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b. Docket No. 100437 -EI, 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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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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: April 26, 2013**

WHITE SPRINGS AGRICULTURAL CHEMICALS, INC.
d/b/a PCS PHOSPHATE – WHITE SPRINGS'
REPLY BRIEF TO RESOLVE DISPUTED ISSUES

Pursuant to the Commission's April 11, 2013 "Order Granting in Part and Denying in Part Joint Motion of the Parties to Resolve Certain Disputed Case Issues and Request for Oral Argument," White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs' ("PCS Phosphate") submits this Reply Brief to "Progress Energy Florida, Inc.'s ("Duke" or "DEF") Brief in Response to Order Granting Joint Motion of the Parties to Resolve Certain Disputed Case Issues."

OVERVIEW

DEF concedes that the Settlement Agreement approved by the Commission last year in Docket No. 120022-EI does not address the prudence of its management's decision to settle the insurance claims with Nuclear Electric Insurance Limited ("NEIL") concerning property damage and replacement fuel costs associated with the damage that DEF caused to the now defunct Crystal River 3 nuclear unit. DEF Brief at 15. DEF similarly concedes that, with respect to those NEIL claims, the Settlement Agreement expressly provided that DEF management did not seek the approval of the Intervening Parties for Duke's decisions, and, correspondingly, that those Parties "are not precluded from challenging the reasonableness or prudence of such course of action [referring to any proposed final disposition of the NEIL claims]." DEF's Brief at 14 (citing Settlement Agreement ¶10b). This matter is, in fact, the principal issue that the

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Settlement Agreement expressly preserves for a later determination with all parties reserving their rights. Based on this express language, the provision of Paragraph 2 reserving all parties' rights unless expressly waived, and the statements in the Settlement Agreement, the Commission's Order approving the Settlement,[1] and the Order Establishing Procedure in this docket that certain matters relating to Duke's economically tragic misadventure with CR3 were settled while others were not, it is apparent that Duke's attempt to unreasonably restrict the scope of issues and discovery in the remaining portion of this docket is mistaken.

Notwithstanding the express language of the Settlement Agreement, DEF argues that NEIL-related prudence issues nonetheless have been partially settled and that the examination of DEF's dealings with NEIL should be limited. DEF Brief at 16. The error of DEF's position is evident in its initial brief. To arrive at its position, DEF attempts to re-write Paragraph 10b of the Settlement (the provision reserving the Parties' rights with respect to all NEIL issues) by adding a temporal limitation from Paragraph 7 that plainly applies only to SGR replacement and delamination repair activities and not the expressly preserved insurance matters. It is axiomatic that a party cannot reinterpret an agreement by re-writing it. In this case, the specific reservation of rights relating to NEIL issues governs over DEF's overbroad application of the Implementation Date in Paragraph 7.[2] To give reasonable effect to, and reconcile all provisions of the Settlement Agreement,[3] the proper view that reflects the clear intent of the Agreement is

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[1] Order No. PSC-12-0104-FOF-EI.

[2] *See, e.g., Crastvell Trading Ltd. v. Marengere*, 90 So.3d 349, 353 (Fla.App. 4 Dist. 2012) ("It is a well-settled principle of contract law that a contract provision specifically dealing with a particular subject matter controls over a provision generally dealing with that same subject matter." (citing *Bridges v. City of Boynton Beach,* 927 So.2d 1061, 1063 (Fla. 4th DCA 2006))).

[3] *Id.* ("Every provision in a contract should be given meaning and effect and apparent inconsistencies reconciled if possible." (citing *U.S.B. Acquisition Co. v. Stamm,* 660 So.2d 1075, 1080 (Fla. 4th DCA 1995))).

that all questions relating to the NEIL claims were reserved until some definitive information actually became known with respect to those claims.[4]

The plain purpose of the Implementation Date in Paragraph 7 of the Settlement was to establish bounds surrounding specific issues that the Settlement actually resolved. That date was not intended to, and does not serve to, foreclose further inquiry by the Intervening Parties and the Commission into matters not resolved by any substantive Settlement provision. Duke's attempt to cut off reasonable inquiry into DEF's course of dealings with NEIL is erroneous and should be rejected. In addition, DEF has similarly overstated the effect on the Settlement Agreement on the Commission's jurisdiction to consider any and all issues affecting future electric rates for this utility.

A. The Settlement Agreement Does Not Arbitrarily Restrict the Commission's Examination of Prudence Issues related to the CR3 NEIL Insurance Claims

DEF's position in this matter has the virtue of simplicity, and the error of its interpretation is equally transparent. Relying on Paragraph 7 of the Settlement, as discussed below, the utility claims that "all claims for PEF's actions for the CR3 events in this docket," including all possible NEIL prudence issues, before the Implementation Date are foreclosed from any further scrutiny by the terms of the Settlement Agreement. This assertion fails in the face of a comprehensive review of the Settlement, basic contract interpretation principles, and a modicum of common sense.

The Settlement Agreement states at the outset that the agreement only resolves certain outstanding issues in the nuclear cost recovery (Docket No. 120009-EI) and CR3 prudence (Docket No. 100437-EI) dockets. Paragraph 2 specifies that "this Agreement resolves numerous disputed or potentially disputed matters before the Commission. *The Parties reserve all rights,*

[4] DEF provided no public disclosures on those matters other than to admit that those efforts were ongoing until it announced its settlement with NEIL in February 2013.

unless such rights are expressly waived under the terms of this Agreement." (emphasis added). This provision requires no special interpretation. It plainly indicates that there was no settlement of issues by implication or inference.

Next, the Settlement Agreement discusses, but definitely does not resolve the prudence of DEF's actions and decisions concerning the NEIL claims both in the WHEREAS clauses and in two express provisions (Paragraphs 10b and 10c). The Settlement first states that "the Intervenor Parties further support and encourage PEF's efforts to pursue complete coverage of the costs of repairing CR3 under its insurance policies with Nuclear Electric Insurance Limited ("NEIL") to the full extent of the coverage limits in any policies." Settlement Agreement, p. 6. There can be no mistaking the Intevenor Parties' intent with that statement, and DEF does not mention it in its brief.

In keeping with the stated importance to consumers that DEF secure full insurance recoveries, the Settlement Agreement contains two distinct provisions with respect the CR3 NEIL claims and recoveries. First, Paragraph 10b directed DEF to advise the Intervenor Parties with respect to any proposed "potential or final resolution of insurance coverage amounts." This paragraph afforded the Intervenors 20 business days to offer any comments or concerns to DEF management concerning such proposed resolution. Significantly, the paragraph stated that DEF's management was free to take such comments under advisement, but further clarified that utility management need not seek nor obtain the Intervenor Parties' approval to proceed with any resolution of the NEIL claims. Given the purely advisory nature of the Intervenor comments to DEF concerning any resolution of the insurance claims, symmetry demanded, and the Agreement expressly provided, that "the Intervenor Parties are not precluded from challenging the reasonableness or prudence of such course of action." This provision plainly preserves all

prudence questions concerning the NEIL claims, and in no way limits the otherwise reasonable course of inquiry in any prudence assessment related to those claims.

Second, Paragraph 10c contemplated that DEF might ultimately receive a final disposition of its insurance claims with NEIL that might fall short of covering the full expected cost of repair. This provision directed DEF and the Intervenor Parties to attempt to resolve "how best to address that deficiency." Failing such informal resolution, the Settling Parties agreed that this matter would be submitted to the Commission for a determination at later time. This treatment of insurance-related prudence issues is entirely consistent with the acknowledged importance of the insurance claims to consumer rates, the ongoing nature of those discussions, and the fact that neither the Commission nor the Intervenor Parties had any involvement in that process.

Consistent with established principles of contract interpretation recognized by Florida courts,[5] the general reservation of rights in Paragraph 2 and the express provisions of Paragraphs 10b and 10c taken together reveal that the Settlement unmistakably aimed to preserve any and all NEIL-related issues until after DEF and NEIL had arrived at a proposed disposition of all CR3 claims. There were very sound and readily apparent reasons for fully preserving all NEIL issues to a later time. First, DEF was unable or unwilling to disclose much information to the Commission concerning its NEIL efforts while they were ongoing because such disclosures could possibly influence those discussions. Second, the Settlement Agreement is a public document, and any specific resolution relating to DEF's handling of the insurance claims in the

[5] *See, e.g., Fla. Power Corp. v. City of Tallahassee,* 154 Fla. 638, 18 So.2d 671, 674 (1944):

> The courts have established rules to be observed in the construction of contracts. One requires that the contract should be considered as a whole in determining the intention of the parties to the instrument. Another is to the effect that the conditions and circumstances surrounding the parties and the object or objects to be obtained when executing the contract should be considered....

Settlement would almost certainly influence the outcome with respect to NEIL. Both such possibilities could impede to the Intervenor Parties' expressly stated intention in the Agreement, noted above, that DEF should pursue reimbursement from NEIL to the full extent of policy coverage limits. Thus, DEF's argument that some insurance-related prudence issues have been settled through February 22, 2012, rests on an untenable inference to other provisions that directly conflict with the express provisions of Paragraphs 10b and c and the statement in Paragraph 2 that no issues were being settled except for those expressly stated in the Agreement.

This necessarily brings us to DEF's white-knuckled reliance on the broad-based language of Paragraph 7 of the Agreement. Like all Settlement provisions, Paragraph 7 must be considered in its entirety and in the context of the entire Agreement.[6] Paragraph 7 states that "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 the Agreement." As is described in the August 2011 Order Establishing Procedure,[7] the three phases of that docket all contemplated that the utility would repair CR3 (because DEF had announced that it preferred repairing CR3 to retiring the unit in a status report filed two months earlier).[8] Phase I covered the prudence of PEF's actions from the inception of the SGR project to the October 2009 containment delamination. Phase II would cover DEF's decision to repair or retire the unit, and Phase III would cover repair activities from October 2009 through the March 2011 delamination and the unit's ultimate repair. In the context of those issues, Paragraph 7 further states:

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6 *See, e.g., Jones v. Warmack*, 967 So.2d 400 (Fla.App. 1 Dist. 2007) ("The intention of the parties must be determined from an examination of the whole contract and not from the separate phrases or paragraphs." (citing *Lalow v. Codomo,* 101 So.2d 390, 393 (Fla.1958))).

7 Order No. PSC-11-0352-PCO-EI, issued August 23, 2011.

8 *See* CR3 Outage Status Report dated June 27, 2011.

> The Intervernor 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 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.

DEF maintains that the use of the phrase "in connection with" in this sentence is all encompassing and should be broadly read such that "all actions in and about the SGR project, repair activities, or delaminations, all operation and management there, and all matters relating to or growing out of the SGR project repair activities, or delaminations" can no longer be reviewed, investigated, or challenged. DEF Brief at 12. The short answers to this mistaken assessment are first, that this overbroad term does not overrule or negate the express reservation of insurance issues to a later time, and second, that the limiting sentence plainly applies in the context of Paragraph 7 to SGR and delamination repair actions and decisions. It does not apply to an issue that the Settlement's substantive provisions do not purport to address in the first place (and indeed, that they expressly preserve).

Putting the import of Paragraph 7 in its proper perspective, based on information available through the Implementation Date, PCS Phosphate concedes that the prudence of PEF's SGR actions and decisions through the October 2009 delamination (Phase I) has been decided. By the same token, PCS Phosphate does not claim that DEF's failed repair attempt that resulted in the March 11, 2001 delamination can or should be reviewed in the remainder of this docket. Both of these core issues are directly addressed in the Settlement. Similarly, by virtue of the express provision in Paragraph 11b, PCS Phosphate does not challenge DEF's decision to retire CR3, but reserves its rights to contest the calculation of the deferred regulatory asset. PCS Phosphate, however, has reserved its rights to challenge the prudence of all DEF actions and decisions concerning the handling of the NEIL insurance claims because there is no element of

the Settlement Agreement that purports to directly resolve those issues. In fact, the Agreement takes pains to make clear that the insurance issues have not been settled.

At the time of the Settlement's approval by the Commission, neither the Intervenor Parties nor the Commission had any basis for speculation regarding potential outcomes for the insurance claims or the possibility that DEF might settle with NEIL for $1,000 or $2 billion. Thus, the notion that the insurance claims might be settled in part by implication cannot be reconciled with the clear language in the Settlement preserving those issues until necessary information became available. Accordingly, the Commission should find that the issues proposed in the Intervenor Parties' Joint Brief (at 10-11) should be adopted. The Commission should further determine that discovery related to DEF's pursuit of its insurance claims with NEIL is not arbitrarily limited by the Implementation Date contained in Paragraph 7 of the Settlement.

B. The Implementation Date in Paragraph 7 of the Settlement Does Not Otherwise Restrict Intervenor and Staff Inquiry Into DEF's Interactions With NEIL

DEF asks the Commission to "reject the improper issues" raised by the Intervenors and "bar any issue that goes to the prudence of any of PEF's actions related to this Docket prior do February 23, 2012." DEF includes within its perception of the "improper issues" the possibility that Intervenor Parties may seek to "challenge the prudence of PEF's actions [relating to NEIL] prior to the Implementation Date under the pretext of addressing the Company's course of action with NEIL subsequent to the Implementation Date." DEF Brief at 16. In effect, although DEF concedes that the prudence of its dealings with NEIL is an open issue, DEF nonetheless seeks to limit the Commission's inquiry into the utility's interactions with NEIL, including its communications with NEIL and disclosure of certain information provided to NEIL. This is facially unreasonable, and, as discussed above, not supported by the terms of the Settlement. If

the prudence of DEF's handling of its CR3 insurance claims remains an issue, the significance of that matter compels a full and complete examination of those matters.

Under the Florida Rules of Civil Procedure, parties are clearly entitled to issue discovery requests that are reasonably calculated to lead to the discovery of admissible evidence.[9] As DEF at least has conceded that its actions regarding the resolution of the NEIL insurance claims after the Implementation Date must be addressed in this proceeding, DEF Brief at 16, there is no basis for disallowing inquiries into DEF's relationship and interactions with NEIL, regardless of when those interactions occurred, so long as the actions whose prudence is being challenged are indisputably ripe for resolution.

C. The Commission Retains the Authority to Examine DEF's Actions Regarding the SGR Project

DEF asserts that "the Settlement Agreement resolved all claims for PEF's actions for the CR3 events in this docket." PEF Brief at 9. DEF further states, citing basic doctrine relative to administrative finality of prior Commission orders, that "the Commission cannot determine the prudence of PEF's actions prior to the implementation date." *Id.* To support this claim, DEF does not, nor could it, identify any provision of the Settlement Agreement that restricts the Commission's oversight. Nor does DEF identify any aspect of the Commission's Order that prohibits the Commission from exercising of its statutory authority.[10] Instead, DEF can only cite to case law regarding the finality of an administrative order.

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[9] Fl.R.Civ.Proc. 1.280(b)(1) ("It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.")

[10] DEF's assertion that the Commission cannot determine the prudence of DEF's action prior to the Implementation Date is illogical. DEF Brief at 9. First, prior to SACE's withdrawal from this docket, SACE arguably had a right to litigate fault and prudence related to the repair activities for the 2009 and 2011 delaminations (Phases 2 and 3 of this docket). The Parties to the Settlement had expressly waived their right to challenge DEF's prudence, but SACE had not. Second, there is

DEF's overbroad argument threatens to subsume two very distinct legal propositions. The first is that full force and effect should be given to final Commission orders, which is the basic and unopposed point that DEF successfully makes. The second is that the Commission has plenary authority under Chapter 366 Florida Statutes to investigate every aspect of PEF's operations and decision-making that may have a bearing on DEF future electric rates and service. This is a very broad grant of authority, subject only to restrictions against retroactive ratemaking and similar limits. In short, jurisdictionally speaking, the Commission determines, based upon what is necessary to ensure just and reasonable rates, what is the appropriate and necessary remaining scope of this docket.

Finally, DEF's concern with Florida case law regarding the finality of a Commission Order is completely mis-placed. No party is suggesting the Commission's decision to approve the Settlement Agreement in Order No. PSC-12-0104-FOF-EI should be reopened or that the Settlement Agreement is not in the public interest. Rather, the parties are simply disputing the reach of that Settlement Agreement on a matter that asks the Commission, for the first time, to interpret the provisions of the Settlement Agreement.

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nothing within Chapter 366, Florida Statutes, which prohibits the Commission on its own motion from determining prudence of Phases 2 and 3 of this docket, nor which prohibits another party with standing to intervene in this docket and challenge DEF's prudence related to the SGR project or subsequent failed delamination repairs. Therefore, it is clear that not all claims that can be raised related to DEF's actions in this docket prior to February 22, 2012 are resolved. Therefore, DEF's assertion that administrative finality attached to all claims is inaccurate except as to the parties to the Settlement Agreement – DEF and the Intervenor Parties.

CONCLUSION

For the foregoing reasons, PCS Phosphate asks the Commission to reject DEF's unreasonable interpretation of the Settlement Agreement concerning prudence questions pertaining to Duke's insurance claims, that it accordingly clarify the scope of issues that may be addressed in this proceeding as a result of the Settlement Agreement, and that it further find that the Intervenors may inquire into DEF's interactions with NEIL prior to the Implementation Date to the extent those actions may lead to relevant evidence regarding DEF's decision to accept NEIL's insurance claims payment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail and/or U.S. Mail on this 26th day of April 2013 to the following:

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