Matthew R. Bernier
ASSOCIATE GENERAL COUNSEL

October 29, 2020

VIA ELECTRONIC FILING

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

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

Dear Mr. Teitzman:

Please find enclosed for electronic filing on behalf of Duke Energy Florida, LLC ("DEF"), DEF's Request for Confidential Classification filed in connection with certain information provided in the Florida Public Service Commission's Final Order No. PSC-2020-0368-FOF-EI. The filing includes the following:

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

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

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

Respectfully,

/s/ Matthew R. Bernier

Matthew R. Bernier

MRB/cmw
Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery Clause with generating performance incentive Factor	Docket No. 20200001-EI Filed: October 29, 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 Florida Public Service Commission's (FPSC) Final Order No. PSC-2020-0368-FOF-EI. This Request is timely. *See* Rule 25-22.006(3)(a)1, F.A.C. In support of this Request, DEF states:

The FPSC's Final Order No. PSC-2020-0368-FOF-EI, contains "proprietary confidential business information" under § 366.093(3), Florida Statutes.

1. The following exhibits are included with this request:

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

(b) Composite Exhibit B is a package containing two copies of redacted versions of the documents for which the Company requests confidential classification, or slip-sheets for documents which are confidential in their entirety. The specific information for which confidential treatment is requested has been blocked out by opaque marker or other means.

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

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

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

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

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

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

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

RESPECTFULLY SUBMITTED this 29th day of October, 2020.

/s/ Matthew R. Bernier
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CERTIFICATE OF SERVICE
Docket No. 20200001-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to the following this 29th day of October, 2020.

/s/ Matthew R. Bernier
Attorney

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Exhibit A

CONFIDENTIAL

(Slip Sheet- The Confidential Documents have been provided under separate cover.)

Exhibit B

(Two Copies)

REDACTED

FILED 10/15/2020
DOCUMENT NO. 11211-2020
FPSC - COMMISSION CLERK

FLORIDA PUBLIC SERVICE COMMISSION
OFFICE OF COMMISSION CLERK

DOCUMENT NUMBER ASSIGNMENT*

FILED DATE: 10/15/2020

DOCKET NO.: 20200001-EI

DOCUMENT NO.: 11211-2020

DOCUMENT DESCRIPTION:

(CONFIDENTIAL) Final Order PSC-2020-0368-FOF-EI establishing fuel cost recovery for Duke Energy.

***This document number has been assigned to a confidential document.**
For further information, contact the Office of Commission Clerk.

E-MAIL: CLERK@PSC.STATE.FL.US PHONE NO. (850) 413-6770 FAX NO. (850) 717-0114

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery clause with generating performance incentive factor.	DOCKET NO. 20200001-EI ORDER NO. ISSUED:

CONFIDENTIAL

The following Commissioners participated in the disposition of this matter:

GARY F. CLARK, Chairman
ART GRAHAM
JULIE I. BROWN
DONALD J. POLMANN
ANDREW GILES FAY

FINAL ORDER ESTABLISHING FUEL COST RECOVERY FOR DUKE ENERGY FLORIDA, LLC.

BY THE COMMISSION:

I. BACKGROUND

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

A. Prehearing proceedings before the Commission

Duke Energy Florida, LLC (DEF) is an investor-owned electric utility operating in the State of Florida. DEF reaffirmed its party status in Docket No. 20190001-EI on January 3, 2019. Likewise, the Office of Public Counsel (OPC), authorized by Section 350.0611, Florida Statutes (F.S.), to provide legal representation to Florida electric utility customers before the Commission, reaffirmed its party status in Docket No. 20190001-EI on January 4, 2019. The Florida Industrial Power Users Group (FIPUG), an association of utility customers who consume large amounts of electricity, and White Springs Agricultural Chemicals, Inc., d/b/a PCS Phosphate – White Springs (PCS Phosphate), a fertilizer company, reaffirmed their party status on January 4, 2019 and January 15, 2019, respectively.

We issued Order No. PSC-2019-0059-PCO-EI on February 13, 2019, establishing the procedures to be followed. On March 1, 2019, DEF filed its Petition for approval of fuel cost recovery and capacity cost recovery with generating performance incentive factor actual true-ups for the period ending December 2018. At that time DEF also filed the direct testimony of Jeffrey

Swartz which incorporated Exhibit JS-1, filed in the 2018 Fuel Clause. On September 13, 2019, OPC filed the direct testimony and exhibits of Richard A. Polich, non-confidential Exhibits RAP-1 through RAP-2, and confidential Exhibits RAP-3 through RAP-9. On September 26, 2019, DEF filed the rebuttal testimony of Jeffrey Swartz with confidential Exhibits JS-2 through JS-4.

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

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

B. Evidentiary proceedings before the Division of Administrative Hearings

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

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

[1] Section 286.011, F.S.

evidence. The revised Comprehensive Exhibit List (CEL) was admitted into evidence by stipulation as Exhibit No. 114.

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

C. 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 [redacted] 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] in the low pressure section of the steam turbine were damaged. The [redacted] were replaced with [redacted] and the plant was operated until August 2014 when the plant was taken out of service to [redacted] the [redacted]. The plant came back on line in December 2014 and ran until April 2016 when it was taken off line for routine valve work and [redacted] inspection. The plant was placed back in service in May 2016 with a [redacted] and operated until October 2016, when DEF shut the plant down due to excessive vibration and loss of [redacted] material. In December 2016 the plant was put back in service with the [redacted], and was taken out of service in February of 2017 due to a [redacted] projectile that traveled through the low pressure turbine rupture disk diaphragm. 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.

[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.

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

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

In his Recommended Order, the ALJ detailed the relevant facts and legal standards required to determine whether DEF acted prudently in its operation of Bartow Unit 4 from June 2009 until February 2017. In his conclusion, the ALJ recommended that this 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.

D. Post-Hearing proceedings before the Commission

On May 12, 2020, DEF submitted exceptions to the Recommended Order. OPC, jointly with PCS Phosphate and FIPUG (collectively, the Intervenors), filed a Response to DEF's Exceptions.

We have Jurisdiction over this matter under Sections 120.57, 366.04, 366.05, and 366.06, F.S. As discussed in more detail below, we deny DEF's Exceptions to the Recommended Order and adopt the Administrative Law Judge's Recommended Order as the Final Order.

II. RULINGS ON EXCEPTIONS

A. Standard of Review of Recommended Order and Exceptions

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

[3] "Derating" is the reduction in MW output due to installing pressure plates in place of the [redacted] in the low pressure section of the steam turbine.
[4] *Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013).

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]

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

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

B. Rulings on Exceptions to the Recommended Order

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).

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

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 [redacted] 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 [redacted] Thus, DEF concludes that the fact that the [redacted] failed 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 request to Mitsubishi for modifications to operate the unit at [redacted] do not logically support the conclusion that DEF agreed the unit originally could not be operated above 420 MW. These actions, according to DEF, allowed the unit to continue to be operated to produce the most power possible while research into the cause of the Period 1 outage was conducted. DEF argues that getting the unit back on line producing as much power as possible is implementation of long standing Commission policy that utilities operate generating units for maximum efficiency. DEF asserts that these actions are not evidence of DEF's acceptance of 420 MW as a limitation on the output of the unit.

Intervenors' Response

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

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

Ruling

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

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).

We agree 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

[8] Section 120.57(1)(l), F.S.; *Prysi v. Department of Health,* 823 So. 2d 823, 825 (Fla. 1st DCA 2002)
[9] Section 120.57(1)(l), F.S.
[10] DEF Exceptions at 2.
[11] *Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013).

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 is 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 [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 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 lower operating limitations placed on it by Mitsubishi and worked with Mitsubishi to increase the steam turbine's output to [redacted]. DEF disputes the significance of having done so. DEF argues that by [redacted] 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]

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

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

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

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

DEF Exception to Conclusion of Law 111

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

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

DEF takes exception to the conclusion that the [redacted] were not caused by [redacted] 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] as a potential problem 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 Mitsubishi facilities, 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 [redacted] 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 [redacted] were damaged in Period 1, Intervenors find this to be irrelevant since the ALJ does not address that fact in Paragraph 111.

Ruling

This conclusion of law constitutes the ALJ's rejection of DEF's Root Cause Anal ysis (RCA) conclusion that the low pressure steam turbine 40" [redacted][14] [redacted][15] [redacted][16] Given these facts, none of which are disputed by DEF, the ALJ found DEF's exclusion of [redacted] from its final RCA to be troubling, as does this Commission.

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, DEF's Exception to Conclusion of Law 111 is 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 [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 [redacted] in Period 1 was the result of [redacted]

[14] Finding of Fact No. 67.
[15] Finding of Fact No. 83.
[16] Finding of Fact No. 70.

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, under those circumstances, we cannot reject the ALJ's conclusion of law or substitute its own judgment for that of the ALJ.

Ruling

This conclusion of law constitutes the ALJ's acceptance of Mitsubishi's RCA which concluded [redacted][17][18][19].

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 it is 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, DEF's Exception to Conclusion of Law 112 is 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.

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

DEF defends not contacting Mitsubishi by citing the followin g 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 this 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.

Ruling

When viewed as a whole, the ALJ has based his analysis of this case by focusing on several areas. [redacted] Second, the type and meaning of [redacted] Third, the cause of the damage to the low pressure [redacted] 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] Section 3.2.1 of the original Purchase Agreement[22] clearly states [redacted][23] [redacted][24]

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

Under these circumstances it is reasonable to believe that Mitsubishi would have [redacted][25] This is especially true since DEF was proposing the use of an additional 501 Type F combustion turbine and heat recovery steam generator, giving DEF's proposed configuration the ability to produce far more steam than needed to generate 420 MW of output when compared to the original 3x1 application for which the steam turbine was designed.[26] Additionally, neither DEF nor Mitsubishi had any experience running a 4x1 combined cycle plant prior to commencing operation of Bartow Unit 4.[27] In sum, for these reasons the ALJ found that Mitsubishi did not contemplate DEF's operation of the steam turbine beyond the [redacted] 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 updated the warranty to 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, DEF's Exception to Conclusion of Law 113 is 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 vibrations associated with high energy loadings were the primary cause of the L-0 blade failures. DEF failed to satisfy its burden of showing its actions in operating the steam turbine in Period 1 did not cause or contribute significantly to the vibrations that repeatedly damaged the L-0 blades. To the contrary, the preponderance of the evidence pointed to DEF's operation of the steam turbine in Period 1 as the most plausible culprit.

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 [redacted] DEF contends this is true because the [redacted] 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.

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[25] Finding of Fact No. 87.
[26] Finding of Fact No. 31.
[27] Finding of Fact No. 85.
[28] Finding of Fact No. 102.
[29] Factual Finding No. 93.

Intervenors' Response

Intervenors argue that Conclusion of Law 114 summaries the findings of fact that support the ALJ's ultimate determination. Intervenors state that these findings of fact are supported by competent substantial evidence and we 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.

Ruling

As discussed in the ruling on Conclusions of Law 110-113 above, the ALJ found that a preponderance of the evidence supported the finding that the [redacted] was caused by vibrations/flutter associated with high energy loadings. Further, the ALJ found that the weight of the evidence supported the conclusion that the high energy loading on the blades was the result of [redacted]. DEF does not contest that these findings of fact are supported by competent substantial evidence of record.

We agree 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, DEF's Exception to Conclusion of Law 114 is denied.

DEF Exception to Conclusion of Law 119

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

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

Specifically, DEF disputes the ALJ's conclusion that it is not speculative to state that the events of Periods 2 through 5 were precipitated by DEF's actions during Period 1. DEF argues that there is no causal link between the operation of the unit in Period 1 and the forced outage

that occurred in Period 5. DEF contends that the lack of a causal link is proven by the fact that there was no residual damage done to the steam turbine itself in Period 1 and all parties agreed that DEF's operation of the plant subsequent to Period 1 was prudent.

Intervenors' Response

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

Ruling

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

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

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

> You can drive a four-cylinder Ford Fiesta like a V8 Ferrari, but it's not quite the same thing. At 4,000 RPMs, in second gear, the Ferrari is already doing 60 and it's just warming up. The Ford Fiesta, however, will be moaning and begging you to slow down and shift gears. And that's kind of what we're talking about here.
>
> It's conceded as fact that the root cause of the Bartow low pressure turbine problems is [redacted] caused repeatedly over time. The answer to the question is was this due to the way [DEF] ran the plant or is it due to a [redacted] Well, the answer is both.
>
> The fact is that [DEF] bought a steam turbine that was already built for a different configuration that was in storage, and then hooked it up to a configuration . . . that it knew could produce much more steam than it needed. It had a generator that could produce more megawatts, so the limiting factor was the steam turbine.
>
> On its own initiative, it decided to push more steam through the steam turbine to get more megawatts until it broke.
>
> * * *
>
> So from our perspective, [DEF] clearly was at fault for pushing excessive steam flow into the turbine in the first place. The repair which has been established . . . may or may not work, but the early operation clearly impeded [DEF's] ability to simply claim that Mitsubishi was entirely at fault. And under those circumstances, it's not appropriate to assign the cost to the consumers.

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.

Ruling

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." [redacted] Further, whether the vibration was due to the way the plant was run or [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. 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 is denied.

DEF Exception to Conclusion of Law 121

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

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

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

Intervenors' Response

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

Ruling

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

DEF Exception to Conclusion of Law 122

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

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

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

Intervenors' Response

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

Ruling

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

DEF Exception to Conclusion of Law 123

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

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

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

Intervenors' Response

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

Ruling

A review of DEF's exception reveals that it is simply re-argument of its position taken in Conclusion of Law No. 110 discussed above. For the reasons stated therein, DEF's Exception to Conclusion of Law 123 is denied because DEF has failed to demonstrate that its conclusion is as or more reasonable that the ALJ's.

DEF Exception to Conclusion of Law 124

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

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

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

Intervenors' Response

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

Ruling

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

DEF Exception to Conclusion of Law 125

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

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

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

Intervenors' Response

Intervenor's argue that the ALJ's conclusion is supported by competent substantial evidence of record as detailed in Intervenors' responses to DEF's exceptions to Conclusions of

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

Law 110-114 and 119. Intervenors state that DEF is simply rearguing its case that its operation of the steam turbine was prudent and therefore no refunds are required. Intervenors assert that we cannot, under these circumstances, reject the ALJ's conclusion of law by reweighing the evidence and substituting new and directly contrary findings that are favorable to DEF.

Ruling

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

C. Conclusion

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

III. ADOPTION AND APPROVAL OF THE RECOMMENDED ORDER AS THE FINAL ORDER

As set forth above, we deny all exceptions filed by DEF, approve all of the ALJ's findings of fact and conclusions of law without modification, and hereby adopt the ALJ's Recommended Order, found in Attachment A, as our Final Order.

We note that this case is highly fact specific and for that reason will have limited precedential value. There is literally no other plant in DEF's system that has four combustion turbines connected to one steam turbine nor any other plant in DEF's system that uses an after-market steam turbine designed for a 3x1 configuration in a 4x1 configuration. The ALJ was persuaded by OPC witness Polich's testimony that because Bartow Unit 4 was operated to produce more than 420 MW, too much steam was forced into the low pressure section of the steam turbine damaging the L-O blades. Nothing in the ALJ's Recommended Order or our decision in any way establishes, indicates, implies or imputes any going-forward protocol for the operation of steam turbines in DEF's fleet. Adoption of the Recommended Order with this conclusion of law does not translate into a general policy decision by the Commission that under any set of circumstances it is imprudent to run a unit above its nameplate capacity.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the attached Recommended Order (Attachment A) is adopted and approved as the Final Order in this docket. It is further

ORDERED that all of the exceptions to the Recommended Order filed by Duke Energy Florida, LLC, are denied. It is further

ORDERED that the docket shall remain open.

By ORDER of the Florida Public Service Commission this 15th day of October, 2020.

ADAM J. TEITZMAN
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

SPS

Commissioner Donald J. Polmann dissents with opinion.

I respectfully disagree with the majority decision. Having reviewed the evidentiary record in its entirety, applying my knowledge and expertise to the issues, I find that DEF acted prudently. I believe that the majority applied legal boundaries and restrictions that impeded it from taking certain actions, thereby precluding this Commission from exercising its broad authority and its affirmative duty to judge prudence in the public interest of the State of Florida. In my opinion, the particularities of this case involving substantial confidential testimony, the Sunshine Law, and transfer to DOAH imposed such overbearing limitations on the majority that its role was effectively reduced to ministerial.

To ensure that this Commission has clear and unambiguous authority to execute its full breadth of duties in future dockets, I strongly support statutory revisions to redress the diminished capacities that burdened this case. In my opinion, this Commission must advocate to the Florida Legislature for necessary statutory authority to hear confidential material efficiently and effectively in the future.

My profound concern is for perceptions of legal boundaries and restrictions that led this Commission in the majority to be muted into near dysfunction on addressing the Administrative Law Judge's (ALJ's) Recommended Order. My perception of legal boundaries and restrictions is of lesser limitations that do not impede this Commission from taking certain actions which better serve the public interest. Section 120.57(1)(1), Florida Statutes, affords a process in which to accept, reject, or modify an ALJ's Recommended Order. In this case, I disagree that the Conclusions of Law were so inextricably linked with the Findings of Fact. This inextricable linkage ostensibly conflicts with our obligation to review the entire record and leads us down the path of what I believe is strict inappropriate deference to the ALJ's determination of prudence. If that strict deference is appropriate, our role is reduced to ministerial where we must accept the ALJ Order and are unable to fully consider and determine prudence based upon the entire record. The standard for approving an "exception to a Conclusion of Law" is that a different Conclusion of Law is "as or more reasonable" than that of the ALJ and including particular reasons as to why an exception is made. I believe that the information DEF has provided in its exceptions is sufficient reason in Toto to accept a position that is as reasonable as the ALJ. Therefore, I submit that the Commission should have modified the ALJ's Order, by accepting DEF's exceptions to Conclusions of Law 110 through 114 and 119 through 125 and concluded that DEF met its burden of proof that its actions were prudent.

However, my vote in this matter also rejects the notion that the circumstances of this case, combined with legal constraints, eliminated the Commission's ability to hear this case in the first instance. We must conduct all proceedings in the Sunshine pursuant to s. 286.011, F.S., which effectively precludes this Commission from hearing cases requiring presentation of substantial confidential testimony and exhibits. Contrary to normal application of the Administrative Procedure Act and our practice, this case was sent to the Division of Administrative Hearings with delegation of our fact-finding responsibilities to an ALJ. Section 120.569, F.S., provides that each agency "may" refer a matter to DOAH and sets forth the legal standards for the ALJ as fact-finder "if" the agency makes the referral. The conflict of Sunshine and confidentiality caused the Commission to abdicate its fact-finder role.

In my opinion, the Commission's inability to hear this case affected the outcome. Our unique agency expertise and understanding of sound utility principles and practices to assess witness testimony and the record in this case would have been the more appropriate procedure in the public interest. While I fully respect and support the Sunshine Law and conducting our business in the Sunshine, I believe unintended consequences arose in this case through a process defect where certain statutes are not acting in harmony. A case based almost entirely on confidential information, though rare, points directly to critical Commission functions worthy of remedy. Therefore, to avoid frustrating the public interest in the future, I would strongly encourage the Legislature to consider amending the Sunshine Law to allow for a limited and narrow exception which would allow the Commission to conduct a closed hearing in the rare instance where most of the disputed facts at issue are confidential under s. 366.093, F.S.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

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FLORIDA PUBLIC SERVICE COMMISSION
OFFICE OF COMMISSION CLERK

DOCUMENT NUMBER ASSIGNMENT*

FILED DATE: 10/15/2020

DOCKET NO.: 20200001-EI

DOCUMENT NO.: 11211-2020

DOCUMENT DESCRIPTION:

(CONFIDENTIAL) Final Order PSC-2020-0368-FOF-EI establishing fuel cost recovery for Duke Energy.

***This document number has been assigned to a confidential document.**
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery clause with generating performance incentive factor.	DOCKET NO. 20200001-EI ORDER NO. ISSUED:

CONFIDENTIAL

The following Commissioners participated in the disposition of this matter:

GARY F. CLARK, Chairman
ART GRAHAM
JULIE I. BROWN
DONALD J. POLMANN
ANDREW GILES FAY

FINAL ORDER ESTABLISHING FUEL COST RECOVERY FOR DUKE ENERGY FLORIDA, LLC.

BY THE COMMISSION:

I. BACKGROUND

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

A. Prehearing proceedings before the Commission

Duke Energy Florida, LLC (DEF) is an investor-owned electric utility operating in the State of Florida. DEF reaffirmed its party status in Docket No. 20190001-EI on January 3, 2019. Likewise, the Office of Public Counsel (OPC), authorized by Section 350.0611, Florida Statutes (F.S.), to provide legal representation to Florida electric utility customers before the Commission, reaffirmed its party status in Docket No. 20190001-EI on January 4, 2019. The Florida Industrial Power Users Group (FIPUG), an association of utility customers who consume large amounts of electricity, and White Springs Agricultural Chemicals, Inc., d/b/a PCS Phosphate – White Springs (PCS Phosphate), a fertilizer company, reaffirmed their party status on January 4, 2019 and January 15, 2019, respectively.

We issued Order No. PSC-2019-0059-PCO-EI on February 13, 2019, establishing the procedures to be followed. On March 1, 2019, DEF filed its Petition for approval of fuel cost recovery and capacity cost recovery with generating performance incentive factor actual true-ups for the period ending December 2018. At that time DEF also filed the direct testimony of Jeffrey

Swartz which incorporated Exhibit JS-1, filed in the 2018 Fuel Clause. On September 13, 2019, OPC filed the direct testimony and exhibits of Richard A. Polich, non-confidential Exhibits RAP-1 through RAP-2, and confidential Exhibits RAP-3 through RAP-9. On September 26, 2019, DEF filed the rebuttal testimony of Jeffrey Swartz with confidential Exhibits JS-2 through JS-4.

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

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

B. Evidentiary proceedings before the Division of Administrative Hearings

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

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

[1] Section 286.011, F.S.

evidence. The revised Comprehensive Exhibit List (CEL) was admitted into evidence by stipulation as Exhibit No. 114.

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

C. 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 [redacted] 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] in the low pressure section of the steam turbine were damaged. The [redacted] were replaced with [redacted] and the plant was operated until August 2014 when the plant was taken out of service to [redacted] the [redacted]. The plant came back on line in December 2014 and ran until April 2016 when it was taken off line for routine valve work and [redacted] inspection. The plant was placed back in service in May 2016 with a [redacted] and operated until October 2016, when DEF shut the plant down due to excessive vibration and loss of [redacted] material. In December 2016 the plant was put back in service with the [redacted], and was taken out of service in February of 2017 due to a [redacted] projectile that traveled through the low pressure turbine rupture disk diaphragm. 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.

[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.

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

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

In his Recommended Order, the ALJ detailed the relevant facts and legal standards required to determine whether DEF acted prudently in its operation of Bartow Unit 4 from June 2009 until February 2017. In his conclusion, the ALJ recommended that this 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.

D. Post-Hearing proceedings before the Commission

On May 12, 2020, DEF submitted exceptions to the Recommended Order. OPC, jointly with PCS Phosphate and FIPUG (collectively, the Intervenors), filed a Response to DEF's Exceptions.

We have Jurisdiction over this matter under Sections 120.57, 366.04, 366.05, and 366.06, F.S. As discussed in more detail below, we deny DEF's Exceptions to the Recommended Order and adopt the Administrative Law Judge's Recommended Order as the Final Order.

II. RULINGS ON EXCEPTIONS

A. Standard of Review of Recommended Order and Exceptions

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

[3] "Derating" is the reduction in MW output due to installing pressure plates in place of the [redacted] in the low pressure section of the steam turbine.
[4] *Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013).

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]

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

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

B. Rulings on Exceptions to the Recommended Order

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).

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

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 [redacted] 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 [redacted] Thus, DEF concludes that the fact that the [redacted] failed 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 request to Mitsubishi for modifications to operate the unit at [redacted] do not logically support the conclusion that DEF agreed the unit originally could not be operated above 420 MW. These actions, according to DEF, allowed the unit to continue to be operated to produce the most power possible while research into the cause of the Period 1 outage was conducted. DEF argues that getting the unit back on line producing as much power as possible is implementation of long standing Commission policy that utilities operate generating units for maximum efficiency. DEF asserts that these actions are not evidence of DEF's acceptance of 420 MW as a limitation on the output of the unit.

Intervenors' Response

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

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

Ruling

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

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).

We agree 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

[8] Section 120.57(1)(l), F.S.; *Prysi v. Department of Health,* 823 So. 2d 823, 825 (Fla. 1st DCA 2002)
[9] Section 120.57(1)(l), F.S.
[10] DEF Exceptions at 2.
[11] *Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 750 (Fla. 2013).

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 is 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 [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 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 lower operating limitations placed on it by Mitsubishi and worked with Mitsubishi to increase the steam turbine's output to [redacted]. DEF disputes the significance of having done so. DEF argues that by [redacted] 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]

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

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

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

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

DEF Exception to Conclusion of Law 111

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

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

DEF takes exception to the conclusion that the [redacted] were not caused by [redacted] 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] as a potential problem 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 Mitsubishi facilities, 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 [redacted] 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 [redacted] were damaged in Period 1, Intervenors find this to be irrelevant since the ALJ does not address that fact in Paragraph 111.

Ruling

This conclusion of law constitutes the ALJ's rejection of DEF's Root Cause Anal ysis (RCA) conclusion that the low pressure steam turbine 40" [redacted][14] [redacted][15] [redacted][16] Given these facts, none of which are disputed by DEF, the ALJ found DEF's exclusion of [redacted] from its final RCA to be troubling, as does this Commission.

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, DEF's Exception to Conclusion of Law 111 is 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 [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 [redacted] in Period 1 was the result of [redacted]

[14] Finding of Fact No. 67.
[15] Finding of Fact No. 83.
[16] Finding of Fact No. 70.

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, under those circumstances, we cannot reject the ALJ's conclusion of law or substitute its own judgment for that of the ALJ.

Ruling

This conclusion of law constitutes the ALJ's acceptance of Mitsubishi's RCA which concluded [redacted][17][18][19].

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 it is 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, DEF's Exception to Conclusion of Law 112 is 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.

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

DEF defends not contacting Mitsubishi by citing the followin g 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 this 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.

Ruling

When viewed as a whole, the ALJ has based his analysis of this case by focusing on several areas. [redacted] Second, the type and meaning of [redacted] Third, the cause of the damage to the low pressure [redacted] 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] Section 3.2.1 of the original Purchase Agreement[22] clearly states [redacted][23] [redacted][24]

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

Under these circumstances it is reasonable to believe that Mitsubishi would have [redacted][25] This is especially true since DEF was proposing the use of an additional 501 Type F combustion turbine and heat recovery steam generator, giving DEF's proposed configuration the ability to produce far more steam than needed to generate 420 MW of output when compared to the original 3x1 application for which the steam turbine was designed.[26] Additionally, neither DEF nor Mitsubishi had any experience running a 4x1 combined cycle plant prior to commencing operation of Bartow Unit 4.[27] In sum, for these reasons the ALJ found that Mitsubishi did not contemplate DEF's operation of the steam turbine beyond the [redacted] 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 updated the warranty to 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, DEF's Exception to Conclusion of Law 113 is 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 vibrations associated with high energy loadings were the primary cause of the L-0 blade failures. DEF failed to satisfy its burden of showing its actions in operating the steam turbine in Period 1 did not cause or contribute significantly to the vibrations that repeatedly damaged the L-0 blades. To the contrary, the preponderance of the evidence pointed to DEF's operation of the steam turbine in Period 1 as the most plausible culprit.

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 [redacted] DEF contends this is true because the [redacted] 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.

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[25] Finding of Fact No. 87.
[26] Finding of Fact No. 31.
[27] Finding of Fact No. 85.
[28] Finding of Fact No. 102.
[29] Factual Finding No. 93.

Intervenors' Response

Intervenors argue that Conclusion of Law 114 summaries the findings of fact that support the ALJ's ultimate determination. Intervenors state that these findings of fact are supported by competent substantial evidence and we 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.

Ruling

As discussed in the ruling on Conclusions of Law 110-113 above, the ALJ found that a preponderance of the evidence supported the finding that the [redacted] was caused by vibrations/flutter associated with high energy loadings. Further, the ALJ found that the weight of the evidence supported the conclusion that the high energy loading on the blades was the result of [redacted]. DEF does not contest that these findings of fact are supported by competent substantial evidence of record.

We agree 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, DEF's Exception to Conclusion of Law 114 is denied.

DEF Exception to Conclusion of Law 119

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

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

Specifically, DEF disputes the ALJ's conclusion that it is not speculative to state that the events of Periods 2 through 5 were precipitated by DEF's actions during Period 1. DEF argues that there is no causal link between the operation of the unit in Period 1 and the forced outage

that occurred in Period 5. DEF contends that the lack of a causal link is proven by the fact that there was no residual damage done to the steam turbine itself in Period 1 and all parties agreed that DEF's operation of the plant subsequent to Period 1 was prudent.

Intervenors' Response

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

Ruling

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

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

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

> You can drive a four-cylinder Ford Fiesta like a V8 Ferrari, but it's not quite the same thing. At 4,000 RPMs, in second gear, the Ferrari is already doing 60 and it's just warming up. The Ford Fiesta, however, will be moaning and begging you to slow down and shift gears. And that's kind of what we're talking about here.
>
> It's conceded as fact that the root cause of the Bartow low pressure turbine problems is [redacted] caused repeatedly over time. The answer to the question is was this due to the way [DEF] ran the plant or is it due to a [redacted] Well, the answer is both.
>
> The fact is that [DEF] bought a steam turbine that was already built for a different configuration that was in storage, and then hooked it up to a configuration . . . that it knew could produce much more steam than it needed. It had a generator that could produce more megawatts, so the limiting factor was the steam turbine.
>
> On its own initiative, it decided to push more steam through the steam turbine to get more megawatts until it broke.
>
> * * *
>
> So from our perspective, [DEF] clearly was at fault for pushing excessive steam flow into the turbine in the first place. The repair which has been established . . . may or may not work, but the early operation clearly impeded [DEF's] ability to simply claim that Mitsubishi was entirely at fault. And under those circumstances, it's not appropriate to assign the cost to the consumers.

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.

Ruling

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." [redacted] Further, whether the vibration was due to the way the plant was run or [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. 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 is denied.

DEF Exception to Conclusion of Law 121

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

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

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

Intervenors' Response

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

Ruling

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

DEF Exception to Conclusion of Law 122

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

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

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

Intervenors' Response

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

Ruling

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

DEF Exception to Conclusion of Law 123

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

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

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

Intervenors' Response

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

Ruling

A review of DEF's exception reveals that it is simply re-argument of its position taken in Conclusion of Law No. 110 discussed above. For the reasons stated therein, DEF's Exception to Conclusion of Law 123 is denied because DEF has failed to demonstrate that its conclusion is as or more reasonable that the ALJ's.

DEF Exception to Conclusion of Law 124

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

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

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

Intervenors' Response

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

Ruling

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

DEF Exception to Conclusion of Law 125

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

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

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

Intervenors' Response

Intervenor's argue that the ALJ's conclusion is supported by competent substantial evidence of record as detailed in Intervenors' responses to DEF's exceptions to Conclusions of

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

Law 110-114 and 119. Intervenors state that DEF is simply rearguing its case that its operation of the steam turbine was prudent and therefore no refunds are required. Intervenors assert that we cannot, under these circumstances, reject the ALJ's conclusion of law by reweighing the evidence and substituting new and directly contrary findings that are favorable to DEF.

Ruling

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

C. Conclusion

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

III. ADOPTION AND APPROVAL OF THE RECOMMENDED ORDER AS THE FINAL ORDER

As set forth above, we deny all exceptions filed by DEF, approve all of the ALJ's findings of fact and conclusions of law without modification, and hereby adopt the ALJ's Recommended Order, found in Attachment A, as our Final Order.

We note that this case is highly fact specific and for that reason will have limited precedential value. There is literally no other plant in DEF's system that has four combustion turbines connected to one steam turbine nor any other plant in DEF's system that uses an after-market steam turbine designed for a 3x1 configuration in a 4x1 configuration. The ALJ was persuaded by OPC witness Polich's testimony that because Bartow Unit 4 was operated to produce more than 420 MW, too much steam was forced into the low pressure section of the steam turbine damaging the L-O blades. Nothing in the ALJ's Recommended Order or our decision in any way establishes, indicates, implies or imputes any going-forward protocol for the operation of steam turbines in DEF's fleet. Adoption of the Recommended Order with this conclusion of law does not translate into a general policy decision by the Commission that under any set of circumstances it is imprudent to run a unit above its nameplate capacity.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the attached Recommended Order (Attachment A) is adopted and approved as the Final Order in this docket. It is further

ORDERED that all of the exceptions to the Recommended Order filed by Duke Energy Florida, LLC, are denied. It is further

ORDERED that the docket shall remain open.

By ORDER of the Florida Public Service Commission this 15th day of October, 2020.

ADAM J. TEITZMAN
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

SPS

Commissioner Donald J. Polmann dissents with opinion.

I respectfully disagree with the majority decision. Having reviewed the evidentiary record in its entirety, applying my knowledge and expertise to the issues, I find that DEF acted prudently. I believe that the majority applied legal boundaries and restrictions that impeded it from taking certain actions, thereby precluding this Commission from exercising its broad authority and its affirmative duty to judge prudence in the public interest of the State of Florida. In my opinion, the particularities of this case involving substantial confidential testimony, the Sunshine Law, and transfer to DOAH imposed such overbearing limitations on the majority that its role was effectively reduced to ministerial.

To ensure that this Commission has clear and unambiguous authority to execute its full breadth of duties in future dockets, I strongly support statutory revisions to redress the diminished capacities that burdened this case. In my opinion, this Commission must advocate to the Florida Legislature for necessary statutory authority to hear confidential material efficiently and effectively in the future.

My profound concern is for perceptions of legal boundaries and restrictions that led this Commission in the majority to be muted into near dysfunction on addressing the Administrative Law Judge's (ALJ's) Recommended Order. My perception of legal boundaries and restrictions is of lesser limitations that do not impede this Commission from taking certain actions which better serve the public interest. Section 120.57(1)(1), Florida Statutes, affords a process in which to accept, reject, or modify an ALJ's Recommended Order. In this case, I disagree that the Conclusions of Law were so inextricably linked with the Findings of Fact. This inextricable linkage ostensibly conflicts with our obligation to review the entire record and leads us down the path of what I believe is strict inappropriate deference to the ALJ's determination of prudence. If that strict deference is appropriate, our role is reduced to ministerial where we must accept the ALJ Order and are unable to fully consider and determine prudence based upon the entire record. The standard for approving an "exception to a Conclusion of Law" is that a different Conclusion of Law is "as or more reasonable" than that of the ALJ and including particular reasons as to why an exception is made. I believe that the information DEF has provided in its exceptions is sufficient reason in Toto to accept a position that is as reasonable as the ALJ. Therefore, I submit that the Commission should have modified the ALJ's Order, by accepting DEF's exceptions to Conclusions of Law 110 through 114 and 119 through 125 and concluded that DEF met its burden of proof that its actions were prudent.

However, my vote in this matter also rejects the notion that the circumstances of this case, combined with legal constraints, eliminated the Commission's ability to hear this case in the first instance. We must conduct all proceedings in the Sunshine pursuant to s. 286.011, F.S., which effectively precludes this Commission from hearing cases requiring presentation of substantial confidential testimony and exhibits. Contrary to normal application of the Administrative Procedure Act and our practice, this case was sent to the Division of Administrative Hearings with delegation of our fact-finding responsibilities to an ALJ. Section 120.569, F.S., provides that each agency "may" refer a matter to DOAH and sets forth the legal standards for the ALJ as fact-finder "if" the agency makes the referral. The conflict of Sunshine and confidentiality caused the Commission to abdicate its fact-finder role.

In my opinion, the Commission's inability to hear this case affected the outcome. Our unique agency expertise and understanding of sound utility principles and practices to assess witness testimony and the record in this case would have been the more appropriate procedure in the public interest. While I fully respect and support the Sunshine Law and conducting our business in the Sunshine, I believe unintended consequences arose in this case through a process defect where certain statutes are not acting in harmony. A case based almost entirely on confidential information, though rare, points directly to critical Commission functions worthy of remedy. Therefore, to avoid frustrating the public interest in the future, I would strongly encourage the Legislature to consider amending the Sunshine Law to allow for a limited and narrow exception which would allow the Commission to conduct a closed hearing in the rare instance where most of the disputed facts at issue are confidential under s. 366.093, F.S.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

Exhibit C

DUKE ENERGY FLORIDA
Confidentiality Justification Matrix

DOCUMENT/RESPONSES	PAGE/LINE	JUSTIFICATION
Florida Public Service Commission's Final Order No. PSC-2020-0368-FOF-EI	**Page 3**: The information after "contracted with Mitsubishi to" and before "As required by its contract" in its entirety The information after "As required by its contract" to the end of the paragraph in its entirety The information after "DEF discovered that the" and before "in the low pressure" in its entirety The information after "were damaged. The" and before "were replaced with" in its entirety The information after "were replaced with" and before "and the plant" in its entirety The information after "out of service to" and before "the" in its entirety The information after "the" and before "The plant came back" in its entirety The information after "routine valve work and" and before "inspection. The plant" in its entirety	§366.093(3)(c), F.S. The document in question contains confidential information, contractual information, or information provided by a third party that DEF is obligated to keep confidential, the disclosure of which would harm its competitive business interests

	The information after “May 2016 with a” and before “and operated until” in its entirety The information after “vibration and loss of” and before “material. In December” in its entirety The information after “service with the” and before “and was taken” in its entirety The information after “due to a” and before “projectile that traveled” in its entirety **Page 4**: The information in the third footnote after “in place of the” and before “in the low pressure” in its entirety **Page 5**: The information at the end of paragraph 110 after “output of the turbine to” in its entirety **Page 6**: The information after “operating within the” and before “was prudent given” in its entirety The information after “damage the unit” and before “Thus, DEF concludes” in its entirety The information after “operate the unit at” and before “do not logically” in its entirety	

	<u>Page 8</u>: The information after "in Periods 2-5 and" to the end of the paragraph in its entirety The information after "turbine's output to" and before "DEF disputes the" in its entirety The information after "DEF argues that by" and before "in Periods 2-5" in its entirety **<u>Page 9</u>**: The information in paragraph 111 after "failures were caused" and before "This conclusion is belied" in its entirety The information after "by the fact that" and before "Mitsubishi cannot be" in its entirety The information after "be faulted for" and before "in a way that" in its entirety The information after "conclusion that the" and before "were not caused by" in its entirety The information after "were not caused by" and before "DEF argues that" in its entirety The information after "not originally identify" and	

	before “as a potential problem” in its entirety The information after “exact time that the” and before “were damaged in” in its entirety **<u>Page 10</u>**: The information after “to tell when the” and before “were damaged in” in its entirety The information after “steam turbine 40"” and before “footnote 14” in its entirety The information after “footnote 14” and before “footnote 15” in its entirety The information after “footnote 15” and before “footnote 16” in its entirety The information after “DEF's exclusion of” and before “from its final” in its entirety The information in paragraph 112 in its entirety The information after “ultimately attribute the” and before “DEF argues that” in its entirety The information after “damage to the” and before “in Period 1” in its entirety The information after “was the result of” to the end of	

	the paragraph in its entirety **<u>Page 11</u>**: The information after "which concluded" and before "footnote 17" in its entirety The information after "footnote 17" and before "footnote 18" in its entirety The information after "footnote 18" and before "footnote 19" in its entirety **<u>Page 12</u>**: The information after "evidence in the record: 1)" and before "2) the MW output" in its entirety The information after "focusing on several areas." and before "Second, the type" in its entirety The information after "and meaning of" and before "Third, the cause" in its entirety The information after "the low pressure" and before "Analysis of these" in its entirety The information after "clearly states" and before "footnote 23" in its entirety The information after "footnote 23" and before "footnote 24" in its entirety The information in footnote	

	22 after “Entitled the” and before “executed between Florida” in its entirety **<u>Page 13:</u>** The information after “Mitsubishi would have” and before “footnote 25” in its entirety The information after “turbine beyond the” and before “set out in the” in its entirety The information after “evidence demonstrated an” and before “that vibrations associated” in its entirety The information after “significantly to the” and before “DEF contends this” in its entirety The information after “true because the” and before “were damaged in” in its entirety **<u>Page 14</u>**: The information after “finding that the” and before “was caused by” in its entirety The information after “was the result of” and before “DEF does not contest” in its entirety The information after “DEF observed the” and before “of 420 MW.” in its entirety	

	Page 15: The information after “low pressure” and before “would still have” in its entirety **Page 16:** The information after “turbine problems is” and before “caused repeatedly over” in its entirety The information after “due to a” and before “Well, the answer” in its entirety **Page 17**: The information after “situation very well."” and before “Further, whether the” in its entirety The information after “plant was run or” and before “is that both” in its entirety **Page 19:** The information in paragraph 124 after “plate with the” and before “in December 2019.” in its entirety	

Exhibit D

AFFIDAVIT OF JEFFREY SWARTZ

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery Clause with generating performance incentive Factor	Docket No. 20200001-EI Filed: October 29, 2020

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

STATE OF FLORIDA

COUNTY OF _____

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, LLC (hereinafter "DEF" or the "Company") to give this affidavit in the above-styled proceeding on DEF's behalf and in support of DEF's Request for Confidential Classification (the "Request"). The facts attested to in my affidavit are based upon my personal knowledge.

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

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

3. DEF is seeking confidential classification for certain information contained in the Florida Public Service Commission's Final Order PSC-2020-0368-FOF-EI (DN 11211-2020). The confidential information at issue is contained in confidential Exhibit A to DEF's Request and is outlined in DEF's Justification Matrix that is attached to DEF's Request as Exhibit C. DEF is requesting confidential classification of this information because it contains confidential information, contractual information, or information provided by a third party that DEF is obligated to keep confidential, the disclosure of which would harm its competitive business interests.

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

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

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

7. This concludes my affidavit.

Further affiant sayeth not.

Dated the _____ day of _____, 2020.

_____
(Signature)
Jeffrey Swartz
Vice President – Generation Florida

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.

_____
(Signature)

_____
(Printed Name)

(AFFIX NOTARIAL SEAL)

NOTARY PUBLIC, STATE OF _____

_____
(Commission Expiration Date)

_____
(Serial Number, If Any)