject to a prudence determination before the final true-up occurs in the 2025 hearing cycle. FPL witness Jarro testified that he agreed that the 2024 projects and associated costs included in FPL's SPPCRC filing in this docket will be subject to a prudence review and final true-up in the 2025 SPPCRC docket. H.E. 45. DEF objected on grounds the answer called for a legal conclusion. Nevertheless, DEF witness Menendez testified that it was

his understanding that Rule 25-6.031, F.A.C., states that the projected SPP costs in the SPPCRC proceeding will be reviewed for reasonableness and a prudence determination is performed on actual costs. H.E. 46. TECO witness Sweat reiterated that he agreed that when the projects costs for 2024 are actually completed, then they are subjected to a prudence review. H.E. 43. FPUC witness Bennett testified he agreed the projected 2024 SPP costs will be subject to a prudence determination and final true-up in the 2025 hearing cycle. H.E. 44. The Companies confirmed that that these SPP costs are only subject to retrospective review of prudence after the costs have been incurred. In other words, the current review scheme looks for a horse once it is out of the barn and running free. Under the general ratemaking process pursuant to Section 366.06(1), Florida Statutes, the Commission is only to allow recovery of “the money honestly and **prudently** invested by the public utility company” which is determined before these costs are allowed to be placed into rates. (emphasis added). Under the Commission’s and Utilities’ application of Section 366.96, Florida Statutes, the costs of SPP investments are allowed to be recovered through rates, and then only after the costs are incurred and being recovered from customers does the Commission make a retrospective determination as to whether the costs to implement the programs and projects were prudent. Under this flawed interpretation of Section 366.96, Florida Statute, there is a conflict with Section 366.06(1), Florida Statutes, since the Commission has never determined prospectively if it is “prudent” to invest in the SPP programs and projects.

Section 366.06(1), Florida Statutes, requires the Commission to evaluate the prudence of investments in all ratemaking requests before it, which is embedded in the Commission’s legislative mandate. The Commission failed to make a finding that the SPPs and the programs and projects contained therein are prudent to undertake and seek recovery pursuant to Section 366.06(1), Florida Statutes. Therefore, no amounts for the Utilities’ 2024 costs have yet been

determined to be “prudent.” However, OPC has taken no position on these costs, which allowed the Commission to approve Type 2 stipulations on the *factors only*. TR 233.

ISSUE 4: **What are the Storm Protection Plan Cost Recovery Clause total jurisdictional revenue requirements, including true-ups, to be included in the Storm Protection Plan Cost Recovery factors for 2024?**

OPC: *The Commission failed to make a finding that the SPPs and the programs and projects contained therein are prudent to undertake and seek recovery pursuant to Section 366.06(1), Florida Statutes. Therefore, the Commission cannot yet lawfully establish the 2024 cost recovery factors. However, OPC has taken no position on these costs, which allowed the Commission to approve Type 2 stipulations on the *factors only*. *

ARGUMENT:

For the reasons discussed in Issues 2 and 3 and incorporated herein, the Commission failed to make a finding that the SPPs and the programs and projects contained therein are prudent to undertake and seek recovery pursuant to Section 366.06(1), Florida Statutes. Therefore, the Commission cannot yet lawfully establish the 2024 cost recovery factors. However, OPC has taken no position on these costs, which allowed the Commission to approve Type 2 stipulations on the *factors only*. TR 233.

ISSUE 5: **What depreciation rates should be used to develop the depreciation expense included in the total Storm Protection Plan Cost Recovery Clause amounts for 2024?**

OPC: *The last approved depreciation rates for the Companies should be used to calculate any depreciation expense related to SPPCRC recovery in 2024.*

ARGUMENT:

The last approved depreciation rates for the Companies should be used to calculate any depreciation expense related to SPPCRC recovery in 2024.

ISSUE 6: **What are the appropriate jurisdictional separation factors for 2024?**

OPC: *No position.*

ARGUMENT: No position.

ISSUE 7: **What are the appropriate Storm Protection Plan Cost Recovery Clause factors for 2024 for each rate class?**

OPC: *The Commission failed to make a finding that the SPPs and the programs and projects contained therein are prudent to undertake and seek recovery pursuant to Section 366.06(1), Florida Statutes. Therefore, the Commission cannot yet lawfully establish the 2024 cost recovery factors. However, OPC has taken no position on these costs, which allowed the Commission to approve Type 2 stipulations on the *factors only*. *

ARGUMENT:

For the reasons discussed in Issues 2 and 3 and incorporated herein, the Commission failed to make a finding that the SPPs and the programs and projects contained therein are prudent to undertake and seek recovery pursuant to Section 366.06(1), Florida Statutes. Therefore, the Commission cannot yet lawfully establish the 2024 cost recovery factors. However, OPC has taken no position on these costs, which allowed the Commission to approve Type 2 stipulations on the *factors only*. TR 233.

ISSUE 8: **What should be the effective date of the new Storm Protection Plan Cost Recovery Clause factors for billing purposes?**

OPC: *Any Commission-approved SPPCRC factors should be effective no sooner than the first day of the first billing cycle for January 2024.*

ARGUMENT:

Any Commission-approved SPPCRC factors should be effective no sooner than the first day of the first billing cycle for January 2024.

ISSUE 9: **Should the Commission approve revised tariffs reflecting the new Storm Protection Plan Cost Recovery Clause factors determined to be appropriate in this proceeding?**

OPC: *The Commission failed to make a finding that the SPPs and the programs and projects contained therein are prudent to undertake and seek recovery pursuant to Section 366.06(1), Florida Statutes. Therefore, the Commission cannot yet lawfully establish the 2024 cost recovery factors. However, OPC has taken no position on these costs, which allowed the Commission to approve Type 2 stipulations on the *factors only*. *

ARGUMENT:

For the reasons discussed in Issues 2 and 3 and incorporated herein, the Commission failed to make a finding that the SPPs and the programs and projects contained therein are prudent to undertake and seek recovery of costs pursuant to Section 366.06(1), Florida Statutes. Therefore, the Commission cannot yet lawfully establish the 2024 cost recovery factors. However, OPC has taken no position on these costs, which allowed the Commission to approve Type 2 stipulations on the *factors only*.

ISSUE 10: **Should this docket be closed?**

OPC: No.

Dated this 13th day of October, 2023.

Respectfully submitted,

Walt Trierweiler
Public Counsel

/s/ Patricia A. Christensen

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CERTIFICATE OF SERVICE
DOCKET NO. 20230010-EI

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by electronic mail on this 13th day of October 2023, to the following:

Matthew R. Bernier/Stephanie A. Cuello/
Robert Pickels
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