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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 Duke Energy Florida, Inc.

d. There are a total of ten (10) pages.

e. The document attached for electronic filing is: Duke Energy Florida, Inc.'s Response in Opposition to the Office of Public Counsel's Motion for Reconsideration of Commission Order No. PSC-13-0175-PCO-EI.

Thank you for your attention 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 Duke Energy Florida, Inc.

Docket No. 100437-EI

Filed: May 9, 2013

**DUKE ENERGY FLORIDA, INC.'S RESPONSE IN OPPOSITION TO
THE OFFICE OF PUBLIC COUNSEL'S MOTION FOR RECONSIDERATION OF
COMMISSION ORDER NO. PSC-13-0175-PCO-EI**

Duke Energy Florida, Inc. ("DEF" or the "Company") opposes the Office of Public Counsel's ("OPC") Motion for Reconsideration of Commission Order No. PSC-13-0175-PCO-EI ("OPC Motion"). OPC asserts the same objections to the Prehearing Officer's Third Order Revising Order Establishing Procedure (the "Third OEP") that OPC and the other interveners asserted at the hearing held just nine days ago on April 30, 2013 when the Prehearing Officer heard arguments about the schedule established in the Third OEP. The Prehearing Officer heard the interveners' objections to this schedule, considered them, and rejected them. OPC Motion, Attachment A, pp. 6, 61-68. It is well established that it is inappropriate on reconsideration to re-argue matters already considered or to disagree with the Prehearing Officer's conclusions no matter how ardently asserted the disagreement is. See, e.g., OPC Motion, p. 2; Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317-18 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889, 891 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981); Sherwood v. State, 11 So. 2d 96, 98-99 (Fla. 3rd DCA 1959); State ex. Rel. Jaytex Realty Co. v.

Green, 105 So. 2d 817, 818 (Fla. 1st DCA 1958).¹ Nothing has changed in nine days to suggest that the Prehearing Office was in error and abused his discretion under Rule 28-106.211, F.A.C. to issue the Third OEP “to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case.” As a result, OPC’s Motion for Reconsideration should be denied.

ARGUMENT IN OPPOSITION TO MOTION FOR RECONSIDERATION.

OPC’s arguments on reconsideration are fundamentally based on the erroneous assertion that the interveners’ due process rights will be impermissibly impaired if the schedule is not reconsidered and revised to an open-ended schedule that meets with OPC’s approval. OPC Motion, pp. 1, 16. OPC’s Motion, at best, is premature. OPC cannot demonstrate that its due process rights have already been violated two months into an eight-month hearing schedule for the remaining issues in this proceeding.² Six months remain in the Third OEP schedule for OPC to take

¹ OPC initially asserts that the standard for review is de novo based on OPC’s apparent assertion that the Prehearing Officer violated some “tradition” not found in any Commission rule or order cited by OPC that the Commission Chair has the prerogative to establish hearing dates. OPC Motion, pp. 1-2. The Commission has rejected previous arguments that a de novo standard should be applied to Commission review of a Prehearing Officer’s Order because it infringes on the Prehearing Officer’s authority to handle procedural matters under Rule 28-106.211, F.A.C. and opens up any decision by the Prehearing Officer for reconsideration by the Commission for any reason. In re: Petition of Tampa Electric Co. for Determination of Need for Proposed Electrical Power Plant and Related Facilities, Order No. 25567, Docket No. 910883-EI, 1992 WL 12595645 (Fla. P.S.C. January 6, 1992); In re: Review of Florida Power Corporation’s Earnings, Including Effects of Proposed Acquisition of Florida Power Corporation by Carolina Power & Light, Order No. PSC-03-0850-PCO-EI, Docket No. 000824-EI, 2003 WL 21756098 (Fla. P.S.C. July 22, 2003); In re: Supra Telecommunications and Information System, Inc., Order No. PSC-04-0942-FOF-EI, Docket No. 040301-TP, 2004 WL 2294125 (Fla. P.S.C. Sept. 23, 2004). OPC cites no contrary authority to support its argument that a de novo standard should be applied here. OPC’s argument that the standard of review is de novo is without merit.

² The Commission and the interveners are well accustomed to handling complex base rate proceedings and prudence reviews on schedules equal to or less than eight months. See, e.g., §366.06(3), Fla. Stats.; In re: Petition for Rate Increase by Tampa Electric Co., Order No. PSC-13-0150-PCO-EI, Docket No. 130040-EI (April 8, 2013); In re: Petition for Increase

discovery, retain experts, and prepare testimony. OPC has not shown in its Motion that it has been denied any discovery that it is entitled to obtain, that it cannot retain any expert that it needs, or that it cannot file its testimony four months from now in accordance with the Third OEP. OPC cannot claim that its due process rights have been violated by the Third OEP when OPC has not yet expended any effort to actually comply with the Third OEP schedule.

First, OPC started its discovery requests in February 2013, and all interveners are continuing to take discovery on the remaining issues in this docket. DEF has already responded to 129 intervener interrogatories, including subparts, since February 2013. DEF has produced tens of thousands of pages of documents in response to 61 intervener document production requests, including subparts, in addition to the millions of pages of documents the interveners have received or reviewed in this docket for over three years.

Second, OPC has requested twenty-two depositions, and contrary to OPC's assertion, the Company has not objected to producing any Company witness for deposition. As DEF's letter attached to OPC's Motion makes clear, DEF agreed to produce for deposition the first six Company witnesses in the order requested by OPC. OPC Motion, Attachment E. OPC obviously cannot take all Company witness depositions at the same time and DEF reasonably requested that OPC determine if OPC still needed the deposition of Duke Energy's Chief Executive Officer ("CEO") after OPC had taken one the first six Company witness depositions OPC requested.

in rates by Florida Power & Light Co., Order No. PSC-12-0143-PCO-EI, Docket No. 120015-EI (March 26, 2012); In re: Petition on behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers \$143 million, Order No. PSC-07-0048-PCO-EI, Docket No. 060658-EI (January 16, 2007).

DEF did not object to producing the Duke Energy CEO for deposition before July, or at all, as OPC erroneously claims in its Motion. OPC Motion, p. 15; OPC Attachment E.

Third, DEF objected to producing privileged information and documents because interveners have no legal right to obtain privileged information. See, e.g., Fla. R. Civ. Pro. 1.280(b)(1) (“Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action,”) (emphasis supplied); §90.502(2), Fla. Stats. (“A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.”); Shell Oil Co. v. Par Four Partnership, 638 So. 2d 1050 (Fla. 5th DCA 1994) (“Confidential communications between lawyers and clients are privileged from compelled disclosure to third persons.”). Contrary to OPC assertions, again, the Prehearing Officer was fully aware of the privilege claims and potential for motions to compel the production of this information and inquired of the parties about them at the hearing. OPC Motion, p. 15; Attachment A, pp. 49-50, 61-63, 67-68.³ The Prehearing Officer clearly did not overlook or fail to consider this issue.

This issue will likely go away when DEF files its testimony anyway. OPC’s challenge to DEF’s privilege claims are not based on the assertion that the documents or information are not in fact privileged, but instead on the unfounded and

³ DEF produced its first privilege log to OPC and the interveners in response to discovery requests on March 13, 2013. The almost two-month delay by OPC and the interveners in moving to compel and therefore appropriately placing this issue before the Prehearing Officer is certainly not the fault of DEF or the Prehearing Officer.

incorrect assertion that DEF is basing the prudence of its settlement with the Nuclear Electric Insurance Limited (“NEIL”) on legal advice that DEF is refusing to disclose to interveners. See OPC Motion, Attachment A, pp. 67-68. DEF is not claiming that the NEIL settlement is prudent because of the advice it received from its lawyers. DEF will demonstrate in its testimony that DEF determined that the NEIL settlement was prudent based on the Company’s NEIL policies, which establish the terms and conditions of coverage, and the information the Company obtained regarding the Crystal River Unit 3 (“CR3”) containment building delaminations, the repair plan for the CR3 containment building, and the decision to retire CR3. DEF decided the NEIL settlement was prudent based on management judgment of these facts and circumstances regarding the NEIL claim. DEF did not decide the NEIL settlement was prudent based on legal advice, therefore, there is no basis for the interveners’ claims that they are entitled to DEF’s privileged material and these claims should not delay the resolution of this proceeding in accordance with the OEP.

Fourth, the remaining issue regarding the prudence of the Company’s settlement with the NEIL is not as complex as OPC makes it out to be in its Motion. OPC agreed nine days ago that if the Company accepted that the table in DEF’s reply brief set forth the evidence to be heard and considered in “the overall picture,” that this was the “lion’s share of” that issue. OPC Motion, Attachment A, pp. 56-57. OPC agreed then that this issue did not require OPC to challenge the “specific standalone actions” by DEF that led to insurance with NEIL under the NEIL policies and the CR3 insurance claim, instead, OPC admitted that OPC was “after the big picture.” *Id.* DEF submits, then, as the Prehearing Officer recognized, that the

parties are “relatively close together” about what this case is about, id. at 57, if the Prehearing Officer accepts this representation and limits the proceeding on the threshold issue to “the big picture,” instead of decades- or years-old decisions to insure with NEIL in the first place and to insure CR3 under the terms and conditions of the NEIL policies. This proceeding is focused on the “big picture” of the prudence of the Company’s settlement with NEIL and there is no reason this issue cannot be resolved under the Third OEP schedule.

Fifth, Interveners are well positioned to address this remaining insurance issue on the Third OEP schedule despite OPC’s protests to the contrary in OPC’s Motion. Interveners admitted in their reply brief on the threshold issue that the prudence of the Company’s settlement with NEIL involves a claim that arose only because of the Company’s actions that led to the delaminations. Intervener Reply Brief, p. 4. Interveners are well informed about the actions that are the basis for this insurance claim. Interveners have investigated these actions for over three years. DEF has responded to hundreds of intervener interrogatories and document requests, and DEF has produced millions of pages of documents over three years regarding the Steam Generator Replacement (“SGR”) project, the delaminations, and the delamination repairs that admittedly are the basis for the Company’s NEIL insurance claim. DEF produced its insurance policies with NEIL years ago. Interveners did not enter this Docket in February 2013 wholly uninformed about the CR3 costs, the NEIL policies, or the reasons for the NEIL insurance claim.

This is all the Prehearing Officer meant in his statements regarding the exchange of information between the parties under the Settlement Agreement. OPC

Motion, Attachment A, pp. 68-71. The Prehearing Officer was not asserting that this process was a substitute for discovery as OPC erroneously claims in its Motion at pp. 5-7, rather the Prehearing Officer understood that the exchange of information under the Settlement Agreement was one indication that the parties were well informed about the events and actions that led to the NEIL insurance claim. He could have but was not required to reference other reasons why the parties were well informed about the reasons for the NEIL claim and, therefore, well positioned to resolve the issue of the prudence of the NEIL settlement on the Third OEP schedule.

Finally, OPC cites no authority that an eight-month schedule for the remaining issues in this Docket is, in OPC's words, "per se" inadequate and a violation of the interveners' due process rights. OPC Motion, p. 1. See In re: Petition of Tampa Electric Co., Order No. 25567, 1992 WL 12595645 (rejecting due process violation arguments on reconsideration where no authority was cited that 55 days to file responsive testimony was deemed a due process violation under any constitutional or statutory provision). As demonstrated above, despite OPC's objections and at times baseless or erroneous accusations in its Motion, there are no real grounds to believe at this time that the interveners' due process rights are violated by the Third OEP schedule. OPC's Motion for Reconsideration should accordingly be denied.

OPC'S REQUEST FOR ORAL ARGUMENT.

OPC's Motion for Reconsideration of the Third OEP is insufficient on its face, as a matter of well-accepted legal principles applicable to reconsideration motions, and, therefore, oral argument will not be helpful to the Commission and it is

unnecessary. Accordingly, OPC's request for oral argument for its Motion for Reconsideration of the Third OEP should be denied.

CONCLUSION.

Anyone reading OPC's Motion understands that the interveners vehemently disagree with the Prehearing Officer's Third OEP. Disagreement with the Third OEP no matter how strongly asserted, however, is not a reason to conclude that the Prehearing Officer overlooked or failed to consider their arguments and positions. See, e.g., Diamond Cab Co., 146 So. 2d at 891 (reconsideration "is not intended as a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or order."); Sherwood, 11 So. 2d at 98-99 (matters are not overlooked or not considered because the party wants to argue or quarrel "with the [commission] over the correctness of its conclusions on the points it has considered and decided."); State ex. Rel. Jaytex Realty Co., 105 So. 2d at 818 (the function of rehearing or reconsideration is not to provide a "medium through which counsel may advise [the commission] that they disagree with its conclusion."). This is especially true when the Prehearing Officer has the discretion under Rule 28-106.211, F.A.C. to issue any order "necessary to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case." OPC has not demonstrated in its Motion that the Prehearing Officer abused his discretion under Rule 28-106.211, F.A.C. by issuing the Third OEP.

Wherefore, for all the reasons stated above, DEF respectfully requests that the Commission deny OPC's Motion for Reconsideration and Request for Oral Argument.

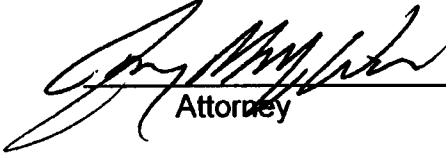
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to counsel and parties of record as indicated below via electronic and U.S. Mail this 9th day of May, 2013.


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