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Subject: PETITION OF OPC AND FRF FOR AN ORDER INVESTIGATING THE PRUDENCE OF PROGRESS ENERGY FLORIDA'S EFFORTS TO OBTAIN NEIL INSURANCE PROCEEDS
Attachments: PETITION OF OPC AND FRF FOR AN ORDER INVESTIGATING THE PRUDENCE OF PROGRESS ENERGY FLORIDA'S EFFORTS TO OBTAIN NEIL INSURANCE PROCEEDS.pdf

Electronic Filing

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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.

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of 25 pages.

e. The document attached for electronic filing is: PETITION OF THE CITIZENS OF THE STATE OF FLORIDA AND THE FLORIDA RETAIL FEDERATION FOR AN ORDER INVESTIGATING THE PRUDENCE OF PROGRESS ENERGY FLORIDA'S EFFORTS TO OBTAIN NEIL INSURANCE PROCEEDS, ESTABLISHING THAT CUSTOMERS HAVE NO RESPONSIBILITY FOR COSTS OF CERTAIN ABANDONED CR3 UPRATE COSTS THAT ARE NO LONGER SUBJECT TO THE NUCLEAR

FILED FOR COSTS OF
01007 FEB 25 2013

COST RECOVERY MECHANISM, AND DELINEATING PARAMETERS OF CR3 "REGULATORY ASSET"

Thank you for your attention and cooperation to this request.

Monica R. Woods

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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: February 25, 2013

PETITION OF THE CITIZENS OF THE STATE OF FLORIDA AND THE FLORIDA RETAIL FEDERATION FOR AN ORDER INVESTIGATING THE PRUDENCE OF PROGRESS ENERGY FLORIDA'S EFFORTS TO OBTAIN NEIL INSURANCE PROCEEDS, ESTABLISHING THAT CUSTOMERS HAVE NO RESPONSIBILITY FOR COSTS OF CERTAIN ABANDONED CR3 UPRATE COSTS THAT ARE NO LONGER SUBJECT TO THE NUCLEAR COST RECOVERY MECHANISM, AND DELINEATING PARAMETERS OF CR3 "REGULATORY ASSET"

The Citizens of the State of Florida ("Citizens" or "OPC"), and the Florida Retail Federation ("FRF"), by and through undersigned counsel, pursuant to Sections 120.57 and 120.569, Florida Statutes, and Rule 28-106.201, Florida Administrative Code (F.A.C.), petition the Commission to enter an order with respect to Progress Energy Florida's ("PEF") damaged Crystal River Unit No. 3 nuclear unit ("CR3") (1) determining that the efforts of PEF to obtain insurance proceeds to date have been insufficient and imprudent, and stating the Commission's intent to impute greater proceeds with respect to pursuing insurance claims against the insurer of PEF's nuclear power plant, Nuclear Electric Insurance Limited ("NEIL"); (2) requiring PEF to refund to customers monies related to the costs of certain "balance of plant" equipment that was part of planned uprates of CR3, that exited the nuclear cost recovery mechanism when completed and was placed in base rates, but that was marooned when PEF decided to retire the unit; and (3) delineating the parameters of the regulatory asset associated with CR3 that PEF will be allowed to collect from customers pursuant to Order No. PSC-12-0104-FOF-EI issued on March 8, 2012. In support of this Petition, Citizens and FRF state as follows:

1. The name and address of the agency affected and the agency's file number:

DOCUMENT NUMBER-DATE

01007 FEB 25 2013

FPSC-COMMISSION CLERK

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
Docket No. 100347-EI

2. The Citizens include the customers of PEF whose substantial interests will be affected by the decisions made in this docket pursuant to several orders. Order No. PSC-12-0104-FOF-EI allows PEF to collect certain monies from its customers pursuant to the Settlement Agreement (“Settlement”) PEF executed with the Citizens and other Intervenors. Order No. PSC-13-0084-PCO-EI, is a procedural order setting out certain important and relevant issues but which does not address all of the issues affecting the customers as a result of PEF’s February 5, 2013 announcement of its decision to retire Crystal River Unit 3 and accept an insurance settlement,, or the additional matters set forth in this Petition. Order No. PSC-13-0080-PCO-EI is a procedural order establishing a hearing schedule in this Docket which is facially insufficient to accommodate all of the issues raised in this Petition as well. The substantial interests of all of PEF’s customers will be affected by the Commission’s actions in this docket 3. Pursuant to Section 350.0611, Florida Statutes, the Citizens who file this Petition are represented by the Office of Public Counsel. OPC’s telephone number and address are:

Office of Public Counsel c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399-1400
Telephone No. (850) 488-9330

3. The Florida Retail Federation is an established association of more than 8,000 members in Florida. Many of the FRF’s members are retail electric customers of Progress Energy Florida; these members purchase electricity from PEF pursuant to several different PEF rate schedules. The FRF has participated in a full party in several Progress Energy rate cases, and is a party to this Docket No. 100437-EI. The FRF’s members require adequate, reasonably priced electricity

in order to conduct their businesses consistently with the needs of their customers and ownership. Because the issues to be determined in this docket will significantly affect the electric rates paid by the FRF's members who are customers of Progress, those members' substantial interests will be affected by the Commission's determinations herein, and the FRF is entitled to intervene to protect those interests. All pleadings, orders and correspondence should be directed to Petitioner's representatives as follows:

Robert Scheffel Wright
John T. LaVia, III
Gardner, Bist, Wiener, Wadsworth, Bowden, Bush,
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4. The Citizens and FRF obtained a copy of Order No. PSC-12-0104-FOF-EI, issued March 8, 2012, and Order No. PSC-13-0084-PCO-EI, issued February 13, 2013, from the Commission's website on or near the respective dates of issuance. The Citizens and FRF raise herein additional matters that are related to the subject matter of these orders and that are not encompassed within their scope.

5. The disputed issues of material fact known at this time are described more fully below. Pursuant to Sections 366.04, 366.041, 366.05, 366.07, and 366.06(1),¹ Florida Statutes, and consistent with the Settlement approved by Order No. PSC-12-0104-FOF-EI, the Commission has jurisdiction over this matter. It has the authority and duty to prescribe and fix just and reasonable rates and charges that PEF may charge, as those rates are affected by the regulatory

¹ In pertinent part, Section 366.06(1), Florida Statutes, provides that, "The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, less accrued depreciation, and shall not include any goodwill or going-concern value or franchise value in excess of payment made therefor."

treatment of CR3, to resolve all disputed issues of material fact alleged herein, and to grant the relief requested by the Citizens and FRF accordingly.

6. Citizens and FRF reserve the right to take positions and file testimony on any additional issues raised by any other party or which may otherwise arise during the pendency of this docket.

7. This Petition is filed pursuant to Rule 28-106.201, F.A.C., and has been timely filed.

8. Sections 120.57, 120.569, 366.04, 366.041, 366.05, 366.06, and 366.07 Florida Statutes, are the specific statutes that require the Commission to take action in this matter.

9. Citizens and FRF request that the Commission take actions with respect to this Petition and the matters addressed herein as described in Parts I, II, III, and IV of the Request for Relief Section below:

BACKGROUND

On October 2, 2009, while in the midst of a planned outage conducted in conjunction with its Steam Generator Replacement Project (“SGR”), PEF discovered a significant delamination (cracking and separation) in the concrete wall of Bay 3-4 of the CR3 containment building while attempting to cut a large opening in that building to remove the old steam generators and install new steam generators. That discovery and subsequent repair efforts, which in turn led to additional cracking of the containment structure, resulted in an extended unplanned outage of PEF’s lowest running cost base load generation unit. This unplanned outage has exceeded three years in duration.

On or about January 20, 2012, following months of investigations and negotiations, PEF and the Office of Public Counsel, the Florida Retail Federation (“FRF”), PCS Phosphate (“PCS”) and the Florida Industrial Power Users Group (“FIPUG”) (collectively, the “Intervenor Group”) executed and filed the Settlement with the Commission. Among other provisions, the Settlement

established that PEF would refund \$288 million to customers (\$388 million if certain events – that have now come to pass – were to occur). The Settlement did not make any finding with respect to fault or prudence regarding PEF’s actions to that point, and the signatory Intervenor parties waived their rights to seek a fault or prudence determination regarding PEF’s actions and decisions that led to the damage.² At the same time, PEF and the Intervenor Group acknowledged that PEF’s insurance reimbursement claims with NEIL were unsettled. The Settlement made no assumptions or presumptions concerning insurance recoveries under existing policy coverages, but provided that those matters would be addressed when appropriate,

Among the matters and issues that the signatory members of the Intervenor Group did *not* waive were the following:

- The prudence or reasonableness of PEF’s accepting any insurance settlement with NEIL, including both the prudence of accepting *any* settlement at all and the prudence of the *amount* of any settlement that PEF might accept.
- Allocation of any shareholder contribution in lieu of insurance proceeds as between offsetting replacement fuel costs resulting from the prolonged outage and reducing the remaining asset value of the CR3 asset.
- Determination, for ratemaking purposes, of the value of the CR3 asset following the then-hypothetical retirement of the CR3 unit.

The scope of the Settlement also does *not* encompass the prudence of PEF repair activities subsequent to February 22, 2012, the utility’s resolution or settlement of insurance coverage and reimbursement from NEIL, or PEF’s course of action toward settling its insurance claims with NEIL. PEF’s prudence or imprudence with respect to these subjects was not

² The scope of the Settlement, including the extent of any matters that were waived in consideration of the refund amount, is treated in Paragraph 7 of the Settlement. The Intervenor Parties reserved all rights unless “expressly waived” under its terms. (See, Paragraph 2).

resolved by the Settlement or the Order approving it. By this Petition, the Citizens and FRF present the above “open items” to the Commission for resolution.³

The Settlement also provides for certain accounting treatment for CR3 that largely depended upon whether the CR3 unit would be repaired or retired. With respect to the PEF/Duke Energy decision to retire the plant – which decision has now been made – and with respect to calculation and recovery of the CR3-related costs and the creation of a Regulatory Asset, the Settlement in Paragraph 11.b, provides:

Upon PEF's decision to retire CR3, and until inclusion in customer rates, which inclusion shall not occur prior to the first billing cycle in January 2017, PEF will be authorized to implement deferral accounting through the creation of regulatory assets to address the revenue requirement associated with all CR3 related costs (including, but not limited to actual depreciation/amortization expense, operation and maintenance expense, property taxes, and cost of capital return) and regulatory liabilities to address O&M costs, which may be funded from the Nuclear Decommissioning Trust or obviated by ceasing operations, and property taxes which may no longer be assessed (for example, a type of regulatory liability would entail Retail Nuclear O&M 2010 MFR C-4 \$90 million (per year) (See Exhibit 7) less actual incurred O&M deferred as a regulatory asset). The cost of capital return or carrying charge will be based on the approved AFUDC rate with the cost of equity set to 70% of the then Commission authorized rate (See Exhibit 3); it being the intent of the Parties that whenever the Commission authorizes a change (whether an *increase* or a decrease) to PEF's return on equity *in* the future, the 70% formula in this paragraph will apply to any remaining CR3 investments. PEF shall not seek an increase in customer rates for the aforementioned revenue requirements on the net costs deferred and accumulated in the regulatory assets or liabilities such that the effective date of said increase would occur prior to the first billing cycle of January, 2017. Nothing in this Agreement shall preclude PEF from filing for such an increase during the Term so long as the increase would not occur prior to the first billing cycle of January 2017. Any subsequent request for increase in customer rates to include recovery of the costs of the retired CR3 asset shall also be based on the overall cost of capital utilizing the same formula of 70% of the cost of equity being requested, with the cost of equity remaining subject to the Commission's final order. The Intervenor Parties waive their rights to challenge the prudence of any decision by the Company to retire CR3, and to contest PEF's right to recover a return of and return on the deferred and accumulated CR3 investments, regulatory assets/liabilities, and carrying costs, in the above referenced rate increase proceeding using the reduced rate of return specified above, or any other proceeding. **The Intervenor Parties retain the right**

³ By executing the Settlement, PEF implicitly acknowledged the pendency of matters beyond its limited scope.

to contest the calculation of the deferred regulatory asset, and the execution of the repairs, if any, subject to the terms of paragraph 10. The Parties agree that the balance of regulatory assets pursuant to this Agreement shall not be used as the basis for interim rate relief or included for purposes of determining whether PEF's rate of return on equity has fallen below 9.5% so as to trigger PEF's right to seek a base rate increase pursuant to paragraph 20 of this Agreement. The Parties agree that any remaining CR3 investments shall be amortized through 2036.

(Emphasis added).

As a result of PEF's decision to retire CR3, the repair decisionmaking provisions remain relevant to the extent that they relate to and bear on the determination of insurance coverage and *PEF's required efforts to secure the full level of insurance reimbursement for its claims presented under the four NEIL Policies⁴ that pertain to the losses caused by the CR3 Outage.⁵* Under the Settlement, in a unit retirement scenario, all insurance proceeds shall be applied to the benefit of PEF consumers (i.e. to mitigate the substantial cost and rate impacts of the unit retirement). The Settlement reflects the Intervenors' expectation that PEF was committed to seek maximum recovery under the NEIL Policies. Moreover, as a monopoly public utility regulated under Chapter 366, Florida Statutes, PEF has an obligation to its captive customers to exert full efforts to provide service at the lowest reasonable costs – which, in this instance, means doing everything necessary to maximize its recovery under the NEIL Policies in order to minimize costs to its customers.

⁴ "NEIL Policies" means the policies described in PEF's response to OPC's Third Set of Interrogatories, No. 28;

⁵ "CR3 Outage" means the extended outage occasioned by the discovery of the delamination in Bay 3-4 on October 2, 2009;

SPECIFIC REQUESTS FOR RELIEF

I. NEIL INSURANCE CLAIMS

On February 5, 2013, PEF announced its decision to retire CR3 and its intent to accept the NEIL Settlement⁶ amounting to only \$530 million as total remaining compensation⁷ from NEIL for all CR3 outage-related losses covered by the four NEIL Policies. OPC and the FRF do not here challenge the decision to retire CR3. However, OPC and FRF do challenge the prudence and adequacy of PEF's intent to accept only \$530 million in settlement of its insurance claims under the NEIL Policies. Unless PEF fulfills its obligations to act in the customers' best interests when pursuing its insurance claims and demonstrates that it has pursued its claims aggressively and exhaustively, the Commission should act to protect PEF's customers from the monetary consequences of PEF's insufficient efforts. The Commission can and should do so by imputing greater amounts of insurance proceeds for its regulatory and ratemaking purposes and in furtherance of its broad authority under Chapter 366 to establish fair, just and reasonable rates.⁸

⁶ "NEIL Settlement" means the agreement by PEF and NEIL announced on February 5, 2013 where NEIL will pay \$530 million to settle all claims related to the CR3 Outage.

⁷ Prior to halting payments after May 17, 2011, NEIL had paid PEF a total of \$305 million for losses under both the replacement power (\$162 million) and repair or property damage (\$143 million) categories.

⁸ *In Re: Petition of Tampa Electric Company for Authority to Increase Its Rates and Charges*, Docket No. 850050-EI, 85 FPSC 12:95, 1985 WL 1090302 (Fla.P.S.C.) (Commission imputed revenues for Big Bend Unit 4 excess capacity sales to Florida Power & Light); *Gulf Power Company v. Florida Public Service Commission*, 453 So.2d 799 at 806 (Fla 1984) (imputation of \$5,391,931 in revenues by the Commission clearly within the delegated authority of the Commission); *In Re: Petition of Florida Power Corporation to Increase Its Rates and Charges*, Docket No. 820100-EU Order No. 11628, February 17, 1983, 83 FPSC 148, 1983 WL 819531 (Fla.P.S.C.) (Commission imputed revenues to protect the general body of customers from the company's decision to enter into a franchise agreement and absorb certain costs); *In Re: Water Management Service, Inc.*, Docket No. 100104-WU Order No. PSC-11-1056-FOF-WU, Issued March 7, 2011 (imputation is a tool available to the Commission to protect customers); *In re: Application for a rate increase by City Gas Company of Florida*, Docket No. 030569-GU, issued February 9, 2004 (Commission imputed lower cost of debt to protect regulated customers from the financial difficulties created by the parent company).

BASIS FOR RELIEF

The \$530 million of NEIL proceeds that PEF intends to accept without further efforts to pursue its claims is woefully inadequate in light of the circumstances that gave rise to the claims, the enormity of the loss, the policy limits, public statements that PEF made prior to and after the Commission's vote to accept the Settlement, and the importance to PEF customers of full insurance reimbursement to the coverage limits. Accordingly, it is unreasonable, imprudent, and contrary to customers' best interests for PEF to accept this expedient and patently insufficient settlement with NEIL. During the negotiation of the Settlement, the Public Counsel, along with the Intervenor Group, strongly supported repair of CR3, if technically feasible, in a cost-effective and timely fashion. Throughout the period following the initial October 2009 delamination event and also following the March 2011 and July 2011 delamination events, PEF consistently told the Intervenor Group, and the public generally, that repairing CR3 was technically feasible. These statements were corroborated and supported by reports of multiple consulting engineering teams, including the team assembled by Zapata Engineering at the behest of Duke Energy Corporation. The Zapata team's report was made public on October 1, 2012.

PEF's decision to retire the unit after three years of study conveys the catastrophic nature of the damage to the containment structure. Customers have paid insurance premiums of tens of millions of dollars through rates that PEF has charged in the decades during which CR3 has been in service for insurance coverage in the event of accidents such as the one that crippled the unit. The NEIL Policies, for which PEF's customers paid, are part of a broader picture, in that there has been an understanding that the nuclear generation industry, of which PEF and Duke are a part, has maintained insurance policies for the benefit of customers and the general public upon which regulators and customers have relied. This understanding was manifested in the public

statements that PEF made regarding its confidence that sufficient insurance coverage existed to allow PEF to finance the repairs necessary to return CR3 to service. This understanding was also acknowledged by PEF in recent sworn testimony before this Commission that the NEIL insurance monies directly and primarily benefit PEF's customers.⁹

In fact, on February 16, 2012 – 6 days before the Commission voted to approve the Settlement – PEF stated in its 2011 Earnings Results and 2012 Earnings Guidance (Form 10-K) that “PEF believes that all applicable costs associated with bringing CR3 back into service are covered (under NEIL Policies).” A similar representation appeared in the Progress Energy, Inc. 2012 3rd Quarter Form 10-Q, filed on November 8, 2012.¹⁰ However, while the most recent and refined estimates of the repair costs required to return CR3 to service range from approximately \$1.5 billion to \$2.4 billion, PEF proposes to accept only \$835 million in total payments to settle the insurance claims that it lodged with its nuclear generator cousins. Of this amount, approximately \$490 million is ostensibly for replacement fuel costs. By implication, PEF appears to have accepted a settlement of only \$345 million that can be attributable to non-replacement power costs incurred by PEF as a result of the CR3 catastrophe.

Given that the maximum amount payable under the replacement power policy (E-series), assuming a single event, is \$490 million, the remaining \$345 million offered by NEIL barely covers the initial out-of-pocket repair (including assessment and engineering design) expenditures of \$324 million *to date* reported in PEF's financial reporting documents.¹¹ These repair costs would be included in applicable costs recoverable under the property damage

⁹ Testimony of Marcia Olivier at the November 5, 2012 fuel adjustment clause hearing in Docket No. 120001-EI, T 76-77.

¹⁰ On page 26 of the PGN 2012 3rd Quarter Form 10-Q, it states: “PEF continues to believe that all applicable costs associated with bringing CR3 back into service are covered under all insurance policies.” See also footnote No. 12, *infra*.

¹¹ See p.26 of PGN Third Quarter Form 10-Q.

policies (P-, X-, BX- series) having a combined single-event limit of \$2.25 billion. The aggregate deductibles for the NEIL Policies for a single event total approximately \$79 million. (The deductible amount for the property damage is \$10 million and the deductible amount for the replacement power policy is roughly \$69 million which is 12 weeks' worth, or 12/52 of approximately \$300 million in annual replacement power costs). Given the fact that PEF has stated that total replacement power costs to-date are well in excess of \$490 million, the NEIL Settlement does not even cover the minimal (i.e. before beginning to consider the costs associated with the total loss of the entire nuclear plant) actual out-of-pocket costs incurred by PEF because of the damage PEF did to the CR3 containment building.

Notwithstanding the tens of millions of dollars in premiums paid by PEF customers over the years, the total payout by NEIL effectively provides ZERO contribution to loss of the building under the "Actual Cash Value" provisions of the NEIL policies.¹² OPC and the FRF assert that PEF's willingness to accept a token amount of coverage without pursuing the matter further¹³ is an embarrassingly inadequate effort toward fulfillment of its obligation to its customers. More broadly, it is practically a fraud upon the electricity consuming public that has relied for decades upon the nuclear utility industry-fashioned insurance coverage scheme that is designed to maintain confidence in the ultra-high risk world of nuclear generation.

The Public Counsel and FRF seek a comprehensive review and determination of the prudence of PEF's proposed acceptance of the NEIL Settlement. This request seeks a determination of whether PEF's actions relating to the NEIL Settlement were prudent and

¹² Under the Property Damage policies (P, X, BX series), the payout under a retirement scenario is to be determined under an Actual Cash Value approach, defined as "the amount determined by taking the Replacement Cost of the Insured Property and reducing it by straight line depreciation at a rate of three percent (3%) per year, subject to a maximum depreciation of fifty (50%). Essentially, PEF would be entitled to half of the full cost of repairing the CR3 containment building under the plain reading of the policy.

¹³ Under the Neil Policies, PEF has the right to litigate its claims through arbitration if the insurer does not offer an adequate settlement. See, e.g., Section V.G of the P-Series NEIL policy.

consistent with the Settlement and the expectations of the Parties and the customers and the Commission. In order for this to be accomplished, PEF must demonstrate that it has done all that is possible to minimize the enormous burden that the loss of CR3 has placed on the backs of customers. The Commission should enforce the expectations it had at the time it approved the Settlement.

At the most basic level, PEF's customers should not be prejudiced by Duke/PEF's actions that subordinated an aggressive pursuit of full coverage under the NEIL policies to its desire to focus on implementation of the Duke/PEF merger, creation of a new company and eagerness to move beyond the unpleasantness in Florida. Throughout the time of the extended outage and up to the period immediately preceding the Commission's vote on the Settlement, PEF made several public statements to the effect that it expected that NEIL coverage would be sufficient to cover the costs of bringing the plant back into service. Along with these statements, the Company publicly stated that its repair efforts would be to execute a "global repair" of the building. At the same time, PEF was in the midst of a long merger process with Duke Energy Corporation ("Duke"). During the settlement negotiations, the Public Counsel and FRF materially relied upon public statements by the CEO of PEF's parent – Progress Energy, Inc. ("PGN") – that Bill Johnson was motivated to repair if feasible.

A chronological summary of key events in this unfortunate saga shows the following:

- In January 2011, Duke and PEF announced that they had agreed to merge and that the deadline for concluding the merger was December 31, 2011.

- As part of the merger agreement, it was agreed that PGN CEO Bill Johnson was to become the CEO of the merged companies.
- On March 14, 2011, a second very large delamination was discovered in the wall of Bay 5-6 and in May 2011, NEIL ceased making any payments to PEF under the NEIL Policies.
- On or about July 27, 2011, a third very large delamination was discovered in the wall of Bay 1-2.
- From May 2011 until January 2012, the Public Counsel and other Intervenors negotiated the Settlement agreement with PEF.
- During this time, public statements by PEF executives, including Mr. Johnson, were supportive of repair as the preferred option.
- Late in the fourth quarter of 2011, Duke and PEF agreed to extend the deadline for closing the merger until July 8, 2012.
- Sometime during January 2012, the Duke Board of Directors considered and voted to approve the then proposed Settlement, as a part of the PEF internal approval process. (See also July 20, 2012 testimony of Duke Director Michael Browning before the North Carolina Utilities Commission (“NCUC”).¹⁴

¹⁴ **Browning:** A: Right. My problem with CR-3 isn't the cost of what the repair or replacement might be at Crystal River. My -- the date for me where -- when I began to look at this situation differently occurred in mid-January when we had a --

Q: January --

- The Settlement was submitted to the Florida Public Service Commission on January 20, 2012 and hearings and a vote were scheduled on February 20 and 22, 2012, respectively.
- On February 16, 2012, PEF held a call with investors and made public comments about the Settlement and CR3 and NEIL, including a statement by the CEO (Johnson) that “We believe that all applicable costs associated with bringing Crystal River 3 back into service are covered” and by the CFO (Mulhearn) that “our negotiations continue with NEIL regarding coverage associated with the second delamination, and we continue to believe that all applicable costs associated with bringing CR3 back into service are covered under the insurance policies.”¹⁵
- On February 20, 2012, the Commission held a hearing on the Settlement and on February 22, 2012, the Commission voted to approve the Settlement.
- On March 8, 2012, the Commission issued Order No. PSC-12-0104-FOF-EI, approving the Settlement.
- On July 2, 2012, the Duke/Progress merger closed and approximately an hour later, the newly constituted Board of

Browning: A: 2012, when we were asked to -- to approve a rate case settlement between Progress and the commission in Florida. It was a very complicated document. We were given it the same day that we were asked to vote on it.

(Vol 4 transcript, p.54/line 19 – p.56/line 16.)

¹⁵ Seeking Alpha Transcription of Progress Energy (PGN) Q4 2011 Earnings Call February 16, 2012 2:00 PM.

Directors of the merged entity fired Bill Johnson (the presumptive CEO of the merged entity) and concurrently installed Jim Rogers, the CEO of the legacy Duke Energy entity who also was a member of the Duke Board of Directors that voted to approve the Settlement in January 2012.

- In hearings held before the NCUC in the aftermath of Johnson's abrupt departure, Duke's displeasure with the emphasis on repair and the lack of a settlement with NEIL were identified by Mr. Rogers as contributing factors to the ouster of Mr. Johnson.¹⁶
- In the ensuing months leading up to the February 5, 2013 retirement announcement, from the Intervenor Party perspective, Duke and PEF appeared to lose interest in arbitrating a settlement with NEIL and in repairing the CR3 unit, predictably resulting in the announcement of PEF's intent to accept the shockingly low NEIL Settlement and its decision to shut the plant down permanently. Clearly, Duke's appetite

¹⁶ **Rogers:** [A:]. . . Another concern was around Crystal River. And the concern -- this really kind of was around a couple different aspects of Crystal River. Our board believed that -- they had concerns about whether or not realistic assessments the best way forward with Crystal River. And I'd say I simply with that what we were led to believe about where they were in the negotiation -- where Progress was in the negotiations with NEIL and their continued push for repairing that unit --

Q: Whose push? NEIL's or Progress'?

Rogers: A: Progress' push -- and their earnings costs and their publications 'cause we'd expressed clearly to them that we really need as a new board to consider whether to retire or replace. And what we thought was going to be resolution of the NEIL issue, led to believe, turned out not resolved and we are now in mediation with respect to that.

(Vol 1 transcript, p.33/line 24 – p.35/line)

for a spirited dispute with NEIL over the amount of insurance proceeds waned after the merger was consummated and as the emerging details of the CR3 repair option became more complicated.

In short, the strong incentive for PEF and Duke to “close the book” on the CR3 calamity is readily apparent. It is equally obvious that PEF has a perverse rate setting incentive to preserve as much of the CR3 regulatory asset as possible. The NEIL settlement reflects the combined impact of those forces to the utility’s benefit, to NEIL’s immense relief (in avoiding a landmark payout under its policies), and to the substantial disadvantage of PEF’s current and future customers for years to come. The NEIL settlement discounts PEF’s estimated CR3 repair costs almost in their entirety. Because of this development and the unexpectedly low (in contrast with the nearly \$3 billion in aggregate policy limits payable under the NEIL Policies) proposed insurance payout, the customers of PEF are entitled to have the Florida Public Service Commission assess the circumstances leading up to the NEIL Settlement, communicate its expectation that PEF will use its best efforts and exhaust all avenues for maximizing insurance proceeds with all requisite vigor,¹⁷ and take measures to protect Florida customers from the consequences of PEF’s and Duke’s imprudent timidity in pursuing insurance claims against its brethren in the event PEF fails to satisfy that requirement.

In the end, the NEIL Settlement boils down to an electric utility-negotiated, cozy deal with an offshore (Bermuda-based), electric industry-owned, insurance mutual company (of which Duke and PEF are members) licensed in Delaware (making it putatively shielded from other appropriate, customer-protective action by Florida insurance regulators). PEF, Duke, and NEIL individually and collectively have pursued their own interests while discarding the

¹⁷ At this point, PEF has not announced publicly or affirmatively stated that it has executed the NEIL Settlement.

interests of Florida electric customers, who had no voice or even presence in the insurance negotiations or mediations.¹⁸ This case presents compelling circumstances for the Commission to place the burden squarely upon PEF to demonstrate why it would be reasonable and in the public interest for PEF's customers to have borne the cost of the NEIL premiums for decades, only to find that the NEIL coverage was a mirage when it mattered the most.

II. MAROONED UPRATE INVESTMENTS

The Public Counsel and FRF request that the Commission find that PEF's customers are not responsible for bearing the costs of investment related to the Phase 2 ("Balance of Plant" or "BOP") portion of the uprate of the CR3 plant; require PEF to refund all monies received pursuant to the related base rate increase that took effect in January 2010; and direct PEF to reduce base rates so as to rescind the 2010 base rate increase associated with the BOP.

BASIS FOR RELIEF

Paragraph 11.a. of the Settlement defines "unrecovered CR3 related investments" as "the unamortized rate-base balance for CR3." The BOP Uprate is not in the rate base.

On August 28, 2009, PEF filed a Petition to remove approximately \$111 million in investment from the Nuclear Cost Recovery Clause ("NCRC") and place it in rate base, pursuant to Section 366.93, Florida Statutes. On October 2, 2009, the delamination that ultimately led to the loss of the entire CR3 plant was discovered. Despite this development, PEF continued forward with the BOP request. PEF amended its Petition on October 30, 2009, with no mention of the intervening delamination. On December 1, 2009, the Commission voted to approve the Amended Petition (with no mention of the delamination), and on December 7, 2009, PEF filed

¹⁸ The Intervenor Group asked to be allowed to observe the mediation session(s) (that were publicly disclosed by PEF and NEIL) but were denied the opportunity.

the base rate increase associated with the BOP Uprate. At that point, the BOP equipment left the NCRC clause and the applicable provisions of Section 366.93, F.S., on a permanent basis. Pursuant to those base rate tariff amendments, PEF implemented a base rate increase of approximately \$16 million effective on or about January 1, 2010. Shortly thereafter, PEF implemented a credit in the NCRC Portion of the capacity cost recovery factor to offset (or zero out) the base rate increase for the BOP investment. As a matter of fact, *the investment related to the BOP was never placed in service*. Base rates were not decreased, however, as a result of any credit effectuated through the NCRC proceeding.

PEF has acknowledged that the BOP assets were never placed in service. In subsequent testimony in the NCRC dockets, the BOP investments have been described as “not yet in service.”¹⁹ In addition, in a nation-wide call with investors on November 3, 2011, Progress Energy CFO Mark Mulhearn described the assets as being in Construction Work In Progress (CWIP).²⁰

¹⁹ See, e.g., Prefiled Direct Testimony of Thomas G. Foster (May 1, 2009) in Docket No. 090009-EI, EX TGF-4, p. 34 of 35 (shows full BOP Phase Uprate asset of \$170,104,388 going into service in December 2009); Prefiled Direct Testimony of Thomas G. Foster (April 30, 2010) in Docket No.100009-EI (no mention of BOP Phase uprate in or out of service); Prefiled Direct Testimony of Thomas G. Foster (May 2, 2011) in Docket No. 110009-EI, page 20 (describing the BOP uprate costs as “transferred to base rates but not yet placed in service”); EX TGF-4, pp 53-54 of 55 (\$111,441,133 of assets moved to Base Rates and unspecified revenue requirements); Prefiled Direct Testimony of Thomas G. Foster (April 30, 2012) in Docket No. 120009-EI, page 20 (describing the BOP uprate costs as “transferred to base rates but not yet placed in service”); EX TGF-4, pp. 48-49 of 50 (\$111,441,133 of assets moved to Base Rates with an associated revenue requirement of \$16,812,605).

²⁰ **Q: Jonathan P. Arnold** - Deutsche Bank AG, Research Division

Okay. And then one other question we have, I mean in your original guidance for this year, I think there was [sic] clauses and other margin. You would have \$0.15 item coming from there. And it's only been about \$0.03 year-to-date. Is the rest of that showing up in the fourth quarter? Or where is it being made up?

A: Mark F. Mulhern - Chief Financial Officer and Senior Vice President of Finance

Jonathan, I anticipated that somebody smart like you would ask this question. What happened is really it is showing up in lower depreciation because if you recall, what we had anticipated going into the year was that we would have Crystal River 3 back into service so that we would begin collecting to the clauses. **The steam generator replacement issue, the power operate [sic] issue at Crystal River 3, so it's really -- what is happening is those items have stayed in CWIP and are still in construction work in progress, so you see a lower depreciation**

Based on the above facts, the entire CR3 Uprate Project is excluded from the Settlement, save for the provisions of paragraphs 8 (as referenced by paragraph 12) and 12. Paragraph 12 expressly covers uprates that have not been included in base rates. That provision allows PEF to continue NCRC Recovery and add uprates that were NOT included in base rates – under a now moot repair scenario – no sooner than 9 months after a putative return to service of the unit. By definition, this covers the two uprates: (1) the low pressure turbine-portion of the BOP and (2) the Extended Power Uprate (EPU), which are both still subject to the NCRC. The Public Counsel and FRF assert that PEF cannot re-insert the BOP assets - forever removed from NCRC Cost Recovery on December 7, 2009 - into the NCRC docket or invoke Sections 366.93 or 403.519, Florida Statutes, for recovery. In essence, these assets are marooned by the decision to retire CR3, and have been abandoned for all purposes relevant to ratemaking. Particularly under circumstances in which PEF proceeded with the BOP uprate project with virtually no property damage coverage, the investments should not be afforded deferential treatment that would prejudice customers. The Settlement does not allow the BOP related assets to be included in the CR3 Asset, and the NCRC does not have any provision allowing *completed* projects no longer eligible for advance recovery to be forced back into the NCRC merely for the utility's convenience. The costs related to these futile investments should be borne by Duke shareholders, not Florida electric customers.

number. So you won't see that clause in other margin make up in Q4, but you do see an offsetting positive number and lower depreciation and amortization.

(Seeking Alpha Transcription of Progress Energy (PGN) Q3 Earnings Call November 3, 2011 10:00 AM ET.)
(Emphasis added)

III. PARAMETERS OF CR3 REGULATORY ASSET

The Public Counsel and FRF request that the Commission conduct a formal evidentiary proceeding and issue a final order that will accomplish the following:

- A. Determine the components and total amount of the CR3 Asset;²¹
- B. Determine the methodology to be utilized by PEF in identifying the currently indeterminate components and amounts of costs to be included in the CR3 Asset; and
- C. Take all steps necessary to determine, monitor, minimize and adjudicate the amount of the CR3 Asset, including the auditing, monitoring, and establishment of any necessary criteria for creation and inclusion of defined expenses to be recognized in determining the value of the CR3 Asset.

BASIS FOR RELIEF

Under the terms of the Settlement, PEF is to develop and present for consideration a “regulatory asset” consisting of certain CR3-related components. The Settlement addresses the regulatory asset in conceptual terms; implementation of this aspect of the Settlement requires the development of specifics. Now that Duke/Progress has decided to retire CR3, the issue of the value of the CR3 regulatory asset is fully ripe for determination. The amount of insurance proceeds – whether actually realized by Progress or imputed by the Commission as the amounts that Progress should reasonably and prudently have obtained for its customers’ benefit – that will

²¹ “CR3 Asset” means the asset defined in paragraph 11.b. of the Settlement.

be used to “write down” the asset value is a critical component of determining that asset value.²² Moreover, because it is likely that PEF will expend significant sums on O&M costs between now and January 1, 2017, which costs it intends to capitalize into the CR3 regulatory asset value for recovery starting on or after that date, it is essential that the Commission act now to establish the criteria, methodologies, and standards for determining what amounts of what cost items (such as “avoidable” O&M expenses) can legitimately be capitalized into the CR3 asset value. So that customers can have the benefit of greater certainty, so that the Commission can ensure that Progress’s rates, as affected by its destruction and abandonment of the CR3 nuclear unit, are based on Progress’s legitimate, prudent investment in CR3 that is appropriately recoverable pursuant to Section 366.06(1), Florida Statutes, and so that the Commission can identify the impact of the loss of the benefits (including, but not limited to, fuel benefits) of the CR3 nuclear plant on customers, the Commission should consider and establish the necessary parameters, criteria, methodologies, and auditing standards as expeditiously as possible.

For all of the above reasons, the Public Counsel and FFF request that the Commission take all necessary and appropriate actions to protect the customers of PEF and to insure that they bear no more of the costs of the financial and economic disaster visited upon them by the CR3 Outage. Specifically, the Public Counsel and FRF request that the Commission establish a proceeding to consider and take the actions identified in Parts I, II, III and IV of the Request for Relief section of this Petition.

²² The Public Counsel and FRF are authorized to represent that the Intervenor Group is actively discussing allocation of a portion of NEIL proceeds to offset the cost of the Regulatory Asset. At this time, no member can state that allocation to the asset is not a possibility.

IV. OTHER PROCEEDURAL MATTERS

OPC and the FRF are aware that Order No. PSC-13-0084-PCO-EI, issued February 13, 2013, in this docket, has set forth controlling dates and procedures pursuant to which the Commission proposes to address Phase 2 and Phase 3 of this docket. However, the Public Counsel and FRF believe that the proposed schedule and procedures are insufficient to protect the rights and interests of PEF's customers with respect to the substantial issues affecting PEF's customers as a result of PEF's February 5, 2013 announcement that it will retire Crystal River Unit 3 and accept an insurance settlement.

OPC and the FRF submit this Petition in the above docket because the subjects of the Petition are related to the issues that have been identified to date. However, it is obvious that the time frames that are contemplated for the existing activities would clearly be inadequate to address this Petition. OPC and the FRF prefer and strongly urge the Commission to establish a revised schedule that will accommodate all of the related issues.

In the event that the Commission declines to modify the schedule established by Orders PSC-13-0080-PCO-EI and PSC-13-0084-PCO-EI, the OPC and FRF request that the Commission treat this petition as commencing a separate proceeding.

CONCLUSION

Specifically, on behalf of the Citizens of the State of Florida, the Public Counsel requests, and on behalf of its members, the Florida Retail Federation requests, that the Commission issue a final order or orders that would accomplish the following.

- A. Order PEF to obtain maximum insurance proceeds for the benefits of its customers, or, after appropriate proceedings, determine that PEF's efforts were imprudent and insufficient, and order that PEF/Duke shareholders shall bear the

difference between the amount of the NEIL Settlement (\$530 million) and the full value of insurance proceeds to which PEF's customers are entitled, which the Public Counsel and FRF assert is at least \$500 million over and above the \$530 million represented by the NEIL Settlement.

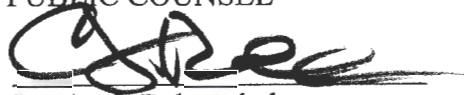
- B. Disallow recovery from customers of the approximately \$111 million in Balance of Plant costs associated with the now-abandoned and wasted and marooned CR3 Uprate project, direct PEF to refund all monies collected pursuant to the related base rate increase that became effective on December 31, 2009, and order that base rates be reduced by \$16,812,605 annually.
- C. Determine the recoverable amount of the CR3 Asset and include only those amounts that are reasonable and prudent, and specifically excluding avoidable operation and maintenance costs that PEF might otherwise attempt to capitalize into the value of the CR3 Asset. The Public Counsel and FRF believe that the amounts of such costs at issue in the requested proceeding exceed \$100 million. Further, in conjunction with determining the amount of the CR3 Asset, the Commission should establish the auditing and monitoring requirements, and necessary and appropriate limits and criteria to be applied in determining both the ultimate value of the CR3 Asset, but also in determining ongoing operation and maintenance costs that are appropriately recovered from customers during the pre-decommissioning period (expected to last from the present until approximately 2036) before the defunct CR3 plant is actually decommissioned.

WHEREFORE, the Citizens and FRF hereby Petition the Commission to reschedule and enlarge the evidentiary hearing contemplated by Order No. PSC-13-0084-PCO-EI, and conduct a

formal evidentiary hearing, as required under the provisions of Section 120.57(1), Florida Statutes, to address the issues raised by OPC and the FRF in this Petition.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and foregoing copy of the PETITION OF THE CITIZENS OF THE STATE OF FLORIDA AND THE FLORIDA RETAIL FEDERATION FOR AN ORDER INVESTIGATING THE PRUDENCE OF PROGRESS ENERGY FLORIDA'S EFFORTS TO OBTAIN NEIL INSURANCE PROCEEDS, ESTABLISHING THAT CUSTOMERS HAVE NO RESPONSIBILITY FOR COSTS OF CERTAIN ABANDONED CR3 UPRATE COSTS THAT ARE NO LONGER SUBJECT TO THE NUCLEAR COST RECOVERY MECHANISM, AND DELINEATING PARAMETERS OF CR3 "REGULATORY ASSET" has been furnished by electronic mail and/or U.S. Mail on this 25th day of February 2013, to the following:

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