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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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COMMISSION
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re: Fuel and Purchased Power cost recovery

EI-Docket No. ~~120001-EI~~

120001-EI

Clause with Generating Performance Incentive factor

Filed: November 12th, 2012

SSM

**POST HEARING BRIEF, PROPOSED FINDING OF FACTS AND
CONCLUSIONS OF LAW OF THE FLORIDA INDUSTRIAL POWER USERS GROUP**

The Florida Industrial Power Users Group ("FIPUG"), by and through its undersigned counsel, and pursuant to the Chairman's Order announced at the conclusion of the evidentiary hearing in this matter, files its post hearing brief, proposed findings of fact, and conclusions of law. The only issue that will be addressed is Issue 1D.

SUMMARY OF POSITION

Issue 1D: What amount, if any, should PEF include in its 2012 projections to account for potential insurance recoveries for the Crystal River 3 Unit from Nuclear Electric Insurance Limited?

FIPUG: Given that the first two delamination events are separated by more than 1 year in time, and occurred at different portions of the containment building, these two events, and possibly others, should be considered separate events for the purposes of NEIL replacement fuel insurance coverage. Consequently, additional replacement fuel insurance factor dollars, beyond coverage for only one event, should be assumed when establishing the fuel factor.

THE PROPOSED FINDING OF FACTS

By way of introduction, it does not appear that the facts related to the failure of Crystal River 3 nuclear unit ("CR3") to generate electricity for the use and benefit of PEF's ratepayers are in dispute at this point in time. What is disputed, recognizing these undisputed facts, is whether PEF's assumption that replacement fuel insurance proceeds are only available for one event rather than two events is reasonable.

The Crystal River 3 nuclear unit ("CR3") is a nuclear power plant owned and operated by Progress Energy Florida ("PEF"). In October 2009, during an outage for refueling and maintenance, PEF discovered delamination or separation within the concrete at the CR3 containment building. Ex. 119 at page 45. Following the October 2009 delamination event, PEF

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filed a claim with its insurer, the Nuclear Electric Insurance Company (“NEIL”), for damages associated with PEF having to procure replacement fuel. *Id.* PEF had in place an insurance policy issued by NEIL entitled “NEIL Accidental Insurance Policy”. Ex. 121 at page 1. This policy provides insurance coverage of up to \$490 million dollars for replacement fuel payable at a weekly rate of \$4.5 million dollars per week. *Id.* at page 2. The policy states an annual premium of \$600,400 and a retrospective premium adjustment of \$6,004,000. *Id.* at page 1.

PEF’s witness Marcia Olivier admitted during cross examination that non-payment of premium was not an issue. Witness Olivier also acknowledged that the premium costs for this and other insurance policies are included in rates paid by ratepayers and that ratepayers stand to directly benefit financially if NEIL pays the insurance claims that PEF makes or has made. (PEF also filed a claim for repair costs with NEIL pursuant to a different insurance policy that has a policy limit of \$2.25 billion dollars. Ex. 119 at page 46.)

The October 2009 event occurred during the applicable policy period for the one year policy that began on April 1, 2009 and concluded on April 1, 2010. This event occurred during a period of time in which insurance coverage was provided was detailed in FIPUG exhibit 121. NEIL made payments of \$162 million to PEF pursuant to the 2009-10 Accidental Outage Insurance Policy. *Id.* It stopped making payments without an explanation, according to Ms. Olivier, the PEF witness most knowledgeable about the NEIL insurance issue who provided testimony in this case. Payments have not resumed, and NEIL is apparently still investigating the matter.

In 2010, PEF purchased another accidental outage insurance policy from NEIL. See Ex. 122. Specifically, PEF secured an Accidental Outage Insurance policy similar to the 2009-10 policy. This policy provided coverage from April 1, 2010 through April 1, 2011. Again, the policy limit was \$490,000,000. The annual premium charged was \$608,573 and the retrospective premium adjustment was \$6,087,573. *Id.* at page 1. During the effective dates of this 2010-2011 policy, another incident occurred at CR3. More than a year after the first event, in another portion of the containment building, while performing a “retensioning” task, the containment building cracked or delaminated a second time. Ex. 120 at page 2.

Again, the disputed issue in this case is whether PEF’s assumption that NEIL accidental outage funds are only available for one covered event, not two, is reasonable. FIPUG and PEF disagree on which assumption should be used for the purposes of establishing a fuel factor; there does not appear to be a disagreement on the key facts as set forth above.

THE BASIS FOR ASSUMING TWO COVERED EVENTS, NOT ONE

FIPUG argues that it is not a reasonable assumption to assume only one covered event based on the undisputed facts. Further, FIPUG argues that the plain language of the insurance policy in question, the 2010-2011 NEIL Accidental Outage Insurance Policy, leads to the inescapable conclusion that two covered events occurred at CR3. The second event occurred

more than one year after the first event, in a different part of the containment building, while activity different from what prompted the first event was taking place. Moreover, NEIL issued a new policy for the CR3 unit following the first event and accepted premium dollars to insure against the risk that an “accident” as defined in the policy would prevent the unit from returning to service and PEF would be forced to procure replacement power.

A closer review of key terms of the insurance policy in place when the second event occurred, while tedious, is helpful and leads to the conclusion that coverage should be in place for two events, not one. Provision I. A. of the policy entitled “Coverage for Accidental Property Damage at the Unit” states: “This Policy provides insurance for an Outage at a Unit specified in the Declarations resulting from Accidental Property Damage occurring to Insured Property.” The “Insured Unit” is defined as the CR3 nuclear unit, a fact reflected in Item 7 of the Declarations of the policy. An “Outage” is defined as either a “Cessation Outage” or “Delay Outage”. “Delay Outage” is defined as a situation in which “the Unit is delayed from resuming the generation of electric power other than for testing purposes as a result of Accidental Property Damage that does not cause a Cessation Outage.” “Cessation Outage” is defined as taking place when “the Unit ceases to generate electrical power as a result of Accidental Property Damage.” “Accidental Property Damage” means “Property Damage which is caused by an Accident.” “Property Damage” is defined as “direct physical damage or destruction of the Insured Property.” Finally, and importantly, “Accident” is defined as:

a sudden and fortuitous event, an event of the moment, which happens by chance, is unexpected and unforeseeable. Accident does not include any condition which develops, progresses or changes over time, or which is inevitable. The date or time at which the Property Damage is discovered shall be deemed the date or time of an Accident.

See Exhibit 122.

All of the evidence in this proceeding, and all of the statements and representations made by PEF support the conclusion that the second delamination event was “an accident” as the term is defined in the insurance policy. There is no evidence to the contrary. NEIL, which has failed to pay in full the claim resulting from the first event in 2009, and has been “investigating” that initial claim for more than three years, continues to delay resolution of this matter.

NEIL

When Duke Energy agreed to merge with Progress Energy, Duke Energy commissioned an independent report to review the CR3 matter and its repair plan. This lengthy report was completed in less than one year and shared with the Commission. See Ex. 120, page 1. In stark contrast to the timing of the Duke Energy investigation, apparently NEIL is still investigating PEF’s initial claim for replacement fuel. NEIL has shared no details of that investigation with this Commission, any other regulatory body, or as far as FIPUG and PEF witness Olivier knows, anybody else.

Except for what FIPUG believes to be an unusual circumstance that will be discussed in detail below, FIPUG would suggest that this Commission seek details about the status of the pending 2009-10 PEF insurance claim for replacement fuel directly from NEIL. Seeking information from NEIL is more reliable since asking PEF what NEIL is saying calls for hearsay. Asking PEF what NEIL is thinking calls for speculation. Hearsay evidence and speculation are less reliable than asking questions of NEIL directly. While PEF reports that NEIL says the matter is under investigation, that summary statement sheds no light on details and questions that are important to PEF, its customers and this Commission.

However, while an invitation to NEIL to address the Commission about important insurance coverage issues that directly affect ratepayers could surely be extended, it seems unlikely such an invitation would be accepted because NEIL apparently does not conduct business in the state of Florida. The Florida Secretary of State has no record of NEIL being authorized to conduct business in Florida. See Ex. 123. Further, section 624.401(1), Florida Statutes, entitled "Certificate of Authority Required" states in pertinent part:

No person shall act as an insurer, and no insurer or its agents, attorneys, subscribers, or representatives shall directly or indirectly transact insurance, in this state except as authorized by a subsisting certificate of authority issued to the insurer by the office, except as to such transactions as are expressly otherwise provided for in this code.

As made clear by FIPUG exhibit 124, NEIL does not presently have, and has never had, a certificate of authority issued by the Office of Insurance Regulation to conduct the business of insurance in this state. See Ex. 24, p. 3-4. This fact raises a multitude of questions and may offer some insight into why it has taken NEIL more than 3 years to adjust PEF's initial claim for replacement fuel PEF made pursuant to the 2009-10 Accidental Outage Insurance Policy. These questions include, but are not limited to, the following:

- 1) Did NEIL ever come to Florida, specifically, to the CR3 power plant site, to investigate PEF's replacement fuel insurance claim made under the 2009-10 Accidental Outage Insurance Policy?
- 2) If not, why not?
- 3) What is the current status of PEF's pending replacement fuel claim made under the 2009-10 Accidental Outage Insurance Policy with a policy limit of \$490 million and for which only \$162 million dollars have been paid to date?
- 4) Why did NEIL stop making payments associated with the replacement fuel costs resulting from the 2009 delamination event?
- 5) Why has it taken over 3 years for NEIL to investigate the replacement fuel claim made by PEF under the 2009-10 Accidental Outage Insurance Policy?

- 6) What amount did NEIL establish as loss reserves for the 2009 delamination event and resulting damage?
- 7) What is the current status of NEIL's investigation into the CR3 matter and when is it anticipated that such investigation will be concluded?
- 8) What reasons, if any, does NEIL have to suggest that an event NEIL itself refers to as "the 2011 delamination" is not a second covered event in accordance with the terms of the 2010-11 Accidental Damage Outage Insurance Policy?

These are important questions that deserve answers. The lack of information provided by NEIL is the chief reason PEF argues its one event assumption, rather than two events, is reasonable for the purposes of setting a fuel factor in this case.

This Commission should act within its powers to seek the answers to these and related questions about NEIL insurance coverage, both the accidental outage policy and the property insurance policy. These policies provide more than 3 billion dollars worth of coverage for accidents at CR3. These monies, as admitted by PEF witness Olivier, can be used to offset the rates that PEF seeks from ratepayers. These insurance proceeds provide a direct benefit to ratepayers. It is for this reason that FIPUG and other intervenors are keenly interested in NEIL, and how PEF's insurance claims are resolved.

Conclusion

The undisputed evidence presented in this case establishes that two separate, distinct accidents occurred at CR3, one in 2009 and a second in 2011. Ratepayers paid for, and PEF obtained not one, but two Accidental Damage Outage policies from NEIL, each with \$490 million in coverage, to defray the costs of replacement power. A review of the key terms of the 2010-11 NEIL Accidental Damage Outage policy leads to the conclusion that the 2011 delamination at CR3 is a covered event for which up to \$490 million dollars for replacement fuel should be available. For the purposes of setting a fuel factor, PEF should assume that insurance monies will be available to offset replacement power costs for the 2009 delamination as well as the 2011 delamination.

The only reason PEF says it is not reasonable to assume insurance coverage for two events, not one, is because NEIL is still investigating the matter. In this case, nobody provided any concrete details about that investigation or its status. NEIL, a company not even registered or authorized by the Florida Office of Insurance Regulation to conduct insurance business in the state, has taken years to investigate PEF's insurance claims. The lack of information flowing from a snail's-paced investigation is not persuasive evidence compared to a review of the terms of the 2010-11 NEIL Accidental Outage Insurance Policy and the undisputed facts. An abject lack of information that can be linked directly to NEIL should not impair the ratepayers' ability to benefit from an adjustment to the fuel factor that is consistent with terms of the insurance

policy in question. PEF should adjust its 2012 proposed fuel factor projections to account for insurance proceeds that are due and owing in accordance with the provisions of NEIL's 2010-11 Accidental Outage Insurance Policy.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing, FIPUG's Post Hearing Brief, Findings of Fact and Conclusions of Law, was provided to those listed below this 13th day of November, 2012 by electronic mail.

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