IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2017-022854-CA-01
SECTION: CA21
JUDGE: David C. Miller

Heydi Velez et al
Plaintiff(s)

vs.

Florida Power & Light Company et al
Defendant(s)
_____/

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs Heydi Velez, Miriam Perez, Mirialis Rivero, Enrique Arguelles, Ruben Mendiola, and Jose Zarruk brought this putative class action lawsuit against Defendant Florida Power & Light Company (FPL) for FPL's failure to comply with its contractual obligation to use reasonable diligence at all times to provide continuous service and for gross negligence. (Doc. 20, Ex. A at § 2.5 regarding "Continuity of Service.") As a legal result of FPL's breaches and gross negligence, Florida residents suffered unnecessary and prolonged power outages from Hurricane Irma, a storm that merely sideswept the area. (*Id.* at ¶25-34; 41; 63; and 67.) This case is before the Court on Plaintiffs' Motion for Class Certification (Doc.133.), and Defendant FPL's Brief in Opposition (Doc. 136.). The Court held a 3-day evidentiary hearing on class certification and other issues commencing on December 15, 2021, the transcripts and exhibits of which are incorporated by reference.[1] (Doc. 150-205.)

I. Background

The facts alleged in this case are set forth in Plaintiffs' First Amended Complaint (FAC). (Doc. 20.) To provide a brief summary, each of the individual Plaintiffs entered into a uniform

contractual agreement[2] with FPL for electrical services (Doc. 20 Ex. A at § 2.1 regarding "Service.") in consideration for a monthly fee. (*Id.* at ¶¶ 9, 14, 19-21.) In addition, each of the individual Plaintiffs were charged a surcharge for storm restoration and hardening activities pursuant to section 366.8260, Florida Statutes. (*Id.*)

In this suit, Plaintiffs allege that FPL failed to comply with its contractual obligation to use reasonable diligence at all times to provide continuous service and was gross negligence, and as a result of FPL's breaches and gross negligence, Plaintiffs experienced prolonged power outages following Hurricane Irma and suffered consequential damages. Specifically, Plaintiffs allege that FPL failed to: (1) adhere to its storm hardening plan that adopted the National Electrical Safety Code (NESC) to improve FPL's system infrastructure to withstand 145 mph winds at the southernmost tip of the state, 130 mph winds in south Florida, and 105 mph further north;

(2) carry out preventative maintenance initiatives;

(3) replace outdated, decaying, and failing grids;

(4) replace decaying utility poles, outdated failing transformers and local overhead power distributions;

(5) clear vegetation; and

(6) replace defective equipment. (*Id.* at ¶¶ 43, 64.)

FPL initially challenged Plaintiffs' ability to pursue this matter in the Florida courts. (Doc. 25.) After a denial of its Motion to Dismiss, FPL petitioned the Third District Court of Appeal for a writ of prohibition to force the parties' dispute before the Florida Public Service Commission (PSC). The Third District Court of Appeal denied that request, and the matter

returned to this Court in November of 2018. *See Florida Power & Light Co. v. Velez et al.*, 257 So.3d 1176 (3d DCA 2018). Thereafter, Plaintiffs commenced class discovery, serving their Request for Production on January 7, 2019. FPL responded with various objections, which this Court overruled by virtue of its Order dated February 25, 2019. (Doc. 68.) In response, FPL petitioned the Third District Court of Appeal again, and requested a writ quashing the Court's Order and granting relief from Plaintiffs' discovery request.

Rather than continue in an endless cycle of motion practice and appellate proceeding, the Parties stayed the matter before the Third District Court of Appeal and engaged in a months-long effort to negotiate a workable discovery compromise. An agreement was reached, and FPL's Petition was withdrawn on September 16, 2019. The agreed discovery exclusively concerned FPL's data collection methods and data stores. Pursuant to the Parties' agreement, Plaintiffs requested and FPL produced, among other things, data underlying its hurricane readiness and performance delivery reports to the PSC, as well as data relating to outage assessments, diagnoses, causes, and repair during and following Hurricane Irma.

Plaintiffs have now moved to certify the following class:

> All persons and business owners who reside and are otherwise citizens of the state of Florida that entered into contractual agreement with FPL for electrical services, were charged a storm charge, experienced a power outage after Hurricane Irma, and suffered consequential damages, directly and proximately, because of FPL's breach of contract and/or gross negligence.

(*Id.* at 47.) Plaintiffs would exclude the following from the proposed class: "FPL customers that are not citizens of the state of Florida; all persons who made a timely election to be excluded from the Class; the judge to whom this case is assigned and his/her immediate family; and the attorney of record." (*Id.* at 48.) Each member of the class would assert claims based on the two legal theories: breach of contract and gross negligence.

II. Legal Standard

Before a trial court certifies a class, it must find that all the requirements of Rule 1.220(a) of the Florida Rules of Civil Procedure have been met. *Sosa,* 73 So.3d at 105. In relevant part, Rule 1.220(a) provides:

> Before any claim or defense may be maintained on behalf of a class by one party or more suing or being sued as the representative of all the members of a class, the court shall first conclude that (1) the members of the class are so numerous that separate joinder of each member is impracticable, (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class, (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class, and (4) the representative party can fairly and adequately protect and represent the interests of each member of the class.

Rule 1.220(a). The movant has the burden of proving that class certification is appropriate under Rule 1.220. *Sosa,* 73 So.3d at 106 (citing *InPhyNet Contr. Servs. Soria*, 33 So.3d 766,771(Fla. 4th DCA 2010).[3] For the many reasons detailed below, and on the record, the Court finds that the Plaintiffs have met that burden.

III. Discussion

a. The Requirements of Rule 1.220(a)

The Court first turns to the requirements of Rule 1.220(a) in analyzing whether the proposed class may be certified. While FPL does not contest all four prongs of Rule 1.220(a), the trial court must conduct a rigorous analysis to ensure that the certification "has a sound basis in fact and is not predicated on mere supposition." *Id.* at 117 (quoting *Baptist Hosp. of Miami, Inc. v. Demario*, 661 So.2d 319, 321 (Fla. 3d DCA 1995).

1. Numerosity

The numerosity requirement of Rule 1. 220(a)(1) is satisfied if "the members of the class are

so numerous that separate joinder of each member is impracticable." Rule 1.220(a)(1). "No specific number and no precise count are needed to sustain the numerosity requirement." *Toledo v. Hillsborough Cnty. Hosp. Auth.,* 747 So.3d 958, 961 (Fla. 2d DCA 1999)("It is well-settled that, while a plaintiff is not required to plead the exact number of persons included in a proposed class, a plaintiff is precluded from relying on speculation as to class size."). Plaintiffs have submitted FPL's Hurricane Irma Performance Report as evidence that there are more than 4.454 million members of the proposed class. (Doc. 184 at ¶ 6.)

Rather than challenge the fact that 4.4 million members lost power following Hurricane Irma, FPL argues that "until it is determined which customers lost power because of some alleged failure of FPL to perform its obligated services, the number of class members cannot be determined." (Doc. 148, Ex. 34 at ¶9.) Tellingly, FPL collects data sets such as the location of the outage, the estimated number of customers impacted by the outage and the cause of the outage (Doc. 148, Ex. 34 at ¶19.) to report on its reliability to the PSC following a storm. In fact, FPL's witness testified that 4.4 million customers lost power following Hurricane Irma, and that based on the data FPL collected and reported to the PSC, 89.7 percent of those customers reported an outage with a "cause code" of "Hurricane." *See* Class Certification Tr.280:21-22; 282:5-11, December 16, 2021. Because joinder of 89.9 percent of 4.4 million customers who reported an outage following Hurricane Irma due to a "cause code" of "Hurricane" is impracticable, numerosity is present. Thus, the Court finds that the numerosity requirement is satisfied in this case.

2. **Commonality**

Commonality is satisfied if the defendant is alleged to have "engaged in a standardized course of conduct that affects all class members." *In re Terazosin Hydrochloride Antitrust Litig.,* 220 F.R.D. 672, 685-86 (S.D. Fla. 2004).; *see also Morgan v. Coats,* 33 So.3d 59*,* 64 (Fla. 2d DCA 2010) (citing *Powell v. River Ranch Prop. Owners Ass'n, Inc.* 522 So.2d 69,

70 (Fla. 2d DCA 1988)). "Claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action, and breach of contract cases are routinely certified as such." *Steinberg v. Nationwide Mutual Insurance Company,* 224 F.R.D. 67, 74 (E.D. NY 2004) citing to *Klay v. Humana Inc*. 382 F.3d 1241, 1251 (11th Cir. 2004). "The threshold of the commonality requirement is not high. A mere factual difference between class members does not necessarily preclude satisfaction of the commonality requirement." *See Sosa*, 73 So.3d at 107 (internal citations omitted). "[T]he commonality prong only requires that resolution of a class action affect all or a substantial number of the class members, and that the subject of the class action presents a question of common or general interest." *Id*.

The United States Eleventh Circuit Court of Appeals has described commonality requirement as a "low hurdle."[4] *Williams v. Mohawk Indus., Inc*., 568 F.3d 1350, 1356 (11th Cir. 2009). The inquiry is "the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart v. Dukes,* 131 S. Ct. 2541, 2551 (2011). Even "a single common question will do." *In re Disposable Contract,* 329 F.R.D. at 405. The standard has been met here.

Plaintiffs have established commonality in this case. Plaintiffs' claims arise out of the same course of conduct and are based on the same legal theories as those of the putative class members. FPL in its routine course of conduct and common billing practice charged each class member a monthly fee stemming from its Tariff for service. (Doc. 148, Ex. 34 at ¶¶4,6.) In exchange for a portion of that fee, FPL has agreed to harden its system in accordance with NESC standards in order to withstand winds of certain represented speeds. But, according to Plaintiffs, FPL failed to deliver on that obligation—as a Hurricane Irma's windspeeds failed to reach beyond tropical storm force for much of the State yet caused what FPL's representatives confirmed was the largest outage event in the company's history.

FPL's conduct presents several common legal issues, including whether FPL breached its

contractual agreement by failing to use reasonable diligence at all times to provide continuous service, whether FPL evidenced a conscious disregard of an imminent or "clear and present danger," and whether damages are recoverable under Florida law. *See Sosa*, 73 So. 3d at 107 (finding commonality where the plaintiff's claims "arose from the same course of conduct and routine billing practice by [defendant] and were based on the same legal theory"). Even FPL's principal defense, that is, whether Irma amounted to an "Act of God" for purposes of its Tariff, presents a common legal question whose resolution may be applied class-wide.

Moreover, unlike the plaintiffs in *Dukes,* Plaintiffs here have provided evidence of a common uniform policy or practice by FPL. That is, FPL captures in its common course of conduct the "cause code" associated with each customers' outage irrespective of weather conditions in its Trouble Call Management System (TCMS). *See* Class Certification Tr.160: 2-9, December 15, 2021; *see also* Class Certification Tr. 381:12-19, December 16, 2021. During storm restoration periods following a hurricane, including Hurricane Irma, it is FPL's common course of conduct to enter "Hurricane" as the most-commonly used "cause code" because "it's a blanket or a placeholder" and covers "anything related to the hurricane." *See* Class Certification Tr.161: 9-18, December 15, 2021. Thus, when the finder of fact adjudicates whether FPL complied with its contractual obligation under its Tariff or was grossly negligent, FPL's common course of conduct to capture "cause codes" will offer common answers to each question that will drive the resolution of the litigation. Accordingly, the commonality requirement has been satisfied.

3. **Typicality**

"The key inquiry for a trial court when it determines whether a proposed class satisfied the typicality requirement is whether the class representative possesses the same legal interest and has endured the same legal injury as the class members." *Sosa*, 73 So. 3d at 114 (citing *Morgan v. Coats*, 33 So. 3d 59, 65 (Fla. 2d DCA 2010)). Typicality measures whether a sufficient nexus

exists "between the named plaintiff[s]' legal and remedial theories and the theories of those whom they purport to represent." *Morgan*, 33 So. 3d at 65; *see also Clausnitzer v. Fed. Exp. Corp.*, 248 F.R.D. 647, 656 (S.D. Fla. 2008) (holding that "[a]s is the case with commonality, the requirements of typicality are not high"). The claim of a class representative is typical "if it arises from the same event or conduct giving rise to the claims of absent class members." *See Basco v. Wal-Mart Stores, Inc.*, 216 F. Supp. 2d, 592, 599 (E.D. La. 2002) (holding that "[o]ne of the purposes of the typicality requirement is to ensure that the representative's interest is "aligned with those of the represented group, and in pursing his own claims, the named plaintiff will also advance the interests of the class members"). "The typicality requirement may be satisfied despite substantial factual differences, however, when there is a 'strong similarity of legal theories.'" *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001)(quoting *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985)).

Plaintiffs' claims are typical of the claims of the class because they all arise out of the same course of conduct and are based on the same legal theories. Although FPL contends typicality is not met because proving the cause of the Plaintiffs' outage would not necessarily prove the cause of each class member's outage (Doc. 136 at 12.), Plaintiffs are not required to make such a showing. Plaintiffs and the class can rely on FPL's own records for that. The named Plaintiffs are merely required to show that they "share the issues common to other class members," a requirement they have easily met. *See* Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 3:13 at 317 (4th Ed. 2002).

The claims of Plaintiffs and the class members are based on the same legal theory – a breach of contract and gross negligence – that arose from the same course of conduct that caused a similar injury – FPL charging Plaintiffs and the putative class members a monthly fee in exchange for the now-unmet promise of an electric grid that could withstand the known and anticipated risks of a significant wind event. And the fact that Plaintiffs' and the putative class

members' damage recovery might differ is a mere factual difference as to the extent of his or her injury and damage recovery, which does not preclude a finding of typicality.

4. **Adequacy**

"A trial court's inquiry concerning whether the adequacy requirement is satisfied contains two prongs. The first prong concerns the qualifications, experience, and ability of class counsel to conduct the litigation. The second prong pertains to whether the class representative's interests are antagonistic to the interests of the class members." *Sosa*, 73 So. 3d at 115. FPL does not challenge the adequacy of class counsel here, and their representation before this Court confirms the adequacy of each of the attorneys and law firms representing the Plaintiffs to serve as class counsel.

As to the second prong, FPL contends that Plaintiffs would not be adequate to represent: (1) a class of customers whose loss was the result of a cause other than Plaintiffs' alleged cause for lost power; and (2) a series of business and governmental customers. (Doc. 136 at ¶13.) The specific issues in this controversy concern whether FPL in its routine course of conduct and common billing practice charged each class member a monthly fee stemming from its Tariff and storm surcharge and failed to comply with its contractual obligation to use reasonable diligence at all times to provide continuous service and was grossly negligent in its undertaking. If Plaintiffs' claims are successful on a class-wide basis, all class members will benefit by recovering consequential damages. Nonetheless, members of the class that feel they are not being adequately represented may opt out. *See e.g., Payne v. Travenol Labs, Inc*. 673 F.2d 798 (5th Cir. 1982).

Moreover, the evidence is clear that plaintiffs were willing and able to take an active role as class representatives and advocated on behalf of all class members. *See* Dep. of Jose Zarruck, 18:15-19:2; Dep. of Rubens Mendiola, 12:20-13:16; Dep. of Enrique Arguelles, 27:1-28:8; Dep. of Mirialis Rivero, 22:9-24:21; Dep. of Miriam Perez, 27:10-28:10; and Dep. of Heydi Velez,

29:7-16. Plaintiffs participated fully in discovery, have been deposed, and appeared at the extensive evidentiary hearing conducted by this Court on the questions of class certification. Plaintiffs' interests were not antagonistic to those of the rest of the class. *See* Dep. of Jose Zarruck, 18: 23-24. Plaintiffs interest go hand in hand with the interests of every putative class member as they sought redress from FPL for the same breaches and derelictions of duty. Thus, Plaintiffs fulfilled the adequacy requirement of Rule 1.220(a).

b. **The Requirements of Rule 1.220(b)(3)**

Plaintiffs seek to certify their class under Rule 1.220(b)(3). The rule provides that a class for damages may be certified when questions of law or fact common to the claim or defense of the representative parties and the claims of each class member must predominate over any questions of law or fact affecting only individual members of the class, and class representation is superior to other methods for the fair and efficient adjudication of the controversy. Fla. R.

Civ. P. 1.220(b)(3).

1. **Predominance**

Plaintiffs must first establish that common questions of law and fact predominate over individual, plaintiff-specific issues. *See* Fla. R. Civ. P. 1.220(b)(3); *see also Sosa* 73 So. 3d at 111. Florida courts have held that common questions of fact predominate when the defendant acts toward the class members in a similar or common way. *Id.* The methodology employed by a trial court in determining whether class claims predominate over individual claims involves a proof-based inquiry. *Id.* at 112. That is, a class representative establishes predominance if he or she demonstrates a reasonable methodology for generalized proof of class-wide impact. *Id. (*citing *InPhyNet Contr. Servs. v. Soria,* 33 So.3d 766, 771 (Fla. 4th DCA 2010). A class representative accomplishes this if he or she, by proving his or her own individual case, necessarily proves the cases of the other class members. *See Id.* (*citing Seminole Cnty. v.*

Tivoli Orlando Assocs. Ltd., 920 So.2d 818, 824 (Fla. 5th DCA 2006)).

i. **Plaintiffs' Breach of Contract Claim**

Florida law recognizes three discrete elements for a claim in breach of contract: (1) the existence of a contract, (2) a breach of the contract, and (3) damages resulted from the breach. *AVVA-BC, LLC v. Amiel*, 25 So.3d 7, 12 (Fla. 3d DCA 2009). Common issues predominate in consumer class actions for a breach of contract where, as here, the defendant has exhibited a common course of conduct. *See Allapattah Servs. Inc. v. Exxon Corp.*, 333 F.3d 1248 (11th Cir. 2003)(when agreements are materially similar, whether defendant breached the agreement is common to the class and the issue of liability is appropriately determined class-wide).[5]

The Rule 1.220(b)(3) predominance element is met in this case. FPL's Tariff is a form document with uniform terms and conditions, and as admitted by FPL applies to all Plaintiffs and class member. (Doc. 148, Ex. 34 at ¶¶ 4, 6.) FPL drafted the Tariff and presented it to its customers on a take it or leave it basis, FPL's customers had no bargaining power at all. Thus, FPL's Tariff was a contract of adhesion.[6] As discussed above, the Tariff was intended to memorialize the parties' contractual relationship, and the language utilized in the Tariff unambiguously states that FPL "will use reasonable diligence at all times to provide continuous service." (Doc. 20, Ex A at § 2.5 "Continuity of Service.")

In addition, the Tariff references and incorporates FPL's governing "Service Standard." (Doc. 20, Ex A at § 9 "Service Standard.") The "Service Standards" explain the character of the electric service provided as well as the industry standards applicable to FPL in the provision of that service. Further, the Tariff expressly incorporates and renders itself subject to the latest edition of the NESC. (Doc. 35 at Ex. C "[FPL's Electric Service Standards] is subject to and subordinate in all respects to…the current edition of the National Safety Code.") The NESC places an affirmative obligation on FPL to regularly inspect and test its lines and equipment for compliance with NESC standard, to keep records of and promptly correct defects, and to

maintain vegetation within its right-of-way. (Doc. 35.)

Also consistent with Plaintiffs' position, the Tariff expressly references and provides for the storm charge referenced in Plaintiffs' FAC. (Doc. 20, Ex. A at § 8.040 "Rate Schedules.") It is axiomatic that FPL must meet the obligations undertaken in exchange for that storm charge. Plaintiffs plainly allege those promises and FPL's widespread breaches thereof. (*Id.* at ¶¶ 43, 64). As a result of FPL's breaches, Plaintiffs and the class members suffered consequential damages.

FPL has artfully attempted to acknowledge the Tariff while obscuring and escaping its mandates. However, FPL's failures to harden and safeguard its facilities against the foreseeable risks of severe storms are clear and beyond dispute. FPL further contends that there is no single, easily identifiable cause of the damages alleged. (Doc. 136 at 34.) According to FPL, there were tens of thousands of outages over a ten-day period with at least several dozen causes attributable to Acts of God[7] or outside of the control of FPL, and thus it argues that the unique factual and legal issues relevant to the claims of individual class members would be ignored if this Court resolved class members' claims and FPL's affirmative defenses on the basis of a single set of facts. But the Court finds FPL's testimony consistently inconsistent, and its allusions to mini-trials and causation inquiries unavailing.

It is well-settled in data-driven cases like this one, even if there are potential individualized determinations, that "the necessity of making individualized factual determinations does not defeat class certification if those determinations are susceptive to generalized proof like [business] records." *Minns v. Advanced Clinical Employment Staffing LLC*, 2015 WL 3491505, at *8 (N.D. Cal. 2015) (*citing* Newberg § 4:50); *Bussey v. Macon County Greyhound Park, Inc.,* 562 Fed. Appx. 782, 788 (11th Cir. 2014) (finding objective criteria such as defendant's records could be relied on to identify members of the class). Predominance exists where common questions can be answered by use of computerized software

systems. *See, e.g., see also Roper v. Consurve, Inc.,* 578 F.2d 1106, 1113 (5th Cir. 1978)[8] (certifying class and noting, "While it may be necessary to make individual fact determinations with respect to charges, if that question is reached, these will depend on objective criteria that can be organized by a computer, perhaps with some clerical assistance").[9] As discussed above, FPL in its common course of conduct captures "cause codes" and other highly relevant data associated with a customers' outage, providing the Court with a reasonable methodology for generalized proof of class-wide impact. Because of the standardized nature of the Tariff and FPL's conduct to classify the cause of power loss by, among other things, hurricane, storm/wind w/eqp damage, tree preventable, equipment failed oh, etc., common questions predominate. The amount of evidence required to prove the putative class members' claims is effectively the same as the evidence required to prove Plaintiffs' claims, because the Tariff is a standardized form contract which was drafted by FPL and Plaintiffs can utilize FPL's data to prove, on a class wide basis, FPL's liability. Further, the data available could also be used to establish statistical damage amounts, as well as a methodology to be able to handle this matter class wide.

FPL deploys "patrollers" and "forensic patrollers" in order to determine outage causes and restore power. FPL uses multiple data systems to track that information, makes outage information and restoration projections available to customers in real-time, draws conclusions from its data-rich systems, and reports outage causes (and makes its data available) to Florida's Public Service Commission. It stands to reason that FPL has identified the cause of an outage where it has been able to turn the power back on. FPL, though, has now dedicated the bulk of its presentation to undermining the accuracy of its own records. The Court is unmoved by those efforts.

FPL's "very business model includes gathering and distilling information from a variety of sources in order to [determine the cause of outages]." *Equifax*, 307 F.R.D. at 197. And, in general, "courts do not look favorably upon the argument that records a defendant treats as

accurate for business purposes are not accurate enough to define a class." *Id.* at 197-98. The Court finds that the evidence supports Plaintiffs' theory and methodology for utilizing FPL's business records and data systems for determining liability on a class-wide basis.

ii. **Plaintiffs' Gross Negligence Claim**

Under Florida law, a plaintiff must establish the following elements to prevail on a negligence claim: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach proximately caused an injury to the plaintiff; and (4) the plaintiff sustained damages as a result of the injury. *Clampitt v. D.J. Spencer Sales*, 786 So.2d 570, 573 (Fla. 2001). To prevail on a gross negligence claim, the plaintiff must establish the same elements but also show that the defendant's conduct evidenced a conscious disregard of an imminent or "clear and present danger." *Moradiellos v. Gerelco Traffic Controls, Inc.,* 176 So.3d 329 (Fla. 3d DCA 2015).

Whether a duty exists is a question of law. *McCain,* 593 So. 2d at 502. A duty may arise from four general sources: (1) legislative enactments or administrative regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedent; and (4) the general facts of the case. *Clay Elec. Co-op., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2203) (quoting *Clay Elec. Coop., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003)). The present case falls within the first and fourth categories – FPL's duty arises from legislative enactments and the general facts of the case.

Plaintiffs FAC specifically states that "FPL owed a duty to Plaintiffs and the Class to perform storm-recovery activities, including, but not limited to, mobilization, staging, construction, reconstruction, replacement, and betterment of electric generation, transmission, and distribution facilities to withstand climatic conditions arising from expected wind events typical in South Florida." (Doc. 20 at ¶70.) It describes in more than necessary detail FPL's duty under the Tariff. Thus, these duties create the following straightforward yet pivotal issues common to all Plaintiffs

and putative class members:

a. Whether FPL breached its duty of care by failing use reasonable diligence at all times to provide continuous service under the Tariff; and
b. Whether FPL breached its duty of care by failing to conduct adequate ongoing due diligence analysis of its storm-recovery activities and thereby failing to comply with its storm hardening plan.

The Court finds that these issues are common to Plaintiffs and all putative class members and will be resolved by common proof that does not vary from customer to customer based on FPL's course of conduct to utilize the same data systems and methodologies for all 5.6 million customers. *See* Class Certification Tr. 281:12-22 and 290:7-9, December 16, 2021. Indeed, the record reflects that FPL blurred the critical difference between the manner in which it collects information related to customer outages on a blue-sky day and the manner in which it collects information related to customer outages during a hurricane. *See Id.* 299:3-25. On a blue-sky day the "cause code" associated with an outage is the actual and proximate cause for a customer's power outage. *See Id.* 299: 3-7. However, the record now shows clearly that FPL trains its employees to purposefully select the "cause code" of "Hurricane" as the direct and proximate cause of an outage following a storm such as Hurricane Irma. *See Id.* 115:6-16.

Based upon the common procedures above, the question is whether FPL adopted (or declined to adopt) those procedures and so evidenced a conscious disregard of an imminent or "clear and present danger." The Court finds that a reasonable jury could come to such a conclusion. With respect to FPL's common course of conduct to collect customer outage data, a jury could find that FPL's conscious decision to categorically subject information about outages following a storm to a different standard than information about outages on a blue-sky day, and inherently invites breaches of the type that are alleged above to be grossly negligent.

Similarly, a jury could find that FPL understood the risks associated with its mode of

collecting "causes" of customer outages following a storm and its integration or lack thereof with other critical FPL databases, and that, thusly aware, FPL's common course conduct nonetheless evidenced a conscious disregard of an imminent or "clear and present danger." Finally, a jury could find that FPL's policy or procedure on reporting customer outages following a storm to the PSC ran such a risk as well. Of course, the fact that FPL was on notice about potential problems with "cause codes" associated with "Hurricane" before furnishing the PSC its Performance Report speaks to FPL's conscious disregard of an imminent or "clear and present danger" on its own.

FPL responds that it is entitled to an individual review of each outage for which relief is sought to determine whether FPL acted in reckless disregard of human life or rights equivalent to an intentional act or a conscious indifference to the consequences of an act. (Doc. 136 at 18.) FPL is surely entitled to review the causes it selected during its common course of conduct. This does not, however, upend the commonality of the conscious disregard of an imminent or "clear and present danger" inquiry and Plaintiffs' generalized, class-wide proof will demonstrate that FPL ignored the risks created by overgrown vegetation, spurned its obligation to take preventative measures, and recklessly exposed Plaintiffs and the class members to the dangers of suffering a prolonged power outage in oppressive post-hurricane heat because of its faulty data collection process.

FPL argues next that the Tariff excuses acts of simple negligence. Section 2.5 of the Tariff addresses FPL's liability. Section 2.5 of the Tariff provides in part that:

> The Company shall not be liable for any act or omission caused directly or indirectly by strikes, labor troubles, accident, litigation, shutdowns for repairs or adjustments, interference by Federal, State or Municipal governments, acts of God or other causes beyond its control.
>
> FPL Tariff § 2.5.

Here, Plaintiffs contend that Section 2.5 of the Tariff does not bar their gross negligence claim because it is against public policy to provide an exemption from a suit for gross negligence. The Court agrees with Plaintiffs. The Tariff's liability shield does not apply to gross negligence. *Landrum.,* 505 So. 2d at 554.

2. **Ascertainability**

Courts regularly certify classes where the defendant's records can be searched to identify class members and the damages they have suffered. *See Smilow v. Southern Bell Mobile Sys.,* 323 F.3d 32,40 (1st Cir. 2003)(common issues predominate "where individual factual determinations can be accomplished using computer records, clerical assistance, and objective criteria thus rendering unnecessary an evidentiary hearing on each claim"); *In re Checking Account Overdraft Litigation*, 307 F.R.D. 656, 678 (S.D. Fla. June 8, 2015)("[c]lass members are readily ascertainable through objective criteria: [defendant's]own records of individuals who were assessed overdraft fees"); *Sadler v. Midland Credit Mgmt.,* No. 06c5045, 2009 WL 901479, at *2 (N.D. Ill. Mar. 31, 2009)(querying of defendants' database would yield "objective criteria" necessary to ascertain the class); *Stern v. AT&T Mobility Corp*., No. 05-cv-8842, 2008 WL 4382796, at *5 (CD. Cal. Aug. 22, 2008)(defendants' business records provided sufficient information to identify individuals who purchased cellular telephone service and were enrolled in either one of the challenged services without ever having requested the service).

Class members in this case are readily ascertainable through objective criteria: FPL's own records. *See* Class Certification Tr. 281:12-22, December 16, 2021. That is, FPL maintains detailed records of its customers. FPL's Supervisory Control and Data Acquisition ("SCADA") system captures messaging from its automated equipment in the field and at substations, including timestamps of equipment operations which include outage and restoration times, equipment ID, and any operations that would re-route the energization of circuits from automated equipment (Doc. 148, Ex. 34 at ¶17.); FPL's electrical outage tickets provide detailed

data such as the location of the outage, the estimated number of customers impacted by the outage and the suspected cause of the outage (*Id.* at ¶19.); and FPL's Electric Storm Damage Assessment (ESDA) captures the location and type of damage (*Id.* at ¶28). All of the foregoing information is readily accessible, and FPL can run queries to generate reports.

In response to Plaintiffs' discovery request, FPL was able to run queries to identify causes of outages following Hurricane Irma by "Interruption," "Ticket Type," "Ticket Status," "County and Equipment Code" and "County and Priority Level." *See* Class Certification Tr. 451: 21 – 455:15, December 16, 2021. FPL also admitted that it has to the ability to identify: (1) every single customer that lost power in the state of Florida following Hurricane Irma; (2) the applicable NESC extreme wind region per customer; (3) outages at a powerplant, local substation, and distribution line and associate them to an outage with a cause code of "Hurricane" based on a relational tie in. *See Id.* 302: 10-16; 446; 448:5-14.

FPL alleges Plaintiffs are proposing an unascertainable class. FPL's protests ring hollow in light of its own capabilities to run queries and generate detailed reports for the PSC. In fact, FPL's business model includes gathering and distilling information from a wide variety of sources in order to glean insights concerning customer outages. *See* Class Certification Tr. 440:5, December 16, 2021. "[C]ourts do not look favorably upon the argument that records a defendant treats as accurate for business purposes are not accurate enough to define a class." *Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D. 183, 198 (E.D. Va 2015)(citing *Herrera v. LCS Fin. Servs. Corp.,* 274 F.R.D. 666, 674 (N.D. Cal. June 1, 2001)("What was ascertainable to *Ocwen* in the course of adhering to its own policy is ascertainable for the purposes of identifying members of the class.").

In sum, the Court finds that Plaintiffs propose objective criteria capable of identifying those individuals described in the class definition, and thus, the ascertainability requirement is satisfied.

3. **Superiority**

The superiority analysis of Rule 1.220(b)(3) requires that the Court examine whether class representation is superior to other available methods for the fair and efficient adjudication of the controversy. See Fla. R. Civ. P. 1.220(b)(3). Courts consider three factors when deciding whether a class action is the superior method of adjudicating a controversy:

1. a class action would provide the class members with the only economically viable remedy;
2. there is a likelihood that the individual claims are large enough to justify the expense of separate litigation; and
3. a class action cause of action is manageable.

Sosa, 73 So. 3d at 115. In this case, these factors weigh in favor of class certification. *Id*. Plaintiffs' cause of action is suitable for class certification because it is the superior form of adjudication for this controversy. There are potentially millions of prospective class members and their small individual economic claims are not large as to economically justify each individual filing a separate action. Allowing Plaintiffs and the putative class members to proceed with this class action is the most economically feasible remedy given the potential individual damage recovery for each class member.

Furthermore, because of the large number of potential class members who based their claims on the same common course of conduct by FPL, a class action would be more manageable and more efficient use of judicial resources than individual claims. As MSP Recovery LLC's Chief Information Officer, Christopher Miranda's deposition testimony made clear, Plaintiffs' through MSP Recovery, LLC have the ability to: (1) ingest FPL's data; (2) normalize FPL's data; and (3) perform preliminary analytics on FPL's data. *See* Dep. of Christopher Miranda, 6:1-7:8. Mr. Miranda reviewed numerous documents produced by FPL, including its data dictionary and was able to identify that FPL maintains sets of data that contain outage ticket and other reliability information used to calculate metrics and delineate the cause of

an outage making this the quintessential case for class action certification. *See* Dep. of Christopher Miranda, 13:8-14:6. The requirements of Rule 1.220(b)(3) have thus been met.

IV. Conclusion

This action is predicated on a common contract with nonnegotiable terms that permeates class wide, giving rise to uniform rights and obligations. FPL contractually undertook to use reasonable due diligence at all times to provide its customers continuous service even during foreseeable wind events because of its storm hardening improvements.

Plaintiffs are not claiming that FPL is an insurer against hurricanes nor, will class status produce that result. Instead, Plaintiffs seek class wide management over a basic contractual issue of whether FPL breached its contractual obligation to honor its promise to use reasonable diligence at all times to provide continuous service or did FPL somehow commit gross negligence in performing its duties under its Tariff. These issues are best suited for class wide treatment. It is hereby ORDERED:

1. Plaintiffs' Motion for Class Certification (Doc. 133.) is GRANTED.
2. The certified class encompasses this Court Certifies the following Class: All persons and business owners who reside and are otherwise citizens of the state of Florida that entered into contractual agreement with FPL for electrical services, were charged storm charges, experienced a power outage after Hurricane Irma, and suffered consequential damages, directly and proximately, because of FPL's breach of contract and/or gross negligence;
3. The class is certified with respect to Plaintiffs' breach of contract and gross negligence claim;
4. The Court may establish sub-classes on the question of damages after liability is determined;

5. Heydi Velez, Miriam Perez, Mirialis Rivero, Enrique Arguelles, Ruben Mendiola, and Jose Zarruk are hereby certified as class representatives;
6. Plaintiffs' counsel John H. Ruiz, Alexis Fernandez, Gonzalo Dorta, J. Alfredo Armas, Eduardo Bertran, Francesco Zincone, and Julio C. Acosta (collectively "Plaintiffs' Counsel") are hereby certified as Class counsel; and
7. Within 30 days, Plaintiffs shall submit to the Court for approval a proposed notice to the class members in accordance with Florida Rule of Civil Procedure 1.220(d)(2). Plaintiffs shall also identify and describe any measures they propose to take to locate and notify potential class members. Prior to filing this proposed notice, Plaintiffs shall confer with FPL in an attempt to agree on the language of the class notice. If an agreement is not reached, FPL may file objections to Plaintiffs' proposed notice or submit an alternative proposed notice. To the FPL has not already done so, it is directed to make available to Plaintiffs all evidence in its possession that may assist Plaintiffs, in locating members of the class.

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[1] *See Sosa v. Safeway Premium Fin. Co.,* 73 So.3d 91, 118 (Fla. 2011) (holding that for class certification, a court considers the "entire case file" and "affidavits, deposition testimony, discovery, [and] documentation . . . .").

[2] FPL's General Rules and Regulations are part of the company's tariff (the "Tariff"). The Tariff constitutes an enforceable contract for electric service and sets forth the parties' respective obligations. *Fla. Power & Light Co. v. State ex rel. Malcolm,* 107 So. 317 (Fla. 1932)(holding that a tariff regulation is binding upon the consumer unless it is unreasonable or outrageous in its general operation); *Landrum v. Fla. Power & Co.,* 505 So. 2d 552, 554 (Fla. 3d DCA 1987)("[t]ariffs [have] the force and effect of the law"); and *Potts v. Fla. Power & Light Co.,* 841 So. 2d 671 (Fla. 4th DCA 2003)(stating that "the consumer is bound by the tariff regardless of his knowledge or assent thereto").

[3] The named plaintiffs must also demonstrate that they personally suffered injury with respect to each claim to establish standing. *See Sosa*, 73 So.3d at 116. Because each of the individual Plaintiffs were allegedly charged for services not provided in the same manner as the putative class members, that requirement is easily met here.

[4] Florida Rule of Civil Procedure 1.220, is based on Federal Rule of Civil Procedure 23, and this Court may look to federal cases as persuasive authority in the interpretation of Rule 1.220. *Broin v. Philip Morris Co.*, 641 So. 2d 888, 889 (Fla. 3d DCA 1994), rev. denied, 654 So. 2d 919 (Fla.1995)).

[5] *See also Herman v. Seaworld Parks & Entertainment, Inc.,* 320 F.R.D. 271 (M.D.Fla. 2017); *In re Checking Account Overdraft Litigation* 286 F.R.D. 645 (S.D. Fla. 2012); *Moreno-Espinosa v. J&J Ag Products, Inc.,* 247 F.R.D.686 (S.D. 2007); *Sears, Roebuck and Co. v. Labora*, 670 So. 2d 1025 (Fla. 3d DCA 1996); *Castellanos v. Citizens Property Ins. Corp.,* 98 So.3d 1180 (Fla. 3d DCA 2012*); Dover v. British Airways, PLC (UK),* No. 12 CV 5567 (RJD) (CLP), 2017 WL 1251083 (E.D.N.Y. Mar. 31, 2017), 23(f) pet. *Denied; and Smith v. Triad of Ala., LLC*, No. 1:14-CV-324-WKW, 2017 WL 1044692 (M.D. Ala. Mar. 17, 2017).

[6] An adhesion contract is a "standardized contract form offered to consumers of good and services on essentially a take or leave basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form contract." *Gainesville Health Care Ctr. v. Weston*, 857 So. 2d 278, 285 (Fla. 1st DCA 2003).

[7] FPL has pleaded the defense of "Act of God" as a complete bar to any liability, to rebut Plaintiffs' allegations of breach of contract and gross negligence. "While it is true that no human agency can prevent or stay an act of God, the act itself being that of omnipotence and irresistible, it is frequently the case that the results or natural consequences of an act of God, by the exercise of reasonable foresight and prudence, may be foreseen, and guarded against. When this can be done by the exercise of reasonable diligence and prudence, a failure to do so would be negligence, and subject the party upon whom this duty devolved to damages, although the original cause was an act of God." *Davis v. Ivey*, 93 Fla. 387, (Fla. 1927). Here, FPL failed to take various reasonable and preventive measures to safeguard electric services against the foreseeable risk of Hurricane Irma.

[8] Decisions of the Fifth Circuit, pre-dating October 1, 1981, are binding in this jurisdiction. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

[9] *Schorr v. Countrywide Home Loans, Inc.*, 2015 WL 13402606, at *4 (M.D. Ga. Apr. 1, 2015) (class action against lenders for failure to record satisfactions of mortgage, holding that predominance was met where defendant's computerized spreadsheets identified properties for which lenders failed to

record satisfactions); *Smilow*, 323 F.3d at 40 (reversing denial of request to certify class of telephone customers because plaintiffs' expert testified that he could "fashion a computer program that would extract from [defendant's] records" the data that would determine defendant's class-wide liability); *Boyle v. Progressive Specialty Ins. Co.*, 326 F.R.D. 69, 76 (E.D. Pa. 2018) (court certified class of Progressive insureds who sought to collect improperly withheld discounts, finding that predominance existed because Progressive "has a database identifying each vehicle" and that "[c]omparing Progressive's database with" plaintiffs' data "can prove which insureds' vehicles . . . did not receive the discount."); *Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D. 183, 197 (E.D.Va. 2015) (finding the class manageable since "*the majority of sifting in this case will be achieved through dataset searches and other forms of electronic data analysis.*") (emphasis added).

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 31st day of December, 2021.

2017-022854-CA-01 12-31-2021 7:55 PM

Hon. David C. Miller

CIRCUIT COURT JUDGE

Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

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