



Matthew R. Bernier
Associate General Counsel
Duke Energy Florida, LLC.

August 14, 2020

VIA ELECTRONIC FILING

Adam 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 for certain information contained in Staff of the Florida Public Service Commission's Recommended Order. The filing includes the following:

- DEF's Request for Confidential Classification
- Slip-sheet for confidential Exhibit A
- Redacted Exhibit B (two copies)
- Exhibit C (justification matrix), and
- Exhibit D (affidavit of Jeffrey Swartz-unverified)

The 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/mw
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

Dated: August 14, 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 for certain information provided in the Staff (“Staff”) of the Florida Public Service Commission’s (“FPSC”) Recommended Order for the final hearing held on February 4 and 5, 2020. In support of this Request, DEF states:

1. Staff’s Recommended Order contains “proprietary confidential business information” under § 366.093(3), Florida Statutes.

2. The following exhibits are included with this request:

(a) Sealed Composite Exhibit A is a package containing unredacted copies of all the documents for which DEF seeks confidential treatment. Composite Exhibit A has been submitted separately in a sealed envelope labeled “CONFIDENTIAL”. 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. 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 by page and line 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.

3. As indicated in Exhibit C, the information for which DEF requests confidential classification is “proprietary confidential business information” within the meaning of Section 366.093(3), F.S. Specifically, the information at issue includes proprietary and confidential third-party owned and contractual information, the disclosure of which would impair the third-party’s competitive business interests, and if disclosed, the Company’s competitive business interests and efforts to contract for goods and services on favorable terms. *See* § 366.093(3)(d) & (e), F.S.; Affidavit of Jeffrey Swartz at ¶¶ 4, 5 and 6. Accordingly, such information constitutes “proprietary confidential business information” which is exempt from disclosure under the Public Records Act pursuant to Section 366.093(1), F.S.

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. If DEF cannot demonstrate to its third-party OEM, and others that may enter into contracts with DEF in the future, that DEF has the ability to protect those third-parties’ confidential and proprietary business information, third-parties will be less likely to provide that information to DEF – harming DEF’s ability to prudently operate its business. *See* § 366.093(3)(d) & (e), F.S.; Affidavit of Jeffrey Swartz at ¶¶ 4, 5 and 6. Furthermore, disclosure of

the information could detrimentally impact DEF's ability to negotiate favorable contracts as third-parties may begin to demand a "premium" to do business with DEF to account for the risk that its proprietary information will become a matter of public record, thereby harming DEF's competitive interests and ultimately its customers' financial interests. *See* § 366.093(3)(e), F.S.; Affidavit of Jeffrey Swartz at ¶ 6. 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.* Accordingly, such information constitutes "proprietary confidential business information" which is exempt from disclosure under the Public Records Act pursuant to Section 366.093(1), F.S.

5. The information identified as Exhibit "A" is intended to be and is treated as confidential by the Company. *See* Affidavit of Jeffrey Swartz at ¶ 7. The information has not been disclosed to the public, and the Company has treated and continues to treat the information and contracts at issue as confidential. *See* Affidavit of Jeffrey Swartz at ¶ 7.

6. DEF requests that the information identified in Exhibit A be classified as "proprietary confidential business information" within the meaning of section 366.093(3), F.S., that the information remain confidential for a period of at least 18 months as provided in section 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 14th day of August, 2020.

s/Matthew R. Bernier

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Attorneys for Duke Energy Florida, LLC

CERTIFICATE OF SERVICE

Docket No. 20200001-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via email this 14th day of August, 2020, to all parties of record as indicated below.

s/Matthew R. Bernier
Attorney

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|---|--|
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Exhibit A

“CONFIDENTIAL”

(submitted under separate cover)

Exhibit B

REDACTED

(Copy one)

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

A three-volume transcript of the final hearing was filed with the Commission Clerk on February 18, 2020, and was provided to the DOAH Clerk on February 24, 2020. DEF, Commission staff, and OPC, jointly with PCS Phosphate and FIPUG, timely filed confidential proposed recommended orders on March 20, 2020. The ALJ issued his Recommended Order² on April 27, 2020. A redacted version of the Recommended Order is found in Attachment A to this recommendation.

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

Overview of the Recommended Order

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

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

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

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

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

There are two amounts that are associated with the initial prudence question: 1) replacement power costs for the February 2017 outage in the amount of \$11.1 million, and 2) May 2017 through September 2019 unit derating³ costs in the amount of \$5,016,782 million.

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

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

Legal standards for review of recommended orders

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

³ “Derating” is the reduction in MW output due to installing pressure plates in place of the L-0 blades in the low pressure section of the steam turbine.

⁴ *Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013).

⁵ Section 120.57(1)(l), F.S.

Discussion of Issues

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

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

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

DEF Exception to Conclusion of Law 110

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

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

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

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

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

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

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

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

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

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

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

¹⁰ DEF Exceptions at 2.

¹¹ *Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013).

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

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

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

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

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

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

DEF Exception to Conclusion of Law 111

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

111. DEF's RCA [Root Cause Analysis] concluded that the blade failures were caused [REDACTED]

[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.

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

Intervenors' Response

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

Staff Analysis and Conclusion:

This conclusion of law constitutes the ALJ's rejection of DEF's Root Cause Analysis (RCA) conclusion that [REDACTED]

[REDACTED] The ALJ cites the fact that in [REDACTED] steam turbines with a [REDACTED] of the same [REDACTED] only Bartow Unit 4 has had [REDACTED] Further, Bartow Unit 4 had the [REDACTED] loading in [REDACTED]

¹⁴ Finding of Fact No. 67.

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

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

DEF Exception to Conclusion of Law 112

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

112. [REDACTED]

DEF states that Mitsubishi did not ultimately attribute the blade failure in Period 1 to operation in excess of 420 MW but found in September 22, 2017, that [REDACTED]

[REDACTED] DEF argues that given the fact that the turbine was not operated above 420 MW in Periods 2 through 5, it is more reasonable to conclude that the damage to the blades in Period 1 was the result of [REDACTED]

Intervenors’ Response

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

Staff Analysis and Conclusion:

This conclusion of law constitutes the ALJ’s acceptance of Mitsubishi’s RCA which concluded [REDACTED]

[REDACTED] After [REDACTED] on the steam turbine in December 2014, Mitsubishi concluded that the damage to the L-0 blades in all

¹⁵ Finding of Fact No. 83.

¹⁶ Finding of Fact No. 70.

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

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

DEF Exception to Conclusion of Law 113

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

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

DEF defends not contacting Mitsubishi by citing the following evidence in the record: 1) [REDACTED]

2) the MW output of a steam turbine is not an “operating parameter”; and 3) Mitsubishi knew DEF would operate the plant in excess of 420 MW. For these reasons, DEF argues that it is “as or more reasonable” to conclude that DEF did not need to contact Mitsubishi.

Intervenors' Response

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

¹⁷ Finding of Fact Nos. 37, 63.

¹⁸ Finding of Fact No. 70.

¹⁹ Finding of Fact No. 78.

Staff Analysis and Conclusion

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

The ALJ's findings of fact establish that the steam turbine was originally designed to be used in a 3x1 configuration with a design point maximum of 420 MW. The 3x1 configuration used three M501 Type F combustion turbines connected to the steam turbine.²⁰ The 4x1 design configuration used by DEF used four M501 Type F combustion turbines connected to the same steam turbine.²¹

with a
.²³ These guaranteed outputs were based on
calculated using only three combustion turbines and
heat recovery steam generators with duct firing. Of the run by
to predict how the steam turbine would operate, not one showed it producing more
than 420 MW.²⁴

Under these circumstances it is reasonable to believe that Mitsubishi would have instructed its consultant to run if it thought the steam turbine could handle it.²⁵ This is especially true since DEF was proposing the use of an additional 501 Type F combustion turbine and heat recovery steam generator, giving DEF's proposed configuration the ability to produce far more steam than needed to generate 420 MW of output when compared to the original 3x1 application for which the steam turbine was designed.²⁶ Additionally, neither DEF nor Mitsubishi had any experience running a 4x1 combined cycle plant prior to commencing operation of Bartow Unit 4.²⁷ In sum, for these reasons the ALJ found that Mitsubishi did not contemplate DEF's operation of the steam turbine beyond the scenarios set out in the Purchase Agreement.²⁸

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

²⁰ Finding of Fact No. 14.

²¹ Finding of Fact No. 6.

²² Entitled the executed between Florida Progress and Mitsubishi.

²³ Finding of Fact No. 26.

²⁴ Finding of Fact No. 87.

²⁵ Finding of Fact No. 87.

²⁶ Finding of Fact No. 31.

²⁷ Finding of Fact No. 85.

²⁸ Finding of Fact No. 102.

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

DEF Exception to Conclusion of Law 114

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

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

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

Intervenors' Response

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

Staff Analysis and Conclusion

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

²⁹ Factual Finding No. 93.

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

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

DEF Exception to Conclusion of Law 119

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

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

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

Intervenors' Response

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

Staff Analysis and Conclusion

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

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

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

DEF Exception to Conclusion of Law 120

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

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

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

It's conceded as fact that the root cause of the Bartow low pressure turbine problems is [REDACTED] [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] [REDACTED] Well, the answer is both.

The fact is that [DEF] bought a steam turbine that was already built for a different configuration that was in storage, and then hooked it up to a configuration . . . that it knew could produce much more steam than it needed. It had a generator that could produce more megawatts, so the limiting factor was the steam turbine.

On its own initiative, it decided to push more steam through the steam turbine to get more megawatts until it broke.

³⁰ Finding of Fact No. 84.

³¹ Finding of Fact No. 89; Footnote 4.

* * *

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

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

Intervenors' Response

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

Staff Analysis and Conclusion

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

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

DEF Exception to Conclusion of Law 121

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

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

DEF Exception to Conclusion of Law 124

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

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

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

Intervenors' Response

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

Staff Analysis and Conclusion

There is no question that installation of the pressure plate caused the derating of the steam turbine from 420 to 380 MW.³² Likewise, the parties have agreed that the period of time associated with the derating is April 2017 through the end of September 2019.³³ Nor do the parties disagree that the amount associated with the derating is \$5,016,782.³⁴ DEF is simply rearguing its position that its operation of the steam turbine was not responsible for blade damage in Period 5, a position considered and rejected by the ALJ.³⁵ As discussed in

³² Finding of Fact No. 60.

³³ Finding of Fact No. 61.

³⁴ Finding of Fact No. 80.

³⁵ Finding of Fact No. 119.

Exhibit B

REDACTED

(Copy two)

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

A three-volume transcript of the final hearing was filed with the Commission Clerk on February 18, 2020, and was provided to the DOAH Clerk on February 24, 2020. DEF, Commission staff, and OPC, jointly with PCS Phosphate and FIPUG, timely filed confidential proposed recommended orders on March 20, 2020. The ALJ issued his Recommended Order² on April 27, 2020. A redacted version of the Recommended Order is found in Attachment A to this recommendation.

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

Overview of the Recommended Order

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

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

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

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

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

There are two amounts that are associated with the initial prudence question: 1) replacement power costs for the February 2017 outage in the amount of \$11.1 million, and 2) May 2017 through September 2019 unit derating³ costs in the amount of \$5,016,782 million.

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

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

Legal standards for review of recommended orders

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

³ “Derating” is the reduction in MW output due to installing pressure plates in place of the L-0 blades in the low pressure section of the steam turbine.

⁴ *Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013).

⁵ Section 120.57(1)(l), F.S.

Discussion of Issues

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

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

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

DEF Exception to Conclusion of Law 110

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

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

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

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

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

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

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

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

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

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

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

¹⁰ DEF Exceptions at 2.

¹¹ *Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013).

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

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

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

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

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

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

DEF Exception to Conclusion of Law 111

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

111. DEF's RCA [Root Cause Analysis] concluded that the blade failures were caused [REDACTED]

[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.

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

Intervenors' Response

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

Staff Analysis and Conclusion:

This conclusion of law constitutes the ALJ's rejection of DEF's Root Cause Analysis (RCA) conclusion that [REDACTED]

[REDACTED] The ALJ cites the fact that in [REDACTED] steam turbines with a [REDACTED] of the same [REDACTED] only Bartow Unit 4 has had [REDACTED] Further, Bartow Unit 4 had the [REDACTED] loading in [REDACTED]

¹⁴ Finding of Fact No. 67.

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

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

DEF Exception to Conclusion of Law 112

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

112. [REDACTED]

DEF states that Mitsubishi did not ultimately attribute the blade failure in Period 1 to operation in excess of 420 MW but found in September 22, 2017, that [REDACTED]

[REDACTED] DEF argues that given the fact that the turbine was not operated above 420 MW in Periods 2 through 5, it is more reasonable to conclude that the damage to the blades in Period 1 was the result of [REDACTED]

Intervenors’ Response

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

Staff Analysis and Conclusion:

This conclusion of law constitutes the ALJ’s acceptance of Mitsubishi’s RCA which concluded [REDACTED]

[REDACTED] After [REDACTED] on the steam turbine in December 2014, Mitsubishi concluded that the damage to the L-0 blades in all

¹⁵ Finding of Fact No. 83.

¹⁶ Finding of Fact No. 70.

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

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

DEF Exception to Conclusion of Law 113

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

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

DEF defends not contacting Mitsubishi by citing the following evidence in the record: 1) [REDACTED]

2) the MW output of a steam turbine is not an “operating parameter”; and 3) Mitsubishi knew DEF would operate the plant in excess of 420 MW. For these reasons, DEF argues that it is “as or more reasonable” to conclude that DEF did not need to contact Mitsubishi.

Intervenors' Response

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

¹⁷ Finding of Fact Nos. 37, 63.

¹⁸ Finding of Fact No. 70.

¹⁹ Finding of Fact No. 78.

Staff Analysis and Conclusion

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

The ALJ's findings of fact establish that the steam turbine was originally designed to be used in a 3x1 configuration with a design point maximum of 420 MW. The 3x1 configuration used three M501 Type F combustion turbines connected to the steam turbine.²⁰ The 4x1 design configuration used by DEF used four M501 Type F combustion turbines connected to the same steam turbine.²¹

with a
.²³ These guaranteed outputs were based on
calculated using only three combustion turbines and
heat recovery steam generators with duct firing. Of the run by
to predict how the steam turbine would operate, not one showed it producing more
than 420 MW.²⁴

Under these circumstances it is reasonable to believe that Mitsubishi would have instructed its consultant to run if it thought the steam turbine could handle it.²⁵ This is especially true since DEF was proposing the use of an additional 501 Type F combustion turbine and heat recovery steam generator, giving DEF's proposed configuration the ability to produce far more steam than needed to generate 420 MW of output when compared to the original 3x1 application for which the steam turbine was designed.²⁶ Additionally, neither DEF nor Mitsubishi had any experience running a 4x1 combined cycle plant prior to commencing operation of Bartow Unit 4.²⁷ In sum, for these reasons the ALJ found that Mitsubishi did not contemplate DEF's operation of the steam turbine beyond the scenarios set out in the Purchase Agreement.²⁸

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

²⁰ Finding of Fact No. 14.

²¹ Finding of Fact No. 6.

²² Entitled the executed between Florida Progress and Mitsubishi.

²³ Finding of Fact No. 26.

²⁴ Finding of Fact No. 87.

²⁵ Finding of Fact No. 87.

²⁶ Finding of Fact No. 31.

²⁷ Finding of Fact No. 85.

²⁸ Finding of Fact No. 102.

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

DEF Exception to Conclusion of Law 114

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

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

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

Intervenors' Response

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

Staff Analysis and Conclusion

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

²⁹ Factual Finding No. 93.

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

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

DEF Exception to Conclusion of Law 119

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

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

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

Intervenors' Response

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

Staff Analysis and Conclusion

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

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

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

DEF Exception to Conclusion of Law 120

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

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

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

It's conceded as fact that the root cause of the Bartow low pressure turbine problems is [REDACTED] [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] [REDACTED] Well, the answer is both.

The fact is that [DEF] bought a steam turbine that was already built for a different configuration that was in storage, and then hooked it up to a configuration . . . that it knew could produce much more steam than it needed. It had a generator that could produce more megawatts, so the limiting factor was the steam turbine.

On its own initiative, it decided to push more steam through the steam turbine to get more megawatts until it broke.

³⁰ Finding of Fact No. 84.

³¹ Finding of Fact No. 89; Footnote 4.

* * *

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

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

Intervenors' Response

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

Staff Analysis and Conclusion

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

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

DEF Exception to Conclusion of Law 121

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

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

DEF Exception to Conclusion of Law 124

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

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

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

Intervenors' Response

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

Staff Analysis and Conclusion

There is no question that installation of the pressure plate caused the derating of the steam turbine from 420 to 380 MW.³² Likewise, the parties have agreed that the period of time associated with the derating is April 2017 through the end of September 2019.³³ Nor do the parties disagree that the amount associated with the derating is \$5,016,782.³⁴ DEF is simply rearguing its position that its operation of the steam turbine was not responsible for blade damage in Period 5, a position considered and rejected by the ALJ.³⁵ As discussed in

³² Finding of Fact No. 60.

³³ Finding of Fact No. 61.

³⁴ Finding of Fact No. 80.

³⁵ Finding of Fact No. 119.

Exhibit C

DUKE ENERGY FLORIDA Confidentiality Justification Matrix

| DOCUMENT/RESPONSES | PAGE/LINE | JUSTIFICATION |
|---------------------------|--|---|
| Staff's Recommended Order | <p>Page 3: Information in the first paragraph titled "Overview of Recommended Order" after "update the" and before "for a" and the remaining information in the paragraph after "required by its contract," information in the third paragraph titled "Overview of Recommended Order" after "that the" and before "L-0 blades" and after "damaged. The" and before "L-0 blades" is confidential.</p> <p>Page 4: First paragraph, the first sentence through the "and plant", before "service to" and after "The plant". Third sentence after "with a" and before "blade", after "loss of" and before "In December". Fourth sentence after " with the" and before "and was" and after "due to a" and before DEF brought" is confidential.</p> <p>Page 6: The Paragraph titled "DEF's Exception to Conclusion of Law 110, the remaining information after " turbine to" and before "First" and the information in paragraph beginning, "Second", after "fact that</p> | <p>§366.093(3)(d), F.S. The document in question contains confidential information, the disclosure of which would impair DEF's efforts to contract for goods or services on favorable terms.</p> <p>§366.093(3)(e), F.S. The document in question contains confidential information relating to competitive business interests, the disclosure of which would impair the competitive business of the provider/owner of the information.</p> |

the” and before “in February” and the paragraph beginning “Third”, the information after “and its” and before “to operate” and after “unit at” and before “do not” is confidential.

Page 8: The remaining information in the fifth paragraph after “worked with” is confidential.

Page 9: The information in the second paragraph after “with the” and before placed on” and after “Mitsubishi to” and before “DEF disputes” is confidential.

Page 10: The information in the section titled “DEF Exception to Conclusion of Law 111 after “caused by” and before “This conclusion”, after “fact that” and before “Mitsubishi”, in the paragraph beginning, “DEF takes” after “caused by” and before “on the”, after “identify” and before “and it was” and after “with other” and before “but with” and the information in the paragraph titled “Staff Analysis and Conclusion”, the information after “conclusion that” and before “The ALJ”, after “fact that in” and before “steam turbines”, after “with a” and before “of the” and after “the same” and

before “only Bartow”, after “has had” and before “Further” and after “had the” and before “loading in” is confidential.

Page 11: the information in the first sentence after “fleet, in” and before “for the rest”, information in the second sentence after “agreed with” and before “was one” and the information in the third sentence after “exclusion of” and before “from its”, the information in paragraph titled “DEF Exception to Conclusion of Law 112, all information after “112” and before “DEF”, the information after “2017, that” and before “DEF argues”, remaining sentence after “the result of” and before “Intervenor’s”, the information in the Staff’s Analysis and Conclusion after “which concluded” and before “After”, the information after “After” and before “on the” is confidential.

Page 12: information after “attributable to” and before “Mitsubishi published”, after “Mitsubishi that” and before “was one”, after “created by” and before “which did”, after “allow the” and before “DEF is”, the paragraph that begins, “DEF defends” after “1)”

and before “2)” is confidential.

Page 13: the information in the second paragraph after “steam turbine” and before “with a”, after “with a” and before “These guaranteed”, after “based on” and before “calculated”, after “Of the” and before “run by”, after “run by” and before “to predict”, in the third paragraph after “to run” and before “if it”, after “beyond the” and before “scenarios”, in the fourth paragraph after “effectively” and before “to and in the footnote after “Entitled the” and before “executed” is confidential.

Page 14: In the paragraph titled “DEF’s Exception to Conclusion of Law 114 after “demonstrated an” and before “that”, after “that” and before “DEF”, after “cause or” and before “To the”, in the paragraph titled “Staff Analysis and Conclusion”, the information after “caused by” and before “Further”, after “that the” and before “was the” is confidential.

Page 15: the information in DEF Exception to Conclusion of Law 119, after “observed the” and before “of 420 MW” is confidential.

Page 16: Information in

| | | |
|--|---|--|
| | <p>DEF's Exception to Conclusion of Law 120, after "problems is" and before "caused repeatedly", information after "due to a" and before "Well" is confidential.</p> <p>Page 17: In the paragraph titled "Staff Analysis and Conclusion", the information after "due to a" and before "is that both" is confidential.</p> <p>Page 20: In the paragraph titled "DEF Exception to Conclusion of Law 124, information after "with the" and before "in December" is confidential.</p> | |
|--|---|--|

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

Dated: August 14, 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 in the Fossil Hydro Operations Department. This section is responsible for overall leadership and strategic direction of DEF's power generation fleet.

3. As the Vice President of Florida Generation, I am responsible, along with the other members of the section, for 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, and retirement of generation facilities.

4. DEF is seeking confidential classification for information contained in the Staff (“Staff”) of the Florida Public Service Commission’s (“FPSC”) Recommended Order to the Division of Administrative Hearings (“DOAH”) held on February 4 and 5, 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 sensitive business information, the disclosure of which would impair the Company’s competitive business interests and ability to contract for goods and services on favorable terms.

5. The confidential information at issue relates to proprietary and confidential third-party operating procedures and technical information regarding the third-party’s proprietary component design and operation parameters, the disclosure of which would impair third-party’s competitive business interests, and if disclosed, the Company’s competitive business interests and efforts to contact for goods or services on favorable terms.

6. Further, if DEF cannot demonstrate to its third-party OEM, and others that may enter contracts with DEF in the future, that DEF has the ability to protect those third-parties’ confidential and proprietary business information, third-parties will be less likely to provide that information to DEF – harming DEF’s ability to prudently operate its business. DEF has not publicly disclosed the information. Without DEF’s measures to maintain the confidentiality of this sensitive business information, DEF’s ability to

contract with third-parties could detrimentally impact DEF's ability to negotiate favorable contracts, as third-parties may begin to demand a "premium" to do business with DEF to account for the risk that its proprietary information will become a matter of public record, thereby harming DEF's competitive interests and ultimately its customers' financial interests.

7. Upon receipt of 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, and restricting the number of, and access to the information and contracts. At no time since receiving the information in question has the Company publicly disclosed that information. The Company has treated and continues to treat the information at issue as confidential.

8. This concludes my affidavit.

Further affiant sayeth not.

Dated the ____ day of _____, 2020.

(Signature)
Jeffrey Swartz
Vice President Florida Generation
Duke Energy Florida, LLC
Florida Regional Headquarters
St. Petersburg, FL

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

(AFFIX NOTARIAL SEAL)

(Signature)

(Printed Name)
NOTARY PUBLIC, STATE OF _____

(Commission Expiration Date)

(Serial Number, If Any)