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b. Docket No. 100437-EI

In re: Examination of the outage and replacement fuel/power costs associated with the CR3 steam generator replacement project, by Progress Energy Florida, Inc.

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Thank you for your attention and cooperation to this request.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Examination of the outage and replacement fuel/power costs associated with the CR3 steam generator replacement project, by Progress Energy Florida, Inc.	DOCKET NO.: 100437-EI FILED: April 26, 2013

INTERVENORS' JOINT REPLY BRIEF

The Citizens of the State of Florida, by and through the Office of Public Counsel ("OPC"), and the Florida Retail Federation ("FRF"), hereinafter, Intervenors[1], hereby submit this Joint Reply Brief on the scope of hearing issues pertaining to Duke Energy Florida ("DEF" or "Duke").[2]

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Duke is wrong in claiming that the Intervenors are barred in any way from litigating the issue of the prudence of Duke's pursuit of the insurance proceeds from NEIL ("Nuclear Electric Insurance Limited"). Intervenors emphatically reject, and this Brief will demonstrate that, the disingenuous nature of Duke's assertion that the Settlement Agreement[3] approved by the Commission between Duke and the Intervenor Parties evidenced an "intent to resolve ***all*** prudence issues in this docket up to the Implementation Date of the Settlement Agreement

[1] The OPC and FRF concur in the separate reply brief filed by White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate - White Springs ("White Springs").

[2] This Brief will refer to Progress Energy Florida (PEF), Progress Energy, Inc. (PGN), Duke Energy Florida (DEF), and Duke Energy Corporation (Duke) as "Duke" or "DEF." References in Orders and other published material will be left in original language, but all discussion will utilize Duke or DEF to mean the same entity referenced.

[3] "Settlement" or "Settlement Agreement" refers to the Stipulation and Settlement Agreement approved by Commission vote on February 22, 2012 in Order No. PSC-12-0104-FOF-EI, issued March 8, 2012.

(February 22, 2012)." Duke Brief at 1 (emphasis in the original).[4] In addition, Intervenors also reject Duke's claim that litigating the prudence of Duke's course of dealing with NEIL in pursuit of insurance proceeds during the period from the inception of the Steam Generator Replacement project ("SGR") through the Implementation Date (February 22, 2012) in any way violates administrative finality. Duke Brief at 3. The Settlement approved by the Commission does not bar litigating the entire subject matter of whether Duke was prudent in its pursuit of the insurance claim against NEIL for recovery of covered damages that Duke caused to its own building, and there is no reasonable interpretation of the Settlement that would place an artificial time limitation on Duke's obligation to meet its burden of proof or on the Intervenors' rights to discovery in litigation on the burden of proof. See Paragraphs 2, 7, & 10.b of Settlement. As it relates to the pending discovery and hearing scope dispute, Duke has the burden of proving that it prudently pursued maximum recovery of insurance proceeds for the benefit of its customers. Accordingly, the Intervenors, who represent Duke's customers, are entitled to full discovery and the opportunity to be heard on this point.

At the core of the issues in dispute is a clause in Paragraph 7 of the Settlement Agreement that, all parties agree, forever settled the issue of fault in the actions that Duke took to physically modify and then, after the initial delamination event on October 2, 2009 ("10/09 delamination"), to repair the structure that is the CR3 Containment. Now, in its surprising, even shocking, efforts to hide its dealings with NEIL from the Commission and the public, Duke seeks to expand and apply that clause to a wholly separate insurance claim process by grafting a tortured and convoluted interpretation of what did not happen in negotiations into the otherwise easily understood provision.

[4] At the time the Settlement was signed (January 20, 2012), the Intervenors had conducted approximately 12 months of discovery (first document production on January 11, 2011) and not the three years of discovery inaccurately asserted by Duke. Duke Brief at 2.

All parties agree that the Commission opened this Docket in order to make a determination of prudence with respect to the actions that caused the 10/09 delamination. At the time the docket was opened, the only event that was known was the 10/09 delamination. The first set of discovery was issued in November 2010 and responses were served on January 11, 2011. The first depositions were taken on January 20 and 21, 2011. During those depositions, the engineer in charge of the SGR project testified that the SGR project had been concluded in March 2010 (Terry Deposition, January 20, 2011 at 43). Less than 60 days later, on March 14, 2011, the 3/11 delamination ("3/11 delamination") occurred. In May 2011, negotiations that eventually led to the Settlement began. The entire impetus of the discovery (especially depositions) during 2011 and the discussions related to the CR3 portion of the Settlement was focused on the resolution of the issues of causation and fault/prudence connected to the 10/09 delamination. Discovery related to the 3/11 repairs was minimal during this time, since the investigation into and repair of the 3/11 delamination was ongoing, indeterminate, and not seen as ripe for litigation before the Commission. The issue of NEIL recovery was even more remote, was indeterminate, and not even deemed a viable subject for resolution in the Settlement.

II. THE ISSUES THAT INTERVENORS HAVE RAISED RELATE ONLY TO DUKE'S PURSUIT OF INSURANCE PROCEEDS AND NOT FAULT OR PRUDENCE RELATED TO THE ACCIDENT THAT CAUSED THE DELAMINATIONS OR THE REPAIR OF THE DELAMINATIONS.

In its Brief, Duke poses what it cleverly characterizes as a "rhetorical" question: *"What else could PEF's NEIL damage claim be about if not PEF's actions during the SGR project and the resulting damage and repairs that took place because of it?"* Duke Brief at 3. The intent of this device is to distract the Commission from the fact that the issues that the Intervenors raise are related to the prudence of Duke's actions in *pursuing* the NEIL claim, its inter-relatedness

with NEIL, and how Duke interacted with NEIL. The contested issues have nothing to do with the quality of the engineering or the decisions that Duke made in choosing the repair methods or the execution of those construction activities upon the physical structure that is the CR3 Containment. The prudence of actions that Duke took toward the building in cutting the hole and then attempting to repair the ensuing damage to the building were the only CR3 accident issues in Paragraph 7 that were resolved by the parties in the Settlement. The language plainly and unambiguously says that. This is all that the parties intended and agreed to resolve by Paragraph 7, and all other rights were and are expressly reserved by Paragraph 2 of the Settlement.

The Intervenors readily agree that the NEIL claim arose only because Duke undertook certain actions that led to the accident that created the delaminations. An insured, covered accident happened and Duke established a separate process to pursue the insured claim. Duke has agreed that they must answer to the Commission and the customers about the prudence of the way they resolved the NEIL claim. Duke Brief at 15. Significantly, Duke is not arguing that the subject matter has been resolved; nor does Duke contend that prudence had been established or proven relative to the company's pursuit of the claim. Rather, Duke argues that – despite express language to the contrary – the Intervenors have agreed not to challenge the prudence of all actions relating to the pursuit of the NEIL claim prior to February 23, 2012. This is nonsensical. Boiled down to its essence, Duke wants to cut off discovery and avoid answering embarrassing questions about their interactions with NEIL, the formation of the insurance policy that customers have been paying for, the observed change in NEIL's attitude toward making payments under the policies, as well as Duke's relationship with NEIL.

In order to expand the Settlement's prohibitions beyond the prudence issue that the parties mutually intended to resolve, Duke seeks to inject a concept that was not part of the Settlement discussions. Had such a significant issue[5] been intended by the parties to be a part of the Settlement, it would have been negotiated and included. However, it was not. This fact – that no such provision was included – demonstrates on its face that the parties did not intend for this issue to be included within the scope of waivers expressly agreed to in the Settlement. Duke has not presented any evidence – because none exists – that there was the type of careful consideration in negotiating and drafting the agreement required for such a significant issue to have been resolved therein; nor has Duke presented any evidence or any reasonable argument that would allow its wished-for waiver to be created through judicial interpretation, construction or implication. *Triple E. Devel. Co. v. Floridagold Citrus Corp.*, 51 So. 2d 435, 439 (Fla. 1951). (Finding that the language that supported the interpretation of the contract provision had been "carefully considered" by both parties). Clearly, the Intervenors never contemplated that Duke's course of action towards NEIL was ever on the table for resolution in the Settlement. There was no agreement, no meeting of the minds, and no mutuality is evidenced in Duke's attempted interpretation of the Settlement.

The Commission should take inventory of exactly how matters relating to NEIL were "carefully considered" and expressly included in the Settlement, in contrast with the implied provisions that Duke seeks to interject. In negotiating the Settlement, the Intervenors were interested in imposing some discipline on Duke in the event the hoped-for repair was undertaken. The desire was for an accurate estimate of a repair with an eye toward two concepts: (1) a consensus cost estimate for repair and an upper bound of a range within which the parties would

[5] At the time the Settlement was executed, the value of the issue was up to $2.25 billion, which was the policy coverage limit for repairing the plant.

equally share the risk of cost overruns, with the project costs above the band going to the Commission for dispute resolution, and (2) the ability to take a shortfall (gap between the repair estimate and the ultimate NEIL proceeds) to the Commission for resolution (e.g., cost recovery or reevaluation of a repair route). These concepts are straightforward and are evidenced in the Settlement in Paragraphs 10.a and 10.c, pages 9-13.

Paragraph 10.b is different. It states in pertinent part: ". . . No approval of any such litigation, arbitration, or settlement from the Intervenor Parties is required, and the Intervenor Parties are not precluded from challenging the reasonableness or prudence of such course of action." Paragraph 10.b of Settlement. This provision clearly expresses the negotiated concept that all parties agreed the Settlement did not disturb the Intervenors' then-existing right to present the ultimate resolution of the NEIL proceeds – whether by litigation, arbitration or settlement – to the Commission for a prudence determination. Two concepts are embedded in this clause. First, this clause is not, itself, a grant of authority to bring a prudence case. That right existed, and continues to exist, because the Intervenors did not expressly waive it, in accord with the explicit, express reservation of rights provision contained in Paragraph 2. Second, the sentence is an express recognition that Duke acknowledged the Intervenors' rights to bring to the Commission for adjudication issues of prudence of the company's resolution (by settlement as it turns out) of the NEIL claim. These are the only aspects in the Settlement that deal with NEIL. These express provisions were carefully negotiated and considered, and expressly included in the language. No other NEIL-related matters are spelled out, and certainly there is no concurrent, implied or constructive waiver of any rights by the Intervenors relating to NEIL.

III. THE SETTLEMENT RESOLVED ONLY CERTAIN CLAIMS RELATED TO DUKE'S PHYSICAL ACTIVITIES TOWARD THE CR3 CONTAINMENT. THE SETTLEMENT WAS NOT ENTERED INTO FOR ANY PURPOSE RELATED TO NEGOTIATING OR RESOLVING THE DUKE CLAIM WITH NEIL.

Duke attempts to re-cast the purpose of the Settlement and the posture it was in when the Settlement was approved by the Commission, as illustrated in the company's efforts to slip fictitious words and phrases into the headings contained in its Brief. The first example is in Section III as follows:

> III. THE SETTLEMENT AGREEMENT RESOLVED ***ALL CLAIMS*** FOR PEF'S ACTIONS FOR THE CR3 EVENTS IN THIS DOCKET THROUGH THE IMPLEMENTATION DATE ***TO PLACE PEF IN THE POSITION TO RESOLVE THE CR3 OUTAGE AND PROPERTY DAMAGE CLAIMS WITH NEIL.***

Duke Brief at 9 (emphasis added)

The Intervenors object to the title of this section as being erroneous. This is evidence of Duke's attempt to substitute its wishful thinking for what the Intervenors' actually intended in entering the Settlement Agreement. The Settlement plainly did not resolve ALL claims for ALL of Duke's actions related to the CR3 events in Docket No. 100437-EI through the Implementation Date. Duke Brief at 9. Duke's argument bears no relation to the Parties' negotiations or their articulated intentions expressed in the Settlement Agreement. Only the claims related to the specific subject of Duke's actions taken towards physical modification and repair of the containment structure, and the actions logically connected to conducting those actions, were resolved for that time period.

In this regard, the Intervenors disagree with Duke's characterization of the Settlement Agreement in its Brief at pages 5-7. In that section, Duke tries to utilize sleight of hand in referencing introductory, general language from the Settlement in Paragraph 2 providing that

"This Agreement resolves numerous disputed or potentially disputed matters before the Commission."[6] Duke then contorts this simple sentence into some bizarre notion that the Intervenors settled all prudence issues related to ALL of Duke's actions from the beginning of the SGR project through the Implementation Date. This is not an "interpretation;" it is audacious, out-of-bounds revisionism. Nothing of the sort transpired. Nothing of the sort was negotiated or agreed to. No reasonable person could read the quoted sentence to mean that the parties intended to resolve ALL issues of prudence – related to anything in the world that might have had any tangential relationship to Crystal River 3 – up through the Implementation Date. The more reasonable, logical and actual construction of the language is that it is merely a recitation that the Settlement resolved certain issues on matters that also included subjects beyond just the broken CR3 Containment.

The first sentence of Paragraph 2 makes clear that the issues resolved throughout the *entire* agreement are numerous. This is certainly true as the Settlement did, in fact, cover matters related to the Levy Nuclear project, aspects of the CR3 uprate, resolution of a potential base rate case filing, and certain CR3 issues. Still, in no instance was the Settlement exhaustive with respect to its treatment of any specific issue. Instead, aspects of each subject matter or issue were addressed. It is misleading at best to say that that language was intended to mean ALL prudence issues were resolved. "Numerous" means "many;" it does not mean "all."

The Intervenors are astounded – as the Commission should be – by Duke's extraordinary, unsupported, disingenuous, and desperate assertion that the purpose of the Settlement was to "place PEF in a position to resolve the CR3 outage and property damage claims with NEIL." This *post hoc* creation is not only incorrect as to anything in the Intervenors' experience, but it is

[6] Curiously, Duke omitted and never addressed in its Brief the next sentence relating to the express reservation of rights, but more about that later.

also self-serving and designed to bolster the fiction that there is a time limitation on Duke's burden to prove the prudence of its actions in pursuing the NEIL claim. Nothing in the Settlement supports Duke's statement. The Commission should reject Duke's effort to re-cast the purpose of the Settlement. Such a purpose is not indicated in the Settlement and comments at the February 20, 2012 hearing about alignment of interests are not evidence that the parties agreed to "clear the decks" in order for Duke to go do battle with NEIL. No such purpose was negotiated and obviously no such battle ever occurred.

IV. HAD THE PARTIES INTENDED TO FORECLOSE THE COMMISSION'S CONSIDERATION OF DUKE'S PURSUIT OF NEIL PROCEEDS, THEY COULD HAVE EASILY DONE SO IN THE SETTLEMENT

An issue of the magnitude of the pursuit of insurance proceeds under policies with face value coverages amounting to $2.7 billion would never reasonably have been left to the vagaries and whims of a *post hoc* interpretation through a highly subjective body of case law. In the face of an explicit reservation of rights (a retention of all rights unless expressly waived), Duke cannot now, with the use of self-serving hindsight, credibly claim that the Intervenors waived their rights to litigate the prudence of Duke's actions in pursuing insurance proceeds – when the Intervenors were at the complete mercy of Duke's efforts (or lack thereof) in such pursuit. The final resolution of such a momentous subject would only have been the subject of an express settlement provision.

The Commission should note that, at the time the Settlement was executed, Duke was still actively pursuing a repair of CR3 and the Intervenors hoped for that repair, and the potential insurance coverage under the NEIL policy was up to $2.25 billion. Duke's suggestion – if they truly believe it – that the Intervenors would have waived their ability to litigate Duke's actions in accepting less than the policy limits is irrational. It would be a violation of principles of

construction for the Commission or any reviewing tribunal to impose an implied term into this contract when silence on the NEIL issue clearly evinces an intention to exclude it from the waiver of rights and the Settlement. See *Azalea Park Utilities, Inc v. Knox-Florida Development Corp.*, 127 So. 2d 121, 123 (Fla. 2d DCA 1961) ("When the writing is silent on the point in controversy, courts are reluctant to add terms by implication, for there is a clear danger that, in so doing, the court will remake the contract. . . . The absence of a provision from a contract is evidence of an intention to exclude it rather than of an intention to include it"). As discussed below, the language of the express waiver of rights to which the parties agreed, could (assuming the negotiation of appropriate consideration) easily have been written to accommodate Duke's now remorseful and wishful view of Paragraph 7 that company apparently now regrets not having negotiated.

Had the parties intended ALL issues of prudence to have been resolved, the appropriate words could have simply been added. Language foreclosing the discrete and enormous dollar value of the NEIL issues was not added. There was no negotiated intent to resolve the wholly separate issue of Duke's *pursuit* of its claim against NEIL in the Settlement or the negotiations leading up to the Settlement. Likewise, there was no negotiated agreement regarding the value of such a resolution that the Intervernors would receive. Furthermore, Duke has recently shown that it is certainly knowledgeable in writing a clear and unambiguous waiver of rights or release.[7]

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[7] For example, this is the release that was executed in the March 28, 2013 NEIL settlement:

4. Mutual Releases

> Progress, on its own behalf and on behalf of its officers, directors, owners, affiliates, insurers, employees, assigns, partners, shareholders, successors, predecessors, employees, assigns, partners, representatives, and all others claiming by or through it (collectively, the "Progress Releasors") hereby covenant not to sue and unconditionally and fully and forever release and discharge NEIL and its officers, directors, owners, affiliates, insurers, reinsurers, employees, assigns, partners, shareholders, successors, predecessors, employees, assigns, partners, representatives, and all others claiming by or through it (collectively, the "NEIL Releasees") from any and all claims, actions, suits, debts, liens, contracts, agreements, obligations, promises, accounts, rights, controversies, disputes, losses, costs and expenses (including attorneys' fees and

Duke demonstrated that an exhaustive and comprehensive release or waiver could easily have been drafted. As Duke and NEIL did in resolving amongst themselves this same dollar-magnitude issue, similar language would have been appropriate, but if and only if, the Parties intended to foreclose of Commission litigation of Duke's pre-Settlement pursuit of coverage actions. If a $2.25 billion issue is at stake, reasonable and prudent persons will ensure that such matters are expressly resolved and that resolution is unequivocally shown in the Settlement.[8] It would make no sense for the Settlement to be specific with respect to the items that were the subject of specific prudence determinations (e.g., SGR project or delamination repairs) and leave the pursuit of insurance recovery to be addressed by implication, conjecture and *post hoc* interpretation.

V. OPC'S STATEMENTS AND STAFF'S PRESENTATION AT THE FEBRUARY 20, 2012 HEARING CONFIRM THAT THE SETTLEMENT DID NOT LIMIT CONSIDERATION OF ISSUES RELATED TO THE PRUDENCE OF DUKE'S PURSUIT OF NEIL CLAIMS.

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costs actually incurred), liabilities, damages, demands, and causes of action of any nature or kind, whether now known or unknown, suspected or unsuspected, fixed or contingent, constituting, arising out of or in any way connected to: (i) the Claims; (ii) the AO Policies; or (iii) any and all claims under the Policies arising out of or related in any way, directly or indirectly, to the CR3 Containment Structure. Nothing in this Agreement shall affect the Progress Releasors' right to take action to enforce the terms of this Agreement.

The NEIL Releasees covenant not to sue and unconditionally and fully and forever release and discharge the Progress Releasors from any and all claims, actions, suits, debts, liens, contracts, agreements, obligations, promises accounts, rights, controversies, disputes, losses, costs and expenses (including attorneys' fees and costs actually incurred), liabilities, damages, demands, and causes of action of any nature or kind, whether now known or unknown, suspected or unsuspected, fixed or contingent, constituting, arising out of or in any way connected to: (i) the Claims; (ii) the AO Policies; or (iii) any and all claims under the Policies arising out of or related in any way, directly or indirectly, to the CR3 Containment Structure. Nothing in this Agreement shall affect the NEIL Releasees' right to take action to enforce the terms of this Agreement.

It is the intent of the parties that they are hereby releasing any claim, known or unknown, for property damage or business interruption arising from or related to the creation of an opening in the wall of the CR3 Containment Structure in or about September 2009, the detensioning and retensioning of portions of the Containment Structure related thereto, and the property damage that was the subject of the Claims.

[8] Even in the retirement scenario, where other policy provisions apply, the amount at issue is upwards of $1.125 billion, similarly "real money," as Senator Everett Dirksen would have noted

Specifically, with respect to Paragraph 10.b, Duke describes this provision as follows:

> The Settlement Agreement unambiguously reserves the right for the Intervenor Parties to challenge the course of action or process for resolution of the NEIL claims.

Duke Brief at 15. Having correctly stated the plain meaning of the last sentence in Paragraph 10.b, Duke begs the Commission to add the company's self-interested spin that the Intervenors' rights in this regard only exist for facts or actions ***in that process*** that occurred *after* the arbitrary Implementation Date. The putative basis for this limitation is that "there was no reason for PEF to interact with NEIL during this period except 'in connection with' the SGR project and repair activities." Duke Brief at 16. As support for this position, Duke cites an OPC statement at the February 20, 2012 hearing approving the Settlement. What is omitted by Duke in its misplaced presentation of the purpose of OPC's statement, was that the prepared remarks were explaining the discovery that had occurred with respect to the causation and fault issues that were the subject of Phase 1 of the docket, as set forth in the Order Establishing Procedure, and the ongoing repair activities. Nothing mentioned by OPC had anything to do with the actions of Duke in pursuit of the NEIL proceeds. By virtue of the utter silence in the Settlement on any resolution of Duke's actions in pursuit of the NEIL claim, there was no need for such discussion at the hearing. None was had except for Duke's revealing statements, which are discussed below.

It should be noted that Staff's presentation of the Settlement (Settlement Agreement Hearing TR at 12) did not put forward the new 2013 Duke position that pre-Implementation pursuit of NEIL claims was barred to the Commission and, of course, Duke did not challenge the Staff if they in fact held such a view on that hearing day. Duke's lack of challenge, together with its inventive post-presentation argument, are further compelling evidence of the parties' lack of

intent to include the NEIL pursuit activities in the time-bound waiver of rights in Paragraph 7. Accordingly, the Commission should refrain from writing Duke's desired language into the Settlement.

VI. DUKE'S STATEMENTS AT THE FEBRUARY 20, 2012 HEARING CONFIRM THAT THE SETTLEMENT DOES NOT LIMIT CONSIDERATION OF ISSUES RELATED TO THE PRUDENCE OF DUKE'S PURSUIT OF NEIL INSURANCE PROCEEDS

Additional evidence of the significance of the silence on the issue of Duke's pursuit of insurance proceeds from NEIL is evidenced in Duke's own testimony at the Settlement approval hearing. In response to a question from Commissioner Balbis, the following discussion ensued:

> **COMMISSIONER BALBIS:** Thank you, Mr. Chairman. I have just one final question for Mr. Glenn on an important issue. Obviously the payments by NEIL to the company are something that would benefit both the ratepayers and Progress. I'm sure you have, but I'd like you to confirm that you've contemplated this agreement, and to make sure that it did not negatively affect Progress's position with their negotiations with NEIL on any payment.
>
> **MR. GLENN:** I think it aligns all of the parties' interests, the consumer parties and Progress, to move forward with, with NEIL to obtain the coverage which we rightfully believe is due to the company and its customers.
>
> An individual who spoke, I can't recall her name, but asked a question, which I did not respond to, about NEIL coverage. The dollars that we get from NEIL are used to offset the capital repairs and any outage cost to offset that. The settlement agreement specifically addresses how some of those will be handled. But you should know that any money that we go, that we get from NEIL goes to reduce the cost of this repair. It does not go to Progress Energy. So it goes back to our customers to reduce the cost of any repairs of this plant.
>
> So, so I think the settlement does an excellent job in aligning all of the parties' interests to get the best outcome we can.
>
> **COMMISSIONER BALBIS:** Okay. Thank you. And then just a follow-up. Specifically to the terms and conditions of the NEIL insurance policy itself, this stipulation would not negatively affect Progress's position or the terms and conditions with NEIL.
>
> **MR. GLENN:** No, it would not. It would not. In fact, we continue to work with NEIL right now. It's, again, it's their most complex claim that they have, that they've ever seen. So we continue to work with NEIL in a positive way on these

coverage issues. But nothing in this settlement agreement would adversely impact our coverage.

COMMISSIONER BALBIS: Okay. Thank you.

(Settlement Agreement Hearing TR at 91-93)

Duke cites to this exchange as support for its view that the ability of the Intervenors and the Commission to pursue issues relating to Duke's pursuit of NEIL proceeds is barred. They appear to argue that their manufactured "alignment of interests" purpose behind the Settlement is only accomplished by reading the fabricated and non-existent time limitation into the NEIL pursuit issue. The fact is that Duke let NEIL off the hook on March 28, 2013, and thus no worse adverse impact can now occur than what Duke has already allowed. The statements by Duke confirm that the NEIL pursuit issues were a separate process and actually excluded from the Settlement resolution in their entirety. The alignment of interests statements made at that hearing by Duke indicate quite clearly – and in response to the Commissioner's question and concern – that the Settlement was in a position *to not adversely impact* Duke's then separate, ongoing, and continuous commitment to pursue full coverage under the policies. Had Duke's position at the time been consistent with the one it now urges, Duke's representative ***could*** have explained Duke's view – had one existed – that the Settlement gave Duke a free pass on all prior interactions with NEIL. He ***could*** have said that it "cleared the decks" and resolved in Duke's favor all prudence claims whatsoever to allow Duke to go do battle with NEIL on behalf of ratepayers. Duke's representative did neither of these things. Instead, he stated that the Settlement would not interfere in the NEIL claim process and described Duke as "continuing to work with NEIL in a positive way on these coverage issues."

Duke's statements in fact made clear to the Commission that the NEIL claim was an ongoing process that bridged the time period before and after the Implementation date. No

mention was made at that 2012 hearing of Duke's newly found interpretation that the Commission and the parties cannot inquire into the complete, ongoing pursuit-of-coverage issues. These are the very matters that Duke's representative had discussed and represented to the Commission as being, and would continue to be, undertaken for the benefit of customers. TR at 92-93. When given a chance to address this matter, Duke did not then put forward the view that they claim to hold today.

The facts that would – if made known to the Commission and to the public – demonstrate Duke's course of action towards settling with NEIL have their origins in the NEIL policies themselves, and in amendments to those policies, and in the property damage claim process that began in the Fall of 2009. As indicated by Duke at the Settlement Hearing, the NEIL claim pursuit process was ongoing and transcended the cutoff date that applied to the SGR and delamination repair actions. Pursuant to the Florida Rules of Civil Procedure, discovery reasonably calculated to lead to evidence related to the entire claims process is fair game for discovery, as long as the questions and requests for documents have a bearing on Duke's course of action toward NEIL in settling the claim. See Fla. R. Civ. P. 1.280(b)(1). The Intervenors readily acknowledge that the issues cannot be used as a "backdoor" method to re-introduce the concepts of fault, causation or prudence in the actions or activities related to the physical process of modifying or repairing the building, and that is not what the Intervenors are trying to do in this case or in discovery.

VII. THE SETTLEMENT IS UNAMBIGUOUS AS TO WHAT IS RESOLVED; THEREFORE, PRECEDENT REGARDING CONSTRUCTION OF CONTRACT TERMS SUPPORTS THE INTERVENORS' POSITION.

Although the Intervenors contend that there is no need to resort to interpretational case law to reach the plain and common sense reading of the Settlement, the Intervenors reject the

analysis that Duke submits for consideration, as set out below. The Commission should reject it, too. The fundamental position of Duke as to what was waived is contained in the following subheading contained in its Brief:

> A. THE PARTIES TO THE SETTLEMENT AGREEMENT BROADLY AGREED TO WAIVE, RESOLVE, AND SETTLE THE PRUDENCE OF PEF'S ACTIONS PRIOR TO THE IMPLEMENTATION DATE.

Duke Brief at 9.

A plain reading of the entire Settlement demonstrates that the parties to the agreement did *not* broadly agree to waive, resolve, and settle the prudence of ALL of Duke's actions prior to the Implementation Date. Duke's attempt to focus on the relative or qualifying phrases "in connection with" and "including but not limited to" is misplaced. Interpreted in the context of the sentences from which they originated, these phrases clearly indicate that the parties waived, resolved, and settled the prudence of "... *PEF's actions* taken in connection *with the SGR project* or the *repair activities associated with the delaminations*, including but not limited to the *actions which resulted in the delaminations* of the CR3 containment building in 2009 and 2011." Paragraph 7 of Settlement (emphasis added). The subjects of insurance, NEIL, and Duke's pursuit of its claim against NEIL, are not referenced in this part of the Settlement. On the broad, well recognized, and material aspect of NEIL issues related to CR3, the Settlement is silent. Thus, without resorting to any of the principles of contract interpretation (espoused by Duke), it is plainly apparent that the Intervenor Parties did not waive, resolve, or settle anything regarding NEIL "from the SGR project inception through the Implementation Date" or during any other relevant time period.

Consistent with the testimony at the Settlement hearing in February 2012, the Intervenors' rights to fully test the prudence of Duke's pursuit of NEIL proceeds is not time-

bound, either within the language of Paragraph 10 or by Paragraph 7 – which simply does not address the NEIL claim settlement. Duke filed what amounted to a single claim with NEIL based on the 10/09 delamination and the costs of repairing that initial damage. At the time the Settlement was negotiated, it was not known if the claim would be paid without dispute, or through dispute resolution; hence the open-ended nature of the language. What the parties did know was that any final NEIL payment achieved through dispute resolution would be based on the entire process of Duke's dealings with NEIL and not solely on what would transpire from February 23, 2012 at 12:01 A.M forward. If the Duke interpretation were to be accepted, the bargained-for express recognition of the Intervenors' right to challenge "the reasonableness or prudence" of Duke's "course of action" in the "litigation, arbitration, or settlement" of the claim would be rendered a nullity. Settlement Agreement, Paragraph 10.b.

Duke's view would mean, necessarily but absurdly, that the Intervenors agreed affirmatively to deprive themselves of the use of evidence that is material to the proper determination of Duke's activities in pursuing money – potentially $2.25 billion – on behalf of customers. This did not happen. Furthermore, it would be patently absurd to suggest (and Duke does not so suggest) that the pursuit of the claim for total damages had discrete closure points that corresponded to the Implementation Date. Until the NEIL settlement was executed on March 28, 2013, there was no comprehensive resolution of any claim under any of the four policies for the three years at issue. Even the case law that Duke cites requires the reviewing tribunal – when construing a contract – to recognize that, where one interpretation of a contract would lead to an absurd conclusion, such interpretation should be abandoned and one adopted which would be in accord with reason and probability. See *Florida Power Corp. v City of Tallahassee*, 154 Fla. 638, 644 (1944) 18 So. 2d 671. Duke's proposition fails this test.

With regard to interpreting the meaning and express intent of the Settlement Agreement, the Intervenors completely agrees with Duke that a settlement agreement is a contract governed by principles of contract interpretation. Duke Brief at 10 (citing *Robbie v. City of Miami*, 469 So. 2d 1384, 1385 (Fla. 1985)). In fact, the Intervenors agree with the contract construction cases referenced in Duke's Brief that truly relate to interpreting unambiguous language in contracts.[9] The following cases cited by Duke would be useful in construing the Settlement Agreement, if *arguendo*, such legal analysis and construction were truly needed.

Duke cites to the proposition that the intent of the parties is best evidenced by the Settlement Agreement itself. *Azalea Park Utilities, Inc. v. Knox-Florida Development Corp.*, 127 So. 2d 121 (Fla. 2d DCA 1961) (citations omitted). In *Azalea Park*, the Court stated:

> ". . . it is conclusively presumed that the whole engagement and the extent and manner of their undertaking is contained in the writing. The writing itself is the evidence of what they meant or intended by signing it. The test of the meaning and intention of the parties is the content of the written document.
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> ***
>
> When the writing is silent on the point in controversy, courts are reluctant to add terms by implication, for there is a clear danger that, in so doing, the court will remake the contract.
>
> ***
>
> The absence of a provision from a contract [e.g., waiver of prudence of PEF's course and scope of dealing with NEIL through Implementation Date] is evidence of an intention to exclude it [that waiver] rather than of an intention to include it."

Id. at 122-123 (citations omitted).

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[9] It is only the series of the "in connection with" and "including but not limited to" cases where Duke incorrectly contends that these relative or qualifying phrases have some especially expansive power in Florida contact interpretation which the Intervenors do not adopt or agree with. These cases are found on pages 12-13 of the Duke Brief, and are not necessarily helpful to the real issues at hand in that they do not support that the connecting language applies to a totally different subject matter (e.g., pursuit of a NEIL claim versus physical activity against a structure). Furthermore, Duke gratuitously adds the phrases "associated with, relating to or growing out of" in a bootstrapping maneuver to try to bridge the gap between these cases and the strained reading they seek to have the Commission adopt. In fact, all Duke accomplished is to show that that language to reference NEIL – had it represented the intent of the negotiating parties – could easily have been added to the Settlement, This would have been simple to do; however, it was not done.

The fact that Paragraph 7 of the Settlement is silent about NEIL clearly shows that PEF and the Intervenors intended any waiver of prudence provisions **not** to apply to NEIL or to Duke's pursuit of insurance proceeds. To read NEIL or the pursuit of coverage prudence issues into Paragraph 7 would be to "remake the contract" in contravention to the rules of contract interpretation.

In addition, Duke cited to *Triple E. Devel. Co. v. Floridagold Citrus Corp.* That case provides useful guidance where it states the following:

> This Court, from time to time, has approved certain rules to be observed in the construction of contracts and among them are the following: (1) the contract should be considered as a whole in determining the intention of the parties to the instrument; (2) the conditions and circumstances surrounding the parties to the instrument and the object or objects to be obtained when the contract was executed should be considered; (3) courts should place themselves, as near as possible, in the exact situation of the parties to the instrument, when executed, so as to determine the intention of the parties, objects to be accomplished, obligations created, time of performance, duration, mutuality, and other essential features; (4) if clauses in a contract appear to be repugnant to each other, they must be given such an interpretation and construction as will reconcile them if possible; if one interpretation would lead to an absurd conclusion, then such interpretation should be abandoned and the one adopted which would accord with reason and probability; (5) if the language of a contract is contradictory, obscure or ambiguous or where its meaning is doubtful so that it is susceptible of two constructions, one of which makes it fair, customary, and such as a prudent man would naturally execute, while the other interpretation would make it inequitable, unnatural, or such as a reasonable man would not be likely to enter into, then the courts will approve the reasonable, logical and rationable interpretation.

Triple E. Devel. Co. v. Floridagold Citrus Corp., 51 So. 2d 435, 438-39 (Fla. 1951) (citing *Florida Power Corp. v. City of Tallahassee*, 154 Fla. 638, 18 So. 2d 671). Further, Duke cites to *Gold Coast Media*, which provides helpful guidance in stating the following:

> *A trial court's interpretation of a contract should be supported by logic and reason.* It is fundamental that courts should apply the most commonly understood meaning with regard to the subject matter and circumstances of the contract. *See Baker and Company, Florida v. Goding*, 317 So. 2d 118 (Fla. 3d DCA 1975). *See also Bay Management, Inc. v. Beau Monde, Inc.*, 366 So. 2d 788, 791 (Fla. 2d DCA 1978) (A court should arrive at a contract interpretation consistent with

> reason, probability, and the practical aspect of the transaction between the parties.) Grammatical construction of contracts generally requires that a relative or qualifying phrase be construed as referring to its nearest antecedent.

Gold Coast Media, Inc. v. Meltzer, 751 So. 2d 645, 646 (Fla. 3d DCA 1999) (emphasis added).

The aforementioned rules of contract interpretation, when applied to Paragraphs 2, 7, and 10.b of the Settlement (which are the three most relevant provisions being disputed by Duke), support the Intervenors' position.

Paragraph 2 of the Settlement provides:

> "This Agreement resolves numerous disputed or potentially disputed matters before the Commission. The Parties reserve all rights, unless such rights are expressly waived under the terms of this Agreement."

This Paragraph clearly indicates that the parties intended to resolve numerous (but not "all") disputed or potentially disputed issues, and the parties intended to reserve all rights to challenge issues unless those rights are *expressly waived* under the agreement. This clearly and unambiguously indicates that the parties only intended to waive, resolve, or settle the disputed issues or matters that were expressly waived in the Settlement. The Intervenors did not waive their rights to litigate NEIL-related issues.

Paragraph 7 of the Settlement plainly indicates what issues or matters related to the SGR project and delamination repairs the parties expressly intended to settle and resolve. The clear and unambiguous language states:

> [t]he Parties agree that this Agreement *makes no allocation or determination of fault, prudence or reasonableness* in or related to *PEF's actions* taken *in connection with the SGR project* or the *repair activities associated with the delaminations, including but not limited to the actions which resulted in the delaminations* of the CR3 containment building in 2009 and 2011.
>
> ***
>
> The Intervenor Parties *waive their rights to challenge the prudence of PEF's actions* taken during the period from the SGR project inception through the Implementation Date *in connection with the SGR project or the repair activities associated with the*

delaminations, including but not limited to the actions which resulted in the delaminations of the CR3 containment building in 2009 and 2011. . . .

(emphasis added).

The emphasized language clearly shows the disputed issues where the parties had a "meeting of the minds" to resolve and which issues the parties intended to settle related to Duke's actions in connection with the SGR project and delamination repair activities from the SGR project inception through the Implementation Date. The parties agreed to resolve, and to make or seek, no prudence determination related to Duke's actions related to or "in connection with" the SGR project and Duke's actions related to or "in connection with" the delamination repair activities. The SGR project and delamination repair activities relate to engineering, construction, and repair activities solely linked to repairing the CR3 Containment so it could return to commercial operation. Any of Duke's dealings with NEIL during this period were on a separate track from Duke's SGR project actions and Duke's delamination repair activities, and thus, Duke's dealings with NEIL were not intended to be settled by the parties at the time the Commission approved the Settlement Agreement.

The Intervenors concur with Duke regarding the meaning of the express reservation to challenge the prudence of NEIL in Paragraph 10.b:

> No approval of any such litigation, arbitration, or settlement from the Intervenor Parties is required, and the Intervenor Parties are not precluded from challenging the reasonableness or prudence of such course of action.

In its Brief, at 15, Duke states "Thus, the Settlement Agreement unambiguously reserves the right for the Intervenor Parties to challenge the course of action or process for resolution of the NEIL claims." This is absolutely correct. The parties expressly agreed that the Intervenors had reserved their existing right to challenge Duke's course of action in resolving (by whatever means) its claim with NEIL without any limitation or temporal timeframe attached. However,

Duke is wrong when it argues that the Intervenors' rights to challenge are limited to the time and facts after the Implementation Date. There is no reference to a temporal timeframe or to the Implementation Date in Paragraph 10.b. No reasonable rule of construction would over-write such a limitation on the Intervenors' reserved right in this regard, and it is patently absurd to now read such a restriction into the Settlement Agreement. Where the contract is silent or does not include a provision, the Court will not change the contract. *Azalea Park, supra.*

VIII. CONCLUSION

When applying (1) the plain meaning of the Settlement, (2) statements made at the Settlement approval hearing, and (3) principles of contract interpretation set forth in *Azalea Park, Triple E.,* and *Gold Coast Media, supra,* the only logical and reasonable interpretation of the Settlement Agreement is that the Intervenors did not waive any issues relating to the prudence of Duke's course of action in litigating, arbitrating, or settling its repair cost insurance coverage claim with NEIL, and that the parties did not attempt to, and did not intend to, resolve any issues of prudence related to the wholly separate actions of Duke in pursuing its insurance claim against NEIL. It is inconceivable to interpret the Settlement in the manner in which Duke is now espousing. Particularly, in view of the express waiver limitation, the suggestion that the Intervenors *implicitly* waived their rights to challenge Duke's course of action on what was then a $2.25 billion issue is absurd. The Commission should flatly reject Duke's interpretation of the Settlement to the extent it would write into it a substantive limitation on a material point of contention between the parties based on an asserted intent that was never there. There has never been any limitation on litigating the pursuit of the NEIL claim before the Commission. Nothing in the Settlement changed that. Duke has the burden to show that it was prudent in its entire course of dealing with NEIL and in pursuing its claim. Intervenors have a right to raise, and to

conduct discovery on, the issues that define that burden of proof. Now that the Duke-NEIL Settlement Agreement and Mutual Release has been signed (as of March 28, 2013), those issues are ripe for the Commission's determination.

Respectfully submitted,

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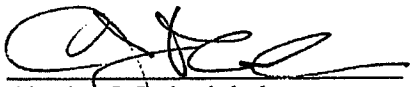

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CERTIFICATE OF SERVICE
Docket No. 100437-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the following parties on this 26th day of April, 2013.

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