

**IN THE SUPREME COURT OF FLORIDA**

CITIZENS OF THE STATE OF  
FLORIDA, ETC.,

CASE NO.: SC18-213

Appellants,

LT Number: 20180007-EI

v.

JULIE IMANUEL BROWN, ETC.,  
ET AL.

Appellees.

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APPEAL FROM THE  
FLORIDA PUBLIC SERVICE COMMISSION

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ANSWER BRIEF OF APPELLEE  
FLORIDA PUBLIC SERVICE COMMISSION

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RECEIVED, 07/23/2018 12:13:25 PM, Clerk, Supreme Court

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## **SYMBOLS AND REFERENCES**

In this Brief, Appellee Florida Public Service Commission will be referred to as the Commission or the FPSC. Appellee Florida Power & Light Company will be referred to as FPL. And Appellant Citizens of the State of Florida through the Office of Public Counsel will be referred to as OPC. The final order on review, *In re Environmental Cost Recovery Clause*, 2018 WL 334384 (2018), Commission Order No. PSC-2018-0014-FOF-EI, will be referred to as Final Order No. PSC-2018-0014-FOF-EI or the Final Order.

The following symbols will be used: (B. [Page #]) – OPC’s Initial Brief; (APP. [Page #]) – OPC’s Appendix to its Initial Brief; (R. [Page #]) – Record on Appeal; (T. [Vol. #]: [Page #, Line #]) – Hearing Transcript; (EXH. [#]) – Exhibits.

Unless otherwise noted, all references to the Florida Statutes are to the Florida Statutes (2017).



## **STATEMENT OF THE CASE AND FACTS**

### **I. STATEMENT OF THE CASE**

This case is a direct appeal filed by OPC from those portions of Final Order No. PSC-2018-0014-FOF-EI relating to the Commission's approval of cost recovery for certain disputed costs associated with FPL's Turkey Point Cooling Canal Monitoring Plan Project ("Cooling Canal Project") through the Commission's 2017 environmental cost recovery clause ("ECRC") proceeding. (R. 2,190-2,221; APP. 5-36) By the Final Order, the Commission also approved environmental cost recovery for a number of other undisputed projected expenditures and true-up amounts for four of Florida's investor-owned electric utilities, including FPL, Duke Energy Florida, LLC, Tampa Electric Company, and Gulf Power Company. (R. 2191-2192, 2214-2220; APP. 6-7, 29-35) The ECRC is an ongoing proceeding with a hearing held every year. "Each investor-owned electric utility presents its historical, actual, and projected environmental recovery costs for the Commission to establish an annual cost recovery factor to be charged to ratepayers." *In re Petition for determination of need by FPL*, 2007 WL 859755 (2007) at \*2.

The Commission's jurisdiction below is pursuant to § 366.8255, Fla. Stat. (also referred to herein as "the ECRC statute"). Section 366.8255(2), Fla. Stat., requires that the Commission "shall allow recovery of [an electric] utility's

prudently incurred environmental compliance costs . . . through an environmental compliance cost-recovery factor that is separate and apart from the utility's base rates." This Court has mandatory jurisdiction pursuant to Art. V, § 3(b)(2), Fla. Const., and §§ 350.128(1) and 366.10, Fla. Stat., because the Final Order relates to the rates of a public utility providing electric service.

## **II. STATEMENT OF THE FACTS**

### **A. History of Cooling Canal System**

The FPL property on which its Turkey Point Power Plant ("Turkey Point") is located covers approximately 11,000 acres in unincorporated southeast Miami-Dade County. (EXH. 8, p. 1) Turkey Point currently has three generating units. "Units 3 and 4 are Florida's first nuclear generating units, which FPL constructed in the 1970s. Unit 5 is a natural gas combined cycle generating unit brought into service in 2007." (EXH. 11, p. 2) Units 1 and 2 were built in the 1960s but have since ceased operating. (EXH. 11, p. 2; EXH. 6, p. 5)

FPL utilizes a 5,900 acre Cooling Canal System at Turkey Point which provides a heat removal function for Units 3 and 4, and receives cooling tower blowdown from Unit 5. (R. 2192; APP. 7; T. 3:287, lines 8-10, EXH. 11, p. 2) The Cooling Canal System is unlined and has a direct connection to the groundwater. (EXH. 12, p. 3) It is permitted by the Florida Department of Environmental Protection ("FDEP") under the National Pollutant Discharge Elimination System

(“NPDES”) program and also as an industrial wastewater facility. (T. 3:288, 13-22; EXH. 4)

FPL witness Sole testified that “during the design and permitting of the [Cooling Canal System], it was well understood that the unlined cooling canals would exchange with the saline groundwater below, and that salinity could increase in the canals during operations.” (T. 3:289, 19-22) The FDEP has determined that

[h]istorical data show that, when the [Cooling Canal System] was constructed in the 1970's, saline water had already intruded inland along the coast due to many factors such as freshwater withdrawals, drought, drainage and flood control structures, and other human activities. To date, the relative contributions of the different factors toward westward movement of the saltwater interface have not been fully identified.

(EXH. 13, p. 3) Witness Sole testified that “annual average salinity [in the Cooling Canal System] gradually increased from approximately 34 Practical Salinity Units (“PSU”) in the early 1970s to approximately 70 PSU in 2013.” (T. 3:290, 7-9)

Witness Sole further testified that “[s]ince the inception of the [Cooling Canal System] more than 40 years ago, its construction and operation have been closely monitored by federal, state, and local agencies to ensure ongoing protection of water quality and the environment.” (T. 3:289, 1-3) Numerous actions of environmental agencies through the years supporting this testimony are contained in the record and are summarized below. (EXH. 3; EXHs. 5-13)

## **B. History of Monitoring Activities**

In 1971, FPL entered into a Final Judgment with the U.S. Department of Justice that required the permitting, construction, operation, and maintenance of the Cooling Canal System. (EXH. 3) Among other things, the Final Judgment required FPL to “construct and maintain a ground water monitoring system southward and eastward of the cooling system for the purpose of evaluating the effect of the seepage from the cooling system upon the underlying aquifer.” (EXH. 3, p. 5)

In 1972, FPL entered into its first Agreement with the Central and Southern Florida Flood Control District, predecessor to the South Florida Water Management District (“SFWMD”), regarding the construction, operation, and monitoring of the Cooling Canal System. (EXH. 5, p. 1). That Agreement was supplemented and amended five times over the years. (EXH. 5, p. 1) The Fourth Supplemental Agreement entered into in 1983 required FPL to construct and operate an Interceptor Ditch System to restrict westward movement of saline water from the Cooling Canal System “to those amounts which would occur without the existence of the [C]ooling [C]anal [S]ystem.” (EXH. 5, p. 3)

In 2008, the Commission granted FPL’s petition for a determination of need for the uprate, or expansion, of the electric generating capacity at Turkey Point Units 3 and 4, upon determining that there was a need for the uprate and that it

“would increase the power output . . . from approximately 700 megawatts (MW) to 804 MW per unit, for a two-unit total of about 208 MW.” *In re Petition of FPL*, 2008 WL 544422 (2008) at \*1.

Also in 2008, by Conditions IX and X of its Conditions of Certification for the uprate under the Florida Electrical Power Plant Siting Act, § 403.501 *et. seq.*, Fla. Stat., FDEP required FPL to develop a revised Monitoring Plan for the Cooling Canal System and its surrounding area. (EXH. 6, pp. 24-27 of 40; EXH. 5, p. 2) At that time, FPL “reported average salinity to be 50 to 60 [PSU]. This is a hypersaline condition, which means the salinity level is higher than is typical for seawater, which is about 35 PSU.” (EXH. 11, pp. 2-3) Among other things, FPL was required to “delineate the vertical and horizontal extent of the hypersaline plume that originates from the [C]ooling [C]anal [S]ystem and to characterize the water quality including salinity and temperature impacts of this plume.” (EXH. 6, p. 26 of 40) FDEP found that the uprate project may cause an increase in temperature and salinity in the Cooling Canal System, and that field data was needed “in order to determine impacts of the proposed changes in the Turkey Point [C]ooling [C]anal [S]ystem on Biscayne Bay.” (EXH. 6, p. 24 of 40) The revised Monitoring plan was to include the “installation and monitoring of an appropriate network of wells and surface water stations.” (EXH. 6, p. 26 of 40)

In 2009, FPL, SFWMD, FDEP, and the Miami-Dade County Department of Environmental Resource Management ("Miami-Dade DERM") developed the revised Monitoring Plan, which FPL agreed to implement. (EXH. 5, pp. 2-4) The revised Monitoring Plan identified

monitoring for the purpose of delineating current ecologic, surface water and groundwater impacts, from the operation of the [C]ooling [C]anal [S]ystem on the water resources of [SFWMD] in general and the facilities and operations of [SFWMD], including, but not limited to, delineation of impacts westward of the Levee 31E and eastward of Turkey Point into Biscayne Bay, and to assess whether mitigation, abatement, and other remedial measures would be necessary.

(EXH. 5, p. 2-3) The Fifth Supplemental Agreement between FPL and SFWMD required the Monitoring Plan or the Interceptor Ditch System to be further revised if SFWMD determined that the data acquired under the Monitoring Plan was insufficient to evaluate impacts of the Cooling Canal System. (EXH. 5, p. 6)

### **C. Abatement or Remediation of Hypersaline Plume**

By letter dated April 16, 2013, SFWMD provided notice to FPL that

SFWMD has determined that saline water from FPL's Turkey Point Power Plant [Cooling Canal System] has moved westward of the L-31E Levee in excess of those amounts that would have occurred without the existence of the [Cooling Canal System] and has moved into the water resources outside the plant's property boundaries.

(EXH. 7) SFWMD thus instructed FPL "to begin consultation with SFWMD to identify measures to mitigate, abate or remediate the movement of saline water."

(EXH. 7)

By letter dated May 1, 2013, FPL responded by agreeing to consult and work with SFWMD and FDEP “to evaluate mitigation, abatement, and remediation options.” (EXH. 8, p. 4) On June 18, 2013, FPL presented the SFWMD and FDEP with a proposal to manage the Cooling Canal System groundwater located west of the L-31E Canal. (EXH. 8, p. 5) That proposal provided for “reducing the salinity within the [Cooling Canal System] to a level comparable to the salinity of Biscayne Bay through the addition of less saline ground and/or surface waters.” (EXH. 8, p. 5)

In August 2014, FPL submitted its first annual post-uprate Monitoring Report to SFWMD, Miami-Dade DERM, and FDEP, reporting that the salinity in the Cooling Canal System had steadily increased since the first quarter of 2013. (EXH. 8, p. 5) “By the end of May 2014, the salinity in the [Cooling Canal System] was averaging approximately 90 PSU.” (EXH. 8, p. 5)

By administrative order dated December 23, 2014, FDEP determined that “reducing the salinity from a higher base salinity condition will require additional measures such as a greater addition of fresh water, removal of salt mass from the [Cooling Canal System], and alteration of [Cooling Canal System] inflows and outflows.” (EXH. 8, p. 6) FDEP thus ordered FPL to submit a detailed Cooling Canal System Salinity Management Plan, with the primary goal of reducing the hypersalinity of the Cooling Canal System “to abate westward movement of

[Cooling Canal System] groundwater into class G-II . . . groundwaters of the State.” (EXH. 8, p. 6) FDEP further ordered FPL to reduce the average annual Cooling Canal System salinity to or below a salinity of 34 PSU within four years of the effective date of the Management Plan. (EXH. 8, p. 8)

The administrative order was challenged by several parties. (T. 3:295, 11; EXH. 11) On April 21, 2016, after an administrative hearing resulted in a recommended order by an Administrative Law Judge (EXH. 11 at pp. 30-63 of 63), the FDEP issued a final administrative order, approving the administrative order as modified therein. (T. 3:296, 3-5; EXH. 11)

On April 25, 2016, the FDEP issued a Notice of Violation and Orders for Corrective Action to FPL regarding saltwater intrusion into an area west of the Cooling Canal System and a Warning Letter identifying water quality concerns in certain areas adjacent to the east and south of the Cooling Canal System. (T. 3:296, 7-10; EXH. 12) By the Notice of Violation, FDEP found that saltwater intrusion into the area west of the Cooling Canal System “is impairing the reasonable and beneficial use of adjacent G-II groundwater and therefore, is a violation of the minimum criteria for groundwater in rule 62-520.400, Florida Administrative Code.” (EXH. 12, p. 3) Fla. Admin. Code R. 62-520.400 prohibits a discharge in concentrations that impair the reasonable and beneficial use of adjacent waters. (EXH. 12, p. 3) The Notice of Violation “directed FPL to enter into consultations



to develop a Consent Order to address abatement and remediation measures to address the hypersaline water's impact on saltwater intrusion.” (T. 3:296, 11-14; EXH. 12)

#### **D. History of Cooling Canal Project Cost Recovery**

In the Commission's 2009 ECRC proceeding, FPL first requested and the Commission first allowed cost recovery for the 2009 Monitoring Plan costs through the ECRC. *In re ECRC*, 2009 WL 4021870 (2009) (“2009 ECRC order”). (EXH. 74) Parties to that proceeding proposed a stipulation for the recovery of those costs, which the Commission approved by final order. *Id.* (EXH. 74) Prior to that time, the costs associated with FPL's monitoring efforts were being recovered through FPL's base rates. *Id.* (EXH. 74)

Witness Sole testified that since 2009, “FPL has annually filed all cost data concerning the project, including information relating to actual and estimated costs, and final true-up amounts. FPL has also filed project description and progress reports annually to provide the Commission with information concerning project accomplishments and expenditures.” (T. 3:309, 6-11)

#### **E. Cooling Canal Project Disputed Costs**

On October 2, 2015, Miami-Dade DERM issued FPL a Notice of Violation “for alleged violations of County water quality standards and criteria in groundwater.” (T. 3:295, 11-14; EXH. 9) On October 7, 2015, FPL entered into a

Consent Agreement with the Miami-Dade DERM. (EXH. 10) The Consent Agreement “require[s] FPL to implement actions to intercept, capture, contain, and retract hypersaline groundwater west and north of the FPL property boundary. It also require[s] FPL to conduct additional monitoring and reporting.” (T. 3:295, 16-21) On August 15, 2016, FPL and Miami-Dade DERM executed a Consent Agreement Addendum, which requires FPL to “take action to address the County's alleged violations of water quality standards and cleanup target levels relating to the exceedance of ammonia.” (EXH. 14, p. 2 of 22)

On June 20, 2016, a Consent Order (“FDEP Consent Order”) was also executed between FPL and the FDEP. (EXH. 13) In addition to monitoring, the FDEP Consent Order requires mitigation and remediation activities. (R. 2197, APP. 12) FDEP witness Sole testified that both the FDEP Consent Order and the Miami-Dade DERM Consent Agreement have threshold requirements for FPL to establish an average 34 PSU salinity within the Cooling Canal System and to bring back to the boundaries of FPL’s property water that exceeds a hypersaline threshold of 19,000 milligrams per liter. (T. 3:354, 16-24) The ultimate goal of the FDEP Consent Order is to arrest migration of hypersaline water from FPL’s property. (EXH. 13, p. 5) The FDEP Consent Order supersedes the 2016 FDEP administrative order discussed *supra*, (EXH. 13, pp. 4, 18) and memorializes

resolutions to address the violations alleged in the FDEP Notice of Violation and issues raised in the FDEP Warning Letter, also discussed *supra*. (EXH. 13, p. 6)

The “Cooling Canal Project Disputed Costs” consist of the environmental compliance costs, including monitoring, mitigation, and remediation costs incurred, or projected to be incurred, to implement the terms of the FDEP Consent Order (EXH. 13), Miami-Dade DERM Consent Agreement (EXH. 10), and Miami-Dade DERM Consent Agreement Addendum (EXH. 14) (hereinafter collectively referred to as “the Consent Actions”). These costs are referred to in the Final Order as “Monitoring Plan Disputed Costs” (R. 2,192; APP. 7) and in OPC’s brief as the “Aquifer Repair Project.” (B. 2)

FPL first filed its projected 2017 Cooling Canal Project Disputed Costs for recovery in the 2016 ECRC proceeding. (R. 525-706) The parties stipulated, and the Commission approved, the deferral of those cost issues for resolution in the 2017 ECRC docket, and meanwhile the Commission authorized FPL to recover the projected costs, subject to refund with interest, through the ECRC true-up mechanism. *In re ECRC*, 2016 WL 6947159 (2016) at \*6.

#### **F. Hearing on Petition for Recovery of Cooling Canal Project Disputed Costs**

On July 19, 2017, FPL filed its 2017 Petition for Approval of Environmental Cost Recovery (“Petition”), by which it requested, among other things, cost recovery through the 2017 ECRC for the Cooling Canal Project Disputed Costs.

(R. 1,013-1,448) Parties filed prehearing statements listing their positions on the issues of the case on September 29, 2017. (R. 1,848-1,891) The Commission conducted a Prehearing Conference on October 18, 2017 (R. 1,920-1,945) and issued its Prehearing Order on October 20, 2017. (R. 1,950-1,974) The only contested issues in the case below were Issues 10A through 10E, which relate to the recovery of the Cooling Canal Project Disputed Costs. (R. 1957-1961)

A full evidentiary hearing was held in the matter on October 25-27, 2017 (R. 1,843-1,847; ATTACHMENT ONE), as scheduled in the order establishing procedure for the case. (R. 857-870) All prefiled witness testimony was stipulated into the record except for those witnesses who testified regarding the recovery of the Cooling Canal Project Disputed Costs. (T. 1:11, 9-20) Three FPL witnesses testified on direct in support of FPL's Petition. (T. 2:232-260; T. 3:282-323; T. 4:558-564) OPC put on one witness, a hydrogeologist and expert in groundwater modeling, (T. 5:608-653) and three FPL witnesses testified on rebuttal. (T. 5:707-719; T. 6:822-824; T. 6:839-865) Cross-examination was conducted on the Cooling Canal Project issues. (T. 2:264-269; T. 3:328-473; T. 4:481-554; T. 4:568-590; T. 5:657-706; T. 5:725-782; T. 6:787-814; T. 6:827-837; T. 6:869-964) Post-hearing briefs were filed on November 13, 2017 (R. 2,013-2,124) and the Commission staff filed its recommendation in the matter on November 30, 2017. (R. 2,125-2,149)

## **G. Final Order**

The Commission ruled upon the merits of the Petition at its December 12, 2017, Agenda Conference. (R. 2150-2163) Upon review of the full evidentiary record, post-hearing briefs of the parties, and recommendation of its staff to allow the cost recovery, the Commission unanimously allowed FPL to recover the Cooling Canal Project Disputed Costs through the ECRC, if prudently incurred. (R. 2211; APP. 26) The Commission approved the actual 2015 and 2016 Cooling Canal Project Disputed Costs as having been prudently incurred and found FPL's request for the projected 2017 and 2018 Cooling Canal Project Disputed Costs to be reasonable. (R. 2211; APP. 26) The Commission allowed the recovery of the 2017 and 2018 Cooling Canal Project Disputed Costs through the ECRC, with the exception of a \$1.5 million escrow deposit required by the FDEP Consent Order, with prudence "to be determined in a future ECRC proceeding, as part of the traditional true-up mechanism." (R. 2201, 2211; APP. 16, 26) The Commission's ruling is memorialized in the Final Order, rendered on January 5, 2018. (R. 2,190-2,221; APP. 5-36)

## **SUMMARY OF ARGUMENT**

The Commission correctly construed § 366.8255, Fla. Stat., in rendering its decision. This Court has consistently given great deference to an agency's interpretation of a statute that it is charged with enforcing. Nevertheless, even if

this Court were to apply a *de novo* standard of review, the Final Order should be affirmed because the Commission's interpretation of § 366.8255, Fla. Stat., comports with the plain meaning of the statute.

OPC's interpretation is flawed because it fails to take into account the plain meaning of the entire statutory phrase "to protect the environment," choosing instead to focus on the common definition of the word "protect" in isolation. The plain meaning of "to protect the environment," or "environmental protection," includes the possible remediation or abatement of environmental harm. The Commission's interpretation of § 366.8255, Fla. Stat., accords with the doctrine of *in pari materia*, the legislative history, and the Commission's prior orders. It is also supported by the record evidence and is commonsensical.

The Consent Actions impose specific new requirements that apply to FPL in relation to its function as an electric utility, including the abatement or remediation of the hypersaline plume. The Consent Actions are environmental regulations pursuant to § 366.8255(1)(c), Fla. Stat.

The Commission's decision to consider the Cooling Canal Project Disputed Costs as part of the 2009 Monitoring Plan rather than approving them as new project costs is based on competent, substantial record evidence. Moreover, the record does not support OPC's suggestion that the growth of the hypersaline plume should have been apparent to FPL in 2009. The record fully supports the

Commission’s findings that FPL prudently incurred the 2015 and 2016 Cooling Canal Project Disputed Costs and that its request for recovery of the 2017 and 2018 projected Cooling Canal Project Disputed Costs is reasonable such that those costs are eligible for ECRC cost recovery, if prudently incurred, with prudence to be determined in a future ECRC proceeding.

The Final Order shows that the Cooling Canal Project Disputed Costs conform to the ECRC’s statutory criteria. The Final Order should be affirmed because it correctly interprets § 366.8255, Fla. Stat., is supported by competent, substantial evidence, and comports with the essential requirements of law.

## **ARGUMENT**

### **I. THE COMMISSION CORRECTLY ALLOWED THE RECOVERY OF PRUDENTLY INCURRED COOLING CANAL PROJECT DISPUTED COSTS THROUGH THE ECRC.**

#### **Standard of Review**

The standard for reviewing a Commission order is as set forth in *Citizens of State v. FPSC*, 146 So. 3d 1143, 1149 (Fla. 2014), wherein this Court stated that:

[a]s we have consistently held, when reviewing an order of the Commission, this Court affords great deference to the Commission's findings. *S. Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 752 (Fla. 2013) (noting that this Court has repeatedly held that “[the Commission's] orders, and concomitant interpretations of statutes and legislative policies that it is charged with enforcing, are entitled to great deference.”). “Commission orders come to this Court clothed with the presumption that they are reasonable and just.” *W. Fla. Elec. Coop. Ass'n, Inc. v. Jacobs*, 887 So. 2d 1200, 1204 (Fla. 2004) (citing *Gulf Coast Elec. Coop., Inc. v. Johnson*, 727 So. 2d 259, 262 (Fla.

1999)); *see also BellSouth Telecomm., Inc. v. Johnson*, 708 So. 2d 594, 596 (Fla. 1998) (noting that Commission orders carry a presumption of validity). Moreover, “[t]o overcome these presumptions, a party challenging an order of the Commission on appeal has the burden of showing a departure from the essential requirements of law and the legislation controlling the issue, or that the findings of the Commission are not supported by competent, substantial evidence.” *S. Alliance for Clean Energy*, 113 So. 3d at 752 (quoting *Crist v. Jaber*, 908 So. 2d 426, 430 (Fla. 2005) (citing *Jacobs*, 887 So. 2d at 1204)).

OPC argues that the Commission incorrectly construed the controlling statute, § 366.8255, Fla. Stat., in rendering its decision. (B. 24) Thus, pursuant to § 120.68(7)(d), Fla. Stat., the standard of review is whether the Commission erroneously interpreted a provision of law and a correct interpretation compels a particular action.

This is not a *de novo* standard, despite OPC’s assertion to the contrary. (B. 24) As support for its assertion, OPC cites to *Citizens of State v. Graham*, 191 So. 3d 897, 900 (Fla. 2016) (reversing final order upon finding that the Commission lacked the statutory authority to act, and that whether the Commission has the authority to act is a question of law subject to *de novo* review). (B. 24) Unlike in *Citizens of State v. Graham*, in the instant case, the Commission has the express statutory authority to act. Section 366.8255(2), Fla. Stat., authorizes the Commission to “allow recovery of [a] utility’s “prudently incurred environmental compliance costs, . . . through an environmental compliance cost-recovery factor that is separate and apart from the utility’s base rates.” OPC does not dispute that



§ 366.8255, Fla. Stat., is the controlling law. (B. 25) At issue is whether the Commission acted appropriately pursuant to § 366.8255, Fla. Stat., not whether the Commission was authorized to rule on the Petition at all.

This Court has consistently given great deference to an agency's interpretation of a statute that it is charged with enforcing. *See, e.g., GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007) (finding that “[t]his Court will not depart from the contemporaneous construction of a statute by a state agency charged with its enforcement unless the construction is ‘clearly unauthorized or erroneous’”) (citation omitted). Nevertheless, even if this Court were to apply a *de novo* standard of review, the Final Order should be affirmed because the Commission's interpretation of § 366.8255, Fla. Stat., comports with the plain meaning of the statute.

### **Argument in Response**

#### **A. In Allowing Recovery of Prudently Incurred Cooling Canal Project Disputed Costs through the ECRC, the Commission Correctly Interpreted § 366.8255, Fla. Stat.**

Section 366.8255(2), Fla. Stat., provides, in material part, that

[a]n electric utility may submit to the [C]ommission a petition describing the utility's proposed environmental compliance activities and projected environmental compliance costs. . . . If approved, the [C]ommission shall allow recovery of the utility's prudently incurred environmental compliance costs . . . through an environmental compliance cost-recovery factor that is separate and apart from the utility's base rates.

Section 366.8255(1)(d), Fla. Stat., defines the term “environmental compliance costs” to include

all costs or expenses incurred by an electric utility in complying with environmental laws or regulations, including, but not limited to:

1. Inservice capital investments, including the electric utility’s last authorized rate of return on equity thereon.
2. Operation and maintenance [“O&M”] expenses. . . .

Finally, § 366.8255(1)(c), Fla. Stat., defines “environmental laws or regulations to include “all federal, state, or local statutes, administrative regulations, orders, ordinances, resolutions, or other requirements that apply to electric utilities and are designed to protect the environment.”

Section 366.8255(1)(c), Fla. Stat., does not define the term “to protect the environment.” OPC erroneously argues that because the plain and ordinary meaning of the word “protect” means to prevent harm, not to “remediate, clean-up or restore to the pre-harm state,” the ECRC statute must be interpreted to limit environmental compliance cost recovery to “prospective, preventive measures.”

(B. 27-29) As reflected in the Final Order, OPC made this same argument below.

(R. 2194-2195; APP. 9-10) In rejecting this interpretation, the Commission found that “[t]he FDEP and [Miami-Dade] DERM are state and local environmental regulators, respectively, with the authority to impose requirements on FPL’s operations of the [Cooling Canal System] and other relevant plants. The [Consent Actions] all include specific new requirements that apply to FPL in relation to its

function as an electric utility.” (R. 2196-2197; APP. 11-12) The Commission further found that the Consent Actions “expressly require FPL to engage in remediation activities.” (R. 2197; APP. 12)

The Commission agrees that “the plain meaning of the statute is always the starting point in statutory interpretation.” *GTC, Inc.*, 967 So. 2d at 785. Nevertheless, OPC’s argument is flawed because it fails to take into account the plain meaning of the entire statutory phrase “to protect the environment,” choosing instead to focus on the common definition of the word “protect” in isolation.

The plain meaning of “to protect the environment,” or “environmental protection,” includes the possible remediation or abatement of environmental harm. The on-line BusinessDictionary.com defines “environmental protection” as being “[p]olicies and procedures aimed at conserving the natural resources, preserving the current state of natural environment and, where possible, *reversing its degradation.*” <http://www.businessdictionary.com/definition/environmental-protection.html> (emphasis added). And although the current Black’s Law Dictionary (10th ed. 2014) no longer defines the term “environmental protection,” earlier editions define it as “[e]nvironmental guardianship based on policies and procedures. Objectives are (1) the conserving of natural resources, (2) the preserving of the existing natural environment and, (3) *where possible, repairing*

*damage and reversing trends.”* Black’s Law Dictionary, 2nd ed. <https://thelawdictionary.org/environmental-protection/> (emphasis added).

The Consent Actions address the migration of the hypersaline plume, which constitutes a violation of FPL’s NPDES/industrial wastewater permit authorizing discharges from Turkey Point to the Cooling Canal System (EXH 4, p. 5 of 25) and of certain water quality standards contained in the Miami-Dade County Code. (EXH. 9; T. 3:426, 11-23) By the Final Order, the Commission correctly found that based on the statutory definition, the Commission’s past interpretation of the statute, and the record in this case, the Consent Actions are environmental regulations pursuant to § 366.8255, Fla. Stat. (R. 2196-2197; APP. 11-12)

Section 403.0885(2), Fla. Stat., gives the FDEP the power to implement the federal NPDES program, “including the general permitting program under 40 C.F.R. s. 122.28 . . . , in accordance with s. 402(b) of the Clean Water Act, as amended, and 40 C.F.R. part 123.” FPL’s permit was also issued pursuant to FDEP’s industrial wastewater permitting program. (EXH. 4, p. 1 of 25; EXH. 13, p. 2) General Condition no. 1 of the permit states that “[t]he terms, conditions, requirements, limitations and restrictions set forth in this permit are binding and enforceable pursuant to Chapter 403, F.S. Any permit noncompliance constitutes a violation of Chapter 403, F.S., and is grounds for enforcement action, permit termination, permit revocation and reissuance, or permit revision.” (EXH. 4, p. 13

of 25) Moreover, the Miami-Dade DERM “is empowered to control and prohibit pollution and protect the environment within Miami-Dade County” pursuant to, among other things, § 403.182, Fla. Stat. (EXH. 14, p. 5 of 22)

Thus, to resolve the dispute over the plain meaning of § 366.8255, Fla. Stat., the statute should be read *in pari materia* with the applicable sections of Ch. 403, Fla. Stat., in order to ascertain the Legislature’s intent as to whether the remediation activities contained within the Consent Actions fall within the ambit of “environmental protection.” See *Department of State v. Martin*, 916 So. 2d 763, 768 (Fla. 2005) (finding that the doctrine of *in pari materia* is “a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent”).

By § 403.021(5), Fla. Stat., the Legislature declares that

the prevention, *abatement*, and control of the pollution of the air and waters of this state are affected with a public interest, and the provisions of this act are enacted in the exercise of the police powers of this state for the purpose of protecting the health, peace, safety, and general welfare of the people of this state.

(Emphasis added.) By § 403.021(6), Fla. Stat., the Legislature finds and declares that

control, regulation, and *abatement* of the activities which are causing or may cause pollution of the air or water resources in the state and which are or may be detrimental to human, animal, aquatic, or plant life, or to property, or unreasonably interfere with the comfortable

enjoyment of life or property be increased to ensure conservation of natural resources; to ensure a continued safe environment; to ensure purity of air and water; to ensure domestic water supplies; to ensure protection and preservation of the public health, safety, welfare, and economic well-being; to ensure and provide for recreational and wildlife needs as the population increases and the economy expands; and to ensure a continuing growth of the economy and industrial development.

(Emphasis added.) Section 403.061(1), Fla. Stat., gives the FDEP

the power and the duty to control and prohibit pollution of air and water in accordance with the law and rules adopted and promulgated by it and, for this purpose, to:

(1) Approve and promulgate current and long-range plans developed to provide for air and water quality control *and pollution abatement*.

(Emphasis added.)

These provisions show that the abatement of pollution and of activities that cause pollution are very much included within FDEP's charge to protect the environment under Ch. 403, Fla. Stat. Moreover, the FDEP Consent Order states that "[t]he terms and conditions set forth in this Order may be enforced in a court of competent jurisdiction pursuant to sections 120.69 and 403.121, F.S." (EXH. 13, p. 21) And § 403.121(2)(b), Fla. Stat., authorizes the FDEP to "institute an administrative proceeding to order the prevention, abatement, or control of the conditions creating [a] violation [of Ch. 403, Fla. Stat.] or other appropriate corrective action." The record shows that the FDEP defines the term "abate" as meaning "to reduce in amount, degree, or intensity; lessen; diminish." (EXH. 11, p. 16 of 63)

Reading the statutory provisions of Ch. 403, Fla. Stat., quoted *supra*, together with the phrase “to protect the environment” contained in § 366.8255, Fla. Stat., shows that the Commission’s interpretation of § 366.8255, Fla. Stat., accords with the doctrine of *in pari materia*. The Consent Actions are environmental regulations as contemplated by § 366.8255(1)(c), Fla. Stat., designed to enforce FDEP and Miami-Dade DERM water quality standards by requiring FPL to abate, reduce, lessen, or diminish water pollution in and around the Cooling Canal System by engaging in activities to retract the hypersaline plume. (EXHs. 10, 13, 14; T. 5:682, 11-20)

OPC’s reliance on the definition of “protect” contained in footnote 9 of *Frandsen v. FDEP*, Case No. 01-0527RX (Fla. DOAH Sept. 26, 2001) (dismissing petition challenging a particular rule implementing FDEP’s duties under Ch. 258, Fla. Stat.) is misplaced. (B. 27) Ch. 258, Fla. Stat., does not relate to the same subject or object as § 366.8255, Fla. Stat. FDEP’s duties under Ch. 258, Fla. Stat., involve the management and operation of Florida’s state parks, not environmental protection through the implementation of the NPDES/Florida industrial wastewater permitting programs regulating wastewater discharges that are reasonably expected to be a source of water pollution. *See* § 403.087(1), Fla. Stat. (providing, in relevant part, that “[a] stationary installation that is reasonably expected to be a source of air or water pollution must not be operated, maintained, constructed,

expanded, or modified without an appropriate and currently valid permit issued by the [FDEP].”). *See also* Fla. Admin. Code R. 62-620 (setting forth the procedures to obtain a permit to construct, modify, or operate a wastewater facility or activity which discharges wastes into waters of the State or which will reasonably be expected to be a source of water pollution, including requirements and procedures for establishing permit limitations and conditions).

The Commission’s interpretation of § 366.8255, Fla. Stat., allowing for the recovery of the Cooling Canal Project Disputed Costs through the ECRC, is reasonable and commonsensical. Section 366.8255, Fla. Stat., does not disallow environmental remediation or abatement costs from ECRC cost recovery when, as in the instant case, the environmental compliance costs are mandated by environmental regulators. (EXHs. 10, 13, 14)

OPC’s interpretation of § 366.8255, Fla. Stat., would require the Commission to evaluate every environmentally-related activity included in every annual ECRC proceeding to determine which environmental compliance costs derive from activities that are remedial rather than prospective in nature. This would prove to be more difficult than it may appear at first blush. For example, the FDEP Consent Order requires FPL to “[i]mplement a remediation project that shall include a recovery well system that will halt the westward migration of hypersaline water. . . .” (EXH. 13, p. 8) Yet FPL witness Ferguson testified that



FPL has determined that the Recovery Well System performs both remediation and prevention functions. The remediation function is related to the removal of hypersaline water from areas outside the boundaries of the Turkey Point Cooling Canal System (“CCS”) that are in violation of groundwater standards, while the preventive function is related to the containment and removal of the hypersaline water within CCS boundaries. FPL engaged TetraTech to perform an engineering analysis to determine the apportionment of the Recovery Well System costs between prevention and remediation, based on the relative mass of hypersaline water removed from within and beyond the CCS boundaries, respectively, over the 20-year expected operating life of the Recovery Well System.

(T. 4:561, 19 – 4:562, 6)

Upon record review and analyzing the parties’ arguments as to the proper accounting treatment for the costs associated with the Recovery Well System and related activities, the Commission found that they perform both remediation and containment functions such that the costs should be allocated as “74 percent containment (capital) and 26 percent remediation (O&M).” (R. 2210; APP. 25) Thus, under OPC’s theory that only containment or preventive measures should be recoverable, 26 percent of the Recovery Well System costs would be disallowed. Neither the language of § 366.8255, Fla. Stat., nor its legislative history, quoted *infra*, suggests that the Legislature anticipated or expected, much less mandated such a result, particularly when § 366.8255(1)(d)(1.)&(2.), Fla. Stat., includes both capital investments and O&M expenses within the definition of “environmental compliance costs.”

The Commission's expertise as an economic regulator does not extend to evaluating the nature of environmental compliance measures beyond determining the prudence and reasonableness of environmental compliance costs and their cost allocation pursuant to generally accepted accounting principles. The Commission's policy regarding ECRC cost recovery is as set forth in *In re Petition for environmental cost recovery by Gulf Power Company*, 1994 WL 47830 (1994) ("*Gulf Power*"). Pursuant to § 366.8255, Fla. Stat., the Commission must determine, whether: (1) the environmental compliance costs were prudently incurred after April 13, 1993 (the date the ECRC statute became effective); (2) the activity giving rise to the costs was indeed mandated by an environmental regulator after the utility's last test year upon which rates are based; and (3) the costs are not already being recovered through another cost recovery mechanism or through the utility's base rates. (R. 2195-2196; APP. 10-11)

Nor does the legislative history of § 366.8255, Fla. Stat., give any credence to OPC's interpretation of the statute. (B. 29-30) Prior to passage of the act that, among other things, created § 366.8255, Fla. Stat., the following remarks were exchanged between Rep. Davis and Rep. Tobin:

Rep. Davis: . . . . I'd like to ask you a series of questions that are designed to clarify the legislative intent behind this amendment so it will be used in the most restrictive fashion possible by the [PSC]. In the amendment that is before us there is reference to in-service capital investments as a type of cost that the [PSC] could allow the utilities to recover under this procedure. Is it the intent of this

amendment that the costs of a large capital item such as an entire power plant could be recovered through this procedure?

Rep. Tobin: . . . . The answer to that is no. The intent is not to authorize recovery through this procedure of new power plant construction costs. *The intent is to allow the recovery of modifications to existing plan[t]s in order to bring them into compliance with the environmental standards.*

Rep. Davis: . . . . What sort of modifications are intended to be recovered through this proceeding?

Rep. Tobin: Additional scrubbers to remove pollutants from smoke stacks. Another example would be changing the boilers or combustion systems to reduce emissions. This is basically to bring those older plants into compliance for more safe environmental standards.

Rep. Davis: Does the [PSC] retain any discretion under the proposal to determine what type of in-service capital investment is an environmental compliance cost?

Rep. Tobin: Yes, Mr. Davis. On page 6, at lines 20 through 24, *the [C]ommission is given authority to determine if a company-proposed activity is for the purpose of complying with environmental standards.*

Rep. Davis: Final question, Representative Tobin. Is it the intent that the Commission be given the flexibility to determine whether the proposed environmental compliance costs should be handled under this procedure or in a full-blown rate case?

Rep. Tobin: Yes. The intent is for the Commission to have the flexibility to hold a full-blown rate case in certain cases. The Commission may elect to hold a rate case if it determines that the proposed capital investment is so large that it's material to the overall costs and expenses of the company. It may also make such action if it finds that the primary or dominant purpose of the investment is not to comply with environmental standards but to generate electricity.

*Fla. H.R. Jour.* 674 (Reg. Sess. 1993) (emphasis added).

Those remarks plainly show that the Legislature intended to restrict the Commission from using the ECRC statute to authorize recovery of new power plant construction costs, and to allow the recovery of modifications to existing plants “in order to bring them into compliance with the environmental standards.” *Id.* This is precisely what the Commission did in the instant case, as reflected in the Final Order. (R. 2195-2197; APP. 10-12)

**B. The Commission’s Interpretation of § 366.8255, Fla. Stat., Accords with Prior Commission Orders.**

The Commission has denied petitions for ECRC recovery upon finding that the activity in question does not constitute an environmental regulation pursuant to § 366.8255(1)(c), Fla. Stat. *See, e.g., In re ECRC*, 2014 WL 7463863 (2014) (denying FPL petition for ECRC cost recovery upon finding that based upon the plain meaning of § 366.8255, Fla. Stat., the Commission lacks the authority to extend ECRC cost recovery to activities involved in shaping policies, *i.e.*, lobbying efforts, as opposed to complying with environmental laws or regulations). OPC cites to that 2014 ECRC order in arguing that the Commission may not stretch or misapply the plain language of the ECRC statute. (B. 26) Yet by that order, the Commission appropriately disallowed those lobbying costs, just as it appropriately allowed the costs at issue here, upon correctly interpreting § 366.8255, Fla. Stat., to allow ECRC cost recovery only for activities undertaken to comply with environmental laws or regulations. *See also Gulf Power*, 1994 WL 47830 (1994),

discussed *supra* (setting forth Commission policy regarding ECRC cost recovery and excluding research and development costs from ECRC cost recovery upon finding that they were not necessary to comply with any environmental laws or regulations).

The Commission has also allowed ECRC recovery for costs incurred in complying with environmental regulations requiring the abatement of pollution. *See, e.g., In re ECRC*, 1998 WL 968520 (1998) (allowing ECRC cost recovery of costs to clean up certain fuel oil discharges upon finding that by rule, the FDEP “requires that when evidence of a discharge is discovered the owner must contain, remove and abate the discharge”). *See also In re ECRC*, 2005 WL 3598119 (2005) (allowing ECRC cost recovery of costs to assess groundwater arsenic levels and consultant costs for development of arsenic remediation plans). (R. 2197, fn 11; APP. 12, fn 11) OPC distinguishes *In re ECRC*, 2005 WL 3598119 (2005), on the basis that the remediation plans were being implemented because the FDEP had recently lowered its arsenic groundwater standard and the companies were not yet in a post-violation posture. (B. 36-37) Nevertheless, the 2005 ECRC order shows that the Commission approved those costs upon finding that they were “incurred to comply with new environmental legal requirements . . . and this compliance activity [was] not being recovered through base rates or any other means.”

OPC also takes issue with the Commission's references in the Final Order to two prior Commission orders granting ECRC cost recovery to Tampa Electric Company (R. 2197, fns 9, 10; APP. 12, fns 9, 10) because the activities at issue therein were designed to reduce the future emission of contaminants, not to clean up past pollution. (B. 38-39) Those citations to *In re Petition by Tampa Electric Company for ECRC cost recovery*, 2007 WL 1774415 (2007), and *In re Petition by Tampa Electric Company for ECRC cost recovery*, 2000 WL 1910853 (2000), correctly show that the Commission has previously interpreted a Consent Decree with the Environmental Protection Agency ("EPA") (R. 2197, fn 9; APP. 12, fn 9) and settlement agreements reached with the EPA and the FDEP (R. 2197, fn 10; APP. 12, fn 10) to be qualifying environmental requirements under the ECRC. (R. 2197; APP. 12)

OPC's reliance on *In re Petition by FPL to recover Scherer Turbine upgrade costs*, 2011 WL 339538 (2011), also lacks merit. (B. 32-33) In that case, the Commission reviewed a number of its prior ECRC decisions in denying ECRC cost recovery for the requested upgrade costs upon finding that the upgrade was "a discretionary, voluntary project, and the costs associated with it [were] not environmental compliance costs required by any known environmental rule or regulation." *Id.* (emphasis added). The Commission found that "we have consistently enforced the requirement that projects eligible for ECRC cost recovery

must be required to comply, or remain in compliance with, a governmentally imposed environmental regulation.” *Id.* The Cooling Canal Project Disputed Costs arise from the Consent Actions at issue, which constitute governmentally imposed environmental regulations. (EXHs. 10, 13, 14)

The Commission has correctly found that § 366.8255, Fla. Stat., “permits recovery of a wide variety of costs associated with compliance with governmentally imposed environmental requirements, if the costs were incurred after section 366.8255 was enacted, and if the costs are not being recovered in base rates or another cost recovery mechanism.” *In re Petition by Progress Energy Florida, Inc., to recover modular cooling tower costs through the ECRC*, 2007 WL 2512512 (2007) (“*Progress Energy*”). In so finding, the Commission stated that “[w]e understand OPC's concern that utilities have the incentive to pass many costs through cost recovery mechanisms, and we are attuned to that concern, but that cannot lead us to restrict the eligibility of environmental costs beyond what the statute contemplates.” *Id.*

That statement holds true in the instant case. (R. 2194, fn 4; APP. 9, fn 4) Pursuant to § 366.8255(1)(c), Fla. Stat., the Consent Actions requiring FPL to retract the hypersaline plume and to lower salinity levels in the Cooling Canal System are administrative orders or regulations designed to protect the environment. The costs that FPL incurs to comply with them are environmental

compliance costs within the meaning of § 366.8255(1)(d), Fla. Stat. Section 366.8255(2), Fla. Stat., requires the Commission to allow FPL to recover those costs through the ECRC upon approving the project for cost recovery, so long as the costs are prudently incurred and are not already being recovered through another cost recovery mechanism or through the utility's base rates. (R. 2195-2196; APP. 10-11)

**C. The Commission's Interpretation of § 366.8255, Fla. Stat., Is Supported by the Record.**

As the Commission found in the Final Order (R. 2196-2197; APP. 11-12), the record supports the Commission's interpretation of § 366.8255, Fla. Stat. In its notice to FPL to begin consultation "to identify measures to mitigate, abate or remediate the movement of saline water," SFWMD emphasized that it "is committed to continuing to work collaboratively with FPL and FDEP to better understand the factors contributing to the western movement of saline water and develop solutions *that protect the area water resources* and maintain FPL's mission of maintaining critical electric power generation operations at Turkey Point. (EXH. 7) (emphasis added).

The final FDEP administrative order states that "[FDEP's] choice to exercise its authority . . . *in favor of remediation to protect the public health* than in favor of punishment by charges and fines is a matter of enforcement discretion squarely within [FDEP's] province." (EXH. 11, p. 12) (emphasis added). Moreover, "[t]he



consent order or equivalent shall, at a minimum, delineate actions to abate the [Cooling Canal System] contribution to the hypersaline plume, reduce the size of the hypersaline plume, *and prevent future harm to waters of the State.*” (EXH. 12, p. 5) (emphasis added). And FPL witness Sole testified that “I’ve evaluated the details of the [Cooling Canal Project] and I have high confidence that it will be successful to the extent that *we will no longer be causing harm to the environment.*” (T. 5:780, 11-13) (emphasis added).

By the Final Order (R. 2197; APP. 12), the Commission correctly found that the Cooling Canal Project Disputed Costs arise from the new environmental requirements primarily contained in Paragraphs 20 through 33 of the FDEP Consent Order (EXH. 13, pp. 7-18), Paragraph 17 of the Miami-Dade DERM Consent Agreement (EXH. 10, pp. 4-8), and Paragraph 34 of the Miami-Dade DERM Consent Agreement Addendum. (EXH. 14, pp. 1-2 of 3) In addition to monitoring, the requirements of the FDEP Consent Order include mitigation and remediation activities, such as “implementing plans to meet salinity thresholds, installation and operation of freshening projects, improving thermal efficiency, and engaging in remediation projects including a recovery well system.” (R. 2197, APP. 12). FPL witness Sole testified that

[t]he three objectives of the 2016 [Consent Order] are to cease discharges from the [Cooling Canal System] that impair the reasonable beneficial use of adjacent G-II groundwater, prevent releases of groundwater from the [Cooling Canal System] to surface

waters connected to Biscayne Bay that result in exceedances of saltwater standards, and provide mitigation for impacts related to historic operation of the [Cooling Canal System].

(T. 3:296, 16-20)

Among other things, the FDEP Consent Order requires FPL to: (1) achieve an average annual salinity of 34 PSU or below in the Cooling Canal System by the end of the fourth year of water freshening activities; (2) submit a thermal efficiency plan for the Cooling Canal System to achieve a minimum 70 percent thermal efficiency; and (3) implement a remediation project to include a recovery well system that will halt the westward migration of hypersaline water from the Cooling Canal System within three years and reduce the westward extent of the hypersaline plume within 10 years. (EXH. 13, pp. 7-9)

Also among other things, the Miami-Dade Consent Agreement, as amended, requires FPL to: (1) evaluate alternative water sources to offset the Cooling Canal System water deficit and reduce chloride concentration, including the appropriateness of using reclaimed wastewater from the Miami-Dade County South District Wastewater Treatment Plant; (2) conduct a review of the Interceptor Ditch Operations to determine if modifications are warranted to improve its function; (3) develop and implement certain actions to intercept, capture, contain, and retract the hypersaline groundwater to FPL's property boundary, including construction of the recovery well system referenced in the FDEP Consent Order;

and (4) submit plans to address and correct certain ammonia levels that allegedly exceed water quality standards set forth in the Code of Miami-Dade County. (EXH. 10, p. 5; EXH. 14, pp. 1-2)

The Consent Actions are environmental regulations that apply to FPL and are designed to protect the environment. The Final Order should be affirmed because it shows that in approving the Cooling Canal Project Disputed Costs through the ECRC, the Commission correctly interpreted § 366.8255, Fla. Stat.

**II. THE COMMISSION DID NOT ERR BY HOLDING THAT THE COOLING CANAL PROJECT DISPUTED COSTS ARE PART OF THE 2009 MONITORING PLAN.**

**Standard of Review**

OPC argues that the Commission erred by finding, in the face of unrefutable evidence to the contrary, that the Monitoring Plan approved by the Commission in 2009 applied to the Turkey Point plant as a whole, rather than only to the uprate of Units 3 and 4. (B. 43) In *Citizens of State v. FPSC*, 146 So. 3d at 1149, this Court held that “a party challenging an order of the Commission on appeal has the burden of showing . . . that the findings of the Commission are not supported by competent, substantial evidence.” (citations omitted). In noting that the appellant in that case pointed to conflicting evidence of record, this Court also stated that it affords great deference to the Commission’s findings, that it will not

overturn an order of the Commission because it would have arrived at a different result, and that it will not re-weigh the evidence. *Id.* at 1164.

### **Argument in Response**

#### **A. The Commission Correctly Found that the 2009 Monitoring Plan Applied to the Whole Turkey Point Plant.**

The Final Order is well grounded in the 2009 ECRC order approving the Cooling Canal Project for ECRC cost recovery. The Commission-approved stipulation at Section III. E. of the 2009 ECRC order states that “FPL has been conducting certain monitoring activities at the [Turkey Point] Plant for some time, and FPL indicates that the [F]DEP and water management district have been concerned with adverse environmental impacts from the [Cooling Canal System] beyond the specific impacts that may result from the nuclear uprate.” *In re ECRC*, 2009 WL 4021870 (2009). (EXH. 74) Moreover, the Commission found that “it is uncertain at this point when the incremental O&M activities of the Project will cease due to the nature of the project scope, which includes further assessment of the impacts of the Uprate Project and the implementation of mitigation measures to offset such impacts.” *Id.* (EXH. 74)

OPC is wrong that the evidence of record un rebuttably shows that the 2009 Monitoring Plan applied only to the nuclear uprate of Units 3 and 4. (B. 44-46) The Final Order includes the following quotation from the 2009 ECRC order:

Because the costs for the [Cooling Canal] Project are predominantly O&M expenses that will continue for an uncertain duration, and because the water-quality issues the Project is being undertaken to address relate to operation of the Turkey Point plant as a whole and not just the [Turkey Point] Nuclear Uprate, FPL should be allowed to recover the costs associated with the [Cooling Canal] Project through the ECRC.

(R. 2206; APP. 21; EXH. 74) Moreover, witness Sole testified that

The initial focus of the [2009 Monitoring Plan] was on implementing groundwater monitoring in the vicinity of the [Cooling Canal System] to determine the impact of the Turkey Point [extended power uprate] on the groundwater in the vicinity of the [Cooling Canal System]. Those were the initial requirements of [Conditions of Certification] IX and X. However, the testimony accompanying FPL's petition for approval of the [2009 Monitoring Plan] made it clear that if the FDEP, in consultation with the SFWMD and the [Miami-Dade] DERM, found that water from the [Cooling Canal System] was causing harm or potential harm to adjacent waters, expanded assessment and remediation measures would be required pursuant to [Conditions of Certification] IX and X.

(T. 3:308, 16 – 3:309, 2)

Witness Sole further explained that

[i]nitially, the compliance costs were for monitoring, but as described above, over time the results of the monitoring led both the FDEP and [Miami-Dade] DERM to direct FPL to take corrective and remedial actions. Since 2013, the [Monitoring Plan] has included projects related to the development, planning, and implementation of mitigation and remediation activities directed at addressing salinity reduction requirements.

(T. 3:310, 8-13)

Thus, the Commission's decision to consider the Cooling Canal Project Disputed Costs as part of the previously approved 2009 Monitoring Plan rather

than approving them as new project costs is based on competent, substantial record evidence. (R. 2207; APP. 22) Nevertheless, even assuming *arguendo* that the Cooling Canal Project Disputed Costs should have been treated as a new project, the Commission's decision to treat them as part of the 2009 Monitoring Plan would constitute harmless error. Under the facts of this case, the Cooling Canal Project Disputed Costs would have been just as eligible for cost recovery through the ECRC if they had been presented as a new project after the Consent Actions were executed. As the Commission correctly found in the Final Order, the Consent Actions "introduce new regulatory requirements and are therefore eligible for potential recovery through the ECRC subject to a prudence review." (R. 2201-2202; APP. 16-17)

OPC cites to *In re ECRC*, 2011 WL 6144960 (2011) (allowing FPL to recover costs associated with its proposed St. Lucie cooling water monitoring project), to show that the Commission approved a stipulation requiring FPL to petition the Commission to amend a project for further ECRC cost recovery if any corrective actions were to arise from certain monitoring activities. (B. 37) This is essentially what FPL did in the instant case. By letter filed in the Commission's ECRC docket on August 15, 2016, and copied to all parties of record, FPL advised that it would update its 2016 actual/estimated Cooling Canal Project costs in its ECRC projection filing for 2017, to explain the impact of the FDEP Consent Order

and the Consent Agreement Addendum with Miami-Dade DERM on FPL's estimate of Cooling Canal Project activities for the remainder of 2016. (R. 518-520) Then, in revising its 2016 actual/estimated true-up filing in its 2017 Petition discussed *supra*, FPL explained that those two new regulatory developments had "significantly affected the estimate of costs to be incurred for the [Cooling Canal Project] during the remainder of 2016." (R. 527)

In the 2016 ECRC docket, FPL witness LaBauve testified to the regulatory developments "and their impact on the scope of FPL's [Cooling Canal Project] activities for the remainder of 2016." (R. 527; EXH. 73) He testified at that time that "[b]ased on current understanding and assumptions regarding environmental conditions and required compliance activities, FPL expects to incur approximately \$206 million in O&M and Capital compliance costs from 2016-2026." (EXH. 73, p. 7) He further testified that

the majority of the costs -- approximately \$9.5 million in capital costs and \$106.2 million in O&M expenses -- will be incurred in 2016 and 2017. This is because construction of major compliance facilities such as the recovery and monitoring wells must occur at the outset. After 2017, it is anticipated that the level of costs for the [Cooling Canal Project] will significantly decrease.

(EXH. 73, p. 7) Thus, contrary to OPC's assertion (B. 42), the Commission did not ignore the change in scope of the 2016 Cooling Canal Project to somehow facilitate clause recovery. Moreover, in noting that the Intervenor below, including OPC, were correct that the costs for O&M and capital have increased for

the Monitoring Plan, the Commission found that “an increase in costs itself is not a change in scope of a project.” (R. 2206; APP. 21)

OPC also argues that the Commission’s finding that “[t]he costs FPL is requesting to recover are the result of the anticipated evolution of the original Monitoring [Plan]” (R. 2207; APP. 22) suggests that the growth of the hypersaline plume should have been apparent in 2009, making it “eligible for base rate consideration prior to the 2016 [rate case] settlement and subject to the base rate freeze.” (B. 44) The record does not support this suggestion. The 2009 ECRC order shows that it was uncertain at that time “when the incremental O&M activities of the Project [would] cease due to the nature of the project scope, which includes further assessment of the impacts of the Uprate Project and the implementation of mitigation measures to offset such impacts.” (EXH. 74, p. 13)

FPL witness Sole testified that

[r]equired environmental compliance activities have progressed from monitoring, to expanded monitoring, to identification of the need for corrective actions, and now to implementing those corrective actions. The [Monitoring Plan] Project was approved for recovery through the Environmental Cost Recovery Clause in 2009 and anticipated from the outset that such a progression was a potential outcome.

(T. 3:285, 17 – T. 3:286, 1) He further explained that

[t]he stepwise progression from initial monitoring and data collection to more extensive monitoring and mitigation and/or remediation activities is common in environmental regulatory processes. Environmental regulators typically engage site owners or facility operators to determine what additional steps must be taken. FPL



explained in its 2009 testimony that the [2009 Monitoring Plan] could follow a similar evolution.

(T. 3:310, 16-21) This evidence shows that it was anticipated that the original Monitoring Plan would evolve, but it does not suggest that FPL should have known about the growth of the hypersaline plume in 2009. As witness Sole explained, “the expanded monitoring enhanced the ability of FPL and the relevant regulatory authorities to ascertain the extent to which the hypersaline condition of the [Cooling Canal System] was impacting the groundwater below, and ultimately that monitoring pointed to the need for corrective action.” (T. 3:286, 10-14) On rebuttal, he further explained that “[o]nly recently has the requisite certainty about the need for corrective actions evolved out of the extensive monitoring and technological analyses conducted within the last several years.” (T. 5:713, 5-7)

Moreover, OPC’s reliance on *Citizens of State v. Graham*, 213 So. 3d 703 (Fla. 2017), is misplaced. (B. 48) In that case, this Court found that “the testimony of [Florida Public Utilities Co. (“FPUC”)] witnesses suggested that FPUC simply chose to pursue recovery through the fuel clause as a matter of convenience, rather than any necessity borne of unforeseen volatility.” *Id.* at 716. There is no such evidence in the instant case to suggest that FPL “opted to seek recovery through the ECRC simply because it was an available vehicle, not because the remediation conformed to any of the ECRC’s statutory criteria.” (B. 48) Rather, witness Sole testified that “FPL has reflected incremental costs for the expansion of FPL’s

environmental compliance activities each year, and the Commission has approved the recovery of those costs.” (T. 3:286, 1-3) He further testified that “[s]ince 2009, the Commission has approved ECRC recovery for both the monitoring and corrective action activities related to hypersalinity conditions in the [Cooling Canal System.]” (T. 3:310, 3-5)

The Final Order shows that the Cooling Canal Project Disputed Costs conform to the ECRC’s statutory criteria. Pursuant to § 366.8255, Fla. Stat., and the Commission’s policy implementing it as set forth in *Gulf Power*, discussed *supra*, the Commission found that the Cooling Canal Project Disputed Costs: (1) were incurred after April 13, 1993 (R. 2196; APP. 11); (2) were mandated by governmentally imposed environmental regulations after the utility’s last test year upon which rates are based (R. 2196-2197; APP. 11-12); and (3) are not already being recovered through another cost recovery mechanism or through the utility’s base rates. (R. 2197; APP. 12) The Commission also found, based upon its review of the record and analysis of the parties’ arguments (R. 2202-2203; APP. 17-18), that: (1) FPL prudently incurred the 2015 and 2016 Cooling Canal Project Disputed Costs; and (2) “FPL’s actual/estimated 2017 expenditures and projected 2018 expenditures are reasonable such that they are eligible for recovery through the ECRC,” (R. 2203; APP. 18) with the prudence of those costs to be determined

“in a future ECRC proceeding as part of the traditional true-up mechanism.”

(R. 2201; APP. 16)

**B. The Commission Did Not Deviate from Prior Policy by Treating the Cooling Canal Project Disputed Costs as Part of the 2009 Monitoring Plan.**

OPC’s argument that the Commission’s treatment of the Cooling Canal Project Disputed Costs as part of the 2009 Monitoring Plan deviates from Commission policy is also meritless. (B. 46-47) The Commission allows utilities “to recover the costs of environmental compliance projects after the Commission has had the opportunity to review and approve cost recovery for the projects.” *In re ECRC*, 1994 WL 560468 (1994) (finding that § 366.8255, Fla. Stat., requires that “a utility’s petition for cost recovery must describe proposed activities and projected costs, not costs that have already been incurred.”). The Commission has no policy of requiring a utility to petition for approval of a new ECRC project each time the requirements of a previously approved project are modified due to a change in an environmental law or regulation. Nor is there a need for such a policy. The Commission’s policy with respect to ECRC recovery, as set forth in *Gulf Power*, 1994 WL 47830 (1994), is for the Commission to assess utility requests for environmental compliance costs to determine their eligibility for recovery through the ECRC pursuant to § 366.8255, Fla. Stat., regardless of whether they are part of a new or a previously approved project. As stated *supra*, the Commission annually

reviews cost recovery for all historical, actual, and projected environmental project costs as part of its ongoing ECRC proceedings. *See In re Petition for determination of need by FPL*, 2007 WL 859755 (2007) at \*2.

Moreover, OPC's reliance on *Progress Energy*, 2007 WL 2512512 (2007), as support for its accusation that utilities have increasingly used the ECRC as a base rate relief mechanism instead of following the dictates of the ECRC statute, is misplaced. (B. 47, fn 26) In *Progress Energy*, the temperature of inlet water into the plant site had increased significantly in recent years due to hotter weather. The Commission allowed the recovery of costs to lease modular cooling towers in the summer months through the ECRC, upon finding that it would allow the utility to remain in compliance with its FDEP industrial wastewater permit, which included a thermal limit of 96.5 degrees Fahrenheit on the cooling water discharge from the plant. The Commission found that the activity was legally required to comply with a governmentally imposed environmental regulation whose effect was triggered after the company's last test year upon which rates are based.

OPC's reliance on *In re Petition by Tampa Electric Company for approval of new environmental program through the ECRC*, 2006 WL 2076663 (2006), as further support for its accusation that utilities have increasingly used the ECRC as a base rate relief mechanism instead of following the dictates of the ECRC statute, is also misplaced. (B. 47, fn 26) In that case, the Commission allowed the recovery

of costs to improve the reliability of the utility's scrubbers in order for it to remain in compliance with an EPA Consent Decree requiring the removal of at least 95% of the Sulphur Dioxide in the flue gas that enters the scrubber. The costs at issue were incurred in order for the utility to remain in compliance with an environmental regulation pursuant to § 366.8255, Fla. Stat.

As the Commission noted in the Final Order, the ECRC “provides an investor-owned utility the opportunity to recover the costs associated with changes in environmental regulations between rate cases.” (R. 2195; APP. 10) The Commission correctly found that “[n]o party argued, and there is no substantial evidence in the record, that the [Cooling Canal Project] Disputed Costs were triggered prior to FPL’s last test year upon which rates are based.” (R. 2197; APP. 12) At the time the Commission approved the 2009 Monitoring Plan, FPL was operating under base rates set in 2005, using a 2006 test year. *In re Petition for rate increase by FPL*, 2005 WL 2276715 (2005). The Consent Actions were imposed on FPL by environmental regulators in 2015-2016, well after that 2006 test year. (EXHs. 10, 13, 14) Because this project was already approved for ECRC recovery, FPL has never included these costs in any subsequent test year for base rates. As the Commission found in the Final Order, “[n]o party argues, and there is no substantial evidence in the record, that the Cooling Canal Project Disputed

Costs are being recovered through base rates or an alternate clause mechanism.”

(R. 2197; APP. 12)

**C. The Record Does Not Contain Any Evidence of Imprudence, Negligence, or Malfeasance on the Part of FPL.**

OPC concludes by stating that passing remediation costs to ratepayers would result in there being “no limit to the level of negligence or malfeasance ratepayers would be forced to subsidize.” (B. 49-50) OPC further implies that FPL made an imprudent management decision to ignore the law by allowing the hypersaline plume to grow and spread for years. (B. 50) The record does not support these accusations.

Although OPC witness Panday testified that FPL should have recognized a need for corrective actions concerning the movement of saline water sooner (T. 5: 618, 2-7), FPL witness Sole testified on rebuttal that

the best experts working with the best information available provided opinions that advised the decision-making of FPL and the regulatory agencies. OPC witness Panday’s critique of that decision-making benefits from the luxury of hindsight gained by being able to survey the full body of data collected for more than 45 years. His conclusions were not apparent to FPL, the regulatory agencies or the authors of these many reports as the events, data and analysis occurred.

(T. 5:712, 20 – T. 5:713, 3)

Moreover, there is ample record evidence showing that FPL fully cooperated with its environmental regulators. For example, witness Sole testified that

[t]hroughout the [Cooling Canal System's] operating history, FPL has provided the relevant environmental regulatory agencies with monitoring reports and any monitoring data that has been requested. Until quite recently, that large body of data did not lead any of the relevant regulators to conclude that the impacts of the [Cooling Canal System] warranted implementing any further measures.

(T. 5:711, 16-21) Witness Sole further testified that FPL followed the guidance and requirements embodied in its environmental permits and agreements governing the operation and monitoring of the Cooling Canal System. (T. 5:713, 17-19) He explained that

[f]or example, the Fourth Supplemental Agreement between FPL and the SFWMD governed the operation of the Cooling Canal System from 1983 to 2009. The document includes a finding by the SFWMD that "...the obligations undertaken by FPL and the [Central and Southern Florida Flood Control District, predecessor to SFWMD] in the original Agreement and the supplemental agreements have been satisfactorily performed to date.

(T. 5:713, 21 – T. 5:714, 3)

The FDEP Consent Order states that "FPL entered into consultations with the [FDEP] as required by the Orders for Corrective action in the [Notice of Violation]. The consultations resulted in resolutions to address the violations alleged in the [Notice of Violation] and issues raised in the Warning Letter, as memorialized in [the 2016 FDEP Consent] Order." (EXH. 13, p. 6) Nor did the FDEP Consent Order impose any penalties on FPL. (EXH. 13, p. 20) In addition, by the Consent Agreement with the Miami-Dade DERM, FPL agreed and acknowledged that "it would be beneficial to improve the water quality within the

Cooling Canal System itself, and FPL has already undertaken some efforts to improve the CCS water quality.” (EXH. 10, p. 3) Witness Sole testified that “[t]he actions FPL has taken over the last few years has resulted in improved conditions within the [Cooling Canal System].” (T. 3:306, 17-21)

The Commission correctly found that “no substantial evidence was provided in the record as to what actions should have been taken and the potential alternatives or cost savings measures that FPL could or should have implemented prior to engaging in the activities that resulted in the [Cooling Canal Project] Disputed Costs.” (R. 2203; APP. 18) The record fully supports the Commission’s findings that FPL prudently incurred the 2015 and 2016 Cooling Canal Project Disputed Costs and that its request for recovery of the 2017 and 2018 projected Cooling Canal Project Disputed Costs is reasonable such that those costs are eligible for ECRC cost recovery, if prudently incurred, with prudence to be determined in a future ECRC proceeding. (R. 2201, 2203; APP. 16, 18)

The Final Order should be affirmed because it correctly interprets § 366.8255, Fla. Stat., is supported by competent, substantial evidence, and comports with the essential requirements of law. *S. Alliance for Clean Energy*, 113 So. 3d at 752.



## **CONCLUSION**

OPC has failed to show that the Commission misinterpreted the ECRC statute or misapplied its policy on approval of ECRC projects in allowing FPL to recover the Cooling Canal Project Disputed Costs. The Commission's Final Order should be affirmed.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail through the Court's e-filing portal to all counsel on the attached service list this 23rd day of July, 2018.

By: s/ Rosanne Gervasi

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY, pursuant to Rule 9.210(a)(2), Florida Rules of Appellate Procedure, that this brief was prepared using Times New Roman 14-point typeface, a font that is proportionally spaced.

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