Matthew R. Bernier
ASSOCIATE GENERAL COUNSEL

June 11, 2020

VIA ELECTRONIC FILING

Adam J. Teitzman, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: *Fuel and purchased power cost recovery clause with generating performance incentive factor; Docket No. 20200001-EI*

Dear Mr. Teitzman:

Please find enclosed for electronic filing on behalf of Duke Energy Florida, LLC ("DEF"), DEF's Request for Confidential Classification filed in connection with certain information provided in the Office Of Public Counsel, PCS Phosphate – White Springs, and The Florida Industrial Power Users Group Joint Response To DEF's Exceptions to the Administrative Law Judge's ("ALJ") Recommended Order dated April 27, 2020. The filing includes the following:

- DEF's Request for Confidential Classification
- Exhibit A (Slip Sheet for Confidential Documents)
- Exhibit B (two redacted copies)
- Exhibit C (Justification Matrix), and
- Exhibit D (affidavit of Jeffrey Swartz)

DEF's confidential Exhibit A that accompanies the above-referenced filing has been submitted under separate cover.

Thank you for your assistance in this matter. Please feel free to call me at (850) 521-1428 should you have any questions concerning this filing.

Respectfully,

/s/ Matthew R. Bernier
Matthew R. Bernier

MRB/cmw
Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery Clause with generating performance incentive Factor	Docket No. 20200001-EI Filed: June 11, 2020

DUKE ENERGY FLORIDA, LLC'S
REQUEST FOR CONFIDENTIAL CLASSIFICATION

Duke Energy Florida, LLC, ("DEF" or "Company"), pursuant to Section 366.093, Florida Statutes (F.S.), and Rule 25-22.006, Florida Administrative Code (F.A.C.), submits this Request for Confidential Classification filed in connection with certain information provided in the Office Of Public Counsel, PCS Phosphate – White Springs, and The Florida Industrial Power Users Group Joint Response to DEF's Exceptions to the Administrative Law Judge's ("ALJ") Recommended Order dated April 27, 2020. This Request is timely. *See* Rule 25-22.006(3)(a)1, F.A.C. In support of this Request, DEF states:

The Intervenors' Joint Response to DEF's Exceptions to the ALJ Recommended Order dated April 27, 2020 contains "proprietary confidential business information" under § 366.093(3), Florida Statutes.

1. The following exhibits are included with this request:

(a) Sealed Composite Exhibit A is a package containing an unredacted copy of all the documents for which DEF seeks confidential treatment. In the unredacted version, the information asserted to be confidential is highlighted in yellow.

(b) Composite Exhibit B is a package containing two copies of redacted versions of the documents for which the Company requests confidential classification, or slip-

sheets for documents which are confidential in their entirety. The specific information for which confidential treatment is requested has been blocked out by opaque marker or other means.

(c) Exhibit C is a table which identifies the information for which DEF seeks confidential classification and the specific statutory bases for seeking confidential treatment.

(d) Exhibit D is an affidavit attesting to the confidential nature of information identified in this request.

2. As indicated in Exhibit C, the information for which DEF requests confidential classification is "proprietary confidential business information" within the meaning of § 366.093(3), F.S. DEF is requesting confidential classification of this information because it contains contractual information or information provided by a third party that DEF is obligated to keep confidential, the disclosure of which would harm its competitive business interest and ability to contract for goods or services on favorable terms. *See* §§ 366.093(3)(d) & (e), F.S.; Affidavit of Jeffrey Swartz at ¶¶ 3, 4 and 5. Accordingly, such information constitutes "proprietary confidential business information" which is exempt from disclosure under the Public Records Act pursuant to § 366.093(1), F.S.

3. In order to contract with third-party vendors and Original Equipment Manufacturers on favorable terms, DEF must keep contractual terms and third-party proprietary information confidential. The disclosure of which would be to the detriment of DEF and its customers. Additionally, the disclosure of confidential information provided by a third party could adversely impact DEF's competitive business interests. If such information was disclosed to DEF's competitors, DEF's efforts to obtain competitive contracts that add economic value to both DEF and its customers could be undermined. *See* Affidavit of Swartz at ¶¶ 4 and 5. *Id.*

4. The information identified as Exhibit "A" is intended to be and is treated as confidential by the Company. *See* Affidavit of Swartz at ¶¶ 4 and 6. The information has not been disclosed to the public, and the Company and third-party vendors have treated and continue to treat this information as confidential. *Id.*

5. DEF requests that the information identified in Exhibit A be classified as "proprietary confidential business information" within the meaning of § 366.093(3), F.S., that the information remains confidential for a period of at least 18 months as provided in § 366.093(4) F.S., and that the information be returned as soon as it is no longer necessary for the Commission to conduct its business.

WHEREFORE, for the foregoing reasons, DEF respectfully requests that this Request for Confidential Classification be granted.

RESPECTFULLY SUBMITTED this 18th day of May, 2020.

/s/ Matthew R. Bernier
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to the following this 11th day of June, 2020.

/s/ Matthew R. Bernier
Attorney

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Exhibit A

CONFIDENTIAL

(Slip Sheet)

Exhibit B

(Two Copies)

REDACTED

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

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

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

OVERVIEW

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

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

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

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

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

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

THE COMMISSION'S SCOPE OF AUTHORITY WHEN RULING ON EXCEPTIONS

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

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

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

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

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

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

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

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

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

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

RESPONSE TO DEF EXCEPTIONS

RESPONSE TO DEF EXCEPTION NO. 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RESPONSE TO DEF EXCEPTION NO. 2.

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

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

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

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

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

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

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

RESPONSE TO DEF EXCEPTION NO. 3.

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

112. [redacted]

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

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

[redacted]

[redacted]

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

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

RESPONSE TO DEF EXCEPTION NO. 4.

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

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

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

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

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

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

RESPONSE TO DEF EXCEPTION NO. 5.

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

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

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

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

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

RESPONSE TO DEF EXCEPTION NO. 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RESPONSE TO DEF EXCEPTION NO. 7.

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

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

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

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

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

RESPONSE TO DEF EXCEPTION NO. 8.

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

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

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

RESPONSE TO DEF EXCEPTION NO. 9.

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

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

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

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

RESPONSE TO DEF EXCEPTION NO. 10.

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

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

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

RESPONSE TO DEF EXCEPTION NO. 11.

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

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

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

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

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

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

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

RESPONSE TO DEF EXCEPTION NO. 12.

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

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

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

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

CONCLUSION

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

DATED THIS 21st day of May 2020.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

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

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

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

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

OVERVIEW

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

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

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

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

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

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

THE COMMISSION'S SCOPE OF AUTHORITY WHEN RULING ON EXCEPTIONS

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

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

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

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

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

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

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

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

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

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

RESPONSE TO DEF EXCEPTIONS

RESPONSE TO DEF EXCEPTION NO. 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RESPONSE TO DEF EXCEPTION NO. 2.

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

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

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

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

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

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

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

RESPONSE TO DEF EXCEPTION NO. 3.

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

112. [redacted]

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

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

[redacted]

[redacted]

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

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

RESPONSE TO DEF EXCEPTION NO. 4.

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

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

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

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

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

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

RESPONSE TO DEF EXCEPTION NO. 5.

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

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

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

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

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

RESPONSE TO DEF EXCEPTION NO. 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RESPONSE TO DEF EXCEPTION NO. 7.

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

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

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

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

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

RESPONSE TO DEF EXCEPTION NO. 8.

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

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

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

RESPONSE TO DEF EXCEPTION NO. 9.

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

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

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

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

RESPONSE TO DEF EXCEPTION NO. 10.

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

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

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

RESPONSE TO DEF EXCEPTION NO. 11.

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

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

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

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

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

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

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

RESPONSE TO DEF EXCEPTION NO. 12.

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

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

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

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

CONCLUSION

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

DATED THIS 21st day of May 2020.

RESPECTFULLY SUBMITTED,

J.R. Kelly
Public Counsel

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CERTIFICATE OF SERVICE

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

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**Hand Filing with PSC Clerk
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Exhibit C

DUKE ENERGY FLORIDA
Confidentiality Justification Matrix

DOCUMENT/RESPONSES	PAGE/LINE	JUSTIFICATION
The Intervenors' Joint Response to DEF's Exceptions to the ALJ Recommended Order dated April 27, 2020	**Page 5**: The information after "output of the turbine to" and before "DEF acknowledges that" in its entirety **Page 7**: The information after "blades was caused by" to the end of the page in its entirety **Page 8**: The information at the beginning of the page and before "(Recommended Order, ¶ 37)" in its entirety The information after "DEF agreed that the" and before "(Recommended Order, ¶ 69)" in its entirety The information after "history of the steam turbine," and before "(Recommended Order, ¶ 71)" in its entirety **Page 9**: The information after "capacity of 420 MW." and before "(Recommended Order, ¶ 86)" in its entirety The information after "steam turbine beyond the" and before "The evidence was" in its entirety	§366.093(3)(c), F.S. The document in question contains confidential information, contractual information, or information provided by a third party that DEF is obligated to keep confidential, the disclosure of which would harm its competitive business interests

	<u>Page 10</u>: The information after "could safely exceed the" and before "Mr. Swartz was unable" in its entirety **<u>Page 12</u>**: The information after "power factor exceeding" and before "which would result" in its entirety The information after "intended to operate it at" and before "Polich, Tr. 329-330.)" in its entirety The information after "above 420 MW" and before "The ALJ, however, found" in its entirety **<u>Page 13</u>**: The information after "erred by viewing DEF's" and before "of Mitsubishi's 420 MW" in its entirety The information after "the ALJ includes the" and before "provided by Mitsubishi." in its entirety The information in the footnote after "limit of the ST through" and before "The ALJ further found" in its entirety **<u>Page 14</u>**: The information after "failures were caused by" and before "This conclusion is" in its entirety	

	The information after "the fact that" and before "Mitsubishi cannot be" in its entirety The information after "cannot be faulted for" and before "in a way that would" in its entirety **Page 16**: The information after "112." and before "Paragraph 112 of the" in its entirety The information after "it determined that" and before "(Swartz, Tr. 100; Ex. 82 at 5-6)." in its entirety The information after "Mitsubishi concluded that" to the end of the page in its entirety **Page 17**: The information at the beginning of the page and before "(Swartz, Tr. 111-12," in its entirety **Page 19**: The information after "evidence demonstrated an" and before "that vibrations associated" in its entirety **Page 20**: The information after "DEF observed the" and before "of 420 MW." in its entirety The information after "that there was no" and before "to the ST following" in its	

	entirety **<u>Page 21</u>**: The information after "operation of the unit at" and before "bears no relation" in its entirety The information after "the design of the" and before "40" L-0 blades" in its entirety **<u>Page 22</u>**: The information at the beginning of the second bullet point and before "Polich, T. 304- 309," in its entirety The information at the beginning of the third bullet point and before "(Swartz, T. 108, 179;" in its entirety **<u>Page 23</u>**: The information after "turbine problems is" and before "caused repeatedly over time." in its entirety The information after "is it due to a" and before "Well, the answer" in its entirety **<u>Page 27</u>**: The information after "pressure plate with the" and before "in December 2019." in its entirety	

Exhibit D

AFFIDAVIT OF JEFFREY SWARTZ

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery Clause with generating performance incentive Factor	Docket No. 20200001-EI Filed: June 11, 2020

AFFIDAVIT OF JEFFREY SWARTZ IN SUPPORT OF DUKE ENERGY FLORIDA'S REQUEST FOR CONFIDENTIAL CLASSIFICATION

STATE OF FLORIDA

COUNTY OF PINELLAS

BEFORE ME, the undersigned authority duly authorized to administer oaths, personally appeared Jeffrey Swartz, who being first duly sworn, on oath deposes and says that:

1. My name is Jeffrey Swartz. I am over the age of 18 years old and I have been authorized by Duke Energy Florida (hereinafter "DEF" or the "Company") to give this affidavit in the above-styled proceeding on DEF's behalf and in support of DEF's Request for Confidential Classification (the "Request"). The facts attested to in my affidavit are based upon my personal knowledge.

2. I am the Vice President of Florida Generation. I am responsible for the overall leadership and strategic direction of DEF's power generation fleet. My major duties and responsibilities include strategic and tactical planning to operate and maintain DEF's non-nuclear generation fleet; generation fleet project and additions recommendations; major maintenance programs; outage and project management; retirement of generation facilities; asset allocation; workforce planning and staffing; organizational alignment and design; continuous

business improvements; retention and inclusion; succession planning; and oversight of hundreds of employees and hundreds of millions of dollars in assets and capital and operating budgets.

3. DEF is seeking confidential classification for certain information contained in the Office Of Public Counsel, PCS Phosphate – White Springs, and The Florida Industrial Power Users Group Joint Response to DEF's Exceptions to the Administrative Law Judge's ("ALJ") Recommended Order dated April 27, 2020. The confidential information at issue is contained in confidential Exhibit A to DEF's Request and is outlined in DEF's Justification Matrix that is attached to DEF's Request as Exhibit C. DEF is requesting confidential classification of this information because it contains confidential information, contractual information, or information provided by a third party that DEF is obligated to keep confidential, the disclosure of which would harm its competitive business interests.

4. In order to contract with third-party vendors and Original Equipment Manufacturers on favorable terms, DEF must keep contractual terms and third-party proprietary information confidential. The disclosure of which would be to the detriment of DEF and its customers. DEF takes affirmative steps to prevent the disclosure of this information to the public, as well as limits its dissemination within the Company to those employees with a need to access the information to provide their job responsibilities. Absent such measures, third-party vendors would run the risk that sensitive business information that they provided would be made available to the public and, as a result, end up in possession of potential competitors. Faced with that risk, persons or companies who would otherwise contract with DEF might decide not to do so if DEF did not keep specific information confidential. Without DEF's measures to maintain the confidentiality of sensitive terms in contracts, the Company's efforts to obtain competitive contracts could be undermined.

5. Additionally, the disclosure of confidential information provided by a third party could adversely impact DEF's competitive business interests. If such information was disclosed to DEF's competitors, DEF's efforts to obtain competitive contracts that add economic value to both DEF and its customers could be undermined.

6. Upon receipt of confidential information from third-party vendors, and with its own confidential information, strict procedures are established and followed to maintain the confidentiality of the terms of the documents and information provided, including restricting access to those persons who need the information to assist the Company. At no time since receiving the contracts and information in question has the Company publicly disclosed that information. The Company has treated and continues to treat the information and contracts at issue as confidential.

7. This concludes my affidavit.

Further affiant sayeth not.

Dated the _____ day of June, 2020.

_____
(Signature)
Jeffrey Swartz
Vice President – Generation Florida

THE FOREGOING INSTRUMENT was sworn to and subscribed before me this ___ day of June, 2020 by Jeffrey Swartz. He is personally known to me or has produced his _____ driver's license, or his _____ as identification.

_____
(Signature)

_____
(Printed Name)
(AFFIX NOTARIAL SEAL) NOTARY PUBLIC, STATE OF _____

_____
(Commission Expiration Date)

_____
(Serial Number, If Any)