BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| 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<br>ORDER NO. PSC-13-0194-PCO-EI<br>ISSUED: May 10, 2013 |

ORDER RESOLVING DISPUTED CASE ISSUES IN DOCKET NO. 100437-EI

On April 5, 2013, Progress Energy Florida, Inc. (PEF or DEF),[1] the Office of Public Counsel (OPC), the Florida Retail Federation (FRF), the Florida Industrial Power Users Group (FIPUG), and PCS Phosphate (PCS), collectively referred to as the "Parties," jointly moved the Commission to resolve certain disputed issues in Docket No. 100437-EI. The Parties contend that over the last several months, they have diligently worked with Commission staff to develop a list of issues that remain to be resolved in this docket. They acknowledge that staff has conducted three separate issue identification meetings with the parties, and have made substantial progress in developing an agreed-to list of issues to submit to the Commission for consideration. However, despite the progress that has been made in this process, the Parties contend that they have identified an agreed upon threshold question which precludes them from being able to acquiesce to a final list of issues to be resolved in this matter. The threshold question is as follows:

> **What issues, if any, does the Settlement Agreement, approved by Commission vote on February 22, 2012 and in Order No. PSC-12-0104-FOF-EI, preclude the Commission from determining in this docket?**

The Parties assert that the resolution of this question will promote judicial efficiency and will allow them to continue to finalize their efforts to prepare a proposed list of remaining issues to be resolved in this matter and will prevent discovery disputes and objections related to these issues.

On April 11, 2013, Order No. PSC-13-0155-PCO-EI, was issued affording the parties an opportunity to file briefs, responsive briefs if necessary, and to present oral argument before the Prehearing Officer on the disputed threshold question. The parties filed initial and responsive briefs. On April 30, 2013, the parties presented oral argument. At oral argument, the parties asserted positions similar to the positions in their respective briefs.[2]

This Order is issued pursuant to my authority under Rule 28-106.211, Florida Administrative Code (F.A.C.), which provides "the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, to prevent delay, and to promote

[1] As of April 29, 2013, Progress Energy Florida, Inc.'s name was changed to Duke Energy Florida, Inc. (DEF).
[2] Note: The Intervenor Parties filed an initial joint brief. PCS and FIPUG filed separate rebuttal briefs, while OPC and FRF filed a joint rebuttal brief.

the just, speedy, and inexpensive determination of all aspects of the case, including bifurcating the proceeding."

DEF's Argument

In its briefs and at oral argument, DEF asserted that the Settlement Agreement resolves all prudence issues in this docket (Docket No. 100437-EI) through the date of the final Commission vote (February 22, 2012) approving the Settlement Agreement.[3] DEF argued that the resolution of these issues was final under Florida law when there was no appeal of Commission Order No. PSC-12-0104-FOF-EI approving the Settlement Agreement. DEF asserted that under paragraph 7 of the Settlement Agreement, the Intervenors expressly waived their rights to challenge in any Commission or judicial proceeding the prudence of PEF's actions on the Steam Generator Replacement (SGR) project or the repair activities associated with the SGR, including but not limited to actions which resulted in the delaminations from the inception date of the SGR project through the implementation date of the Settlement Agreement.[4] DEF further asserted that this prohibition includes its activities associated with the Nuclear Electric Insurance Limited (NEIL) for damages and repairs up to the February 22, 2012 approval date.

DEF asserted that the terms and provisions on the Settlement Agreement are intentionally broad because the parties wanted to resolve, without the time, expense, and uncertainty of litigation, the prudence of all of DEF's actions from the beginning of the SGR project through the February 22, 2012 approval date. DEF argued that because the Settlement Agreement is a contract, governed by the rules of contract interpretation, and the language of the Settlement Agreement is unambiguous, the clear contract language controls. Thus, the Commission should not resort to judicial construction of the terms of the Settlement Agreement.[5] DEF asserted that the Intervenors' reading of the Settlement Agreement is contrary to a construction that includes all the words of the waiver provision in the context of the Settlement Agreement as a whole.[6] DEF argued that the Parties expressed their intent to settle disputed and potentially disputed issues in all phases of this docket and that the Parties understood that they were supporting DEF's efforts to pursue complete coverage of the cost of repairing Crystal River 3 (CR3) under the insurance policies. Thus, the Parties broadly agreed to waive their rights and thereby resolve the prudence of DEF's actions in connection with the SGR or the repair activities including but not limited to all the delaminations prior to February 22, 2012.

DEF also argued that administrative finality attaches to Order No. PSC-12-0104-FOF-EI, which approved the Settlement Agreement, and all the provisions contain therein. DEF asserted that Order No. PSC-12-0104-FOF-EI became final and subsequently, consistent with the terms of the Settlement Agreement, the Commission dismissed Phase 1 of this docket and stayed Phases 2 and 3.[7] DEF asserted that the Commission lacks the authority to re-visit the final Order

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[3] DEF BR 1.
[4] DEF BR. 6.
[5] DEF BR. 10.
[6] DEF BR. 10.
[7] See Order No. PSC-12-0115-PCO-EI, dismissing Phase 1 from the proceedings and staying Phases 2 and 3.

approving the Settlement Agreement based upon the principle of administrative finality.[8] However, both in its Reply Brief to Intervenors' Joint Brief (Reply Brief) and at the oral argument on April 30, 2013, DEF conceded that the principal of administrative finality would not preclude the Commission or the parties from analyzing the prudence of DEF's management decision to settle the insurance claims with NEIL or its decision to retire the CR3 unit.[9] In addition, on page 8 of its reply brief DEF further aknolwedged that "[i]n summary, PEF is in no way suggesting that the Commission cannot consider all proper evidence put before it going back well before the lmplementation Date of the Settlement Agreement."

Intervenors' Argument

In their briefs and at oral argument, the Intervenors argued they did not waive their rights as they relate to any NEIL issue. The Intervenors asserted that the Settlement Agreement resolved the prudence of DEF's decision to retire rather than attempt further repairs of CR3. However, the Settlement Agreement expressly reserves all other prudence questions related to CR3 that may affect consumer rates or have a bearing on other matters that fall within the broad scope of the Commission's regulatory authority pursuant to Chapter 366, Florida Statute (F.S.).[10] The Intervenors contend that the Settlement Agreement did not judge the adequacy of any aspect of the wholly separate process associated with DEF's unilateral settlement of its insurance claims with NEIL concerning the CR3 outage.[11] Moreover, the implementation date does not limit or narrow the scope of discovery or testimony concerning the remaining issues is this docket.[12]

The Intervenors assert that the Commission has broad authority and a public policy imperative to completely assess all aspects of DEF's management of the extended outage. They contend that the profound impact of this case requires the Commission to thoroughly explore and implement every means of minimizing customer impacts using the full panoply of its ratemaking authority, given that DEF's customers will be called upon to pay for a new generation unit, and the uninsured higher fuel cost over the next 20 years due to the loss of CR3. They assert that the Settlement Agreement must be interpreted to give deference to its plain and intended language. Thus, the Commission should strictly and narrowly construe the scope of what was earlier resolved and give substantive meaning to the reservation of rights provision which reserves all rights, unless such rights are expressly waived under the terms of the Settlement Agreement.[13]

As stated, the Intervenors argue that the Settlement Agreement approved on February 22, 2012, does not waive a review of CR3 related insurance issues because the Settlement Agreement did not attempt to resolve those matters. The Intervenors contend that given the language that the waiver must be express demonstrates that there was no waiver beyond the SGR project and delamination repair activities prior to February 22, 2012.[14] They assert that the

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[8] DEF BR. 8.
[9] DEF BR at 16; DEF Reply BR. 1-3; and TR 9-11, 44-45.
[10] Intervenors BR. 1-2.
[11] Intervenors BR. 2.
[12] Intervenors BR. 2.
[13] Intervenors BR. 9.
[14] Intervenors BR. 14.

overarching pursuit of the insurance claim was a single ongoing, continuous matter separate and apart from the building-specific actions and has a largely separate set of core actors and facts.[15]

Analysis

Having reviewed the briefs and the transcript from the oral argument, I find that the Commission and the Intervenors are not precluded form reviewing the prudence of DEF's actions with respect to the NEIL insurance policy prior to February 22, 2012. My ruling is based upon several factors as set forth below.

First, the Commission is not prohibited from reviewing, analyzing, or making determinations regarding any matter within its jurisdiction that is relevant and necessary to this proceeding. This includes matters relevant to the NEIL insurance policy prior to February 22, 2012. The Commission conducts its proceedings pursuant to the statutory obligations set forth in Chapters 120 and 366, F.S. Although the Commission encourages and approves stipulations between the parties, it cannot through this process abrogate its statutory authority. Thus, if the Commission finds that it is necessary to review and interpret the provisions of a Settlement Agreement, it can and will do so. For example, in Order No. 22352, issued December 29, 1989, in Docket No. 890216-TL, which analyzed the impact of the Tax Reform Act of 1986 on Commission-regulated utilities, we stated that even if the Commission so desired, it could not be bound by a specific course of action created in a contractual agreement. In Order 22352, the Commission, in analyzing GTE Florida Incorporated's assertion that we were bound by the terms of a contractual agreement which had been previously approved by the Commission, we stated that "[w]e do not possess the legal capacity of a private party to enter into contracts covering our statutory duties. Indeed, we cannot abrogate -- by contract or otherwise -- our authority to assure that our mandate from the Legislature is carried out. As a result, we may not bind the Commission to take or forego action in derogation of our statutory obligations."

Also, by Order No. PSC-94-0172-FOF-TL, issued February 11, 1994 in Dockets Nos. 920260-TL, 910163-TL, 910727-TL, 900960-TL and 911034-TL, the Commission approved a settlement agreement between OPC and Southern Bell, which resolved issues regarding Southern Bell's earnings and revenue requirement. In that Order, the Commission stated "when we approve a stipulation between parties, the provisions of the stipulation become part of our order. However, we cannot by our own order, require or preclude a future Commission from carrying out its mandate. This is analogous to the principle that in adopting legislation, the legislature is not bound by actions of prior legislatures nor can it bind future legislatures." We further stated that "likewise, this Commission has an ongoing responsibility under Section 367.081, Florida Statutes, to ensure that LUSI's rates are fair, just and reasonable. Therefore, the parties cannot limit our jurisdiction by way of a settlement agreement." However, settlement agreements do limit the actions of the signatories thereto.

DEF itself conceded to this fact both in its brief and at oral argument on April 30, 2013. On page 6 of its reply brief, DEF acknowledges and agrees with the Intervenor assertion that "there is nothing [in the Settlement with DEF] which prohibits discovery of, or inquiry into, facts

[15] Intervenors BR. 14.

relating to the period prior to February 23, 2012." In addition, at oral argument DEF agreed that the Commission can seek discovery of, or inquire into, facts relating to the period prior to February 23, 2012.[16] However, DEF did assert that neither the Commission nor the parties should go back decades and argue the imprudence of contracting with NEIL for insurance coverage.[17]

Moreover, based upon the expressed reservation of rights provision contained within paragraph 2 of the Settlement Agreement read in conjunction with the express reservation of authority with respect to the NEIL policy contained within paragraph 10.b of the Settlement, I find that the plain language of the Settlement Agreement does not preclude the Intervenors from analyzing or considering matters relevant to the NEIL insurance policy. Paragraph 2 specifically states "[t]his 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." In addition, paragraph 10(b) specifically details the framework that the parties will adhere to regarding DEF's NEIL claim and specifies that "[n]o 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." Thus, I find that the Intervenors did not waive their rights to challenge the prudence of DEF's actions with respect to NEIL prior to February 22, 2012.

The fact that the Settlement Agreement does not preclude the Commission or the Intervenors from reviewing the prudence of DEF's actions with respect to NEIL prior to February 22, 2012, is also based upon my reading of its clear and unambiguous terms. Florida case law precedent provides that "[w]here the language of a contract is unambiguous, there is no occasion for judicial construction. Clear contract language controls." Harris v. Sch. Bd. of Duval County, 921 So. 2d 725, 733 (Fla. 18t DCA 2006). It is also well settled that terms in an agreement must be given their most commonly understood meaning. Gold Coast Media. Inc. v. Meltzer. 751 So. 2d 645, 646 (Fla. 3d DCA 1999) ("It is fundamental that courts should apply the most commonly understood meaning with regard to the subject matter and circumstances of the contract."); Baker and Co. Florida v. Goding, 317 So. 2d 118 (Fla. 3d DCA 1975) (same). Based upon the express reservation of rights contained in paragraph 2, the expressed waiver provisions of paragraphs 7, 10, and 11, and the plain language of the Settlement Agreement, the Intervenors did not waive their rights to challenge the prudence of DEF's actions with respect to NEIL prior to February 22, 2012.

Moreover, even if there is ambiguity present in the language of the Settlement Agreement, as a matter of law, when uncertainty about a waiver of rights exists, waiver by implication is disfavored. Loiselle v. Gladfelter, 160 So. 2d 740, 743 (Fla. 3d DCA 1964) (when a right is vested in a party, and there is doubt as to whether such right has been waived, such doubt should be resolved in favor of the party claiming the right). Thus, in light of the Settlement Agreement provisions and the principle of resolving any ambiguity in favor of the preservation of rights, I hereby find that the Intervenors did not waive their rights to challenge the prudence of DEF's actions with respect to NEIL prior to February 22, 2012.

[16] TR. 10-11.
[17] TR. 10.

Although I find that the plain language of the Settlement Agreement does not preclude the Commission or the Intervenors from reviewing the prudence of DEF's actions with respect to NEIL prior to February 22, 2012, the Settlement Agreement has resolved issues with respect to Phase 1 of this proceeding and thus has narrowed the scope of our analysis of this matter. In particular, the parties agreed to resolve the issues of the prudence of all matters regarding Phase 1 of this case which included the prudence of DEF's actions. Paragraph 7 of the Settlement Agreement provides that "[t]he 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 of the CR3 containment building in 2009 and 2011." Paragraph 7 also provides that "[a]bsent evidence of fraud, international misrepresentation, or intentional misconduct by PEF during the period referenced in this paragraph 7, the Intervenor Parties cannot and will not challenge the prudence of PEF's actions on the SGR project or PEF's repair activities from the inception date of the SGR project through the Implementation Date in any PSC or judicial proceeding." Moreover, paragraph 10(a)(2) specifically states that "the Intervenor Parties waiver rights to challenge PEF's decision to repair and the selected repair plan." In recognition of the terms of the Settlement Agreement as set forth above, Order No. PSC-12-0115-PCO-EI was issued thereby dismissing Phase I from this proceeding.

Therefore, based upon the analysis above, I find that neither the Commission nor the Intervenors are prohibited from analyzing relevant information regarding the NEIL insurance policy in the context of the scope of this case which includes the agreed upon issues that were attached to DEF' initial brief and the disputed NEIL policy issues. However, I caution the parties that this analysis should be conducted to obtain relevant evidence regarding the limited scope of this proceeding and this order does not afford the Parties with a carte blanche ability to review irrelevant information since the inception of the NEIL policy or costs that have already been deemed prudent by the Commission. I will remind the parties that they have already agreed to the majority of the issues which cover the subject matter of this case. Therefore, in light of the above-referenced scope of this proceeding, I hereby determine that with respect to the disputed issues contained on the "Working Issues List" which is attached to DEF's initial brief as Attachment A, I find that OPC's disputed issue number 24 and FIPUG's unnumbered disputed issue are not relevant to our analysis in this case and thus shall be stricken. As stated in the Second Revised Order Establishing Procedure, the identification of issues is an ongoing process and parties may raise issues until the date of the Prehearing Conference.

Based on the foregoing, it is

ORDERED by Eduardo E. Balbis, as Prehearing Officer that the Florida Public Service Commission and the Intervenor Parties are not precluded from reviewing the prudence of Duke Energy Florida, Inc.'s actions with respect to the Nuclear Electric Insurance Limited prior to February 22, 2012, as set forth in the body of this Order. It is further

ORDERED that Office of Public Counsel's issue number 24 and Florida Industrial Power Group's unnumbered issue under the Disputed Issues section of the "Working Issues List" which

is attached to Duke Energy Florida's initial brief as Attachment A, are not relevant to our analysis in this case and thus shall be stricken.

By ORDER of Commissioner Eduardo E. Balbis, as Prehearing Officer, this 10th day of May, 2013.

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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.