BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Storm Protection Plan, pursuant to Rule 25-6.030, F.A.C., Florida Power & Light Company.	DOCKET NO. 20220051-EI FILED: September 6, 2022

JOINT POST-HEARING BRIEF OF THE OFFICE OF PUBLIC COUNSEL AND THE FLORIDA INDUSTRIAL POWER USERS GROUP

The Citizens of the State of Florida, through the Office of Public Counsel ("OPC"), and The Florida Industrial Power Users Group ("FIPUG"), collectively the Joint Parties, ("Joint Parties"), pursuant to the Order Establishing Procedure in this docket, Order No. PSC-2022-0119-PCO-EI issued March 17, 2022, and Order No. PSC-2022-0292-PCO-EI (striking testimony), issued August 1, 2022, hereby submit this Post-Hearing Brief.

STATEMENT OF BASIC POSITION

The Joint Parties' basic position in this case is that the Commission's determinations regarding the proposed Storm Protection Plan (SPP) must be consistent with the public policy contained in Section 366.96, Florida Statutes (the "SPP Statute") and Rule 25-6.030, Florida Administrative Code (F.A.C.) (the "SPP Rule"). The Joint Parties have focused on whether the programs proposed by Florida Power & Light Company ("FPL" or "the Company") satisfy the statutory and rule requirements for permissible programs as well as whether the appropriate comparisons of costs and benefits have been performed, and whether the proposed costs are justified in relation to the expected benefits. The evidence shows some programs within FPL's 2023-2032 SPP do not meet the legal requirements of permissible SPP programs, and there are also some instances where the comparison or analysis of the cost and benefits does not justify the programs. The burden of proof remains on the Company to demonstrate compliance with the SPP Statute and Rule, as well as to demonstrate the reasonableness and prudence of the programs and

their related costs estimates. FPL failed to meet its burden of proof. By challenging certain programs, projects, and costs, the Joint Parties, including OPC and its experts, have not assumed the burden of proof in this case. The Commission should deny or substantially modify the programs that Joint Parties identify as impermissible and/or fiscally unjustifiable.

The Commission should order modifications and adopt a plan that better balances customer interests in affordable service. Accordingly, the Commission should (1) scale back by $3,389 million the Distribution Lateral Hardening program, (2) deny the Transmission Access Enhancement Program, and (3) scale back by $16 million the Substation Storm Surge/Flood Mitigation Program.

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

ISSUES, POSITIONS, AND ARGUMENTS

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

Joint Parties: *****No. The Company failed to provide the requisite benefit estimates in a form by which comparisons required by the SPP Rule can be meaningfully made; this failure precludes an accurate determination of whether the continuation and expansion of existing programs and implementation of new programs are reasonable. Additionally, the data FPL provided regarding past storm performance is not applicable to the new program regarding Transmission Access.*

ARGUMENT:

Rule 25-6.030(4)4, F.A.C., requires a comparison of the ***costs*** identified in subsection (3)(d)3 and the benefits identified in subparagraph (3)(d)1 – said benefits include estimated reductions in restoration ***costs*** and outage times to result from the plan, pursuant to the plain language of the SPP Rule. In other words, the Rule requires a comparison of a cost estimate including capital and operating expenses against an estimate of the resulting reduction in outage times and restoration costs expected to be gained from the SPP programs.

FPL admitted that its SPP failed to include the estimates required by the Rule. TR 74 at 14-16; TR 78 at 5-10; TR 79 at 11-21. In fact, FPL's sole witness regarding the SPP stated that FPL made the affirmative decision not to include the information required by the Rule in its SPP because "[w]e felt it was not the best use of, you know, our time and analysis capability …." TR 100, at 23-25. The Company claims its SPP may deliver both quantitative and unspecified qualitative benefits, but because of the variables involved in making the estimates required by the SPP Rule, the Company's position is that it simply does not need to comply. TR 115 at 18-25; 74 at14-16; 77 at 19-24.

FPL's witness acknowledged that the data the Company chose to submit regarding potential benefits is based on historical information from past hurricanes, and is not applicable to the new TEAP program proposed in the pending SPP. TR 1167 at 4-10. Even for programs where the past storm data could have been useful in evaluating FPL's existing programs, the Company failed to apply the data to make the estimates required by the Rule. Contrary to the Company's claims that there is not an "accurate" way to do it and there would be too many "hypotheticals" involved (TR 75-76), history shows the quantification and calculation of reasonable estimates for

comparison purposes is not only possible, but has been done before.[1] There are models available by which benefits could be expressed in quantitative terms, including dollar figures (TR 845), and the Company admitted it could have engaged a consultant to properly provide the quantitative information referenced in the SPP Rule. TR 1175 at 5-8.

So, the Company is asking the Commission to compare apples to oranges – to compare specific dollar costs to vague, undefined, generalized benefits. The result is not in fact a true comparison, but instead an unhelpful juxtaposition of very different factors.

The plain text of the SPP Rule requires a comparison of costs and benefits. A meaningful comparison for purposes of the SPP Rule that serves the purpose of the statute regarding customer rates requires a substantive comparison of like factors, i.e., quantification in terms of dollars. Otherwise, such an informational-only filing FPL seems to suggest is adequate would render the Legislature's delegation of authority a nullity. See, *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla 1978).

The statutory requirement which governs all aspects of public utilities' actions is stated under the "general duties" outlined at the very beginning of statute chapter 366, Fla. Stat., which governs public utilities. The overriding obligation of utilities is to provide sufficient service at fair and *reasonable* rates. s. 366.03, Fla. Stat. There is nothing in the SPP Statute which indicates the legislature exempted a utility's SPP from this mandate. Moreover, the SPP Statute plainly speaks in terms of "expected" reductions in restoration costs, which is clearly a requirement for forward estimates, not simple lists of past storm data. s. 366.96(4)(a), Fla. Stat. Forward-looking data is

[1] *E.g.*, *In re: Review of 2007 Electric Infrastructure Storm Hardening Plan*, Order No. PSC-2007-1023, Dec. 28, 2007.

also required in order to calculate the rate impacts three years into the future, as required by the law. s. 366.96(4)(d), Fla. Stat.

Based on the normal understanding of the term "comparison," some evaluation in the form of analysis is required by the SPP Rule. Otherwise, the text would simply ask utilities to present separate lists of various, disparate factors with no requirement to compare them. Moreover, because of the overriding statutory requirement that the PSC set rates that are fair and reasonable, it is completely rational for the Commission to require more than historic data sets when the rule requires estimates of any "resulting" reduction in restoration costs expected from the proposed programs. The legislature was clearly concerned about fully considering the costs to ratepayers from making any improvements proposed in SPPs; JOINT PARTIES submit the best way for the Commission to conduct the evaluation required by the statute, particularly that required by s. 366.96 (4)(c), is for utilities to present forward-looking data and analyses in the SPPs. Where the Company failed to comply with the SPP Statute and Rule, it should not be rewarded with wholesale approval of its plan. As such, the Commission should make the modifications recommended by witness Kevin Mara.

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

Joint Parties: *****Some of FPL's proposed programs will have a greater impact on reducing outages times and lowering restoration costs than others. FPL asserts its Transmission Pole replacements already resulted in no pole failures from Hurricanes Matthew or Irma. There is no evidence that creating new roads and bridges as suggested in the Transmission Access Program will reduce restoration costs or improve outage times.*

ARGUMENT:

Rule 25-6.030(3)(d), F.A.C., in relevant part states the following:

> (3) Contents of the Storm Protection Plan. For each Storm Protection Plan, the following information must be provided:
>
> (a) A description of how implementation of the proposed Storm Protection Plan will strengthen electric utility infrastructure to withstand extreme weather conditions by promoting the overhead hardening of electrical transmission and distribution facilities, the undergrounding of certain electrical distribution lines, and vegetation management.
>
> (b) A description of how implementation of the proposed Storm Protection Plan will reduce restoration costs and outage times associated with extreme weather conditions therefore improving overall service reliability.
>
> ***
>
> (d) A description of each proposed storm protection program that includes:
>
> 1. A description of how ***each proposed storm protection program*** is designed to enhance the utility's existing transmission and distribution facilities ***including an estimate of the resulting reduction in outage times and restoration costs*** due to extreme weather conditions… .

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

Underpinning the SPP Rule is a logical determination that requiring a program-by-program demonstration of the legislatively mandated test for SPP eligibility a necessary element to holding runaway SPP spending in check. The Legislature intended SPPs to focus on core transmission, distribution and lateral hardening and equipment undergrounding, stating:

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

Section 366.96(1)(c), Florida Statutes.

Otherwise, customers are exposed to the "kitchen sink" effect. This is where, in addition to the core SPP programs like transmission, distribution and lateral hardening and undergrounding

that the Legislature mandated to be included in the SPP, a utility seeks to add general infrastructure work which is not logically or demonstrably tied to protection against extreme weather conditions. An example of this kitchen sink phenomenon occurred when FPL originally sought to gain approval to include capital and O&M costs in the SPP under the guise of "winterization" storm hardening in its SPP.[2] The Commission must resist the extensive mission creep that will inevitably occur and overwhelm the SPP process if strict adherence to the statutory standards is not enforced.. Otherwise costs for responsible and prudent maintenance activities of the grid that are properly part of normal *routine* maintenance that should be the subject of base rate recovery will end up on customers' bills as separate SPPCRC recoveries. Strict application of the test laid down by the Legislature and a reasonable cost-effectiveness standard will ensure that on programs that truly meet the needs of Floridians in an affordable manner will be implemented.

The SPP Rule embodies a recognition that if a plan is evaluated for meeting the Two-Prong test on a plan-only level, it can lead to improper enlargement of the clause at times when base rates may be frozen. This phenomenon can occur when capital and O&M costs associated with ordinary base rate prudence obligations are shifted out of a rate-frozen base rate recovery paradigm and into a free-for-all, streamlined clause proceeding.

Against the backdrop of the ratepaying public's witness, Lane Kollen, being barred from giving his expert opinion on the logical and appropriate interpretation of the Rule, Company witnesses in the proceeding were given license to reinterpret the SPP Statute and Rule as needed in the attempt to justify inclusion of their programs within the scope of the SPP. In its Motion to

[2] See, Order No. PSC-2022-0194-PCO-EI; Order No. PSC-2022-0291-PHO-EI, at 30, 38 (footnote 2) (Winterization issues 7 &8 withdrawn.)

Strike, FPL effectively said that Mr. Kollen attempted to add criteria to the SPP Rule and misapplied the standard for review of SPPs. Mot. at 4, 15.

However, in offering his own self-serving legal interpretations, FPL's witness Jarro testified numerous times on statutory construction, legislative intent, and his interpretation of the FPL's legal obligations under the SPP Statute and Rule. TR 1108; TR 1115; TR 1131; TR 1137; TR 74 -75, 77-78, 115-116; TR 89; TR 90; TR 95. Among other things, witness Jarro testified at length regarding his interpretation that, even though the Rule requires estimates of results expected from the proposed plan, his own interpretation was that a "historical representation" was better, and thus satisfied the SPP Rule, despite the plain language of the Rule. TR 74 -75, 77-78, 115-116. Jarro also testified about his interpretation of the "comparison" required by the SPP Rule. TR 89. However, Jarro's interpretation of the comparison was allowed, whereas Kollen's was not, despite the fact that Jarro admitted he was in fact applying the law. TR at 95, lines 10-15.

As explained above, FPL failed to provide proper data regarding estimated reductions in restoration costs and outage times associated with extreme weather events. TR 74 at 14-16; TR 77 at 19-24; TR 78 at 5-10; TR 79 at 11-21. In lieu of complying with the requirements of the Rule, FPL provided certain information on past storms, dating as far back as 2005. TR 1165 at 18-22. FPL claims the old data is adequate for purposes of this proceeding such that it need not provide the estimates specified in the Rule regarding expected (i.e., future) reductions in restoration costs and outage times which the utility anticipates will result from the projects listed in the currently proposed SPP.

Aside from FPL's failure to provide the information explicitly required in the Rule, the historical data discussed in FPL's SPP is inadequate for purposes of this proceeding as relates to the new proposed program regarding transmission access, Transmission Access Enhancement

Program, ("TEAP"). The old hurricane data obviously predates the new program which was not in place when the old data was collected. Even if the past storm result data was adequate to satisfy the terms of the SPP Rule, FPL still failed to comply with the requirement to estimate the benefits in terms of reduced restoration costs it expects to result from the programs proposed in the SPP at issue in this proceeding. TR 88 at 7-25, 89 at 1-4. In addition to FPL's failures to provide the data required by the SPP Rule, and specifically as relates to the Substation Storm Surge / Flood Mitigation program, because FPL's system complies with sufficient redundancies, and the substations proposed do not have a history of flooding, there is no evidence that the program would actually reduce outage times. TR 649-650; TR1159-1160. Regarding the TEAP program, the maintenance and building of roads, bridges, and culverts is part of the Company's core responsibilities and does not qualify as the type of storm hardening enhancement contemplated by the SPP Statute or Rule. Instead, TEAP is a prime example of the type of mission creep referenced above. TR 658-661. The TEAP program should not be approved as part of FPL's SPP.

Allowing expansive interpretations designed by utilities to maximize the types of projects approved for recovery via the SPP and SPPCRC process will result in undisciplined ratemaking and skyrocketing customer bills over time. Moreover, if the Commission embraces these notions, they expose the statute itself to running afoul of Article II, Section 3 of the Florida Constitution, discussed *supra*.

The Commission should follow witness Mara's recommendations to exclude FPL's proposed TEAP program and, as relates to the Substation Storm Surge/Flood Mitigation Program, exclude those substations that do not have a history of flooding or that have alternate feeds available.

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

Joint Parties: *****FPL has several proposed projects that prioritize areas of lower reliability performance, including Feeder Hardening, Lateral Hardening, and Transmission Hardening. Substation Storm Surge and Transmission Access do not qualify as permissible SPP programs or projects and/or are not economically justifiable; therefore they must be excluded.*

ARGUMENT:

The Joint Parties reiterate and incorporate their arguments above regarding the proposed Substation Storm Surge and TEAP programs.

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

Joint Parties: *****A large number of programs that FPL has proposed as SPP programs in flood zones are more appropriately addressed in a base rate case since it has not been demonstrated that these programs or projects will harden the system from extreme storm events. Additionally, many programs do not reduce BOTH restoration costs and outage times.*

ARGUMENT:

The Joint Parties reiterate and incorporate by reference the arguments made in Issue 2 above.

Additionally, the Joint Parties focused their evaluation and resulting objections on the lack of strict compliance with the rule and statute governing storm protection plans. Our efforts to identify excessive spending in the plan centered around projects that did not meet the Two-Prong test and those that were not cost-effective.

The Joint Parties note that the phrase "feasible, reasonable, or practical" as used in the issue is a test of the physical viability of the plan components. It is not a statutory test for whether the

public interest has been met, nor does it exclude the consideration of prudence in the determinations mandated by the Legislature.

Consistent with witness Mara's recommendation, the Commission should reduce the budget for FPL's 2023-2032 Distribution Lateral Hardening Program by $3,389 million, reduce the budget for the Substation Storm Surge/Flood Mitigation Program by $16 million, and deny the TEAP program.

ISSUE 5: What are the estimated costs and benefits to FPL and its customers of making the improvements proposed in the Storm Protection Plan?

Joint Parties: *****The Company failed to quantify the dollar benefits of any of its programs and failed to use comparisons of benefits to costs to identify beneficial programs, select and rank those projects, or determine the magnitude of those projects.*

ARGUMENT:

The Company not only failed to estimate the benefits of its proposed programs going forward, but also testified that, contrary to the SPP Rule's requirements, it is not appropriate to conduct such benefit estimates. TR 115 at 18-25. In fact, FPL's sole witness regarding the SPP testified that a generalized, conclusory statement that the plan might generally reduce outage times and costs is adequate to satisfy the requirements of the SPP Rule. TR 79 at 4-10.

The Joint Parties restate and incorporate the arguments made in Issue 1 above.

It would be disingenuous to suggest the legislature intended to create and require the use of a mechanism (the SPP) designed to serve the public interest, with a particular concern about customers' rates (as demonstrated by the requirement in s. 366.96(4)(d), Fla. Stat. to estimate the annual rate impacts of the SPP), but at the same time would bake into the mechanism a way for utilities to avoid any evaluation of the reasonableness of the programs proposed, or cost and benefit comparisons the SPP Rule requires, by allowing utilities to unilaterally decide if, when, and how

they should produce benefit estimates in terms which can be compared to the cost estimates or to rate impacts, i.e., dollars. This would be an absurd result contrary to law. *E.g., Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1270 (Fla. 2008).

Because the Commission struck the substantive testimony of the ratepaying public's witness, Mr. Kollen, the record lacks his full explanation of the ramifications of FPL's failure to provide meaningful or quantifiable information regarding the expected costs and benefits of the Company's SPP programs, and the record also lacks his recommendations on methods and evidence that could be used to evaluate the reasonableness of the subject SPP programs, in terms of their impact on customers' rates. Nevertheless, the available record shows the costs far outweigh the benefits. TR 833-834.

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

Joint Parties: *Since FPL improperly included certain programs in its proposed SPP, FPL's customer rate impacts are not properly calculated.*

ARGUMENT:

FPL's sole SPP witness stated on cross-examination that he was not prepared to answer questions about the rate impacts which would result from implementation of the plan. TR 94 at 4-10. FPL rejected the concept of cost-effectiveness or any sort of analysis of costs versus benefits, regarding any of its SPP projects, and affirmatively testified that in its interpretation of the SPP Statute and Rule, neither of those concepts is required, so they were not included in FPL's SPP. TR 89 at 1-4, 111 at 8-9, 1218 at 12-14. Because the record lacks any evidence of the cost-effectiveness of the programs in dispute, their reasonableness cannot be assessed for purposes of inclusion in the SPP. Where certain programs should have been excluded from FPL's rate impact

calculations, but were improperly included, then the rate impacts proposed by FPL were not properly calculated, and thus are incorrect.

ISSUE 7: **WITHDRAWN**

ISSUE 8: **WITHDRAWN**

ISSUE 9: **Should the Commission approve, approve with modification, or deny FPL's new Transmission Access Enhancement Program?**

Joint Parties: *****The Commission should not approve FPL's Transmission Access Enhancement Program ("TEAP").*

ARGUMENT:

The record shows this new program is not necessary for FPL to harden its system against extreme weather events. FPL has already replaced 99 percent of the transmission structures in the legacy FPL service area without ever having this additional, new program. Thus, the existing roads and bridges were sufficient to achieve almost all the transmission structure work needed and FPL never before had to install new roads or bridges to do it. TR 1155 at 15-24. Additionally, FPL's system is designed with adequate redundancy and complies with NERC standard regarding redundancy, which is even more reason this program is not appropriate for the SPP. TR 1159 at 21 – 1160 at 1. FPL's own position is that it has already successfully achieved substantial reductions in outage times without this program. TR 1166 at 16 – 1167 at 10.

Maintaining or replacing its infrastructure, including bridges and transmission right of ways, is part of the Company's basic responsibilities in the normal course of business. TR 660. Such maintenance does not harden the system or reduce outages, as required for inclusion in the SPP pursuant to the SPP Rule. TR 640-641, 658, 660 at 6-10. Allowing SPP recovery for basic maintenance which should be addressed in a rate case is an example of the type of mission creep which could render the SPP statute and its legislative intent meaningless in addition to exposing

customers to billions of dollars of added expenses on top of the increased base rates collected by the Company. TR 660-661 The vague, simplistic explanation of benefits listed in FPL's SPP, i.e., "Benefits …include reducing restoration time and reducing restoration costs …."[3] does not satisfy the SPP Rule and is inadequate to justify taking hundreds of millions of dollars from ratepayers who are already dealing with inflation pressures and pandemic-related economic challenges and uncertainty. The Commission should follow the admonition of the current Governor in his widely reported April 27, 2022 veto message:

> Given that the United States is experiencing its worst inflation in 40 years and that consumers have seen steep increases in the price of gas and groceries, as well as escalating bills, the state of Florida should not contribute to the financial crunch that our citizens are experiencing.[4]

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

Joint Parties: *It is not in the public interest to approve FPL's Storm Protection Plan without making the modifications recommended by the Office of Public Counsel. The Commission should make the adjustments reflected in the table below from page 13 of the Direct Testimony of Kevin J. Mara.*

[3] EX 2 at 54. Additionally, FPL's testimony regarding TEAP fails to qualify as competent substantial evidence under section 120.57(1)(b) because the Public Counsel was barred from cross-examining the witness about the program on rebuttal. FPL's pre-filed rebuttal testimony explicitly references testimony filed in the 2022 TECO docket. TR 1138, fn. 2. However, when OPC attempted to cross-examine the witness on his representations about how TEAP compares to the TECO program on which FPL claims TEAP is based, OPC was prevented from referencing testimony filed in the 2022 TECO docket, despite the fact that FPL' witness was the *first* party to cite the 2022 TECO docket testimony, thus opened the door to the questioning on so-called "cross docket" testimony. TR 1138, 1163 at 15-23. In essence, FPL was allowed to use the docket "silo" ruling as both a sword and a shield. Due to the violation of 120.57(1)(b) which requires that parties shall have the opportunity to conduct cross-examination on all issues involved, none of FPL's testimony or exhibits concerning TEAP may lawfully be considered competent, substantial evidence; therefore, the program must be denied, thus excluded from FPL's SPP.

[4] https://www.flgov.com/wp-content/uploads/2022/04/4.27.22-Veto-Transmittal-Letter.pdf

ARGUMENT:

The Company's SPP should be modified as listed below.

Capital	Total 2023-2032 SPP $Millions	Reductions Proposed by Mara	Net 2023-2032 SPP $Millions	Reason for Reduction
Distribution Inspection Program	$629	$-	$629	
Transmission Inspection Program	$657	$-	$657	
Distribution Feeder Hardening Program	$2,437	$-	$2,437	
Distribution Lateral Hardening Program	$9,389	$(3,389)	$6,000	Limit impact to customers
Transmission Hardening Program	$499	$-	$499	
Distribution Vegetation Management Program	$28	$-	$28	
Transmission Vegetation Management Program	$-	$-	$-	
Substation Storm Surge/Flood Mitigation Program	$16	$(16)	$-	Does not comply with 25-6.030
Transmission Access Enhancement Program	$116	$(116)	$-	Does not comply with 25-6.030
Total Capital	$13,907.9	$(3,658.4)	$10,249.5	

Further, in determining elements of cost to be included in the SPP for recovery in the SPPCRC, the Commission should also exclude CWIP from both the return on rate base and depreciation expense, and instead allow a deferred return on CWIP until it is converted to plant in service or prudently abandoned. Alternatively, a return on CWIP can be deferred either as an allowance for funds used during construction ("AFUDC") or as a miscellaneous deferred debit.

FPL has suggested that since the SPP Statute contains a legislative finding that promoting storm hardening is generally in the State's interest, then individual SPPs that address four factors referenced in the statute presumptively meet the public interest standard, regardless of the degree to which they comply with all aspects of the SPP Statute and implementing administrative rule. TR 90 at 16-22. The determination of whether a project meets the public interest standard requires

the presentation of facts and analysis instead of a mere reference to a general statement in the statute's legislative findings. The public interest is served by decisions which consider affordability and reasonableness. [5]

The SPP Statute requires estimates of customer rate impacts and the SPP Rule requires a comparison of expected costs and benefits. Thus, it is clearly important to the legislature that storm protection be guided by elements of cost-effectiveness. As stated above, the law requires than all rates and charges demanded by a public utility must be reasonable. s. 366.03, Fla. Stat. The concept of "reasonableness" in rates previously has been construed to include cost-effectiveness.[6] Whether the "comparison" required in the SPP Rule is made by a costs/benefits analysis or some other determinant of cost-effectiveness, there must be rational guidelines in the application of the SPP Statute, or else the costs customers must pay will quickly spiral out of control. In or about 2010, before the SPP statute was enacted, the Commission's records indicated cost recovery clauses provided for approximately 61 percent of FPL's revenue. *In re: Petition for increase in rates by Florida Power & Light Company*, Order No. PSC-2010-0153, p. 10, March 27, 2010. The Commission should exercise caution as it adds on yet another cost to customers' bills, over and above base rates – a cost which is cumulative year over year and which will have ratemaking impacts that last decades. TR 829. Customers' bills are already subject to skyrocketing fuel (natural gas) prices, and base rate increases, not to mention the general economic pressures due to increasing costs of everything, including food and household necessities. The consideration of the public interest must take into account not only the need for storm hardening, but also the level at

[5] At minimum, the Commission's evaluation of the SPP must be guided by reasonableness. *See In re: Petition of East Naples Water Sys.*, Order No. PSC-14658, July 30, 1985 (in the absence of an explicit standard of review, the standard of reasonableness should be applied).

[6] In re: Application for a rate increase by GTE Fla. Inc., Order No. PSC-1993-0108-FOF-TL, p. 123, Jan. 21, 1993.

which it is cost-effective and affordable for ratepayers. The Joint Parties' position is that, based on the information provided by FPL to date, the costs of its SPP far outweigh the benefits, and the SPP must be modified as recommended by witness Mara in order to satisfy the public interest standard and qualify for approval.

JOINT PARTIES' POST-HEARING LEGAL ISSUE:

ISSUE: **Did the Commission unlawfully exclude testimony and evidence related to the reasonable and customary principles for the application of ratemaking methods?**

Joint Parties: *Yes. The Commission's exclusion of the Citizens' testimony submitted by Lane Kollen was a denial of due process and it was reversible error.*

ARGUMENT:

In Order No. PSC-2022-0292-PCO-EI, the Commission struck certain testimony of the public's witness, Lane Kollen, thus cut short the Joint Parties' ability to put on a significant portion of their case. The Order to Strike fundamentally compromised the hearing process, and likely the outcome, due to the exclusion of the public's expert testimony that would have otherwise aided the Commission in interpreting and implementing the SPP Statute and its Rules for the benefit of customers.[7] The Commission also lost the opportunity to protect customers from an endless escalation of costs, year-over-year. The SPP Rule implemented the Legislature's expectation that the Commission take a role in ensuring that the rate trajectory was reasonable, and that there was an appropriate benefit to cost relationship resulting from the plan approval. Rule 25-6.030(3)(d)1., F.A.C. The Order to Strike additionally runs afoul of Article II, Section 3 of the Florida

[7] In addition to the errors discussed above, the Order to Strike contains substantive factual errors in the form of multiple misstatements of OPC's arguments in opposition to the Motion to Strike. TR 800 at 14 through 802 at 5.

Constitution which requires a delegation of legislative authority to contain adequate guidelines to protect against unbridled agency discretion.

By blocking out only the public's views and its ability to put on a significant portion of its case due to the stricken testimony, the Commission has crippled its own ability to follow the law. By pre-emptively deciding that only the IOUs are entitled to introduce testimony which interprets the SPP statute and rules – and inconsistently at that – the agency has greatly disadvantaged the ratepaying public they are required by law to protect. Consequently, the Commission left itself in a take-it-or-leave-it posture that robs it of the opportunity to protect customers from an endless escalation of costs, year-over-year. The Legislature expected to the Commission to take a role in ensuring that the rate trajectory was reasonable and that there was an appropriate benefit to cost relationship resulting from the plan approval. Yet the Commission, with its Order to Strike, removed significant evidence offered to mitigate the requested rate increases.

Approval of the SPP is a prerequisite to the Commission's ability to later approve inclusion of SPP costs in customer's rates. Given that prudence of the actual cost expenditures is only judged ***after*** a final accounting is given by the IOUs two years after approval of the SPP, certain determinations are required elements of the authorization to proceed to expend funds initially in the SPP proceeding; those determinations include the prudence of the programs embedded in the SPP's overall design, the project and funding prioritization, location selections, and cost-effectiveness. This interpretation is confirmed by the provision in section 366.96(7), Florida Statutes that attaches prudence to the plan – upon approval – for purposes of a utility's subsequent proceeding implementation of an SPP:

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

Since the SPPCRC docket is not an authorization to proceed, whereas the approval made in the SPP docket is the authorization to proceed with programs, the Commission cannot deem prudence to exist merely by fiat or waving a public interest wand over the SPPs. The Florida Supreme Court has said as much recently:

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

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

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

Accordingly, the table was set for an asymmetrical hearing where the Commission ordered that no testimony to be taken from the public's witness Kollen on issues of the proper way to interpret and apply the statute and rules while granting FPL and other companies free reign to provide their varying opinions of different ways to read and apply the statute and rules. The imbalance was evident in the way IOU witnesses were allowed to put forward varying (and contrary) interpretations of the areas of the regulatory interpretations.

FPL was allowed to maintain a monopoly in the hearing room on providing the only evidence on how its interpretation best suited its investors, even as Duke Energy Florida ("DEF") presented a starkly different view of utilities' obligations under the SPP statute and rule. Both companies were allowed to opine with impunity while OPC expert Kollen, a 40 year operational

and consulting participant in the world of interpreting and implementing utility regulatory requirements, was prevented from providing expert testimony on a different but entirely reasonable regulatory interpretation.

The unilateral, skewed, and discriminatory hearing process will require reversal of any decision that ignores Mr. Kollen's full testimony. Section 120.68(7)(a), (d), and (e)4.[8]

The Commission made a preordained outcome determination on an essential element of the case prior to the hearing in contravention of section 120.68(7)(a), Florida Statutes.

The Commission violated subsection 120.68(7)(a), first by the issuance of the Order to Strike, and next by rejecting reconsideration. These two erroneous decisions resulted in the

[8] In relevant part the law provides that:

> (7) The court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:
>
> (a) There has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts;
>
> ***
>
> (c) The fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure;
>
> (d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action; or
>
> (e) The agency's exercise of discretion was:
>
> ***
>
> 4. Otherwise in violation of a constitutional or statutory provision;
>
> but the court shall not substitute its judgment for that of the agency on an issue of discretion.

public's expert Kollen not being allowed to provide his expert opinion evidence that supports a reasonable – but different – regulatory interpretation of the SPP requirements than the one the IOUs wish the Commission to adopt. By barring the introduction of such evidence by the public's witness into evidentiary record, the Commission in essence took agency action and made its decision prior to hearing. The Commission took no record evidence from the public[9] on disputed facts regarding the necessary determinations of the prudence of the proposed programs, the valuation of statutorily required benefits, the statutorily required cost-effectiveness of programs, an objective measure of the proper balancing of costs and benefits, and the proper accounting that should underlie the appropriate estimation of rate impacts. The Commission now does not have the option to resort to the excluded, yet proffered testimony since it was taken for the very limited purposes of preserving the appellate record.[10]

The Commission failed to interpret Section 366.96, Florida Statutes, in contravention of Section 120.68(7)(d).

Substantively, the Commission has failed to conform its actions to subsection (d) by arbitrarily, and thus erroneously, failing to effectively interpret section 366.96, Fla. Stat. The error is that the Commission did not make a meaningful attempt to interpret the statute because they blocked any diversity of opinion. This error occurred when the full Commission barred consideration of the portion of Mr. Kollen's testimony – based on the facts surrounding the SPP – that would have provided facts and a renowned expert's common-sense regulatory interpretation that meets a reasonable man standard about methods that the Commission can utilize to limit rate

[9] The allowance of proffered testimony and some limited cross examination as a proffer did not provide the public a full opportunity to provide evidence on disputed facts.
[10] See, TR 1093, "[W]hat is being proffered for appellate purposes…"; TR 1187 "[F]or purposes of preserving a proffered record for appellate review …"

increases. The Legislature mandated that the Commission consider costs and benefits of the programs in making the determinations of the plans. Section 366.96(4), Fla. Stat.

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

The approach taken by the Commission cannot be considered an "interpretation" as contemplated by section 366.96(a) and (d), Fla. Stat. where the agency bars the public's evidence and perspective. The Order to Strike foreclosed the Commission from (1) receiving evidence on a spectrum of views, (2) considering that evidence, and then (3) seriously weighing it before making a reasoned interpretation and application of the SPP statute, calling into question the Commission's ability to faithfully interpret the statute. The fact that the Commission asymmetrically allowed IOU witnesses to testify to their interpretations of the SPP statute and rules underscores the point that the public's witness Kollen's testimony, directed to whether FPL's SPP complied with the pertinent statute and rule, should have been allowed. TR 1108; TR 1115; TR 1131; TR 1137; TR 74 -75, 77-78, 115-116; TR 89; TR 90; TR 95.

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

Article II, Section 3 provides as follows:

> Branches of government. The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers

> appertaining to either of the other branches unless expressly provided herein.

The leading case of *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978), stands for the proposition that it is unlawful for the Legislature to delegate its powers to an agency without providing adequate guidance. This principle has been applied to the statutes governing the Commission. *Microtel, Inc. v. Florida Pub. Serv. Comm'n*, 464 So. 2d 1189, 1191 (Fla. 1985); *Microtel, Inc. v. Florida Pub. Serv. Comm'n*, 483 So. 2d 415 (Fla. 1986). In short, the Commission's hands are not tied. It does not have to accept virtually anything that the utilities can squeeze into the SPP recovery. Indeed, such a narrow view of the Commission's options could be seen as the agency interpreting its mandate without an effective or complete delegation of authority. This may indicate that the Legislature did not provide sufficient guidance, or direction about the rate setting related to the SPP cost incurrence and recovery (re: cost-effectiveness, benefit determination, public interest and prudence). The statutory interpretation offered by the Company's non-lawyers is an incorrect and unwarranted invitation to unbridled ratemaking with no legislative guidance provided to limit the amount or trajectory of the expenditures and rates. This error is compounded where the utilities' interpretation required the Commission to set aside the limitations found elsewhere in chapter 366 that require the Commission to approve only fair, just, and reasonable rates and charges. See, Sections 366.041, 366.05, 366.06, Fla. Stat.

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

ISSUE 11: Should this docket be closed?

Joint Parties: *****No. Joint Parties raised a legal issue regarding the Order striking Mr. Kollen's testimony. The legal issue requires resolution before the docket is closed. In connection with the legal issue, both parties have made evidentiary proffers which must be considered if Joint Parties prevail on the legal issue.*

Dated this 6th day of September, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE
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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 6th day of September 2022, to the following:

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