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b. Docket No. 100437-EI

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

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Thank you for your attention and cooperation to this request.

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

| In re: Examination of the outage and replacement fuel/power costs associated with the CR3 steam generator replacement project, by Progress Energy Florida, Inc. | DOCKET NO.: 100437-EI<br><br>FILED: April 19, 2013 |
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## INTERVENORS' JOINT BRIEF

The Citizens of the State of Florida, by and through the Office of Public Counsel ("OPC"), the Florida Industrial Power Users Group ("FIPUG"), the Florida Retail Federation ("FRF"), and White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate -White Springs ("White Springs"), hereinafter, Intervenors, hereby submit this Joint Brief on the scope of hearing issues pertaining to Duke Energy Florida ("DEF").[1]

## PRELIMINARY STATEMENT

This brief addresses the issue regarding the proper remaining scope of this Docket. The issue reads as follows:

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

The Settlement[2] avoided further litigation concerning the prudence of DEF's actions and decisions related to the Crystal River 3 ("CR3") steam generator replacement ("SGR") project and repairs of the CR3 containment building delaminations caused by DEF during its efforts to replace the steam generator. The Settlement further resolved the prudence of DEF's decision,

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

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



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announced in February 2013, to retire rather than attempt further repairs to CR3 (the Intervenors agreed not to challenge that decision). The Settlement expressly reserves all other prudence questions and concerns related to CR3 that may affect consumer rates or have a bearing on other matters that fall within the broad scope of the Commission's regulatory authority pursuant to Chapter 366, Florida Statutes. More specifically, the Settlement in no way judged the adequacy of any aspect of the wholly separate process associated with DEF's unilateral settlement of its insurance claims concerning the CR3 outage with Nuclear Electric Insurance Limited ("NEIL"). Finally, the "Implementation Date" defined in the Settlement (February 22, 2012) does not in any way limit or narrow the scope of discovery or testimony concerning the remaining issues in this docket.

## BACKGROUND

Consideration of the proper scope of this docket requires recognition of the evolving and contemporaneous tracks and activities addressed in this proceeding: (1) DEF's management of the CR3 extended outage from the inception of the SGR Project and including the initial failed repair efforts up to the utility's decision, announced on February 6, 2013, to retire rather than attempt (again) to repair the damaged nuclear power plant, and (2) DEF's on-going handling of its insurance claims with NEIL associated with that extended outage.

In tandem with its decision to seek a -twenty-year extension of the operating license for CR3 from the Nuclear Regulatory Commission ("NRC") (i.e., to allow the plant to continue running through 2036), DEF planned a $500-plus million investment to replace the CR3 steam generator. This capital investment project is known as the Steam Generator Replacement Project ("SGR" or "SGR Project"). The majority of the existing 104 commercial nuclear plants in the United States have sought, and received, twenty-year operating license extensions from the

NRC. For pressurized water reactors, such as CR3, long-term performance degradation associated with steam generator tube leaks and other physical deterioration typically has required replacement of the steam generators originally installed to accommodate such license extensions (or sooner in some cases).

DEF decided to self-manage the SGR project and further determined to create an opening in the side of the containment building in order to remove the old steam generator and install the new one. In eleven prior SGR projects, none of them self-managed, other utilities had created openings in containment structures for a similar purpose without experiencing any lasting damage to the containment building. Duke's attempt to detension steel tendons and create an opening for its SGR project, however, caused a significant internal crack (delamination) in segment 3-4 ("Bay 3-4") of the containment building on October 2, 2009 ("10/09 delamination"). Duke investigated the cause of the delamination, evaluated its options, and commenced efforts to repair the crack and restore the unit to commercial service. The utility also filed a claim with its insurance carrier (NEIL) for nuclear outage and property damage insurance for this event. NEIL representatives investigated the claim, acknowledged the validity of the claim under the policy, and, following the deductible allowances stated in the applicable policy, began making payments to DEF for both unit repairs ("Property Damage") and replacement power ("Accidental Outage") costs as provided under the applicable NEIL policies. In 2010, the Commission opened this docket to evaluate prudence questions related to the extended CR3 outage.

DEF installed the replacement steam generator and replaced the concrete in the area of the delamination damage to Bay 3-4, as well as in the opening that it had intentionally created. On March 14, 2011 ("3/11 delamination"), while attempting to retension the building in order to

return it to commercial operation, and thus complete the repair, DEF caused another delamination in the containment structure. This precipitated a more extensive assessment of the condition of the containment building and the repair options. In May 2011, coincident to this development and the expanded scope and cost of repairs that may be required, NEIL stopped making payments on the insurance claim. Representatives of DEF and NEIL conducted on-going discussions regarding DEF's insurance claims relating to the CR3 outage and repair plans.

As required by the Commission given the substantially expanded breadth of the damage to CR3 and the probability that the unit outage would be much more lengthy, DEF provided periodic status reports concerning its investigation of the containment delamination causes, its technical reviews of repair options, including estimated repair costs and schedules, and its overall evaluation concerning whether it would attempt additional repairs at all (i.e., retire the unit). DEF's status reports to the Commission disclosed only that its discussions with NEIL were ongoing, until DEF announced in February 2013 that it had reached a settlement with NEIL concerning all CR3 related-claims. As is apparent below, the DEF actions and decisions that are the subject of scrutiny in this docket continued to change as this case evolved.

In its status report dated June 27, 2011, DEF informed the Commission that, based on its technical reviews, DEF management had determined that repair of the damage to CR3 was technically feasible, that repairing the unit was preferable to retiring it, that the CR3 containment repair carried an estimated cost in the range of $900 million to $1.49 billion, and that the repair could be accomplished before the end of 2014. At that point, DEF management had not finally selected a vendor to perform the repair, but was considering proposals by two competing firms.

The Commission's Order Establishing Procedure ("OEP") in this docket, dated August 23, 2011, acknowledged the challenges associated with the technical complexity of the

containment repair issues, the desire for a timely resolution of those issues, and the inherent need to avoid premature determinations with respect to events, actions and decisions that were still unfolding:

> This docket involves a thorough review by the Commission and by the intervening parties of the prudence of PEF's conduct in replacing the steam generator at CR3. It is a complex docket involving events and decisions that have occurred in the past. It also includes events and decisions that are yet to occur.[3]

The OEP accordingly established three distinct phases for this prudence review as follows:

Phase I: Assess PEF's (Duke's) decisions and actions for the SGR project leading to the initial October 2, 2009 containment delamination.

Phase II: Assess PEF (Duke's) management's decision to repair rather than retire and decommission CR3.

Phase III: Assess PEF's (Duke's) decisions and actions from the October 2009 delamination to the subsequent March 14, 2011 Bay 5-6 delamination and the subsequent final repair of the CR3 containment structure.

At that time, only Phase I issues were ripe for adjudication. On October 10, 2011, Duke filed direct testimony and exhibits with respect to Phase I issues even as it continued performing engineering technical evaluations and discussing its insurance claims with NEIL. In a subsequent status report to the Commission, Duke disclosed that it had selected a vendor to perform the repairs and that Duke and the vendor were performing continued study of the required engineering, design and contracting tasks.

Shortly thereafter, Duke and the Intervening Parties entered into discussions which ultimately led to the Stipulation and Settlement Agreement filed in Docket No. 120022-EI that the Commission approved by vote taken on February 22, 2012 (which became the "Implementation Date" under the Settlement Agreement) and a Final Order issued on March 8,

[3] Order PSC-11-0352-PCO-EI, p. 3.

2012 (Order PSC-12-0104-FOF-EI referred to herein as "Order"). As discussed below, the Settlement did not purport to resolve all prudence questions associated with CR3, but only those matters expressly described in the Settlement Agreement.

Events and decisions with respect to CR3 continued to evolve following approval of the Settlement. On July 2, 2012, Progress Energy was acquired by Duke Energy, forming the largest electric utility in the United States. Within hours following closure on the merger, the Duke Board of Directors summarily discharged William Johnson, the Progress Energy Chief Executive Officer who had been tapped to serve as CEO of the combined companies. The ensuing debate concerning this dramatic and unexpected action focused heavily on the extended forced outage at CR3, the issues and uncertainty associated with the repair of the CR3 containment structure, and the reportedly different perspective of Duke's existing senior management concerning the wisdom of attempting to repair the unit at all. Very soon after completing the merger, on August 13, 2012, Duke CEO James Rogers, who replaced Mr. Johnson as CEO of the combined utilities, and other Duke senior management, appeared before the Commission to discuss the merger and Duke's commissioning of an ongoing independent technical review of the Progress Energy repair options for CR3, as well as the estimated repair cost and schedule.

In October 2012, Duke released its independent review team (IRT) report, which concluded that the repair was feasible and largely confirmed the total repair cost estimate, although features of that estimate, including allowances for contingencies, varied. The IRT report (performed by Zapata engineering) assumed a somewhat shorter 30-month repair time, but cautioned that the repair could take as long as 60 months (at an increased estimated total cost of $2.4 billion) if repairs/modifications were required to the CR3 dome. Throughout this period,

Duke publicly reported that it continued to discuss the insurance claims with NEIL and that there was sufficient insurance coverage available to return the plant to service.

On February 6, 2013, Duke announced that it had decided to retire CR3 rather than attempt further repairs intended to return the unit to commercial operation. At the same time, Duke stated that it had reached a settlement agreement with NEIL on all matters relating to the CR3 outage.

## ARGUMENT

The destruction of the Crystal River 3 nuclear plant as a result of the containment structure delaminations caused by DEF is an economic disaster for Florida consumers. Replacement power costs alone over the expected license life of CR3 compared to the scenario, presented by Duke, whereby the SGR project had been successful (i.e., through 2036) will easily exceed $5 billion. Recovery in consumer rates of the now useless nuclear plant, including the new, but never used new steam generator and power uprate investments (which together will cost well over $1 billion), will become a significant burden for ratepayers beginning on January 1, 2017. This docket is the only forum before the Commission to address the prudence questions that were not expressly resolved in the Settlement Agreement approved in Docket No. 120022-EI.

The cause (or causes) of action affecting the substantial interests of the parties to this docket arise under Chapter 366, Florida Statutes, and the Commission's general ratemaking authority granted to it by statute. This is because the outcome of this proceeding will dramatically impact customer rates, including both base rates and fuel charges. This proceeding is subject to Chapter 120, Florida Statutes. Section 120.569, Florida Statutes, applies to all administrative decisions affecting the substantial interests of a party. Section 120.57(1), Florida

Statutes, controls where a proceeding involves a disputed issue of material fact. It follows that a presumption exists that a party is entitled to a hearing on such disputed issues unless it can be shown that there is a legal prohibition to a hearing, such as a waiver, lack of jurisdiction or *res judicata*.

It is clear that there remain disputed issues of material fact whose resolution by the Commission will materially affect Florida consumer rates. There is no prohibition established by statute, rule or the Settlement Agreement that restricts Commission consideration of those matters. As a consequence, the scope of those issues (set out *infra*) should be broadly drawn to ensure that the substantial interests of the parties can and will be decided by the Commission. This case affects over 1.5 million Duke customers (i.e., customer accounts) – well over 3.5 million citizens, young and elderly, working and unemployed, as well as large and small commercial customers, government and private sector customers, and industrial and residential customers. Furthermore, this focal point of the remaining dispute (i.e., whether PEF was imprudent in settling for far less than the $2.25 billion limit under its property insurance policy for CR3) was in no way resolved by the Settlement or the Order approving it.

The importance of the remaining issues is obvious. The costs of writing off the unmitigated disaster – conceivably into the billions of dollars – will be heavily borne by the customers of Duke regardless of the outcome of this docket. Upon expiration of the rate freeze, customers will likely begin paying steeply higher rates on January 1, 2017. The Commission's decisions in this case will meaningfully affect the magnitude of those rate impacts.

**A. The Commission Has Broad Authority and a Public Policy Imperative to Completely Assess All Aspects of Duke's Management of the CR3 Extended Outage.**

In establishing customer rates, the Commission has exercised its authority in an expansive manner for the protection of customers and in determining the public interest. The Florida Supreme Court has recognized that the agency "has considerable discretion and latitude in the rate-fixing process." Gulf Power Co. v. Bevis, 296 So. 2d 482, 487 (Fla. 1974). "[U]pon reviewing the statutes empowering the Commission to fix rates we concluded that 'these statutes repose considerable discretion in the Commission in the rate-making process.' " Id. (quoting City of Miami v. Public Service Commission, 208 So. 2d 249 (Fla.1968)). The Commission has traditionally exercised its authority in an expansive manner for the protection of customers and in determining the public interest, and should do so in this case.

The profound impact of this case requires the Commission to thoroughly explore and implement every means of minimizing customer impacts, using the full panoply of its broad ratemaking authority, especially given that the very same Duke customers will be called upon to pay for a new generation unit (assumedly an approximately $1.5 billion combined cycle unit) and the uninsured, higher fuel costs over the next 20 years occasioned by the loss of CR3. For this reason, the Commission must take great care to interpret the Settlement to give deference to the plain and intended language of the Settlement. This means strictly and narrowly construing the scope of what was earlier resolved and giving substantive meaning to a reservation of rights provision in the Settlement in favor of the Intervenors which requires an ***express waiver*** before any rights to have a hearing are relinquished.

The reasons the Intervenors insist upon an unfettered opportunity to litigate the entirety of Duke's actions in pursuit of the claims under the NEIL policies based on the following facts that no reasonable party can dispute:

a. DEF's customers are the actual party-in-interest and ultimate beneficiary of the NEIL policies;

b. The customers – through rates – have paid approximately $70 million in DEF base rates for premiums to secure the coverage that the policies purported to provide;

c. Customers will be forced to pay for the amortization of the retired CR3 plant for 20 years in an amount that will be increased by every dollar of under-recovered insurance proceeds attributable to Duke's lack of pursuit of full payment insurance proceeds;

d. Duke essentially owes its customers a fiduciary duty when dealing with NEIL for insurance recovery;

e. Duke had a duty to negotiate with NEIL in good faith, notwithstanding that NEIL collectively insures 11 other nuclear units owned by Duke[4], which could have been subjected to pay materially higher premiums had Duke settled CR3 for an amount much closer to the policy limits;

f. Florida customers are vulnerable to Duke's conflicting financial incentives and corporate goals that apply to its efforts to pursue the claims for coverage under the policies, and were powerless to take regulatory action to protect their interests except through this Commission and in this proceeding;

g. Florida customers and the Commission had reasonable expectations at the time the Settlement was executed and approved that the express reservation of rights or non-waiver provision in Paragraph 2 of the Settlement guaranteed that the

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[4] Duke Energy Nuclear Fleet Media Guide at 3, available at http://www.duke energy.com/pdfs/DukeEnergyNuclearFleetMediaGuide.pdf.

customers would have full rights to present the entire course of dealing with NEIL to the Commission for a prudence determination once an outcome of the then-pending insurance claims became manifest and ripe for adjudication;

h. Duke settled the property damage aspect of the claim for what amounts to $202 million for the loss of the CR3 plant due to the March 2011 delamination, against policy limits of $2.25 billion; and

i. Under Florida's applicable law, customers will continue to pay for the extra costs of fuel and generation caused by the forced retirement of CR3 for many years to come.

To this end the Intervenors have proposed the following issues to which Duke has lodged objection:

> **OPC 7:** Did DEF maintain adequate and appropriate accidental outage and property damage insurance coverage for CR3?
>
> **OPC 8:** Did DEF maintain a prudent arm's length relationship with NEIL in all dealings, including negotiation of the scope of policy coverage, endorsement provisions and other amendatory and/or change activities related to the terms and conditions of the NEIL Policies?
>
> **OPC 9:** Was DEF's decision-making prudent with respect to the pursuit (or lack thereof) of claims, if any, against any vendor on the SGR Project or CR3 delamination repair project?
>
> **OPC 13:** As one of the largest members of NEIL, a mutual insurance company, did Duke Energy have a conflict of interest when negotiating with NEIL for insurance proceeds? If so, was that conflict of interest made known to the Commission and intervening parties?
>
> **OPC 24:** What is the amount of CR3 O&M expense currently in rates, if any, and what action should the Commission take at this time with respect to this expense as a result of the DEF decision to retire the CR3 unit?

For the reasons set out below, the Commission should include these issues, which fall safely within the scope of its authority and were not previously resolved in the Settlement, and

any other related issues which may arise during this case, to afford the customers the hearing they are entitled to under the law on the issue of Duke's inadequate pursuit of insurance recovery for the loss of the entire CR3 plant.

As discussed herein, the customers strenuously object to Duke's incorrect reading of the Settlement and urge the Commission to reject DEF's transparent and patently unreasonable attempt to prevent a full assessment of issues that remain undecided. The customers are entitled to a complete explanation and examination of all Duke/NEIL insurance interaction activities that occurred, including but not limited to the NEIL policies that Duke agreed to, the invoices and documentation submitted in support of their claims, their course of dealing with NEIL, the interaction at all levels between Duke and NEIL, Duke's overall corporate motivation in not pursuing expensive recovery of its full claim, the impact of the merger on Duke's appetite to litigate with its nuclear brethren, the insurance recovery strategies available to Duke but discarded in favor of the chosen path, how the insurance claims were processed, whether the insurance claims were handled in accordance with state law and, of course, the amount received relative to the policy limits. The Settlement does not address these matters and thus they are not resolved.

### B. There are Glaring Questions Concerning Duke's Dealings with NEIL that Must be Examined.

Duke's agreement to settle the NEIL claim for what amounts to $202 million for the loss of the CR3 plant following the 3/11 delamination (i.e., not including amounts paid for replacement fuel and the failed repair of Bay 3-4), against policy limits of $2.25 billion, is a significant decision that perversely enhances DEF's finances at ratepayer expense. Unless the Duke shareholders agree to bear the full unreimbursed (by NEIL) costs for the retirement of CR3, Duke is accountable to the customers and the Commission for ***all*** of their decision-making

that led them to accept such an appallingly small amount compared to the amounts that DEF repeatedly informed the Commission were technically required and available under the NEIL insurance policy to repair the unit. The course of Duke's dealings with NEIL must be fully explored starting from the beginning. Among other questions, Duke must explain the following to the Commission: Why was NEIL paying for repairs before 3/11 and then abruptly stopped paying for such repairs in May 2011? Why did Duke make repeated public statements about the full applicability of the policy in the post-3/11 time period and then accept a minimal payment from NEIL?

Especially of concern are the corporate affiliations – existing from before the 10/09 delamination – that require inquiry into the very foundation of the Duke-NEIL relationship. The nature of the policies' provisions and the policy changes that Duke negotiated with its brethren mutual insurer (NEIL), the course of dealing from the time of the 10/09 delamination, the abrupt change in NEIL's behavior after the 3/11 delamination up until the NEIL Settlement was announced, and the relationship between NEIL (owned by all the nuclear utilities in the United States – including Duke and PEF) and Duke are all essential factors that relate to the amount that Duke asks this Commission to bless. Every dollar that Duke left in NEIL's coffers is a dollar that the customers will have to pay absent Commission intervention.[5]

The very fact that the two entities (NEIL and Duke) are inter-related parties places a heightened level of scrutiny and burden of proof on Duke to demonstrate that Duke took every possible step to maximize the payments under the policy for the benefit of the customers who are the true beneficiaries under NEIL. These issues are all part of a single and continuing insured-insurer claims process that existed at least since the 10/09 delamination.

[5] The customers will demonstrate that the "gap" in what Duke received from NEIL and what was available under the policy coverage was at least $750 million assuming that the plant would not be repaired and assuming that the entire set of facts constituted a single event for coverage purposes.

**C. The Rate Settlement Approved in February 2012 Does Not Waive Review of CR3-Related Insurance Issues Because The Settlement did not Attempt to Resolve Those Matters.**

The plain language of the Settlement Agreement – given the language that the waiver must be express – demonstrates that there was no waiver beyond the SGR and delamination repair activities prior to February 23, 2012. Nothing having to do with Duke's obligation to pursue full recovery from NEIL was resolved or waived, nor can it be reasonably argued that there is a constructive, implied or corollary waiver, given that the parties agreed any waiver must be express. To the contrary, the overarching pursuit of the insurance claim was a single ongoing, continuous matter separate and apart from the building-specific actions and has a largely separate set of core actors and facts (many of them legal and managerial). By the express terms of the Settlement (i.e., the last WHEREAS clause), the Intervenors actively and distinctly encouraged Duke to recover everything possible from NEIL under the policies. Duke's agreement to do this is evidenced by its signature on the Settlement Agreement.

The issue of waiver and settlement interpretation was addressed by the Commission in resolving issues attendant to the delay in the consolidated procedural order addressing, among others, the voting in the 2009 Florida Power & Light (FPL) and Progress Energy Florida (PEF) rate cases.[6], Order No. PSC-09-0753-PCO-EI, issued November 16, 2009, at 13-14 ("FPL, 2009"). There, the relevant aspect of the case regarding FPL centered on whether the utility could implement filed rates at the conclusion of the statutory 8-month period since a delay in the voting (occasioned by a change in Commission membership) would extend the final decision

[6] Docket No. 080677-EI, *In re: Petition for increase in rates by Florida Power & Light Company;* Docket No. 090130-EI, *In re: 2009 depreciation and dismantlement study by Florida Power & Light Company; and* Docket No. 090079-EI, *In re: Petition for increase in rates by Progress Energy Florida, Inc.;* Docket No. 090144-EI, *In re: Petition for limited proceeding to include Bartow repowering project in base rates, by Progress Energy Florida, Inc.;* Docket No. 090145-EI, *In re: Petition for expedited approval of the deferral of pension expenses, authorization to charge storm hardening expenses to the storm damage reserve, and variance from or waiver of Rule 25-6.0143(1)(c), (d), and (f), F.A.C., by Progress Energy Florida, Inc. ("FPL 2009")*

past the 8-month deadline or whether FPL had either agreed to not change base rates until new rates had been established (or had waived that legal right) as a result of a stipulation that continued the existing rates until new rates had been established. The Commission determined that principles of contract law govern the dispute about the interpretation of the meaning of paragraph 1 of the 2005 Stipulation and Settlement Agreement between FPL and the Intervenors. Id. at 13. "When a contract's language is clear and unambiguous, it is not subject to interpretation by the courts. Id. (citing Pafford v. Standard Life Insurance Co. of Indiana, 52 So. 2d 910, (Fla. 1951)). "Further, when the language is clear and unambiguous it must be construed to mean 'just what the language therein implies and nothing more.'" Id. (citing Obara v. State, 958 So. 2d 1019, 1022 (Fla. 1st DCA 2007); Walgreen Co. v. Habitat Dev. Corp, 655 So. 2d 164, 165 (Fla. 3d DCA 1995)) (citations omitted). The Commission concluded that the plain language of the 2005 agreement between FPL and the Intervenors clearly requires FPL to keep its base rates in effect until new rates were put into effect by final Commission vote – even if it was past the date that FPL hoped new rates would be effective. In that situation the Commission found that the dispute was essentially one about the interpretation of the meaning of the settlement provision. The Commission found the provision to be clear and that FPL had agreed not to change rates until the Commission voted to change them.

In the instant situation, the same principles apply. It is clear and unambiguous that the Settlement only resolved CR3 matters that are specifically discussed in that agreement, and that the Settlement expressly reserved all other matters for future Commission action. The Order approving the Settlement directly states that the Settlement only settles "certain issues regarding the prudence of PEF's decisions and actions on the steam generator repair project..." Order at p. 1. It is also abundantly clear that the Settlement does not expressly or impliedly purport to

resolve the then-pending questions of the adequacy of the future disposition of Duke's ongoing claims with NEIL or the prudence of the continuous process of Duke's ongoing actions and decisions with respect to those claims. There can be no disagreement that Florida consumers are the real party in interest with respect to the insurance proceeds, since every dime of those proceeds must be used to mitigate the rate impacts to consumers. Accordingly, any and all of Duke's actions and decisions related to the insurance claims, whenever they occurred, are within the proper and necessary scope of this proceeding.

The Commission should find squarely in favor of the customers that the scope of this docket and the rightful inquiry is the process of the entire course of conduct by Duke and NEIL leading to the payment of only $202 million for the total loss of the CR3 plant.[7] As discussed and demonstrated below, the Settlement Agreement is silent on the issue of the prudency of Duke's actions with respect to insurance recovery from NEIL, and thus clear and unambiguous as to what is and is not resolved. As the Commission has previously noted, when the language is clear and unambiguous it must be construed to mean 'just what the language therein implies and nothing more. Order No. PSC-09-0753-PCO-EI, *FPL 2009,*-(citing <u>Pafford v. Standard Life Insurance Co. of Indiana</u>, 52 So. 2d 910, (Fla. 1951)).

Specifically, the Settlement Agreement provided in the relevant portion of Paragraph 7 that PEF would pay to customers $288 million in exchange for the express waiver of rights that reads as follows:

The Intervenor Parties waive their rights to challenge the prudence of PEF's **<u>actions</u>** taken during the period from the SGR project inception through the Implementation Date

[7] The NEIL Settlement (between Duke and NEIL), dated March 28, 2013, at paragraph 2, designates $490 million of the total payments of $835 million as constituting "payment by NEIL of the equivalent of one full policy limits under NEIL's Accidental Outage coverage." The NEIL Settlement further provides that the balance ($345 million) constitutes payment under the property damage policies. Since NEIL paid $143 million for claims through December 2010, this constitutes only costs for the original Bay 3-4 repairs emanating from the 10/09 delamination. Thus, this means that the most that NEIL paid for the total loss of the CR3 plant is $202 million against policy limits of $2.102 billion ($2.25 billion less the $143 million paid for the Bay 3-4 repairs).

> in **connection with the SGR project** or the **repair activities associated with the delaminations,** including but not limited to the actions which resulted in the delaminations of the CR3 containment building in 2009 and 2011. (Emphasis added)

This waiver provision must be read in conjunction with the Settlement's reservation of rights provision in Paragraph 2:

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

These two above-cited sentences demonstrate that the Settlement Agreement is clear on its face that no aspect of PEF's interaction with NEIL has been resolved or is the subject of a waiver of the customers' legal rights to a hearing. This also means that the NEIL insurance issues identified herein (and by the parties) are neither barred under the Settlement from full Commission inquiry and determination, nor subject to the pre-February 22, 2012 prohibition. The plain language expressly references two specific unambiguous subjects: (1) Actions taken in connection with the SGR project; and (2) Repair activities associated with the delaminations. The catch-all "including, but not limited to," clause does not encompass the separate and continuous process of the making, supporting and pursuing the insurance claim. The insurance claim process is not a "repair activity." The "catch-all" clause is confined to the concept of repair activities and clarifies that the activities that caused the delamination are not the only such repair activities that are covered by the waiver. Repair activities that might have imprudently increased costs, for example, are included in the waiver through February 23, 2012. Had the plain and obvious concept of recovery from NEIL been intended by all the parties, after negotiation, it would have been enumerated as item number (3) for inclusion in the express waiver. It was not so negotiated or included. Duke cannot now refill-the-toothpaste-tube with that which it would rather not explain by seeking to "reverse bootstrap" NEIL Insurance

activities into the penumbra of repair activities. Such a tortured reading of a simple and straightforward clause would violate fundamental concepts of contract construction and interpretation, and turn on its head the notion of narrow express waiver that was negotiated. See Pafford, *supra*. To the extent that additional context is needed to provide interpretation, the Intervenors point to the balance of Paragraph 7.

For example, the full Paragraph 7 shows that the matters resolved and for which legal rights and claims were waived or forgone by the Intervenors were the specific activities related to actions affecting the building, whether part of the SGR or delamination repairs:

> ***It is the intent of the Parties and the Parties stipulate that this Agreement resolves issues regarding the CR3 steam generator replacement ("SGR") project in all phases of PSC Docket No. 100437-EI subject to the terms of this Agreement.*** It is the intent of the Parties that, within five days of the Implementation Date, PEF will file a motion to dismiss Phase 1 and to stay Phases 2 and 3 of Docket No. 100437-EI consistent with the terms of this Agreement. The Parties agree that this Agreement makes no allocation or determination of fault, prudence or reasonableness in or related to PEF's ***actions taken in connection with the SGR project or the repair activities associated with the delaminations, including but not limited to the actions which resulted in the delaminations of the CR3 containment building in 2009 and 2011.*** The Parties, however, have not contended and do not now contend that the delaminations prior to the Implementation Date were foreseeable or expected by the Company. ***The Intervenor Parties waive their rights to challenge the prudence of PEF's actions taken during the period from the SGR project inception through the Implementation Date in connection with the SGR project or the repair activities associated with the delaminations, including but not limited to the actions which resulted in the delaminations of the CR3 containment building in 2009 and 2011.*** Absent evidence of fraud, intentional misrepresentation, or intentional misconduct by PEF during the period referenced in this paragraph 7, ***the Intervenor Parties cannot and will not challenge the prudence of PEF's actions on the SGR project or PEF's repair activities*** from the inception date of the SGR project through the Implementation Date in any PSC or judicial proceeding.

(Emphasis added)

Furthermore, the first sentence of Paragraph 7 provides additional confirmation that the scope of what is resolved with respect to the SGR project is directly linked to the Phases

described and established in this docket. Those phases are described specifically in Order No. PSC-11-0352-PCO-EI as follows:

> Phase 1
>
> **All of PEF's decisions and activities leading up to the October 2, 2009 delamination event have already occurred and are ripe for hearing.** Therefore, the first phase of this docket shall include a prudence review of the events and decisions of PEF leading up to the October 2, 2009 delamination event. Phase 1 is set for hearing June 11-15, 2012. The parties shall follow the controlling dates set forth in Section IX of this Order.
>
> Phase 2
>
> **The second phase of this docket will be a consideration of the prudence of PEF's decision to repair rather than decommission CR3.** PEF has indicated in its status reports that it is continuing with the repair of the containment structure and is not decommissioning the nuclear unit. In the August 8, 2011 status conference PEF assured the Commission that it would continue with those activities prior to the hearing on Phase 2. At that August 8, 2011 status conference, PEF also indicated it is in the process of doing the engineering work to get a more precise view of the costs and the schedule for repair. PEF stated it believes that information will be complete in the last quarter of 2011. Accordingly, Phase 2 is not ripe for hearing. PEF shall file status reports regarding its analysis of the engineering reports, costs, and schedule for completion of the repair, along with updated information regarding the decision to repair versus retire CR3, in accordance with the controlling dates set forth in Section IX of this Order. The hearing date and schedule for Phase 2 shall be set in a subsequent order.
>
> Phase 3
>
> **The third phase of this docket shall include the decisions and events subsequent to the October 2, 2009 delamination leading up to the March 14, 2011 delamination event and the subsequent repair of the containment building.** These events and decisions are still unfolding. Phase 3 is not ripe for hearing. PEF shall file status reports regarding the repair of the containment building in accordance with the controlling dates set forth in Section IX of this Order. The hearing date and schedule for Phase 3 shall be set in a subsequent order.

(Emphasis added)

The Settlement Agreement references the plain language of the Commission order that makes no mention of NEIL directly or indirectly. That order's provisions are solidly anchored in the tangible maintenance/planning/engineering/construction actions that (in Phase 1) led up to the 10/09 delamination. Clearly, no NEIL insurance claims process was involved in that Phase as it was established by the Commission and referenced by the Settlement Agreement. The same goes for Phase 2. Related exclusively to the decision of whether to repair the 10/09 delamination, this Phase of the docket again applies solely to the tangible action connected to the decision to repair the building. There is no ambiguity in either of these provisions.

With respect to Phase 3, the plain language of the phase's descriptor refers to the "decisions and events" that led to the "delaminations and the subsequent repair of the containment building." No mention is made of the continuous NEIL claims process or the insurance coverage or the activities related to securing insurance coverage. If the Commission had wanted to include such a determination, it possessed the necessary administrative and professional expertise to craft the Order's provisions in order to do so. There were three status conferences held prior to the issuance of the first OEP. NEIL and insurance were discussed in general; however, there was no mention in the OEP of the ongoing NEIL claim process. Inasmuch as the Settlement Agreement explicitly referenced the OEP in giving context to the scope of what was expressly waived, the Settlement provides further confirmation that the Intervenors did not waive their right to have a prudence determination of all of Duke's actions in pursuing the NEIL claim.

As to the issue of waiver, the Commission stated in *FPL et al*:

> Even assuming that the doctrine of waiver were applicable to this proceeding, FPL has waived its ability to institute rates after 8 months, subject to refund. As FPL states, Florida law requires the following elements to be in existence to waive a right or obligation. A waiver requires (1) the existence at the time of

> waiver of a right, privilege, advantage or benefit which may be waived; (2) the actual or constructive knowledge thereof; and (3) an intention to relinquish such right, privilege, advantage or benefit. Zurstrassen v. Stonier, 786 So. 2d 65, 70 (Fla. 4th DCA 2001)

Order No. PSC-09-0753-PCO-EI at 13-14.

The Intervenors did not in the Settlement Agreement or otherwise, expressly, impliedly, or partially waive their right to a full examination and determination of Duke's actions in pursuing and agreeing to only $835 million from NEIL against nominal policy limits of $2.715 billion. In *FPL 2009*, the ___is a three-part test for the existence of a valid waiver Zurstrassen v. Stonier, *supra*. With respect to the Settlement, to the extent that the Commission even needs to reach the issue of waiver, the test for the existence of the waiver is not met by the plain language of the waiver provision and the existence of the reservation of rights provision which narrowly limited the waiver to what the Intervenors agreed.

The very fact that the ongoing claims process had not been concluded at the time of the Settlement's execution casts serious doubt on whether there was even the existence of a right to a hearing that had reached a justiciable point such that it could be waived. Even assuming that there was a right and there was actual or constructive knowledge of such a right, the mere existence of the reservation of rights provision solidly indicates a complete lack of intention to waive anything but the actions related to activities directed toward the physical structure (e.g. SGR and delamination repair).

Beyond the strict language of the Settlement, the Commission has a duty to the people of Florida generally, and the customers of Duke specifically, to utilize all tools at its disposal to minimize the uninsured costs associated with the first accidental, total loss of an American

nuclear reactor building since the loss of Three Mile Island Unit No. 2 in 1979, and to limit the financial impact of the CR3 loss on those least responsible for the accident.[8]

**D. The Implementation Date Contained in the Rate Settlement Does Not Serve to Limit the Scope of Discovery Concerning Issues that Remain in Dispute.**

Paragraph 7 of the Settlement precludes the signatory Intervenor Parties from challenging the prudence of DEF's SGR and containment repair activities from the inception of the SGR project through the Implementation Date. In effect, the Intervenor Parties, and the Commission in approving it, were signing off only on the issues that the Settlement resolved based on the facts available at the time of the Commission's February 2012 vote. The Implementation Date has no bearing on the examination of issues that were not resolved by the Settlement, including in particular all questions concerning the ongoing process of the NEIL coverage and reimbursement claim. Consequently, Duke cannot meet its burden by arbitrarily selecting February 23, 2012 as the beginning point for the period where it is obligated to explain the NEIL claims process. As demonstrated by the language in the Settlement, there is nothing therein which prohibits discovery of, or inquiry into, facts relating to the period prior to February 23, 2012, nor does it relieve Duke from being fully held accountable for its actions during that time. The Settlement only resolved what the plain language indicates and clearly the Intervenors only waived their rights to contest matters where there was an express waiver.

## CONCLUSION

While the Settlement precludes further litigation by the Intervenors concerning the prudence of DEF's actions and decisions related to the CR3 SGR project and the delamination repairs and DEF's decision to retire the unit, the Settlement expressly reserves all other prudence

[8] At all times, Duke was in control of the steam generator replacement (SGR) project and all subsequent repairs made to CR3 while the customers and the Commission had no role in those actions.

questions and concerns related to CR3 that will affect consumer rates, or that have a bearing on other matters that fall within the broad scope of the Commission's regulatory authority pursuant to Chapter 366, Florida Statutes. More specifically, the Settlement in no way judged the adequacy of any aspect of DEF's relationship or dealings with NEIL or of any aspect of the entire process associated with DEF's unilateral settlement of its insurance claims concerning the CR3 outage with NEIL. Finally, the "Implementation Date" defined in the Settlement (February 22, 2012) does not in any manner limit or narrow the scope of discovery or testimony concerning the remaining issues in this docket. For the reasons expressed above, the Commission, therefore, is obligated to provide the substantially affected parties their statutorily guaranteed hearing on all issues not expressly barred by the Settlement for which the Commission has jurisdiction, which include but are not limited to, the issues raised herein.

Respectfully submitted,

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## CERTIFICATE OF SERVICE
**Docket No. 100437-EI**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the following parties on this 19th day of April, 2013.

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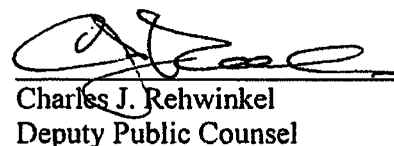

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