STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OFFICE OF PUBLIC COUNSEL,

Petitioner,

and

FLORIDA INDUSTRIAL POWER USERS GROUP,

Intervenor,

vs. Case No. 19-6137RP

FLORIDA PUBLIC SERVICE COMMISSION,

Respondent,

and

FLORIDA POWER & LIGHT COMPANY; GULF POWER COMPANY; TAMPA ELECTRIC COMPANY; AND DUKE ENERGY FLORIDA, LLC,

Intervenors.
_____/

FINAL ORDER

An administrative hearing was conducted in this case on December 20, 2019, in Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF ISSUES

I. Whether the Office of Public Counsel (Petitioner or the Public Counsel) and Florida Industrial Power Users Group (Florida Industrial) have standing.

II. Whether proposed rules 25-6.030(3)(d), 25-6.030(3)(e), 25-6.030(3)(j), 25-6.031(6), and 25-6.031(7)(c), proposed by the Florida Public Service Commission (Respondent or the Commission), are valid exercises of delegated legislative authority.

PRELIMINARY STATEMENT

On November 15, 2019, the Public Counsel filed a petition with the Division of Administrative Hearings (DOAH) to determine the invalidity of certain subsections of proposed rules 25-6.030

and 25-6.031. The case was assigned DOAH Case No. 19-6137RP. Investor-owned utilities (IOUs) Florida Power & Light (Florida Power), Gulf Power Company (Gulf Power), Duke Energy Florida (Duke Energy), and Tampa Electric Company (Tampa Electric) each filed unopposed motions to intervene, which were granted.

At a telephonic case status hearing on November 22, 2019, the final hearing was scheduled to be held December 20, 2019, within the 30-day statutory time-frame. Following that status hearing, an Order of Pre-Hearing Instructions was entered requiring accelerated discovery and submission of a joint pre-hearing stipulation by the parties.

On November 27, 2019, Florida Industrial filed a Motion to Intervene in alignment with Petitioner. Following the Commission's Response in Opposition, Florida Industrial's Motion to Intervene was granted, subject to proof of standing at the final hearing.

The parties timely filed their Joint Pre-Hearing Stipulation on December 18, 2019, which set forth a number of agreed facts and conclusions of law which have been utilized in the preparation of this Final Order.

Prior to the final hearing, Florida Power filed a Motion to Dismiss Florida Industrial's petition for lack of standing, and a Motion in Limine to limit the scope of the testimony of the Public Counsel's expert witness, Marshall Willis, to those

issues addressed during the November 5, 2019, public hearing before the Commission and during his December 16, 2019, deposition in this case. The Motion in Limine further requested that Mr. Willis not be permitted to testify as an expert on topics beyond his area of expertise in accounting. Those motions were addressed at the onset of the final hearing. A ruling on the Motion to Dismiss Florida Industrial was reserved until after the submission of proposed final orders in this case. The Motion in Limine was resolved by agreement that the testimony and expertise of Mr. Willis be limited as requested in that motion.

The final hearing was conducted on December 20, 2019. Both the Public Counsel and Florida Industrial were allowed to fully participate in the proceedings and rulings on any objections to their standing were reserved until after the hearing. The parties introduced 53 joint exhibits which were received into evidence as Exhibits Jt-1 through Jt-53. Petitioner called two witnesses: Marshall Willis, the Public Counsel's chief legislative analyst who is an expert in regulatory accounting and ratemaking; and Tom Ballinger, director of engineering at the Commission. Petitioner introduced 24 exhibits received into evidence as Exhibits P-1 through P-24.

Florida Industrial called as a witness William Coston, supervisor of the Division of Economics for the Commission, and

offered seven exhibits received into evidence as Florida Industrial Exhibits 1A through 1D, and 2 through 4.

The Commission called three of its employees as witnesses: Robert Graves, James Breman, and Bart Fletcher, and offered seven exhibits received into evidence as Exhibits R-1 through R-7. Florida Power called one witness, David Bromley, manager of regulatory services for power delivery at Florida Power.

The proceedings were recorded and a transcript was ordered. The two-volume Transcript of the final hearing was filed on December 26, 2019. The parties were allowed until January 3, 2020, to file proposed final orders. All of the parties timely filed their respective Proposed Final Orders, each of which have been considered in the preparation of this Final Order.

FINDINGS OF FACT

Background

1. Petitioner is statutorily authorized to represent the citizens of the State of Florida in matters before the Commission, and to appear before other state agencies in connection with matters under the jurisdiction of the Commission. § 350.0611(1), (3), and (5), Fla. Stat.[1/]

2. Respondent is the state agency with the authority to implement and enforce, including inter alia, by adopting the administrative rules at issue here, pursuant to chapter 366,

Florida Statutes, the law governing the regulation of public utilities, as defined in section 366.02(1).

3. As a state agency commission, the Commission is subject to Florida's Government in the Sunshine Law, section 286.011, Florida Statutes. Under section 286.011, all official acts of the Commission must be taken at public meetings, open to the public at all times.

4. The intervening IOUs are public utilities that would be substantially affected by the proposed rules. As public utilities, the intervening IOUs are subject to the Commission's jurisdiction under chapter 366. Section 366.96 directs the Commission to adopt rules providing for the strengthening of electric utility infrastructure, including a storm protection plan rule, and rules governing storm protection plan cost recovery. The proposed rules challenged in this proceeding address those issues and require public utilities to file transmission and distribution storm protection plans that cover the immediate 10-year planning period. As entities that will be affected by the adoption of the proposed rules, the intervening IOUs have an interest in this proceeding and the adoption of rules addressing the strengthening of electric utility infrastructure, storm protection plans, and storm protection plan cost recovery. The intervening IOUs support the validity

of the proposed rules challenged in this proceeding and oppose the relief sought by the Public Counsel and Florida Industrial.

5. The 2019 Florida Legislature passed SB 796 to enact section 366.96, entitled “Storm protection plan cost recovery.” Section 366.96 provides:

> 366.96 Storm protection plan cost recovery.
>
> (1) The Legislature finds that:
> (a) During extreme weather conditions, high winds can cause vegetation and debris to blow into and damage electrical transmission and distribution facilities, resulting in power outages.
> (b) A majority of the power outages that occur during extreme weather conditions in the state are caused by vegetation blown by the wind.
> (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.
> (d) Protecting and strengthening transmission and distribution electric utility infrastructure from extreme weather conditions can effectively reduce restoration costs and outage times to customers and improve overall service reliability for customers.
> (e) It is in the state’s interest for each utility to mitigate restoration costs and outage times to utility customers when developing transmission and distribution storm protection plans.
> (f) All customers benefit from the reduced costs of storm restoration.

(2) As used in this section, the term:
(a) “Public utility” or “utility” has the same meaning as set forth in s. 366.02(1), except that it does not include a gas utility.
(b) “Transmission and distribution storm protection plan” or “plan” means a plan for the overhead hardening and increased resilience of electric transmission and distribution facilities, undergrounding of electric distribution facilities, and vegetation management.
(c) “Transmission and distribution storm protection plan costs” means the reasonable and prudent costs to implement an approved transmission and distribution storm protection plan.
(d) “Vegetation management” means the actions a public utility takes to prevent or curtail vegetation from interfering with public utility infrastructure. The term includes, but is not limited to, the mowing of vegetation, application of herbicides, tree trimming, and removal of trees or brush near and around electric transmission and distribution facilities.
(3) Each public utility shall file, pursuant to commission rule, a transmission and distribution storm protection plan that covers the immediate 10-year planning period. Each plan must explain the systematic approach the utility will follow to achieve the objectives of reducing restoration costs and outage times associated with extreme weather events and enhancing reliability. The commission shall adopt rules to specify the elements that must be included in a utility’s filing for review of transmission and distribution storm protection plans.
(4) In its review of each transmission and distribution storm protection plan filed pursuant to this section, the commission shall consider:
(a) The extent to which the plan is expected to reduce restoration costs and outage times associated with extreme weather

events and enhance reliability, including whether the plan prioritizes areas of lower reliability performance.
(b) The extent to which storm protection of transmission and distribution infrastructure is feasible, reasonable, or practical in certain areas of the utility's service territory, including, but not limited to, flood zones and rural areas.
(c) The estimated costs and benefits to the utility and its customers of making the improvements proposed in the plan.
(d) The estimated annual rate impact resulting from implementation of the plan during the first 3 years addressed in the plan.
(5) No later than 180 days after a utility files a transmission and distribution storm protection plan that contains all the elements required by commission rule, the commission shall determine whether it is in the public interest to approve, approve with modification, or deny the plan.
(6) At least every 3 years after approval of a utility's transmission and distribution storm protection plan, the utility must file for commission review an updated transmission and distribution storm protection plan that addresses each element specified by commission rule. The commission shall approve, modify, or deny each updated plan pursuant to the criteria used to review the initial plan.
(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. The commission shall conduct an annual proceeding to determine the utility's prudently incurred transmission and distribution storm protection plan costs and allow the utility to recover such costs through a charge separate and apart from its base rates, to be referred to as the storm protection plan cost recovery clause. If the commission determines that costs were prudently

incurred, those costs will not be subject to disallowance or further prudence review except for fraud, perjury, or intentional withholding of key information by the public utility.

(8) The annual transmission and distribution storm protection plan costs may not include costs recovered through the public utility's base rates and must be allocated to customer classes pursuant to the rate design most recently approved by the commission.

(9) If a capital expenditure is recoverable as a transmission and distribution storm protection plan cost, the public utility may recover the annual depreciation on the cost, calculated at the public utility's current approved depreciation rates, and a return on the undepreciated balance of the costs calculated at the public utility's weighted average cost of capital using the last approved return on equity.

(10) Beginning December 1 of the year after the first full year of implementation of a transmission and distribution storm protection plan and annually thereafter, the commission shall submit to the Governor, the President of the Senate, and the Speaker of the House of Representatives a report on the status of utilities' storm protection activities. The report shall include, but is not limited to, identification of all storm protection activities completed or planned for completion, the actual costs and rate impacts associated with completed activities as compared to the estimated costs and rate impacts for those activities, and the estimated costs and rate impacts associated with activities planned for completion.

(11) The commission shall adopt rules to implement and administer this section and shall propose a rule for adoption as soon as practicable after the effective date of the act, but not later than October 31, 2019.

6. Section 366.96, in essence, does three things. First, it requires each public utility to file a transmission and distribution storm protection plan (storm protection plan) and update the plan at least every three years. Second, section 366.96(7) directs the Commission to hold an annual proceeding, which the law establishes as the "storm protection plan cost recovery clause," to determine each public utility's prudently incurred costs to implement its plan and allow the utility to recover such costs through a charge separate and apart from its base rate. Third, section 366.96(3) and (11), respectively, direct the Commission to adopt rules that specify the elements to be included in an IOU's storm protection plan for the Commission's review, and rules to implement and administer the section as soon as practicable after the effective date, but not later than October 31, 2019.

Rule development and related proceedings

7. In reaction to section 366.96, the Commission proposed two rules: (1) a storm protection plan rule, proposed rule 25-6.030; and (2) a storm protection plan cost recovery clause rule, proposed rule 25-6.031.

8. The Commission's Notice of Development of Rulemaking for those proposed rules was published in Volume 45, No. 111, of the Florida Administrative Register (F.A.R.) on June 7, 2019. The notice included two new rules: Rule 25-6.030, Storm

Protection Plan, and Rule 25-6.031, Storm Protection Plan Cost Recovery Clause. The notice also scheduled a rule development workshop on June 25, 2019. Pursuant to F.A.R. notice published on August 6, 2019, Volume 45, No. 152, a second rule development workshop was held on August 20, 2019. Representatives for the Public Counsel, Florida Power, Gulf Power, Tampa Electric, Duke Energy, and Florida Industrial, among others, participated at the workshops and submitted written post-workshop comments.

9. In accordance with section 286.011, the Commission held a public meeting, which the Commission calls an "agenda conference," on October 3, 2019, at which it determined whether to propose the adoption of proposed rules 25-6.030 and 25-6.031. To aid the Commission in rendering its decision at the agenda conference, on September 20, 2019, the Commission's staff prepared and filed, in accordance with its usual practice and procedure, in the Commission's public docketing system, a written memorandum directed to the Commission. This memorandum is commonly referred to at the Commission as the "Staff Recommendation." The Staff Recommendation contained a written analysis on whether the Commission should propose the adoption of the rules, and it also included stakeholder comments obtained through the rulemaking process and the Commission staff's analysis and recommendations to the Commission on possible rule language.

10. Representatives for the Public Counsel and Intervenors Florida Power, Gulf Power, Tampa Electric, Duke Energy, and Florida Industrial were heard at the October 3, 2019, Agenda Conference on the issue of whether the Commission should propose the adoption of the new rules. After hearing comment and argument from stakeholders and Commission staff, the Commission proposed rules 25-6.030 and 25-6.031.

11. In accordance with the Commission's vote, proposed rules 25-6.030 and 25-6.031 were published in the October 7, 2019, edition of the F.A.R., Volume 45, Number 195. The notice identifies section 366.96 as the "Rulemaking Authority" and "Law Implemented" for both proposed rules. The notice also stated that a Statement of Estimated Regulatory Costs (SERC) was prepared by the Commission and included a summary of the SERC, in which the Commission stated, among other things, that it had determined that the proposed rules would not have an adverse impact on small business. The notice further stated that "[a]ny person who wishes to provide information regarding a statement of estimated regulatory costs or provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice."

12. Pursuant to section 120.54(3)(a)4., Florida Statutes, the Commission filed a letter on October 7, 2019, with the Joint Administrative Procedures Committee that included a copy of the

proposed rules; a detailed written statement of the facts and circumstances justifying the proposed rules; a copy of the SERC it prepared pursuant to sections 120.54(3)(b)1. and 120.541; a statement of the extent to which the proposed rules relate to federal standards or rules on the same subject; and a copy of the F.A.R. Notice of Proposed Rule published on October 7, 2019. Pursuant to section 120.54(3)(a)3., the Commission issued a notice (Commission Order No. PSC-2019-0403-NOR-EU) on October 7, 2019, that included a copy of the F.A.R. notice, to all persons named in the proposed rules and those persons who requested advance notice of its proceedings.

13. On October 25, 2019, pursuant to section 120.54(3)(c), the Public Counsel timely filed a Petition for a Hearing on proposed rules 25-6.030 and 25-6.031. A public hearing was scheduled before the full Commission on November 5, 2019, pursuant to notice appearing in the October 29, 2019, edition of the F.A.R., Volume 45, Number 211.

14. The Public Counsel filed a motion for continuance on October 29, 2019, which was denied by Commission Order No. PSC-2019-0468-PCO-EU, issued October 31, 2019. On October 31, 2019, the Public Counsel filed a motion to suspend the November 5, 2019, hearing and initiate formal proceedings, which was denied by Commission Order No. PSC-2019-0469-PCO-EU.

15. The public hearing was held on November 5, 2019. Through counsel and one witness, the Public Counsel and Florida Industrial provided evidence and argument in opposition to the proposed rules. The Public Counsel also read the comments of Kelly Cisarik into the record. Through counsel, Intervenors Florida Power, Gulf Power, Tampa Electric, and Duke Power provided evidence and argument in support of the proposed rules. The Public Counsel, by oral motion at the beginning and end of the public hearing, requested the Commission to reconsider its decision to deny its motion to suspend the hearing and initiate formal proceedings, which the Commission denied. After hearing evidence and argument on all issues under consideration, the Commission voted to make no changes to proposed rules 25-6.030 and 25-6.031.

16. The Public Counsel timely filed its Petition to Determine the Invalidity of Proposed Florida Administrative Code Rules 25-6.030 and 25-6.031 (Petition) with DOAH on November 15, 2019. Subsequently, Florida Industrial was permitted to intervene, subject to proof of standing.

The interests of the Public Counsel and Florida Industrial

17. The citizens of the State of Florida that the Public Counsel is statutorily authorized to represent include all Florida customers of the IOUs regulated by the Commission. The citizens include ratepayers of the intervening IOUs who are

responsible to pay the rates charged by the IOUs through both the increased regulatory costs for compliance with the proposed rules, which are included in base rates, and any charges approved through storm protection plan cost recovery clause proceedings, separate and apart from base rates. See, e.g., Transcript, Vol. 1 at 75 (Ballinger) "[Customers] are impacted by the rates . . . ."). Therefore, the citizens represented by the Public Counsel will be substantially affected by and have a substantial interest in the proposed rules.

18. Both the Public Counsel and Florida Industrial actively participated in the rule development process for the rules at issue in this proceeding.

19. Florida Industrial is an association of large industrial and commercial businesses who receive electricity from the state's IOUs and whose substantial interests are affected by the Commission's regulation of utility rates. Florida Industrial has participated as an intervenor in numerous proceedings before the Commission involving base rate and cost recovery clause proceedings.

20. Florida Industrial has entered into settlement agreements with IOUs in Commission proceedings, including matters involving Florida Power, and in related matters before the Florida Supreme Court.

21. Florida Industrial's Verified Answers to Public Service Commission's First Interrogatories were received into evidence, which, although hearsay, supplement the direct evidence of, with respect to the nature of the business entities that Florida Industrial represents, e.g., air separation, fertilizer production, forest products, chemical, phosphate mining, metal recycling, and agricultural/food processing and distribution companies. A significant number of Florida Industrial's members receive electric power from one or more of the intervening IOUs.

22. In sum, the proposed rules affect the substantial interests of a significant number of ratepayers represented by the Public Counsel and Florida Industrial.

The challenged proposed rules

23. Portions of both the storm protection plan rule, proposed rule 25-6.030; and the storm protection plan cost recovery clause rule, proposed rule 25-6.031, have been challenged in this proceeding. Specifically, the proposed rules at issue in this proceeding are proposed rules 25-6.030(3)(d), 25-6.030(3)(e), 25-6.030(3)(j), 25-6.031(6), and 25-6.031(7)(c).

24. Subsection (3) and (4) of section 366.96, quoted above, are implementing statutory provisions that apply to proposed rule 25-6.030, the storm protection plan rule.

25. Proposed rules 25-6.030(3)(d), 25-6.030(3)(e), and 25-6.030(3)(j), provide:

> (3) Contents of the Storm Protection Plan. For each Storm Protection Plan, the following information must be provided:
>
> * * *
>
> (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;
> 2. If applicable, the actual or estimated start and completion dates of the program;
> 3. A cost estimate including capital and operating expenses;
> 4. A comparison of the costs identified in subparagraph (3)(d)3. and the benefits identified in subparagraph (3)(d)1.; and
> 5. A description of the criteria used to select and prioritize proposed storm protection programs.
> (e) For the first three years in a utility's Storm Protection Plan, the utility must provide the following information:
> 1. For the first year of the plan, a description of each proposed storm protection project that includes:
> i. The actual or estimated construction start and completion dates;
> ii. A description of the affected existing facilities, including number and type(s) of customers served, historic service reliability performance during extreme weather conditions, and how this data was used to prioritize the proposed storm protection project;
> iii. A cost estimate including capital and operating expenses; and
> iv. A description of the criteria used to

select and prioritize proposed storm protection projects.
2. For the second and third years of the plan, project related information in sufficient detail, such as estimated number and costs of projects under every specific program, to allow the development of preliminary estimates of rate impacts as required by paragraph (3)(h) of this rule.

* * *

(j) Any other factors the utility requests the Commission to consider.

26. Proposed rules 25-6.030(2)(a) and (2)(b) define a storm protection plan program and project:

(a) “Storm protection program” – a category, type, or group of related storm protection projects that are undertaken to enhance the utility’s existing infrastructure for the purpose of reducing restoration costs and reducing outage times associated with extreme weather conditions therefore improving overall service reliability.
(b) “Storm protection project” – a specific activity within a storm protection program designed for the enhancement of an identified portion or area of existing electric transmission or distribution facilities for the purpose of reducing restoration costs and reducing outage times associated with extreme weather conditions therefore improving overall service reliability.

27. Proposed rule 25-6.030(3)(d) requires utilities to file information about their storm protection programs in their storm protection plans.

28. Section 366.96 makes no mention of the level of project detail.

29. The nature of long-term planning is that plans become less detailed as they stretch further into the future. Therefore, it is rational that plans for the first year would be more detailed than the plans for two and three years into the future. A plan can still explain the utility's systematic approach to achieving the statutory objectives without having the same level of detail in each of the first three years.

30. The rationality of a rule requiring less detail in years two and three is further bolstered by the fact that the utilities do not currently have that data, and creating it would be costly. In addition, because of greater potential for inaccuracies, the requirement of more detailed projections further out into the future could create customer frustrations if planned projects are delayed or not undertaken.

31. The standard the Commission will use to evaluate a utility's storm protection plan is contained in section 366.96(4), quoted above.

32. The Commission will not be determining cost recovery when evaluating or approving storm protection plans.

33. Proposed rule 25-6.030(3)(e)2. specifically directs the utility to submit sufficient project level detail for the development of a preliminary rate impact estimate.

34. Under the proposed rules, the utilities submitting the plan will have the burden to demonstrate that the plans are adequately detailed.

35. “Allowance for Funds Used During Construction” is an accounting method by which a utility petitions the Commission to recover what is essentially a carrying cost of funding for an eligible utility project investment during its construction.

36. Under existing Florida Administrative Code Rule 25-6.0141, the Commission determines if a utility meets the requirements to prove an allowance for funds used during construction. If the Commission deems that a project is eligible under rule 25-6.0141, recovery of such carrying costs is permitted.

37. An allowance for funds used during construction is added to the investment portion of an asset only after it is put into service.

38. The level of detail required by the proposed rule for a storm protection plan does not affect or change how an allowance for funds used during construction is treated pursuant to existing rule 25-6.0141.

39. Proposed rule 25-6.030(3)(j) is another filing category in addition to the other filing criteria set forth in subsection (3) of proposed rule 25-6.030. Proposed rule 25-6.030(3)(j) allows the utilities to include information not

specifically required by the other parts of the rule, that a utility believes will assist the Commission in assessing the petition under the statutory factors. Proposed rule 25-6.030(3)(j) is not an additional evaluation criteria outside the scope of section 366.96(4). Rather, the proposed rule recognizes that each utility is unique, and provides an opportunity for utilities to provide individually tailored information, for example, distinctive transmission and distribution methods, which it would like the Commission to consider.

40. The portions of proposed rule 25-6.031 the storm protection plan cost recovery clause challenged in this proceeding, include proposed rules 25-6.031(6) and 25-6.031(7)(c). They provide:

> (6) Recoverable costs.
> (a) The utility's petition for recovery of costs associated with its Storm Protection Plan may include costs incurred after the filing of the utility's Storm Protection Plan.
> (b) Storm Protection Plan costs recoverable through the clause shall not include costs recovered through the utility's base rates or any other cost recovery mechanism.
> (c) The utility may recover the annual depreciation expense on capitalized Storm Protection Plan expenditures using the utility's most recent Commission-approved depreciation rates. The utility may recover a return on the undepreciated balance of the costs calculated at the utility's weighted average cost of capital using the return on equity most recently

> approved by the Commission.
> (7) Pursuant to the order establishing procedure in the annual cost recovery proceeding, a utility shall submit the following for Commission review and approval as part of its Storm Protection Plan cost recovery filings:
>
> * * *
>
> (c) Projected Costs for Subsequent Year. The projected Storm Protection Plan costs recovery shall include costs and revenue requirements for the subsequent year for each program filed in the utility's cost recovery petition. The projection filing shall also include identification of each of the utility's Storm Protection Plan programs for which costs will be incurred during the subsequent year, including a description of the work projected to be performed during such year, for each program in the utility's cost recovery petition.

41. The implementing authority for proposed rules 25-6.031(6) and 25-6.031(7)(c) is section 366.96(7) and (8), quoted above.

42. Proposed rule 25-6.031(6) states that a utility cannot recover costs through the clause that are recovered through base rates or any other cost recovery mechanism. In fact, proposed rule 25-6.031 explicitly prohibits double-recovery by a utility.

43. Under the proposed rule, a utility submitting a plan will have the burden to demonstrate that its plan will not include any double recovery.

44. "Cost recovery clause" has specialized meaning; it is a term of art in the utility regulatory area. The Commission

currently administers a number of other cost recovery clauses, and all of those cost recovery clauses operate in the same way—the Commission routinely establishes projected costs for the next year that are collected from customers in the year they are incurred through a factor on the customer's bills. That factor also includes adjustments for true-ups the Commission makes for the current and the previous year so that customers ultimately never pay more or less than the utility's actual prudently incurred costs.

45. The way the clause process works, costs are passed on to the customer in the same year that the costs are being incurred.

46. Proposed rule 25-6.031(7)(c) requires the utility to file certain information regarding projected costs for the subsequent year.

47. The consideration of projected costs is important in a clause proceeding because if they are not considered, such costs will be incurred, but deferred, and if ultimately approved, will include interest on such deferral, which will increase costs to customers.

CONCLUSIONS OF LAW

48. DOAH has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.56, 120.569, and 120.57(1).

Standing

49. Regarding standing to challenge a proposed rule, section 120.56(1) provides, in pertinent part:

> (1) GENERAL PROCEDURES. –
> (a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.
> (b) The petition challenging the validity of a proposed or adopted rule under this section must state:
> 1. The particular provisions alleged to be invalid and a statement of the facts or grounds for the alleged invalidity.
> 2. Facts sufficient to show that the petitioner is substantially affected by the challenged adopted rule or would be substantially affected by the proposed rules.

50. With regard to a rule challenger's burden of proof, the pertinent portion of section 120.56(2)(a) provides:

> (2) CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS. –
> (a) . . . . The petitioner has the burden to prove by a preponderance of the evidence that the petitioner would be substantially affected by the proposed rule.

51. Section 120.56 allows a person who is substantially affected by a rule or agency statement to initiate a rule challenge. Pursuant to section 120.56(1)(e), other substantially affected persons may join in the proceedings as intervenors. To have standing under the "substantially affected" test, generally a party must demonstrate that: 1) the

rule will result in a real and immediate injury in fact; and 2) the alleged injury is within the zone of interest to be protected or regulated. Jacoby v. Fla. Bd. of Med., 917 So. 2d 358 (Fla. 1st DCA 2005).

52. The anticipated regulatory costs and rate increases from the proposed rules will have a real and immediate impact upon the interests of the IOU's ratepayers. The proposed rules provide a process by which IOUs may obtain approval to charge increased rates or fees to ratepayers as a means of obtaining reimbursement of the capital expended by IOUs in pursuit of storm protection projects and a financial return on the IOU's capital investment. The proposed rules proscribe the method by which such charges will be determined and approved.

53. Protection of the customers' rates is expressly within the zone of interest to be protected by the statute. Section 366.96(4)(c) requires the Commission to consider costs and benefits to the utility and its customers, and section 366.96(4)(d) requires the Commission to consider the estimated annual rate impacts resulting from implementing the IOUs' storm protection plans.

54. The Public Counsel and Florida Industrial met their burden, under section 120.56(2)(a), by a preponderance of the evidence, that the interests they represent will be substantially affected by the proposed rules.

55. The Public Counsel's standing to challenge the Commission's proposed rules has been settled for decades. See, e.g., Citizens of the State of Fla. v. Pub. Serv. Comm'n, Case No. 92-5717RP (Fla. DOAH, Mar. 26, 1993); Citizens of the State of Fla. v. Mann, Case No. 79-1124RP (Fla. DOAH, Feb. 22, 1980).

56. The Public Counsel, as the statutorily authorized representative of the citizens of the State of Florida, who are ratepayers of the Intervening IOUs, has standing because the ratepayers that the Public Counsel represents are substantially affected by the proposed rules.

57. The regulatory costs of the proposed rules will be passed on to ratepayers through base rates and the costs of implementing approved storm protection plans will be added as clause charges to customers' bills, separate and apart from base rates.

58. Ratepayers represented by the Public Counsel and Florida Industrial are ultimately responsible to pay for the increased regulatory costs in the IOUs' base rates and also to pay the storm protection plan cost recovery clause charges under the proposed rules.

59. "To meet the requirements of section 120.56(1), an association must demonstrate that a substantial number of its members, although not necessarily a majority, are 'substantially

affected' by the challenged rule." Fla. Home Builders Ass'n v. Dep't of Labor and Emp't Sec., 412 So. 2d 351, 353 (Fla. 1982).

60. Testimony and evidence submitted at the hearing demonstrated that Florida Industrial is comprised of large industrial users of electric power who, as in the case of ratepayers represented by the Public Counsel, are substantially affected as ratepayers of the IOUs. Accordingly, Florida Industrial has standing and Florida Power's Motion to Dismiss Florida Industrial is denied.

The Commission's burden

61. With regard to an agency's burden in upholding a challenged proposed rule, the pertinent part of section 120.56(2)(a) provides:

> The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised . . . .

62. Section 120.52(8) provides:

> (8) "Invalid exercise of delegated legislative authority" means an action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency.
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the enabling statute.

63. Therefore, the Commission has the burden to prove, by a preponderance of the evidence, that the proposed rules are not invalid, in whole or in part, as to the objections raised by the Public Counsel and Florida Industrial (collectively, the

Challengers). The proposed rules are not presumed to be valid or invalid. § 120.56(2), Fla. Stat.

Proposed rule 25-6.030(3)(d)

64. Section 366.96(4)(d) requires the Commission to consider the "estimated annual rate impact resulting from implementation of the plan during the first 3 years addressed in the plan" in determining whether to approve a plan.

65. The Challengers assert that proposed rule 25-6.030(3)(d) is impermissibly vague and contravenes section 366.96 because it does not require project-level detail sufficient to "enable the Commission to conduct the review required by section 366.96(4), Florida Statutes." Petition at ¶ 32.

66. The preponderance of the evidence, however, demonstrates that the Commission will be able to prepare the required rate estimate under the proposed rule. The storm protection plan rule proposed by the Commission requires a detailed description of each storm protection program, project-level detail for the first year of the plan, and "project-related" information for the second and third years "in sufficient detail . . . to allow the development of preliminary estimates of rate impacts." See proposed rule 25-6.030(3)(d)-(e). This information is sufficient to facilitate preparation of the required estimated rate impacts, and the terms of the proposed rule in that regard demonstrate

that the Commission validly exercised its delegated legislative authority in drafting proposed rule 25-6.030.

67. The Challengers further claim that unless proposed rule 25-6.030(3)(d) requires project-level detail for years two and three of the Plan, double recovery will not be able to be detected because project information will be unobtainable through discovery. The evidence does not support this contention. The idea that double recovery will be undetectable is also inconsistent with applicable law.

68. Under other types of cost-recovery clause proceedings, as well as the cost recovery clause under proposed rule 25-6.031, the utilities have the burden to prove that costs are not double-recovered through both base rates and the new cost-recovery clause. See proposed rule 25-6.031(2); proposed rule 25-6.031(6)(b) (prohibiting double recovery). If a utility's initial filing fails to meet this burden, cost information related to potential double recovery will be relevant and discoverable.

69. Section 366.093(2), states that "[i]nformation which affects a utility's rates or cost of service shall be considered relevant for purposes of discovery in any docket or proceeding where the utility's rates or cost of service at issue."

70. Further, even if Commission Staff and the Public Counsel are unable to obtain the necessary information through routine discovery requests, the Commission itself can access that

information through its express statutory authority to issue data requests and perform inspections and audits. See §§ 366.04(2)(f); 366.08, Fla. Stat.

71. Finally, if information is not provided in sufficient detail for the Commission to carry out is statutory duties, it has the authority to deny approval of the plan. See § 366.96(5), Fla. Stat.

72. The Challengers further claim that the Commission will be unable to assess rate impacts because the Commission lacks sufficient information regarding how utilities plan to recover carrying costs associated with storm protection projects. This contention is speculative, at best.

73. The Commission determines whether a utility project may accrue carrying costs, known as "allowance for funds used during construction," by assessing whether the project is eligible under the requirements of existing rule 25-6.0141. As Mr. Willis explained in his testimony, these carrying costs are "tacked onto the costs" of a project. For recovery, each utility must submit program-level and project-level cost information as part of their plan. See proposed rule 25-6.030(3)(d)-(e).

74. Since carrying costs are "tacked onto" project costs, utilities will be required to include an estimated amount of carrying costs as a component of these cost estimates. If the

utilities fail to do so, Commission Staff and the Public Counsel can request this information through discovery.

75. Proposed rule 25-6.030(3)(d) is not vague. It requires utilities to file information about their storm protection programs in their storm protection plans. A storm protection program is defined in proposed rule 25-6.030(2)(a). There is no contention that there is confusion as to what constitutes program-level detail.

76. Further, proposed rule 25-6.030(3)(d) does not exceed the Commission's grant of rulemaking authority. Rather, as directed in section 366.96(3), the proposed rule specifies the elements to be included in utilities' filings for the Commission's review of storm protection plans.

77. In sum, proposed rule 25-6.030(3)(d) is not an invalid exercise of delegated legislative authority.

Proposed rule 25-6.030(3)(e)

78. The Challengers argue that proposed rule 25-6.030(3)(e) contravenes section 366.96 because the statute requires a utility's storm protection plan to have the same project-level detail for each of its first three years. The statute never mentions project-level detail. The statute says, "[e]ach plan must explain the systematic approach the utility will follow to achieve the objectives of reducing restoration

costs and outage times associated with extreme weather events." § 366.96(3), Fla. Stat.

79. Given the fact that long-term plans become less detailed the further they stretch into the future, it is rational to require more detail in the first year than in the future second and third years.

80. Requiring less detail in years two and three is also supported by the fact that the utilities do not currently have that data, and it would be expensive to create. Because plans become less accurate the further they are projected into the future, requiring more detail could also create customer frustration when planned projects are delayed or abandoned.

81. The Challengers also argue that project-level detail in the first three years of the plan is required to ensure that costs recovered through the storm protection plan cost recovery clause are not being recovered through some other mechanism, like base rates.

82. The utilities, not the Commission, and not the Challengers, have the burden to prove that costs recovered through the clause are not recovered elsewhere. But if that information is needed, it should be provided through a cost recovery clause proceeding, not the storm protection plan approval proceeding.

83. Like proposed rule 25-6.030(3)(d), subsection (3)(e) does exactly what section 366.96(3) directs the Commission to do: adopt a rule that specifies elements that must be included in a utility's filing for review of storm protection plans; therefore, it does not exceed the Commission's grant of rulemaking authority. See Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594, 598–600 (Fla. 1st DCA 2000).

84. Proposed rule 25-6.030(3)(e) is also not vague. The term "sufficient detail" is defined in subsection (3)(e) through use of an example ("estimated number and costs of projects under every specific program") and by cross-reference to proposed rule 25-6.030(3)(h), (which requires the utility to provide "[a]n estimate of rate impacts for each of the first three years of the Storm Protection Plan for the utility's typical residential, commercial, and industrial customers").

85. Proposed rule 25-6.030(3)(e) does not fail to establish adequate standards for the agency's decision and does not vest the Commission with unbridled discretion because proposed rule 25-6.030(3)(e) is a filing requirement, not a standard for the Commission's decision. The standard the Commission will use to evaluate a utility's storm protection plan is contained in section 366.96(4) and, ultimately, what is in the public interest. See § 366.96(5), Fla. Stat. (stating

that the Commission shall determine whether it is in the public interest to approve, modify, or deny the plan).

86. Therefore, proposed rule 25-6.030(3)(e) is not an invalid exercise of delegated legislative authority.

Proposed rule 25-6.030(3)(j)

87. The Challengers argue that nothing in the enabling statute allows the Commission to consider "any other factors" allowed by proposed rule 25-6.030(3)(j); that "any other factors" is not a sufficiently explicit standard and is so vague that it gives the Commission unbridled discretion; and that the proposed rule is arbitrary and capricious.

88. As part of the Commission's rule specifying what a utility must file in its storm protection plan, proposed rule 25-6.030(3)(j) merely allows a utility to file whatever other information it believes is relevant to the Commission's assessment of its plans but not captured by the filing requirements in subsection (3) of the proposed rule.

89. Proposed rule 25-6.030(3)(j) is not an additional evaluation criteria outside of section 366.96(4). If this was all that was required, the rule might be vague. But, as discussed above, it is merely a catch-all in addition to nine other specific requirements.

90. Finally, proposed rule 25-6.030(3)(j) is neither arbitrary nor capricious. Section 366.96(3) requires each

public utility to file a storm protection plan, but all utilities are not the same. Proposed rule 25-6.030(3)(j) allows each utility the opportunity to provide information that is unique to the utility that the utility wishes the Commission to consider when evaluating its individual storm protection plan. It is logical and reasonable to give each utility an opportunity to provide information that would assist the Commission in making a sound, reasoned decision that is in the public interest as to a utility's individual storm protection plan.

91. Thus, proposed rule 25-6.030(3)(j) is not an invalid exercise of delegated legislative authority.

Proposed rule 25-6.031(6)

92. The Challengers argue that proposed rule 25-6.031(6) exceeds the Commission's grant of rulemaking authority and is vague because it fails to provide an adequate standard for the Commission to distinguish non-recoverable costs from recoverable costs.

93. Proposed rule 25-6.031(6), however, is not vague and does not enlarge, modify, or contravene the law implemented. In implementing section 366.96(8), proposed rule 25-6.031(6)(b) requires a utility in a cost recovery clause proceeding to prove, by a preponderance of the evidence, that any costs recovered through the clause are not in the utility's base rates.

94. The prohibition against double recovery in proposed rule 25-6.031(6) does not enlarge or contravene section 366.96. Rather, the language in the proposed rule is drawn directly from the statute. Both the statute and proposed rule share the same prohibition against double recovery.

95. The Challengers further claim that proposed rule 25-6.031(6) exceeds the Commission's grant of rulemaking authority and the law implemented because section 366.96 only allows an investor-owned utility to recoup costs that have already been incurred, rather than projected costs. Proposed rule 25-6.031(6), however, is consistent with section 366.96(7) and (8), as well as standard Commission practice in all cost recovery clause matters. As discussed below in more detail with regard to the Challenger's challenge to proposed rule 25-6.031(7)(c), section 366.96 allows the collection of projected costs because it establishes a cost recovery clause proceeding, and cost recovery clause proceedings allow for the collection of projected costs.

96. Further, proposed rule 25-6.031(6) is not vague. There is nothing confusing about the language used in the proposed rule--it forbids double recovery. Regulated utilities can readily understand its meaning--they may not recover costs through the clause that they are already recovering through base rates.

97. The Challengers also claim that the proposed rule's prohibition against double recovery is vague because it does not say how utilities should prove that they are not double recovering. However, the statute does not require the Commission to articulate the type of proof necessary to demonstrate avoidance of double recovery, and such requirement is otherwise unnecessary because, under the proposed rule, utilities submitting plans will have the burden of demonstrating that their plans do not include double recovery.

98. In sum, proposed rule 25-6.031(6) is not an invalid exercise of delegated legislative authority.

Proposed rule 25-6.031(7)(c)

99. The Challengers argue that proposed rule 25-6.031(7) is vague, fails to provide adequate standards for agency decisions, and provides unbridled discretion to the Commission because it permits investor-owned utilities to request and receive recovery of estimated projected costs.

100. Proposed rule 25-6.031(7)(c) does not exceed the Commission's grant of rulemaking authority nor does it enlarge, modify, or contravene the law implemented.

101. Section 366.96(7) creates the "storm protection plan cost recovery clause," through which the Commission is required to "conduct an annual proceeding to determine the utility's prudently incurred transmission and distribution storm

protection plan costs and allow the utility to recover such costs through a charge separate and apart from the utility's base rates."

102. The term or phrase "cost recovery clause" has specialized meaning; it is a term of art in the utility regulatory area. "[I]n considering the meaning of particular words and phrases, courts must . . . distinguish between terms of art that may have specialized meanings and other words that are ordinarily given a dictionary definition." OB/GYN Specialists of Palm Beaches, P.A. v. Mejia, 134 So. 3d 1084, 1088 (Fla. 4th DCA 2014).

103. The Commission currently administers a number of other cost recovery clauses, and all those cost recovery clauses operate in the same way--the Commission establishes projected costs for the next year that are collected from customers in the next year when they are incurred through a factor on the customer's bills. That factor also includes true-up adjustments for the current and previous year to adjust for overbillings or underbillings so that customers never pay more (or less) than actual costs. The way the clause process works, costs are passed on to the customer in the same year that the costs are occurring. The consideration of projected costs is important in a clause proceeding because if they are not considered, such costs will be accrued but deferred and, if ultimately approved,

will include interest on such deferral, which would cost customers more in deferred costs.

104. Section 366.8255 uses the same "cost recovery clause" term of art, and supports the Commission's interpretation of section 366.96. Section 366.8255(1)(d) defines "Environmental compliance costs" as including "all costs or expenses incurred by an electric utility in complying with environmental laws or regulations." (emphasis added). Section 366.8255(2) states, in pertinent part:

> If approved, the commission 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. (emphasis added).

Like section 366.96(7), section 366.8255 uses the past tense, requiring the Commission to allow recovery of "prudently incurred" costs. While the Challengers argue that section 366.8255 is different from Section 366.96 because it authorizes recovery of projected costs, a closer reading of section 366.8255(3) shows that it is just describing the mechanism for recovery of prudently incurred costs used by the Commission in all of its cost recovery clauses, under which cost-recovery factors are set at least annually based on projected costs that are "trued-up" to ultimately allow the utility to recover its actual prudently incurred costs. See also § 366.8255(5), Fla.

Stat. ("Any costs recovered in base rates may not be recovered in the cost-recovery clause").

105. By using the terms "cost recovery clause" in section 366.96(7), the Legislature created a cost recovery clause like the one created in section 366.8255 and like all other cost recovery clauses the Commission administers.

106. Proposed rule 25-6.031(7)(c) is valid because it requires a utility seeking cost recovery under section 366.96 to provide information on trued-up costs, estimated trued-up costs, projected costs, and proposed factors, all of which is necessary for the Commission to administer a cost recovery mechanism like section 366.8255(3) and all of its other cost recovery clauses. Proposed rule 25-6.031(7)(c) is not vague. It is very specific as to the information a utility must file.

107. Moreover, subsection (7)(c) is a filing requirement for the utility; it is not a standard for the agency's decision and does not vest unbridled discretion in the Commission. The standard the Commission will use to evaluate whether the costs are prudently incurred transmission and distribution storm protection plan costs is contained in section 366.96(7).

108. In sum, proposed rule 25-6.031(7)(c) is not an invalid exercise of delegated legislative authority.

The Commission followed applicable rulemaking procedures

109. The Challengers allege that the Commission materially failed to follow applicable rulemaking procedures set forth in chapter 120, raising issues about the SERC, and the November 5, 2019, public hearing.

The SERC

110. A SERC must include "an economic analysis" regarding the potential impacts of a proposed rule on areas including economic growth, private sector job creation, and business competitiveness. See § 120.541(2)(a)1-3., Fla. Stat.

111. In the SERC, the Commission stated that it had determined that the proposed rules would not have an adverse impact on small business. The Challengers object to the Commission's economic analysis on the grounds that it improperly limited the review and analysis to the IOUs, making much of the fact that utility customers, many of whom are small businesses, will ultimately bear any increase in rates. Those rate increases, however, would not come from the proposed rules, but rather from costs that utilities may be allowed to recover under future storm protection plan cost recovery clause proceedings under section 366.96.

112. Section 366.96 is the authorizing statute. Nothing in section 120.541 requires agencies to consider the costs imposed by the statute authorizing the agency to engage in rulemaking.

113. Section 120.54(3)(b)1. specifically states: "Before the adoption, amendment, or repeal of any rule . . ., an agency is encouraged to prepare a statement of estimated regulatory costs of the proposed rule."

114. The SERC examined all the statutory criteria required by section 120.542(2)(a) and comports with the requirements of sections 120.54(3)(b) and 120.541(2). The IOUs are the only entities that are required to comply with the proposed rules. Therefore, the Commission did not err when it limited its analysis when developing the SERC to these entities, and only considered the potential cost impacts of the proposed rules, instead of the cost impacts of the statute.

115. Moreover, the Challengers waived their right to challenge the SERC by not responding in writing within the 21-day period indicated in the F.A.R. Notice. See Hale v. Dep't of Rev., 973 So. 2d 518, 522 (Fla. 1st DCA 2007) (stating that "'[w]aiver' is the 'intentional relinquishment or abandonment of a known right or privilege, or conduct that warrants an inference of the intentional relinquishment of a known right.'"). The Commission's October 7, 2019, F.A.R. Notice of Proposed Rule, in accordance with section 120.54(3)(a)1., included a summary of the SERC and a statement that any person who wishes to provide the agency information regarding the SERC or to provide a proposal for a lower cost regulatory alternative

must do so in writing within 21 days after publication of the notice. The Commission received no information on the SERC and no requests for a lower cost regulatory alternative in writing within 21 days of the October 7, 2019, F.A.R. Notice.

The November 5, 2019, Public Hearing

116. The Commission followed all applicable rulemaking procedures when it held the public hearing the Public Counsel requested on November 5, 2019. The Commission published the required F.A.R. notice seven days before the public hearing, pursuant to section 120.525(1). Section 120.54(3)(e)2. states that the term "public hearing" includes any public meeting held by the agency at which the rule is considered, so it was not a violation of section 120.54 to hold the public hearing as part of the Commission's regular agenda conference.

117. The Commission did not abuse its discretion when it denied the Public Counsel's motion for a continuance of the public hearing and its motion to initiate formal proceedings. A draw-out hearing is not required merely because a person alleges that its interests will not be protected by the rulemaking process. Corn v. Dep't of Legal Aff., 368 So. 2d 591, 593 (Fla. 1979). In ruling on a request for a draw-out proceeding, the agency is required to "exercise its discretion and make an express determination" as to whether proceedings under section 120.54 would adequately protect the person's asserted interests.

Bert Rogers Sch. of Real Estate v. Fla. Real Estate Comm'n, 339 So. 2d 226, 228 (Fla. 4th DCA 1976).

118. In addition to finding that the request for a draw-out proceeding was untimely, the Commission made express determinations that the Public Counsel failed to show why a continuance was necessary and failed to affirmatively demonstrate that a public hearing conducted under section 120.54(3)(c)1. would not give the Public Counsel an adequate opportunity to protect its substantial interests. The Commission's decisions were not arbitrary, fanciful, or unreasonable. See Graham v. State, 207 So. 3d 135, 142 (Fla. 2016).

119. Pursuant to section 120.54(3)(c), the Commission considered all arguments and evidence. It made part of the rulemaking record all material pertinent to the issues under consideration at the public hearing that were submitted to the Commission within 21 days after the date of the publication of the October 7, 2019, F.A.R. Notice of Proposed Rule and through the end of the final public hearing on November 5, 2019. (Ex. J-48, J-50.)

120. The Challengers' further assertion that the Commission did not allow Kelly Cisarik and Florida Industrial to participate at the hearing is not supported by the record. See Petition at ¶ 57 (noting Public Counsel was permitted "to read

[Ms.] Cisarik's testimony into the record."); Exh. J-48 at 24-29 (Public Counsel reading Ms. Cisarik's letter into the record); Exh. J-48 at 98 (Florida Industrial permitted to ask questions).

121. In sum, the Commission did not fail to follow rulemaking procedures and otherwise complied with all applicable rulemaking procedures and requirements in sections 120.54 and 120.541.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, it is,

ORDERED that:

1. Proposed rules 25-6.030(3)(d), 25-6.030(3)(e), 25-6.030(3)(j), 25-6.031(6), and 25-6.031(7)(c) are not invalid exercises of delegated legislative authority; and

2. The Petition of the Public Counsel and challenges asserted by Florida Industrial against the proposed rules are Dismissed.

DONE AND ORDERED this 21st day of January, 2020, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 21st day of January, 2020.

ENDNOTE

[1/] All references to Florida Statutes are to the current 2019 versions unless otherwise indicated.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.