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**Sent:** Monday, October 01, 2012 4:09 PM  
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**Subject:** FW: 120009 OPC's Post Hearing Statement of Positions and Post Hearing Brief  
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**Sent:** Monday, October 01, 2012 4:04 PM  
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**Subject:** 120009 OPC's Post Hearing Statement of Positions and Post Hearing Brief

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b. Docket No. 120009-EI

In re: Nuclear Cost Recovery Clause

c. Documents being filed on behalf of the Office of Public Counsel

d. There are a total of 25 pages.

e. The document attached for electronic filing is **120009 OPC's Post Hearing Statement of Positions and Post Hearing Brief**. Thank you for your attention and cooperation to this request.

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FPSC-COMMISSION CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Nuclear Cost Recovery  
Clause.

DOCKET NO.: 120009-EI  
FILED: October 1, 2012

**CITIZENS' POST-HEARING STATEMENT OF POSITIONS**  
**AND POST-HEARING BRIEF ON PROGRESS ENERGY FLORIDA ISSUES**

Pursuant to Order No. PSC-12-0445-PHO-EI, issued August 31, 2012, the Citizens of the State of Florida by and through the Office of Public Counsel ("Citizens" or "OPC"), hereby submit this Post-Hearing Statement of Positions and Post-Hearing Brief on the issues pertaining to Progress Energy Florida ("PEF").

**PRELIMINARY STATEMENT**

The OPC submits this brief requesting the Commission to make the following findings and to take the following actions in the 2012 phase of the Nuclear Cost Recovery Clause ("NCRC") docket:

1. Exercise its authority and defer the determination of prudence for 2011 Crystal River Unit Three (CR3) Extended Power Uprate (EPU) costs until the 2013 NCRC hearing cycle.
2. Exercise its authority and defer the collection of carrying costs on 2011, 2012, and 2013 CR3 EPU expenditures until the 2013 NCRC hearing cycle, however, without placing the additional cost of deferral on the customers.
3. Place PEF on notice that avoidable or deferrable expenditures will be strictly scrutinized and subject to potential disallowance as being imprudently incurred and that previously collected carrying costs will be held subject to refund.

## OPC'S STATEMENT OF BASIC POSITION

### *Levy Nuclear Project*

Issues 4 through 11 are governed by the settlement approved by Order No. PSC-12-0104-FOF-EI, issued March 8, 2012, in Docket No. 120022-EI. The settlement does not relieve PEF from prudently managing the Levy Nuclear Project (LNP) or for complying with any requirements of Section 366.93, Florida Statutes (F.S.), or Rule 25-6.0423, Florida Administrative Code (F.A.C.). Any amounts to be approved for recovery for the LNP are specified in the settlement. As it relates to these issues, OPC reaffirms and adopts its positions as stated in the prehearing order issued in this docket.

### *CR3 Extended Power Uprate Project*

As of the filing of this brief, no final decision as to whether to repair or retire CR3 has been made. This lack of a final decision to repair or retire CR3 was made clear in testimony given during the NCRC hearing. The fact that no final decision to repair or retire has been made was extensively stated by PEF in its motion to defer filed on August 14, 2012. As noted in OPC's prehearing statement, the only certainty surrounding the future of CR3 is continued uncertainty.

On September 5, 2012, the Commission voted to approve PEF's motion to defer review of PEF's 2012 CR3 feasibility study and the review for reasonableness of 2012 and 2013 expenditures on extended power uprate (EPU) costs. What remains for review and adjudication by the Commission is the reasonableness and prudence of 2011 CR3 Uprate expenditures that were deferred from consideration and review last year also at the request of PEF. Given the lack of a decision to repair or retire CR3, OPC maintains that the most reasonable approach under these circumstances would be for the Commission to defer (without penalizing customers with additional costs of deferral)

consideration and recovery of these remaining costs until the 2013 NCRC hearing cycle. This will protect the customers from any further losses should Duke decide to retire CR3. If the Commission decides to review for prudence and reasonableness, and allow cost recovery for, the 2011 CR3 EPU costs, the Commission should withhold a determination of prudence on all avoidable or deferrable EPU costs incurred in 2011 after the March 14, 2011 delamination until the next NCRC hearing cycle.

Until such time as the decision to repair or retire has been publicly announced by PEF (and substantially implemented if the decision is to repair), OPC submits PEF has a duty to avoid making any expenditures or incurring any obligations that are avoidable or deferrable on the EPU project which may never be used and useful in the public service. Testimony adduced from PEF witness Franke indicated that PEF has reviewed all CR3 expenditures and attempted to defer expenditures that were not necessary for the completion of the EPU costs during the current extended outage. However, that decision to slow spending may not be enough if Duke ultimately decides to retire CR3 in 2012 or 2013. The Commission should make clear to PEF that it will heavily scrutinize expenditures and hold the company to a requirement to take all affirmative steps in 2012 and 2013, and even looking forward to 2014, to halt or minimize incurring additional expenditures related to the CR3 EPU project and refocus its efforts to complete the EPU project in R-17 outage.

Once Duke decides to repair CR3, EPU construction and design work that has not been contracted for or not yet performed should be deferred as late as possible in the repair process so that the success of the repair and acceptance of the repair by the Nuclear Regulatory Commission (NRC) is reasonably assured. Likewise, any avoidable or

deferrable long lead equipment (LLE) should be similarly deferred. Based on testimony adduced at the hearing, PEF should refocus its efforts to complete the EPU during the R-17 outage instead of pressing forward with completing the EPU during the current extended outage.

In order to facilitate the Commission's review of the EPU expenditures that can be deferred as late as possible or at least until the R-17 outage, PEF should review the EPU scheduled expenditures and provide to the Commission a list identifying those EPU expenditures which are avoidable or deferrable and those which are not. For each and every expenditure that PEF demonstrates to the Commission's satisfaction cannot be postponed until after the decision to repair or retire has been made, or until the R-17 outage, PEF should additionally provide an explanation as to why and whether each such expenditure has any salvage value.

OPC supports PEF's continuing efforts to repair and return CR3 to commercial service as expeditiously as possible if such repair is both technically and financially feasible. OPC further supports PEF completing the EPU project as economically as possible. Until the decision to repair is made and it can be demonstrated that such repair and licensability of CR3 is reasonably assured, continued recovery of the EPU project carrying costs should not be considered ripe for recovery through the nuclear cost recovery clause.

If the Commission does not defer until 2013 its prudence review of 2011 costs, the prudence review for 2011 should be limited only to non-avoidable or non-deferrable expenditures. Similarly, OPC would not oppose the recovery of carrying costs on expenditures that were incurred or obligated or encumbered by PEF *prior to* March 14,

2011. PEF should shoulder a heavy burden of demonstrating that any and all current and future EPU expenditures are critical path items that must be completed now to achieve completion of the EPU. OPC submits that it may be reasonable to endure some delay in the implementation of the CR3 EPU, and (potentially temporarily) forego some of the economic benefits of an uprated CR3 so that the avoidable or deferrable uprate costs, if any, which PEF proposes to otherwise spend now will not be wasted in the event that the presumptive repair is ultimately not carried out. For these reasons, any 2011 avoidable or deferrable expenditures following the March delamination should be deferred. Moreover, because the decision to repair or retire CR3 has not been made, the Commission should place PEF on notice that these expenditures will be held subject to a disallowance as being imprudently incurred and previously collected carrying costs held subject to refund.

#### **POSITIONS AND ARGUMENT ON DISPUTED ISSUES**

**Issue 1: Does Section 366.93, Florida Statutes, authorize the Commission to disallow recovery of all, or a portion of, the carrying costs prescribed by Section 366.93(2)(b), Florida Statutes?**

\*Yes. Section 366.93, F.S., allows the Commission to disallow the recovery of any costs, including resulting carrying costs, which the Commission after hearing determines to be unreasonable or imprudently incurred. Section 366.93(2)(b), F.S., does not *authorize* carrying charges, but merely specifies or prescribes how carrying charges on prudently incurred costs will be calculated once a utility satisfies the requirements of Section 366.93, F.S. As a backstop to Section 366.93, F.S., under Chapter 366, F.S., the Commission has the inherent authority, power, and jurisdiction to disallow for recovery of *any* costs, including carrying costs, which the Commission determines to be unreasonable or imprudently incurred following a hearing.\*

## ARGUMENT

Section 366.93, F.S., allows the Commission to disallow the recovery of any costs, including resulting carrying costs, which the Commission after hearing determines to be unreasonable or imprudently incurred. A plain reading of Section 366.93(2)(b), F.S., does not *require* the Commission to *authorize* carrying charges, but merely prescribes how carrying charges on prudently incurred costs will be calculated once a utility satisfies the determination of need requirements of Section 366.93 for a nuclear or integrated gasification combined cycle power plant. OPC does not disagree with PEF's prehearing order position:

If the Commission finds, based on a preponderance of the evidence adduced at a hearing before the Commission under Section 120.57, Florida Statutes, that certain nuclear power plant costs were imprudently incurred, then the Commission can disallow the carrying costs on those imprudent nuclear power plant costs. Absent that factual determination by the Commission, disallowance of the statutorily prescribed carrying costs is legally impermissible.

Order No. PSC-12-0455-PHO-EI, at 23. OPC agrees that there must be a hearing and any expenditures determined imprudent are not eligible for carrying costs and must be refunded.

As a backstop to Section 366.93 under Chapter 366, the Commission has the inherent authority, power, and jurisdiction to disallow for recovery *any* costs, including carrying costs, which the Commission determines to be unreasonable or imprudently incurred following a hearing. (*The basis for the Commission's inherent authority is discussed more fully under Issue 3*). Disallowing carrying costs under the Commission's general ratemaking authority or pursuant to Section 366.93, F.S., when the preponderance

of the evidence reveals that underlying expenditures were imprudently incurred, is absolutely permitted, and required.

Therefore, if after a Section 120.57 hearing, the Commission determines that all of the underlying expenditures were prudently incurred, then Section 366.93, F.S., authorizes the Commission to allow recovery of all associated carrying costs with the prudent expenditures. Any carrying costs on imprudent expenditures must be refunded. If after a hearing, the Commission determines that *some* of the expenditures were imprudently incurred, then the Commission may disallow recovery the portion of the carrying costs associated with the imprudent expenditures and allow the prudent expenditures.

This legal issue, however, does not address the factual situation that Duke has yet to decide to repair or retire CR3. That decision has a direct bearing on whether the EPU can be successfully implemented. Moreover, in the absence of the decision to repair or retire, do Section 366.93, F.S., and Commission Rule 25-6.0423, F.A.C. still apply to PEF's current factual situation? That question is answered in Issue 3.

**Issue 2: Does the Commission have the authority to disallow recovery of any AFUDC equity on the Crystal River Unit 3 Uprate project in 2012 and 2013 due to the delay caused by the lack of implementation of a final decision to repair or retire Crystal River Unit 3? If yes, should the Commission exercise this authority and what amount should it disallow, if any?**



## ARGUMENT

This issue was rendered moot by the Commission's decision to approve PEF's motion to defer consideration of 2012 and 203 costs and approval of the 2012 CR3 feasibility study. See Exh 119.

**Issue 3: Does the Commission have the authority to defer all determinations of prudence and reasonableness for the Crystal River Unit 3 Uprate project (and, thus, defer cost recovery in 2013) until a final decision to repair or retire has been implemented? If yes, should the Commission exercise this authority?**

\*Yes. Section 366.93, F.S., is silent on whether the Commission has authority to defer determinations of prudence and reasonableness for the CR3 uprate project until a final decision to repair or retire has been implemented. Such a factual situation was not contemplated by the Legislature when the NCRC statute was enacted. Thus, the Commission can and should rely upon its inherent power and ratemaking jurisdiction under Chapter 366, F.S., to defer determinations of prudence and reasonableness of 2011 expenditures. Moreover, the 2011 and 2012 deferrals of reasonableness and prudence requested by PEF and granted by the Commission are further evidence of the Commission's general authority to defer such determinations.\*

## ARGUMENT

*But for* the undisputed supervening fact that Duke has not yet made a final decision to repair or retire CR3, this issue of whether the Commission can and should defer any or all determinations of prudence and reasonableness for the 2011 CR3 EPU expenditures would not be an issue ripe for consideration. If the CR3 containment had been successfully repaired in March 2011, this issue would not have been raised. Even PEF's motion to defer, which the Commission granted on September 5, 2012, recognizes and highlights the fact that Duke's Board of Directors is now responsible for the final decision to repair or retire, and that because of the complexity of the decision, Duke

commissioned an independent study of the options, costs, and risks entailed in such decision. (Motion ¶ 2) PEF's motion expressly states that the results of that independent study are not known at this time.<sup>1</sup> *Id.* As a result, PEF requested that the Commission defer the determination of reasonableness for the 2012 and 2013 expenditures, as well as defer approval of the 2012 feasibility study. The lack of a final decision to repair or retire is a fatal flaw in the 2012 feasibility study; otherwise, why request deferral of the study? However, since the decision to repair or retire remains outstanding, this issue of deferring prudence for 2011 expenditures is paramount and has become exceedingly ripe for the Commission's consideration.

Notwithstanding the delaminated containment, OPC does not dispute that PEF appears to be demonstrating the necessary statutory intent to implement the EPU. *But for* the lack of a final decision to repair or retire CR3, PEF would be eligible under Section 366.93, F.S., and Commission Rule 25-6.0423, F.A.C., to seek recovery for EPU related carrying costs. However, the fact that CR3 has been out of service since October 2009 and still has not been repaired (and may never be repaired) cannot be easily ignored or shuffled under the rug.

It has been established through various orders of the Commission that Section 366.93, F.S., and Commission Rule 25-6.0423, F.A.C., permit the recovery of the carrying costs on all prudently incurred expenditures that conform to the requirements of the statute and rule. That was clearly the intent of the Legislature when the statute was enacted; however, it is highly doubtful that the Legislature intended Section 366.93, F.S.

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<sup>1</sup> While PEF and Duke have promised to provide the Commission a copy of the independent study, that study is not a part of the hearing record of this docket and cannot be considered by the Commission when determining whether the Commission should defer the determination of prudence of the 2011 EPU expenditures.

to apply when the underlying nuclear unit being uprated is broken and may never return to service.

OPC agrees with PEF that an *executive* agency is required to follow its rules. See *Collier County Bd. of County Com'rs v. Fish & Wildlife Conservation Comm'n*, 993 So. 2d 69, 72-73 (Fla. 2d DCA 2008) (citing *Vantage Healthcare Corp. v. Agency for Health Care Admin.*, 687 So. 2d 306, 308 (Fla. 1st DCA 1997) (“An agency action which conflicts with the agency’s own rules is erroneous.”)). However, the Commission is not an *executive* agency. Unlike an executive agency that must follow its own rules agnostically, “[t]he Florida Public Service Commission has been and shall continue to be an arm of the legislative branch of government.” § 350.001, Fla. Stat. (2005). The Florida Supreme Court has stated “public utility rate-making by the Public Service Commission is a legislative function.” *Chiles v. Pub. Serv. Comm'n Nominating Council*, 573 So. 2d 829, 832 (Fla. 1991) (citing *In re Advisory Opinion to the Governor*, 223 So.2d 35 (Fla.1969); *Florida Motor Lines, Inc. v. Railroad Comm'rs*, 100 Fla. 538, 129 So. 876 (1930)). As such, the Commission is a legislative agency imbued with different powers than an executive agency. That does not mean however that the Commission can arbitrarily disregard its own rules. As a quasi-judicial body vested with legislative powers, the Commission can and should determine whether one of its own rules applies to the factual situation at hand, and if the rule does not apply, then it must rely upon its general ratemaking authority as authorized by Chapters 350 and 366, F.S.

According to the rules of statutory construction, “a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms.” *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994) (citing *Adams*

*v. Culver*, 111 So.2d 665, 667 (Fla.1959); *State v. Billie*, 497 So.2d 889, 894 (Fla. 2d DCA 1986), *review denied*, 506 So.2d 1040 (Fla.1987)). “The more specific statute is considered to be an exception to the general terms of the more comprehensive statute.” *Id.* (citing *Floyd v. Bentley*, 496 So.2d 862, 864 (Fla. 2d DCA 1986), *review denied*, 504 So. 2d 767 (Fla.1987)). “[W]hen two statutes are in conflict, the later promulgated statute should prevail as the last expression of legislative intent. *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994) (citing *Sharer v. Hotel Corp. of Am.*, 144 So. 2d 813 (Fla.1962); *State v. Ross*, 447 So. 2d 1380, 1382 (Fla. 4th DCA 1984), *review denied*, 456 So. 2d 1182 (Fla.1984)). The Commission acting in its quasi-judicial role must determine whether the more specific statute is applicable to the factual situation at hand. Here, the more specific NCRC statute clearly does not apply to the specific factual situation in which PEF currently finds itself. Therefore, when a utility or Commission finds itself in the uneasy position or predicament where the specific statute or promulgated rule does not expressly or specifically apply to the relevant factual situation, then the Commission as both a quasi-judicial and legislative agency must look to its general ratemaking authority granted it by the Legislature in Chapters 350 and 366, F.S. for guidance.

OPC asserts that the NCRC statute and its implementing rule never contemplated a situation where cost recovery would be blindly allowed for an extended power uprate on a damaged containment building that potentially may never go into commercial operation. It is absurd for PEF to argue that the Commission cannot take notice of this real factual situation and defer the determination of prudence until the factual situation changes and Section 366.93 specifically applies. Acceding to PEF’s request to approve

as prudent the 2011 expenditures requires the Commission to wear blinders to this undisputed factual reality.

Under the Commission's quasi-judicial and broad legislative ratemaking authority, the Commission should determine that the NCRC statute and NCRC rule do not apply to this factual situation. Alternatively, if the Commission is unwilling to exercise its authority, at the very least it should hold the EPU expenditures subject to disallowance, and defer the determination of prudence for 2011 expenditures and the recovery of carrying charges, without placing the additional cost of deferral on the customers.. In support of the Commission's quasi-judicial and broad legislative ratemaking authority, OPC points to two instances where the Commission has previously deferred reasonableness and prudence review for requests by PEF stemming from the lack of a decision to repair or retire following the delamination of CR3.

First, on August 10, 2011, after stipulation by the parties in Docket No. 110009-EI, the Commission voted to approve PEF's request to defer the Commission's review of the reasonableness of PEF's 2011 and 2012 CR3 Uprate expenditures and associated carrying costs until the 2012 NCRC proceedings. The Commission also voted to defer the review of the long-term feasibility of completing the CR3 EPU until 2012. For 2009 and 2010 CR3 EPU costs, the parties stipulated that they did not object to the Commission making a final prudence determination for those costs pursuant to Sections 366.93 and 403.519(4), F.S. in the 2011 NCRC docket. By so stipulating, the parties maintained that they did not waive, concede, or give up their right to offer any testimony in this or any other Commission docket.

Second, on September 5, 2012, the Commission voted to approve PEF's request to defer the Commission's review of the reasonableness of PEF's 2012 and 2013 CR3 Uprate expenditures and associated carrying costs until the 2013 NCRC proceedings. The Commission also voted to defer the review of the long-term feasibility of completing the CR3 EPU until 2013. None of the parties objected to PEF's request in this docket to defer such review until a later date. Therefore, these are two instances where the Commission did not rely upon the NCRC statute or NCRC Rule to defer, but instead relied upon its inherent authority granted by Chapter 366, F.S., to defer a determination of reasonableness and prudence.

The reason OPC is requesting that the Commission defer the determination of prudence for 2011 expenditures is simple – it protects the ratepayers and prevents the utility from throwing good money after bad. According to Section 366.93(6), “If the utility elects not to complete *or is precluded from completing* construction of the nuclear power plant, . . . the utility *shall* be allowed to recover all prudent preconstruction and construction costs. . . .” (emphasis added). Therefore, if the Commission exercises its authority to defer and does not determine that the utility's expenditures were prudent, then the utility cannot recover those expenditures from the ratepayers even if the utility is later precluded from completing the project unless there is a later finding of prudence. The retirement of CR3 would necessarily preclude PEF from completing the EPU.

Through year end 2010, PEF has spent approximately \$205.8 million (jurisdictional)<sup>2</sup> on the EPU which the Commission has already determined to be prudent. PEF wants this Commission to determine that approximately \$43.6 million

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<sup>2</sup> See jurisdictional amounts - TOR-6, shown in Foster's May 1, 2012 (Exh TGF-6) Exh 9.

(jurisdictional) of 2011 actual expenditures<sup>3</sup> are prudent. If Duke decides to retire CR3 before the next hearing cycle, then approximately \$249.4 million of customer money will have been deemed prudent on something that will never generate a kilowatt-hour of energy. If PEF were to prudently cancel the EPU project today, customers would be responsible for \$205.8 million of the canceled project. If PEF prudently canceled the project after the Commission determines that the 2011 expenditures were prudent, then customers would be responsible for approximately \$249.4 million.

By requesting that the Commission exercise its authority and defer the determination of prudence of those 2011 expenditures to the 2013 hearing cycle, OPC is attempting to preserve the possibility that customers will not have to pay these 2011 EPU costs should Duke decide to retire CR3 and the Commission deems those expenditures imprudent. In addition, without placing the additional cost of deferral on the customers, the Commission should consider deferring the recovery of nearly \$40 million in carrying charges from customers through the 2013 Capacity Cost Recovery Factor. By exercising its authority and deferring a determination of prudence on the 2011 actual expenditures and collection of carrying costs, the Commission would meaningfully lower customer bills in 2013 as well as potentially assure customers might not pay the nearly \$43.6 million of 2011 EPU costs if Duke decides to retire CR3 and the decision making to continue to incur the additional, post-March 14 costs is deemed to have been imprudent based on all the facts and circumstances known at the time.

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<sup>3</sup> According to TOR-6, attached to Foster's May 1, 2012 testimony as Exh TGF-6, PEF's actual 2011 total jurisdictional construction cost were \$43,646,799. Exh 9

**Issue 12: Should the Commission approve what PEF has submitted as its 2012 annual detailed analyses of the long-term feasibility of completing the Crystal River Unit 3 Uprate project, as provided for in Rule 25-6.0423, F.A.C.? If not, what action, if any, should the Commission take?**

\*No. Until a final decision to repair or retire has been implemented, the Commission should defer approving what PEF has submitted as its 2012 annual detailed analyses of the long-term feasibility of completing the Crystal River Unit 3 Uprate project, as provided for in Rule 25-6.0423, F.A.C. While the long-term feasibility remains theoretically possible, until the decision to repair or retire has been made, it is not ripe to approve PEF's feasibility study.\*

#### **ARGUMENT**

This issue was rendered moot by the Commission's decision to approve PEF's motion to defer consideration of 2012 and 2013 costs and approval of the 2012 CR3 feasibility study. See Exh 119.

**Issue 13: Should the Commission find that, for 2011, PEF's project management, contracting, accounting and cost oversight controls were reasonable and prudent for the Crystal River Unit 3 Uprate project? If not, what action, if any, should the Commission take?**

\*No. Until a final decision to repair or retire has been implemented, the Commission should defer determining that PEF's project management, contracting, accounting and cost oversight controls were reasonable and prudent for the Crystal River Unit 3 Uprate project.\*

#### **ARGUMENT**

For the reasons set forth in Issue 3 and other issues and until a final decision to repair or retire has been implemented, the Commission should defer its determination that PEF's project management, contracting, accounting and cost oversight controls were reasonable and prudent for the CR3 Uprate project in 2011 to the 2013 NCRC hearing cycle, without placing the additional cost of deferral on the customers.



**Issue 14: Were all of the actual Crystal River Unit 3 Uprate project expenditures prudently incurred or expended in 2011 in the absence of a final decision to repair or retire Crystal River Unit 3 in 2011?**

\*No. Until a final decision to repair or retire has been implemented, the Commission should defer determining the prudence of 2011 expenditures. However, should the Commission decide not to defer the determination of prudence on 2011 expenditures, only EPU expenditures that could not have been deferred or delayed or avoided should be determined prudent and all others imprudent.\*

#### **ARGUMENT**

For the reasons set forth in Issue 3 and other issues and until a final decision to repair or retire has been implemented, the Commission should defer determining the prudence of 2011 expenditures without placing the additional cost of deferral on the customers. If the Commission decides not to defer until 2013, OPC asserts EPU expenditures that could have been deferred or delayed or avoided, but were not, were not prudently incurred.

OPC witness Dr. William Jacobs provided testimony in support of this position. Because of all the inherent uncertainty surrounding the decision to repair or retire CR3 following the March 14, 2011 delamination, OPC witness Jacobs recommended:

[t]he Commission ensure that PEF minimize all expenditures related to the CR3 EPU project. I recommend that the avoidable or deferrable remaining EPU construction work not be contracted for or performed until late in the containment repair process when the success of the repair and NRC acceptance of that repair is assured. In addition, the Commission should require that PEF provides timely updates on the status of the containment repair decision and update its EPU project plan, even if it requires supplemental testimony.

TR 18G (PEF Jacobs at 8). Further, witness Jacobs recommended that any avoidable or deferrable EPU expenditures that PEF continues to make in 2012 and 2013 in face of the

uncertainty of CR3 returning to service should be held subject to refund until PEF decides to implement the repair to CR3 in earnest. TR 718L (PEF Jacobs at 13).

PEF witness Jon Franke testified that Dr. Jacobs failed to identify any specific CR3 EPU project costs that PEF could avoid in 2013 or defer beyond 2013 and still implement the uprate during the current extended outage. TR 636. OPC witness Jacobs did not attempt to determine what expenditures were avoidable or deferrable because PEF would be in the best position to review, determine, and negotiate with vendors as to which expenditures could be deferred. Neither did OPC witness Jacobs state that PEF should complete the EPU project in the *current* extended outage. Witness Jacob's recommendation is that PEF should defer all avoidable or deferrable expenditures until after the decision to repair CR3 has been made and wait until late in the containment repair process when the success of the repair and NRC acceptance of that repair is assured. Testimony adduced at hearing suggested that delay until the R-17 refueling outage may be an alternative option.

PEF witness Franke testified that instead of delaying the EPU until the R-17 refueling outage, PEF was moving ahead to complete the EPU in the current extended refueling outage because he and PEF believed it was more beneficial to PEF and its customers. TR 621. He testified, if the EPU completion was deferred to the R-17 refueling outage, then "EPU phase costs necessarily increase. . . and some of the fuel savings benefits to customers are also lost. . . ." TR 621. Witness Franke's Exh JF-5, the *February 2012 EPU Options Update*, attempts to quantify the difference in EPU costs and fuels saving between the completion of the EPU in the current extended R-16 refueling outage as opposed to the next R-17 refueling outage. Exh 21. According to this

exhibit, if PEF waits until the R-17 outage to complete the EPU, EPU costs would increase by approximately \$33 million from \$617 million to \$650 million, and fuel savings would decrease by approximately \$120 million in both carbon scenarios. Exh 21, p 3-4 of 6. This amount would be the cost differential, or economic risk to PEF's customers, if PEF delays completion of the EPU to R-17 or if there is an unforeseen delay in the CR3 containment building repair that delays the completion of the EPU. OPC submits this is a minor economic risk compared with PEF proceeding according to its announced EPU project schedule and then, for a variety of reasons, is precluded from placing the EPU in service.

Therefore, the question of deferring EPU expenditures is partially a question of weighing the economic risks associated with delaying the completion of the EPU project. Hypothetically, if PEF can defer many of its expenditures and then still complete the EPU in the current extended outage, it would be an economic win-win for PEF and its customers. Similarly, if PEF proceeds according to its "announced plan" of EPU expenditures (as described in witness Franke's testimony) and is able to complete the EPU during the current outage, it would also be an economic win-win for PEF and its customers. However, proceeding according to PEF's currently announced EPU plan does not account for the known-unknown of whether CR3 can be repaired according to PEF's current schedule, if at all. PEF appears willing to gamble with the customer's money that PEF will be able to repair the CR3 containment and complete the EPU according to its current schedule. OPC opposes such a gamble.

With PEF's gamble, there are two significant risks that customers will bear. The major economic risk is that PEF will move forward with completing the EPU in the

current outage, the CR3 repair fails and/or Duke decides to retire CR3, and customers pay hundreds of millions of dollars for an EPU that never generates one kilowatt-hour of energy not to mention the loss of megawatt-hours previously by CR3 at the pre-EPU capacity. Thus, proceeding according to PEF's announced schedule could result in a huge lose-lose for customers.

OPC believes that there is lesser economic risk for customers if PEF is able to repair the containment and return CR3 to commercial service according to its scheduled timetable and defers the completion of the EPU until the next refueling outage which is R-17. The cost of deferring completion of the EPU to R-17 is quantified by PEF witness Franke and discussed above. Given the uncertainty surrounding the eventual repair of CR3, OPC believes that deferring avoidable and deferrable EPU expenditures is the best course forward for PEF and its customers.

As to what EPU expenditures are avoidable or deferrable, as stated earlier, OPC witness Jacobs did not attempt to answer this question. According to testimony elicited from PEF witness Franke, PEF would be in the best position to ascertain and determine what expenditures must be expended in 2011, 2012, and 2013 in order to complete the EPU during the R-17 refueling outage.

According to witness Franke, immediately following the March 14, 2011 delamination event, PEF undertook a comprehensive review of the EPU project and whether to continue with the EPU. PEF further determined which EPU capital expenditures were critical tasks to completing the EPU in the current outage, and which costs could be delayed or deferred. (TR 660, 688-689, 708-709). Each contract was evaluated in such a manner. (TR 688) In June 2011, PEF made the decision to move

forward with the EPU project. (TR 709). During the hearing, witness Franke explained the process by which PEF reviewed the EPU expenditures for possible deferral to a later period. (TR 663-707). He further indicated that, of the \$49 million in 2011 expenditures for which PEF was seeking prudence review, PEF incurred \$31 million of those expenditures from April to December 2011. (TR 660, 665-666). He testified that following the second delamination in March 2011, there was a significant slowing of planned 2011 expenditures. (TR 661). PEF continued to expend some money in 2011 for the license amendment request (LAR), project management expenses, construction activities, and non-power block engineering and procurement. (TR 661-662). However, little construction cost was expended following the delamination. (TR. 662). Witness Franke testified that some of the expenditures were contracted or incurred prior to the March 2011 delamination, some were for licensing activities which must be incurred in 2011, 2012, and 2013 to assure timely review of PEF's LAR by the Nuclear Regulatory Commission (NRC), and other expenditures were incurred to enable PEF to achieve the completion of the EPU during the current extended outage. (TR 667, 672-674, 663-707). PEF used a similar review process for evaluating what long lead equipment (LLE) payments in 2011 and 2012 could be curtailed. (TR 676- 689). In addition, PEF has not distributed the bid for EPU phase construction contract and nor would that contract be executed until there is a final decision to repair or retire. (TR 674-675).

OPC applauds PEF's efforts to evaluate and scale back EPU expenditures in 2011 immediately following the delamination, but those efforts to slow spending may not be enough if Duke ultimately decides to retire CR3 in 2012 or 2013. It was a good first step. However, OPC maintains that PEF should continue this evaluation process and postpone

all deferrable or avoidable EPU expenditures until PEF decides to implement the repair to CR3 in earnest. At the very least, PEF should halt or minimize incurring additional expenditures and refocus its efforts on implementing the EPU in the R-17 refueling outage and defer those deferrable expenditures with that outage as the goal for completion of the EPU. Finally, the Commission should place PEF on notice that it will heavily scrutinize expenditures and hold the Company to a requirement that any deferrable or avoidable expenditures incurred in 2011 following the delamination, as well as any deferrable or avoidable expenditures in 2012 and 2013 should be subject to a disallowance as being imprudently incurred and previously collected carrying costs held subject to refund.

**Issue 15: What system and jurisdictional amounts should the Commission approve as PEF's 2011 prudently incurred costs and final true-up amounts for the Crystal River Unit 3 Uprate project?**

\*None. Until a final decision to repair or retire has been implemented, the Commission should defer consideration of approval of PEF's 2011 requested costs and final true-up amounts for the Crystal River Unit 3 Uprate project. However, should the Commission decide not to defer the determination of prudence on 2011 expenditures, then the portion, if any, of EPU expenditures that could have been deferred or delayed or avoided, but were not, should be reduced from the system and jurisdictional amount being requested.\*

**ARGUMENT**

See OPC's position statement. The Commission should not approve PEF's final true-up amounts until a final decision to repair has been made. If prudence is withheld and PEF's decision to retire CR3 is determined in a later proceeding to be imprudent, or if the EPU project is canceled prior to a prudence determination, then the 2011 CR3 EPU

carrying costs along with 2012 and 2013 may be refundable to the customers. In addition, 2011 expenditures deemed imprudent should be borne by the shareholders and not the customers.

However, if the Commission decides to go forward with a determination of prudence, the prudence designation should attach only to (1) prudent expenditures in 2011 which were incurred or expended prior to March 14, 2011, and (2) those expenditures that were unavoidable and nonavoidable in the remainder of 2011, such as LAR costs and some limited LLE costs. If the record needs further development to isolate individual costs, then the decision should be deferred until the 2013 hearing cycle so the record can be properly developed.

**Issue 16: Is it reasonable for PEF to incur or expend all of the estimated and projected Crystal River Unit 3 Uprate project expenditures in 2012 and 2013 in the absence of a final decision to repair or retire CR3?**

\*No. Until a final decision to repair or retire has been implemented, PEF should cease incurring or expending any EPU costs, and the Commission should place PEF on notice that avoidable or deferrable expenditures will be held subject to should be subject to a disallowance as being imprudently incurred. However, the Commission does not defer the determination of reasonableness on 2012 and 2013 expenditures, evidence to be adduced at hearing will demonstrate that the portion, if any, of EPU expenditures that could be deferred or delayed or avoided, but are not, will not reasonably incurred.\*

#### **ARGUMENT**

This issue was rendered moot by the Commission's decision to approve PEF's motion to defer consideration of 2012 and 203 costs and approval of the 2012 CR3 feasibility study. See Exh 119.

**Issue 17: What system and jurisdictional amounts should the Commission approve as reasonably estimated 2012 costs and estimated true-up amounts for PEF's Crystal River Unit 3 Uprate project?**

\*None. Absent PEF implementing a final decision to proceed with a repair, the Commission should defer consideration of recovery of any CR3 EPU costs until after the 2012 hearing cycle. If the Commission nevertheless proceeds, OPC asserts cost recovery should not exceed the amounts minimally needed to fulfill contractual or other obligations required to keep the uprate project viable for a repaired CR3.\*

**ARGUMENT**

Absent PEF implementing of a final decision to proceed with a repair, the Commission should defer consideration of recovery of any CR3 EPU costs until after the 2012 hearing cycle. If the Commission nevertheless proceeds, OPC asserts cost recovery should not exceed the amounts minimally needed to fulfill contractual or other obligations required to keep the uprate project viable for a repaired CR3.

**Issue 18: What system and jurisdictional amounts should the Commission approve as reasonably projected 2013 costs for PEF's Crystal River Unit 3 Uprate project?**

\*None. Absent PEF implementing of a final decision to proceed with a repair, the Commission should defer allowing recovery of any CR3 EPU costs until after the 2012 hearing cycle. If the Commission nevertheless proceeds, OPC asserts believe cost recovery should not exceed the amounts minimally needed to fulfill contractual or other obligations required to keep the uprate project viable for a repaired CR3.\*

**ARGUMENT**

Absent PEF implementing of a final decision to proceed with a repair, the Commission should defer allowing recovery of any CR3 EPU costs until after the 2012 hearing cycle. If the Commission nevertheless proceeds, OPC asserts believe cost recovery should not exceed the amounts minimally needed to fulfill contractual or other obligations required to keep the uprate project viable for a repaired CR3.



**Issue 19: What is the total jurisdictional amount to be included in establishing PEF's 2013 Capacity Cost Recovery Clause factor?**

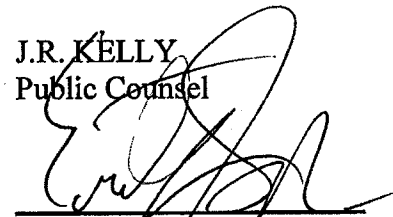
\*The total jurisdictional amount will be a fall-out from other decisions. Recovery should be confined to the LNP project subject to the settlement. Recovery of CR3 EPU carrying costs should be deferred from consideration until 2013.\*

**ARGUMENT**

The total jurisdictional amount will be a fall-out from other decisions. Recovery should be confined to the LNP project subject to the settlement. Recovery of CR3 EPU carrying costs should be deferred from consideration until 2013

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and foregoing **CITIZEN'S POST HEARING STATEMENT OF POSITIONS AND POST HEARING BRIEF** has been furnished by electronic mail and U.S. Mail on this 1st day of October, 2012, to the following:

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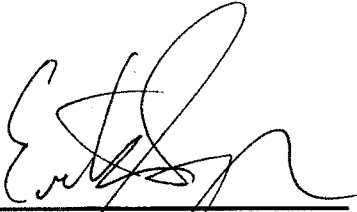
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