

Eric Fryson

From: Woods, Monica <WOODS.MONICA@leg.state.fl.us>
Sent: Tuesday, May 14, 2013 4:20 PM
To: Filings@psc.state.fl.us
Cc: 'Gamba, Blaise N.'; Rehwinkel, Charles; 'Dianne Triplett'; Saylor, Erik; 'F. Alvin Taylor'; 'James Brew '; 'John Burnett'; 'Jon C. Moyle Jr. '; Keino Young; 'Bernier, Matthew R.'; Kelly, JR; Michael Lawson; 'Walls, J. Michael'; 'Myndi Qualls'; 'Paul Lewis Jr. '; 'Schef Wright '; Lee Eng Tan; 'jcostello@carltonfields.com'; Saylor, Erik; Rehwinkel, Charles; Kelly, JR
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Electronic Filing

a. Person responsible for this electronic filing:

Erik L. Saylor, Associate Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
(850) 488-9330
SAYLER.ERIK@leg.state.fl.us

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 58 pages.

e. The document attached for electronic filing is: OPC's First Motion to Compel and Request for In-Camera Review of Documents

Thank you for your attention and cooperation to this request.

Monica R. Woods
Administrative Assistant
Office of Public Counsel
Telephone: (850) 717-0327
Fax: (850) 488-4491

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: May 14, 2013

**CITIZEN'S FIRST MOTION TO COMPEL DISCOVERY AND
REQUEST FOR IN-CAMERA REVIEW OF DOCUMENTS**

The Citizens of Florida (Citizens or OPC) by and through Office of Public Counsel, request the Florida Public Service Commission to conduct an in-camera inspection of all documents and portions of documents withheld by Duke based on a claim of irrelevancy or privilege and to compel Duke Energy Florida (DEF, Duke, or Company) to produce each of the documents responsive to the Citizens' Seventh Set of Requests for Production of Documents (Nos. 63-66) dated February 12, 2013, absent a showing of justification for asserting a valid privilege or other legal basis for withholding discovery.

Summary of the Dispute

1. OPC is challenging Duke's claims of attorney-client and work-product privilege over 31 documents which OPC requested. Within days of learning that Duke settled with Nuclear Electric Insurance Limited (NEIL), OPC propounded three requests for production of documents related to this decision. These requests included: (1) documents provided to Duke management describing, analyzing or making recommendations relating to coverage available under the NEIL policies since 2000;¹ (2) documents analyzing, describing or otherwise explaining coverage available to Progress under the NEIL Policies since 2000;²

¹ Request for Production No. 64

² Request for Production No. 65

DOCUMENT NUMBER-DATE

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and (3) documents created since January 1, 2009, containing recommendations analyses or descriptions to management (including the Board of Directors) with respect to: a. The availability of coverage under each of the NEIL Policies; b. The expected recovery from NEIL related to the CR3 outage under each of the NEIL Policies; c. Possible approaches or strategies for recovery of monies from NEIL for losses sustained in the outage at CR3; and d. Reasons for and against agreeing to the NEIL settlement.³

2. Duke's boilerplate objection for each request, reads: "DEF objects to this request to the extent the request calls for the production of documents protected by the attorney-client privilege, the work product doctrine, or other applicable privilege or protection afforded by law. . . ." However, Duke does not cite any cases or any statutes in its objection.

3. Based on what very little is known about these documents, OPC asserts that Duke's claim of privilege is overly broad. Further, the OPC invokes its right to have the Commission review these documents in camera to determine whether Duke's claims of privilege, if any, apply to any portion of any of these documents. OPC contends that these withheld documents include material facts which are unavailable to OPC but upon which Duke by necessity relied on when making its decision to settle with NEIL. By its privilege claims Duke seeks to avoid disclosing these critical documents to OPC, the public, and the Commission essential information bearing up its settlement decision making. The details of the dispute, the legal standard to apply, analysis of types of privilege asserted, Duke's duty and burden of proof, and why the Commission should compel discovery are thoroughly discussed herein.

³ Request for Production No. 66(a)-(d)

I. Background

4. On February 22, 2012, the Commission approved a Settlement between Duke, OPC, and a group of customer Intervenors to resolve a number of matters, including freezing rates until January 1, 2017. See Order No. PSC-12-0104- FOF-EI in Docket No. 120022-EI (the "Settlement Agreement or Settlement").

5. On February 5, 2013, Duke announced that it had reached a settlement with NEIL and had decided to retire Crystal River Nuclear Unit 3 (CR3) instead of repairing and returning the unit to service. On February 8, 2013, Duke filed a motion to lift the stay on the remaining portions of this docket. On February 12, 2013, the Citizens served its Seventh Set of Requests for Production of Documents on Duke. This request, propounded pursuant to Section 350.0611(1), Florida Statutes (F.S.) and the Florida Rules of Civil Procedure 1.280 and 1.350, included four requests for documents generally related to the insurance coverage for CR3 under the NEIL policies and disputed issues in this case.

6. On February 18, 2013, Duke served its general and specific objections to Citizens' request. Duke's general objections apply to all requests for production and include among other things general objections to definitions (Nos. 2-4), as well as specific objections to requests Nos. 64, 65, and 66(a)-(d), claiming privilege. On April 30, 2013, OPC received Duke's revised privilege log. The documents listed therein are the subject of this motion to compel.

II. Choice of Law

7. The outcome of this proceeding will materially impact customer rates, including both base rates and fuel charges. This case affects the substantial interests of approximately 1.6 million Duke retail customer accounts. Its service area comprises approximately 20,000

square miles in 35 of the state's 67 counties, encompassing the densely populated areas of Pinellas and western Pasco Counties and the greater Orlando area in Orange, Osceola, and Seminole Counties, as well as the smaller communities of Sopchoppy, St. George Island, and Apalachicola located in Wakulla and Franklin Counties. Duke supplies electricity at retail to approximately 350 communities and at wholesale to about 21 Florida municipalities, utilities, and power agencies in the State of Florida. Well over 3.5 million Floridians – young and elderly, working and unemployed, as well as large and small commercial customers, government and private sector customers, and industrial and residential customers – will be affected by this docket. Accordingly, the cause(s) of action affecting the substantial interests of the parties to this docket arise under Chapter 366, F.S., and the Commission's general ratemaking authority granted to it by statute.

8. This proceeding is also subject to Chapter 120, F.S. Specifically, section 120.569, F.S., applies to all administrative decisions affecting the substantial interests of a party. Section 120.57(1), F.S., controls where a proceeding involves a disputed issue of material fact. It is clear that there remain disputed issues of material fact whose resolution by the Commission will materially affect the rates paid by Duke's consumers. As a consequence, OPC must file this motion to compel discovery of all documents subject to Duke's broadly drawn blanket of privilege to ensure that the substantial interests of the parties can and will be decided properly by the Commission *based upon all the relevant facts which Duke had before it* at the time it settled with NEIL.

9. The Commission has before it a first-of-its-kind dispute under Florida law and Florida has a paramount public policy interest in the application of its own law to ensure that customers are adequately protected. *See State Farm Mut. Auto. Ins. Co. v Duckworth*, 648

F.3d 1216, 1218 (11th Cir. 2011) (citing *State Farm Mut. Auto. Ins. Co. v. Roach*, 945 So.2d 1160, 1163 (Fla.2006)) (holding Florida law must apply in an insurance case where there is a paramount public policy interest and Florida citizens need protections afforded by Florida law). For all aspects of this case – whether it applies to discovery disputes or the prudence of Duke’s interactions with NEIL to settle for well less than the limits available under the applicable insurance policies for CR3 – the Commission should apply Florida Statutes and Florida case law to all aspects of this proceeding. Given the significance of this dispute, the potential for material customer impact, the complexity of the underlying issues, the intricacy of the privilege claims, and the fact there is no statutory deadline to complete this proceeding, the Commission should afford itself and the parties the time necessary to correctly decide all the issues of privilege being challenged by OPC in this motion and in any motions other Intervenors may file.

III. Legal Standard for Discovery

10. Florida Rules of Civil Procedure 1.350(a) provides, “Any party may request any other party (1) to produce . . . [documents] that constitute or contain matters within the scope of rule 1.280(b) and that are in the possession, custody, or control of the party to whom the request is directed. . . .” (emphasis added).

11. Florida Rules of Civil Procedure 1.280(b)(1) provides, “In General, Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. 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.” (emphasis added).

12. The Commission has previously determined that the scope of discovery is broad under the Rules of Civil Procedure and that the Commission likewise has broad discretion in resolving discovery disputes. *See e.g.*, Order No. PSC-09-0847-PCO-TP, issued December 24, 2009 at 2;⁴ Order No. PSC-98-0465-FOF-TL, issued March 31, 1998 at 3 (citing *Dade County Medical Association v. Hlis*, 372 So.2d 117, 121 (Fla. 3rd DCA 1979)).⁵ When discovery disputes arise, the Commission must balance the right of one party to pursue full discovery against the right of another party to be protected from unduly burdensome or oppressive discovery. *Id.* Further, pursuant to Rule 28-106.211, Florida Administrative Code (F.A.C.), the Commission has “broad authority to ‘issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case.’ ” *Id.* The abuse of discretion standard governs the review of Commission decisions granting or denying discovery motions requesting relief. *See* Order No. PSC-94-0425-PCO-WS,⁶ issued April 11, 1994 at 2 (citing *Eyster v. Eyster*, 503 So.2d 340, 343 (Fla. 1st DCA 1987), *rev. den.* 513 So.2d 1061 (Fla. 1987)). The elements of the attorney client and work product privileges are discussed at length below. “[T]he burden is upon the party asserting a privilege to establish the existence of each

⁴ Order No. PSC-09-0847-PCO-TP, issued December 24, 2009, in Docket No. 090258-TP, In re: Complaint by dPi Teleconnect, L.L.C. against BellSouth Telecommunications, Inc. d/b/a AT&T Florida for dispute arising under interconnection agreement.

⁵ Order No. PSC-98-0465-FOF-TL, issued March 31, 1998, in Docket No. 970808-TL, In Re: BellSouth Telecommunications, Inc. (citing *Dade County Medical Association v Hlis*, 372 So.2d 117, 121 (Fla. 3rd DCA 1979)).

⁶ Order No. PSC-94-0425-PCO-WS, issued April 11, 1994, in Docket No. 930880-WS, In Re: Investigation Into the Appropriate Rate Structure for SOUTHERN STATES UTILITIES, INC. for All Regulated Systems in Bradford, Brevard, Citrus, Clay, Collier, Duval, Hernando, Highlands, Lake, Lee/Charlotte, Marion, Martin, Nassau, Orange, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties.

element of the privilege in question." *Florida Sheriffs' Self-Insurance Fund v. Escambia County*, 585 So.2d 461,463 (Fla. 1st DCA 1991) (citing Ehrhardt, Florida Evidence § 501.1 (2d Ed.1984)).

13. Consistent with the Commission's broad discretion as well as case law requiring it, the Commission should conduct an in-camera review of the documents, determine whether Duke's general and specific objections are properly asserted and justified, and compel the responses warranted and necessary to afford the Intervenor due process and provide the Commission the opportunity to correctly fulfill its obligation to protect the customers and the public interest.

IV. Duke's General Objection to definitions 2-4

14. Duke objected to definitions 2-4 on the basis "to the extent they [these definitions] seek to encompass documents or information from persons or entities other than Duke who are not parties to this Docket, who are not otherwise subject to discovery under the applicable rules and law, and to the extent these definitions request documents outside of Duke's possession, custody, or control." These objected definitions pertain to Duke⁷ (definition 2), you⁸ (definition 3), and person⁹ (definition 4).¹⁰

15. Duke's boilerplate objection to OPC's definitions is not sufficient to meet its burden to justify withholding the documents. The scope of OPC's request for documents

⁷ "Progress Energy Florida," "DEF," or "the company" means Progress Energy Florida, Inc., its predecessor firm name (Florida Power Corporation) and its subsidiaries and affiliates, including, but not limited to, their present and former officers, employees, agents, directors and all other persons acting or purporting to act on behalf of Duke.

⁸ As used herein the terms "you," "your," and "company" refer to Duke, as defined in the previous paragraph, together with the officers, employees, consultants, contractors, agents, representatives, and attorneys of Duke, as well as any other person or entity acting on behalf of Duke.

⁹ The definition reads: "person" or "persons" shall mean and include natural persons, corporations, partnerships, associations, joint ventures, proprietorships, entities and all other forms of organizations or associations.

¹⁰ Note: Duke does not object to the definition of "person" in its objections to OPC's 8th Set of Requests for Production of Documents.

pertains to Duke, who is a party to this proceeding, its subsidiaries and affiliates. The request encompasses Duke's parent company, Duke Energy Corporation, the successor in interest to Progress Energy as there are webs of interrelationships between Duke, its former parent, and current parent, and OPC is not sure which entity has "possession, custody, or control" of the documents requested. OPC is seeking documents in Duke's "possession, custody, or control" or that which Duke should have access to, such as documents in Duke Energy Corporation's possession, custody, or control which directly relate to the actual decision making that occurred and affected the costs that Florida customers are being asked to pay. While neither Progress Energy nor Duke Energy Corporation (DEF's new parent) is "technically" a party to this docket as a separate entity, documents which those entities have within their "possession, custody, or control" also come within the scope of Duke's "possession, custody, or control" because Duke is also in essence a party to this docket by and through its subsidiary Duke Energy Florida, which as a wholly owned subsidiary and thus cannot act independently from Duke Energy Corporation.

16. If Duke Energy Corporation's grounds for refusal to produce relevant documents to OPC on the basis that Duke Energy Corporation, as the successor in interest to Progress Energy, is not a party in this docket or that OPC's discovery did not expressly include Duke Energy Corporation in the definition section,¹¹ OPC asks that Duke state as such. At the very least, Duke should identify the otherwise responsive documents in Duke Energy Corporation's "possession, custody, or control" and set forth the reasons to the Commission as to why Duke asserts the Commission does not have the jurisdiction to compel the production of those documents from Duke Energy Corporation.

¹¹ The definitions for OPC's 8th Set of Request for Production of Documents expressly include Progress Energy and Duke Energy Corporation to which Duke has made a general objection.

17. As a wholly owned subsidiary, Duke Florida could not act independently of Duke Energy Corporation when deciding whether Duke should have settled with NEIL. The Commission has previously determined that a subsidiary and parent may “act as one.” See e.g., Order No. 22460¹² (compelling discovery responses); see also *Medivision of E. Broward County, Inc. v. Dep't of Health & Rehabilitative Services*, 488 So. 2d 886, 888 (Fla. 1st DCA 1986) (finding that parent and subsidiary “acted as one” and the documents of the parent corporation were subject to discovery). Further, statements by Duke Director Michael Browning indicated that Progress Energy Corporation (PEF or Progress) did not act independently from Duke prior to the merger. Before agreeing to a comprehensive settlement between then PEF and the customers, Progress submitted the settlement to Duke’s Board for review and approval.¹³ This demonstrates that PEF then and Duke Florida now cannot act independently of its parents on issues of such magnitude that affect the well-being of both the regulated subsidiary and the parent and overall Duke Energy Corporation. The CR3 delamination repair and subsequent insurance claim and retirement decision making are unquestionably issues material to the entire Duke Energy Corporation as evidenced by the significant attention paid to those matters in its United States Securities and Exchange (SEC) filings and publically published statements to investors. Accordingly, the Commission should find that Duke Florida and Duke Energy Corporation “acted as one” for the purposes of providing documents that may be in the “possession, custody, or control” of Duke Energy Corporation, and that those documents should be provided. The record is replete with evidence that all of the material decisions relating to CR3 and the pursuit of insurance from

¹² Order No. 22460, issued January 24, 1990, in Docket No. 890190-TL, In Re: Petition of the Citizens of Florida to Investigate Southern Bell's Cost Allocation Procedures

¹³ Transcript, Vol. 4, page 55, July 20, 2012, testimony by Michael Browning before the North Carolina Utilities Commission, In re: Duke Energy Carolinas, LLC. Investigation Regarding the Approval and closing of the Business Combination of Duke Energy Corporation and Progress Energy, Inc.

NEIL were made by Duke executives other than those within the Florida regulated entity. As a simple example of evidence of the fact that Duke Florida and Duke acted as one, please refer to Duke's response to FIPUG First Set of Interrogatories Nos. 5 & 6, Attachment A, indicating that all the key personnel dealing with NEIL at the executive level were parent company executives.

18. If otherwise responsive documents in question are in the "possession, custody, or control" of NEIL, OPC asks that Duke state such. Duke should identify what documents are in NEIL's "possession, custody, or control," and are not otherwise available to or accessible by Duke.

19. For the reasons discussed above, the Commission should reject Duke's efforts to withhold crucial decision making documents from the customers, the public, and the Commission using a general objection to these definitions, should require the Company to identify all documents not produced pursuant to these general objections described above, and should require the Company produce any documents, if any, it has withheld based on general objections to the definitions.

V. Duke's Specific Objections to Request Nos. 64, 65, and 66(a)-(d)

20. DEF raised the same specific objection to each of these requests:

DEF objects to this request to the extent the request calls for the production of documents protected by the attorney-client privilege, the work product doctrine, or other applicable privilege or protection afforded by law. Duke will provide a privilege log within a reasonable time or as may be agreed to by the parties to the extent that the document request calls for the production of privileged or protected documents.

21. Pursuant to Florida Rules of Civil Procedure 1.280(b)(6), a party asserting attorney client or work-product privilege must "describe the nature of the documents [or]

communications . . . in a manner that . . . will enable other parties to assess the applicability of the privilege or protection.” That is generally done through a privilege log containing a detailed description of the documents as well as producing redacted versions of the privileged documents.

22. In response to OPC’s Seventh Request for Production, Duke provided an eight-page privilege log along with a list of 31 separate documents that it claims are subject to both the Attorney Client Privilege and Work Product Privilege. *See Attachment B – Duke’s Revised Privilege Log to OPC’s Seventh Request for Production*. The log contains the following columns: Bates No./Request (however, no documents with Bates Numbers with privilege material redacted were provided); Date (presumably the date the document was created or transmitted to Recipient); Author; Recipient (only one recipient is listed; it does not indicate if it was transmitted to multiple recipients or the means in which it was transmitted); Description (the document description is minimal; it presumably includes the document name and a parenthetical that is designed to say some privileged information may be contained); and Privilege (lists the applicable privilege asserted; Duke asserts attorney-client privilege and work-product privilege over all but one of the documents listed in the revised privilege log).¹⁴

23. There are some problems with the revised privilege log. First, the description of the documents in the log does not allow OPC (or the Commission) to adequately “assess the

¹⁴ Duke’s *initial* privilege log did not assert Mediation/Settlement Privilege over any of the documents listed. However, Duke’s revised and updated privilege log asserts “Mediation/Settlement Privilege” over the following document responsive to OPC Request Nos. 64, 65, 66 (a-c): “*Progress Energy Florida, Inc. v. Nuclear Insurance Limited Mediation Presentation of Progress Energy including discussion of mediation issues and substance of mediation issues*” OPC notes this document appears to be the same responsive document to OPC’s Eight Request for Production No. 78, listed on Duke’s revised privilege log for OPC’s Eight Request for Production. Therefore, OPC expressly reserves the right to challenge Duke’s Mediation/Settlement Privilege assertion over this document in a follow-up motion to compel for OPC’s Eight Request for Production and to fully discuss why the Mediation/Settlement Privilege does not apply, was waived, or should be abrogated as to this document.

applicability of the privilege or protection” being asserted. From the basic description provided, one cannot determine whether the applicable privilege should be attorney-client privilege, work-product privilege, or both privileges.

24. Second, Duke failed to produce the documents with the privileged communication redacted. The *carte blanche* refusal to produce the redacted documents further hampers OPC’s ability to “assess the applicability of the privilege or protection” being asserted by Duke. The Commission should require that the entire set of documents be produced with the privileged information redacted so OPC and the Commission “in-camera” can assess whether privilege may apply. It seems unlikely even from the minimal description in the log provided by Duke that all portions of all documents in question are privileged.

25. Therefore, OPC requests that the Commission compel Duke to 1) provide a more robust description of the documents subject to Duke’s privilege claims, describing whether each is protected under attorney-client privilege or work-product privilege or both; 2) provide the documents themselves with the privileged communication redacted; and 3) provide all documents being withheld under a claim of privilege to be submitted to the Commission for in-camera review, so that the Commission can determine whether and to what extent, if any, privilege attaches to any of the documents being requested.

VI. Legal Standard – In-Camera Review

26. All the documents should be produced so the Commission can conduct an in-camera review. “[W]hen the work product and attorney-client privileges are asserted, the trial court must hold an in-camera inspection of the discovery material at issue in order to rule on the applicability of the privilege.” *Snyder v. Value Rent-A-Car*, 736 So. 2d 780, 782 (Fla. 4th DCA 1999) (citing *Allstate Insurance Co. v. Walker*, 583 So.2d 356 (Fla. 4th DCA

1991)) (emphasis added); *see also Florida E. Coast Ry., L.L.C. v. Jones*, 847 So. 2d 1118, 1119 (Fla. 1st DCA 2003).

27. When a trial court fails to conduct an in-camera review of the disputed materials, the appellate court quashes the order on discovery, directing the trial court to review the materials in camera. *See Metric Eng'g, Inc. v. Small*, 861 So. 2d 1248, 1250 (Fla. 1st DCA 2003) (“Once the trial court knows the requestor's theory as to why the items are needed and how the material could potentially help the requesting party's case, the trial court should then conduct an in camera review.”); *see also Hamilton v. Ramos*, 796 So.2d 1269 (Fla. 4th DCA 2001) (quashing an order compelling discovery; noting that the trial court should have conducted an in-camera hearing to determine whether deposition questions elicited information protected by work product privilege).

28. OPC requests that the Commission conduct an in-camera review of all the documents listed on Duke's privilege log to determine whether they are privileged. To aid the Commission's understanding of the OPC's preliminary theory so that a determination can be made whether these documents are privileged or subject to a privilege exception, OPC incorporates by reference OPC's February 25, 2013 petition, the list of issues and disputed issues attached to Duke's April 19, 2013 Brief, Intervenor's April 19, 2013 Joint Brief, and Intervenor's April 26, 2013 Reply Briefs.

29. Oral argument on this motion may be helpful to explain OPC's reasoning for the arguments made herein, and contemporaneously submits a request for oral argument. However, without redacted versions of the documents listed on Duke's privilege log, oral arguments on the individual documents may be premature. At the appropriate time, OPC reserves the right to request an opportunity to present oral argument once redacted versions

of the documents are provided, and this subsequent request for oral argument may be accompanied by testimony or affidavits by the parties, to aid in the Commission's in-camera deliberations. *See Florida E. Coast Ry., L.L.C. v. Jones*, 847 So. 2d 1118, 1119 (Fla. 1st DCA 2003) ("In quashing this order we direct the trial court to hold an evidentiary hearing to determine whether the plaintiff could make the requisite showing of need and undue hardship.")

VII. Legal Standard – Attorney-Client Privilege as Applied Corporations

30. "The attorney-client privilege applies to confidential communications made in the rendition of legal services to the client." *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1380 (Fla. 1994) (citing § 90.502(1)(b), Fla.Stat. (2000)). This privilege is applicable to corporations. *Id.* ("Florida law applies the attorney-client privilege to corporations."). "The burden of establishing the attorney-client privilege rests on the party claiming it." *Southern Bell* at 1383 (citing *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976)).

31. In developing the criteria for evaluating attorney-client privilege as applied to corporations, the Court noted in *Southern Bell* that corporations are different from natural persons. *Id.*¹⁵ The Court stated that a corporation can only act through its agents and "relies upon its attorney for business advice more than the natural person." *Id.* (noting "that the 'zone of silence' [i.e., privilege] will be enlarged by virtue of the corporation's continual contact with its legal counsel." (citing *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F.Supp. 771, 774 (N.D.Ill.1962))). Thus, the Court determined that any criteria developed for

¹⁵ Person. (13c) 1. "A human being. — Also termed natural person." *Black's Law Dictionary* (9th ed. 2009); *see also* Natural person – "a human being as distinguished in law from an artificial or juristic person" (e.g., a corporation), *Merriam-Webster Dictionary*, available at <http://www.merriam-webster.com/dictionary/natural%20person>.

testing whether attorney communication was business advice or privileged legal advice, the court “ ‘must strike a balance between encouraging corporations to seek legal advice and preventing corporate attorneys from being used as shields to thwart discovery.’ ” *Id.* (quoting *First Chicago International v. United Exchange Co. Ltd.*, 125 F.R.D. 55, 57 (S.D.N.Y.1989)). Therefore, “to minimize the threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery, claims of the privilege in the corporate context will be subjected to a heightened level of scrutiny.” *Id.*

32. *Southern Bell* established the following criteria to evaluate whether a corporation’s communications with its attorney(s) are protected by the attorney-client privilege:

- (1) the communication would not have been made but for the contemplation of legal services;
- (2) the employee making the communication did so at the direction of his or her corporate superior;
- (3) the superior made the request of the employee as part of the corporation’s effort to secure legal advice or services;
- (4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee’s duties;
- (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Id. at 1383.

33. Given that a heightened level of scrutiny is applied to a claim of attorney-client privilege by a corporation in documents produced in the business setting, the existence of the privilege should not be presumed. Corporation attorney-client privilege does not attach when the communications or documents containing the communications were created for a *business purpose* as opposed to a legal service. In addition, corporation attorney-client privilege can be waived if that communication is “disseminated beyond those persons who,

because of the corporate structure, need to know its contents” *Id.* (e.g., the privileged communication was disclosed to some other person in Duke who has no need to know, to NEIL, to a third party, etc.).

34. Based upon the limited information available to OPC at this time, few if any of the documents listed on Duke’s privilege log under a claim of attorney-client privilege appear to be subject to the corporation attorney-client privilege. There is no demonstration that the documents were created for the purpose of rendering legal services as opposed to the business purpose of deciding the future of CR3 and collecting insurance. There is no overt demonstration that the documents were created to secure legal advice or services or that the documents were not disseminated beyond the “need to know” zone within Duke. According to the limited document descriptions provided, a great majority of the documents may only contain “attorney mental impressions.” By definition, a document containing “attorney mental impressions” means it is not subject to the corporation attorney-client privilege. Certainly there is no presumption that the entire document is privileged solely because Duke says that it is.

35. For example, the first document on Duke’s revised privilege log for OPC’s Seventh Request for Production is entitled: “CR3 Review Team Whitepaper.” The description says it “contains attorney mental impressions.” It does not state the document was created to secure or provide legal advice to Duke. The fact that it was authored by Duke Florida’s general counsel does not automatically make it privileged attorney client communication. This document might only contain business advice to Duke. As recognized by *Southern Bell*, corporate in-house counsels routinely render business advice to their clients to enable corporation management to make a business decision based on the business

advice. The document's title: "CR3 Review Team Whitepaper" is generic, and creates an issue of fact as to whether this document was created for a "business purpose." On its face, and without an independent in-camera review, it appears this document does not satisfy the five-prong corporation attorney-client privilege test announced by *Southern Bell*, *supra*. Moreover, the same analysis must be applied to all the documents listed in Duke's revised privilege log.

36. It appears that all (or almost all) of the documents may have been created for a *business purpose*, thus corporate attorney-client privilege would not apply absent an *in-camera* review. The Commission must make a determination whether the documents with the designation "attorney client communication" were created for a business purpose or to render legal services to Duke. Additionally, the Commission should indicate which portions of those documents contain protected attorney-client communication so Duke can make the appropriate redactions and provide the redacted documents to OPC.

37. Once the attorney-client privilege question is resolved, the question still remains whether the documents were prepared in anticipation of litigation (or arbitration) and, if so, whether the documents contain privileged attorney work product as defined by *Southern Bell*.

VIII. Legal Standard – Attorney Work Product Privilege

38. *Southern Bell* describes the "work product doctrine" and its effect (hereinafter "work product privilege"). The court described work product as "materials prepared in *anticipation of litigation* by or for a party or its representative. . ." and stated these materials "are protected from discovery, unless the party seeking discovery has *need* of the material and is unable to obtain the substantial equivalent without *undue hardship*." *Southern Bell*, 632 So. 2d at 1384 (citing Florida Rule of Civil Procedure 1.280(b)(3)) (emphasis added).

Generally, routine business documents prepared by an attorney do not necessarily make the documents subject to attorney work product privilege. See *Neighborhood Health Partnership, Inc. v. Peter F. Merkle M.D., P.A.*, 8 So. 3d 1180, 1185 (Fla. 4th DCA 2009) (“[T]he work product doctrine was created as a litigation privilege. It was never meant to apply to ordinary, routine, business-as-usual communications. That obviously means that it was not intended to protect the general foreseeability of being sued in the course of business. . . .”). Corporate in-house counsels are routinely asked to provide written assessments to the corporations for whom they work; however, that does not automatically cloak the document with attorney work product privilege. Before getting into the heart of the argument whether the documents prepared by an attorney are routine business communications or are subject to work product privilege, the Commission must address several preliminary questions.

A. Does work product privilege apply to documents prepared in anticipation of arbitration?

39. This question is more than mere semantics. According to the plain language of Florida Rules of Civil Procedure 1.280(b)(3), work product protection is afforded to material prepared in anticipation of *litigation*; however, the rule does not mention arbitration.

40. Arbitration, like mediation, is an alternative dispute resolution proceeding wholly different from and designed to avoid costly litigation. *Midwest Mut. Ins. Co. v. Santiesteban*, 287 So. 2d 665, 667 (Fla. 1973) (“The courts favor arbitration to expedite claims and reduce litigation.”). A threshold question for the Commission to resolve: Are materials prepared in anticipation of “arbitration” afforded the same work product privilege protections as materials prepared in anticipation of “litigation”?

41. Litigation defined by Black's Law Dictionary (9th ed. 2009), is as follows: “*litigation, n. (17c) 1. The process of carrying on a lawsuit <the attorney advised his client to make a generous settlement offer in order to avoid litigation>. 2. A lawsuit itself <several litigations pending before the court>.*” Litigation involves taking one’s legal claims to court for resolution.

42. Arbitration defined by Black's Law Dictionary (9th ed. 2009), is as follows: “*arbitration, n. (15c) A method of dispute resolution involving one or more neutral third parties who are usu. agreed to by the disputing parties and whose decision is binding. — Also termed (redundantly) binding arbitration. Cf. mediation (1). [Cases: Alternative Dispute Resolution 111.] — arbitrate, vb. — arbitral, adj.*” and “*voluntary arbitration. (18c) Arbitration by the agreement of the parties.*”

43. Arbitration is a private law alternative to a court litigated proceeding. Arbitration is designed to resolve disputes between two parties instead of resorting to very costly court litigation, which, in turn, is subject to all the discovery rules, formality, and costs associated therewith. The United States Supreme Court has announced a national policy favoring the use of arbitration when the parties contract for that type of dispute resolution. *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984)). The NEIL Policies included an arbitration clause which allowed for voluntary, non-binding mediation in lieu of or prior to going to arbitration. See e.g., CR3 NEIL policies.¹⁶

44. By definition, litigation and arbitration are substantively different and involve different forums. Litigation and arbitration are not synonymous terms; they are not

¹⁶ The NEIL policies dispute resolution clause includes a “catchall provision,” indicating which court of law the parties would take any disputes found not subject to arbitration.

interchangeable concepts. This distinction is borne out by what the parties to the Settlement negotiated. When Duke and the Intervenors negotiated Paragraph 10(b) of the Settlement, the parties clearly indicated they knew there was a substantive difference between litigation and arbitration. Paragraph 10(a)(3) recognizes that resolution of the NEIL claim could arrive “through arbitration, litigation, settlement, or otherwise. . .” and 10(b) again recognizes the outcome could be through “any such litigation, arbitration, or settlement. . . .”

45. The Florida Arbitration Code, Sections 682.01-682.22, F.S., does not reference the words “litigation” or “privilege” once in the entire code. The Code does not provide for litigation or the right to assert privilege in an arbitration proceeding. While it is clear that attorney work product receives the protection of privilege in a litigation context, Florida law is silent as to whether attorney work product privilege attaches to documents prepared in anticipation of arbitration.

46. While the term “litigation” is expressly mentioned under Florida Rules of Civil Procedure 1.280, “arbitration” is not. Neither is arbitration referenced in any of the Rule’s “Committee Notes” or cases cited under Westlaw’s annotated guide to Rule 1.280.¹⁷ Further, a plain reading of Rule 1.280 and cases interpreting Rule 1.280 does not equate arbitration with litigation.

47. This is a question of first impression before the Commission, and it should be answered in the negative. No presumption of privilege should be assumed in an arbitration

¹⁷ A diligent WestlawNext search of Florida cases regarding “arbitration work product privilege” indicates that Florida Courts have not yet extended or created an attorney work-product privilege to documents prepared in anticipation of arbitration. C.f., There are a line of federal district court cases which have found that arbitration proceedings are “adversarial” in nature, akin to litigation, thus under the Federal Rules of Civil Procedure, work product privilege would apply. See *Amobi v. District of Columbia Dep’t of Corrs.*, 262 F.R.D. 45, 52 (D.D.C.2009) (finding that because arbitration was adversarial in nature it can be characterized as litigation). However, a WestlawNext review of the search terms “arbitration work product privilege” indicates there are no US Circuit Court of Appeals or US Supreme Court cases which have agreed with the findings of the lower tribunals. Therefore, the finding of privilege in federal district court cases is not binding on the Commission or any Florida Courts, and given the unique circumstances, should not be deemed persuasive.

context. Materials prepared by Duke in anticipation of arbitrating Duke's insurance claims with NEIL under the NEIL CR3 policies should not be afforded work product privilege protection under the Florida Rules of Civil Procedure or under Florida case law. Thus, discovery of those materials should be compelled.

B. Does work product privilege relating to documents prepared in anticipation of arbitration between NEIL and Duke apply when those documents are subject to discovery in an administrative hearing?

48. If the Commission decides that materials prepared in anticipation of arbitration should be afforded the same privilege protection as materials prepared in anticipation of litigation, then the Commission should resolve the question whether work product prepared for an arbitration proceeding between Duke and NEIL should receive any privilege in an administrative proceeding before the Commission between OPC and Duke now that Duke and NEIL have settled the case. In short, does the qualified work product privilege endure once Duke settled with NEIL?

49. OPC would agree, if work product attached at all, that Duke could assert work product privilege over certain documents *against* NEIL if NEIL sought discovery of those documents because they were clearly created in anticipation of that arbitration proceeding. By contrast, those documents were not created to litigate prudence in a Commission proceeding. Therefore, while Duke might still assert work product privilege against any discovery by NEIL of those documents, it cannot against OPC or any other parties to this docket.

50. Thus, in the context of a non-party to the arbitration seeking production of documents prepared for an arbitration proceeding for use by the non-party in a different proceeding, no work product privilege should apply. Further, there is no evidence or

assertion by Duke that, when Duke was preparing its arbitration and mediation strategy with NEIL, Duke was simultaneously preparing to litigate the prudence of its pursuit of NEIL claims *before the Commission* especially since Duke has publically maintained it had adequate insurance coverage and committed no fault in regards to the SGR project and subsequent repairs. An in-camera inspection may well reveal there was no mutually exclusive duality in Duke's legal preparation, to the extent that intent would be manifest in the documents. It is clear, however, that there is nothing in the record at this time to indicate that such a duality existed at the time the subject documents were created.

51. OPC contends that the Commission should also answer the question of first impression in the negative and against the existence of a work product privilege. Materials prepared by Duke in anticipation of arbitrating Duke's insurance claims with NEIL through private arbitration should not be entitled to work product privilege protection in the Commission's administrative law prudence determination on Duke's pursuit of NEIL proceeds. The Commission is a separate venue (private arbitration vs. administrative proceeding) which is governed by different rules of procedure and evidence. In addition, this proceeding has different parties. Thus, the qualified work product privilege should not continue in this proceeding.¹⁸

52. If, however, work product privilege also applies equally in this Commission proceeding to the materials prepared in anticipation of arbitrating with NEIL in a different

¹⁸ OPC would not raise this argument if this case was being decided in a court of law because according to *Alachua General*, "[T]he weight of modern authority clearly provides that work product retains its qualified immunity after the original litigation terminates, regardless of whether or not the subsequent litigation is related. . . . [M]aterials prepared by an attorney in anticipation of litigation should enjoy qualified protection from discovery." *Alachua Gen Hosp v. Zimmer USA, Inc.*, 403 So. 2d 1087, 1088 (Fla. 1st DCA 1981). However, this is not a court of law, thus arguably this continuation of qualified privilege rule does not apply. As such, OPC asserts this is a question of law to be decided of whether the qualified privilege for work product, if any, existed in the first place, and whether it should continue from a private venue into a governmental tribunal convened for a completely different purpose (i.e., in an administrative proceeding before the Commission).

forum, the analysis turns to the type of work product and whether any exceptions or waiver of privilege applies.

C Two Types of Attorney Work Product

53. The Court in *Southern Bell* separates “work product” into two categories: opinion work product and fact work product. *Id.* “Opinion work product consists primarily of the attorney’s mental impressions, conclusions, opinions, and theories.” *Id.* (citing *State v. Rabin*, 495 So.2d 257 (Fla. 3d DCA 1986)) (emphasis added).

54. “[F]act work product is subject to discovery upon a showing of ‘need’ and ‘undue hardship,’ [while] opinion work product generally remains protected from disclosure.” *Id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981); *Rabin supra*). “The material does not need to actually be gathered by the attorney to be [fact] work product, but must be gathered in anticipation of litigation.” *Metric Eng’g, Inc. v. Small*, 861 So. 2d 1248, 1250 (Fla. 1st DCA 2003).

55. While attorney opinion work product containing an “attorney’s mental impressions, conclusions, opinions, and theories” is absolutely privileged and protected from disclosure in discovery, fact work product is not absolutely protected. *See e.g., Southern Bell*, 632 So. 2d at 1384; *5500 N. Corp. v. Willis*, 729 So.2d 508, 512 (Fla. 5th DCA 1999); *Ford Motor Co. v. Hall-Edwards*, 997 So. 2d 1148, 1153 (Fla. 3d DCA 2008); *Acevedo v. Doctors Hosp., Inc.*, 68 So.3d 949, 953 (3d DCA 2009). Exceptions to Fact-work product are discussed below.

D. Exceptions to work product privilege

56. The first exception is waiver. A party can waive privilege to both attorney-opinion and fact work product. The second exception is “need” and “undue hardship.” The

Court in *Southern Bell* noted that the Florida Rules of Civil Procedure and case law, generally provide a “need” and “undue hardship” exception for fact work product privilege, but not to attorney-opinion work product.¹⁹ *Southern Bell*, 632 So. 2d at 1384. The “need” and “undue hardship” exception, discussed below, has been reaffirmed numerous times by Florida courts.

E. Need and undue hardship exception to fact work product privilege

57. In order to discover fact work product privileged materials, the party seeking discovery must establish a showing of “need” or “undue hardship.” *Southern Bell*, 632 So. 2d at 1384 (citing Florida Rules of Civil Procedure 1.280(b)(3)). Case law sets forth how to establish “need” as well as “undue hardship.”

58. In this docket, Duke has the burden of proof to establish that it acted prudently. Duke currently has all the fact work product documents upon which it based its decision to settle with NEIL – these documents go to the merits of Duke’s case – and many of these critical fact documents are subject to a claim of work product privilege. Much of Duke’s fact work product will be needed in order for OPC to present its theory of the case, and OPC’s approach to its presentation of its theory of the case will in large part depend upon what Duke pre-files in its direct case on June 17, 2013.²⁰ During the Commission’s in-camera review, the Commission should separate attorney opinion work product from fact work

¹⁹ Case law does not address whether opinion work product containing the “mental impressions, conclusions, opinions, and theories” of *non-attorneys* would fall under “attorney opinion work product” as opposed to “fact work product.” Since the case law is silent, OPC asserts the legal position that non-attorney opinion is “fact work product” and therefore subject to discovery upon a showing of “need” and “undue hardship,” or alternatively upon some waiver by Duke.

²⁰ OPC reserves the right to file a supplemental motion to compel fact work product following the filing of Duke’s direct case, stating forth with more particularity OPC’s theory of the case in light of the actual Duke explanation provided at that time (rather than the speculation that must occur at this juncture) and establishing why OPC believes these fact work product documents are “needed” and cannot be independently created without “undue hardship.”

product and determine to what extent, if any, attorney-client privilege protects work product documents.

59. In the interest of justice, all fact work product properly segregated from attorney opinion work product should be compelled because OPC will most assuredly need it to present its case and cross-examine and test Duke's witness presentations on prudence claims. Further, OPC is incapable of replicating the facts contained in Duke's fact work product. Only Duke has in its possession the fact documents for which OPC has no firsthand knowledge. Further, it would be impossible for OPC to replicate these fact documents absent Duke's specialized knowledge. The "need" and "undue hardship" standard established by *Southern Bell* is abundantly satisfied, and the fact work product contained within these documents should be compelled. Any "attorney opinion work product" contained in those documents should be redacted unless that privilege was waived or otherwise subject to another exception.

F. Additional Exceptions to Work Product Privilege

60. The sword and shield exception to work product: If the work product privileged material is "reasonably expected or intended" to be used during the proceeding by the attorney who created the work product, then it is discoverable. *Northup v. Acken*, 865 So. 2d 1267, 1272 (Fla. 2004) ("The overriding touchstone in this area of civil discovery is that an attorney may not be compelled to disclose the mental impressions resulting from his or her investigations, labor, or legal analysis unless the product of such investigation itself is reasonably expected or intended to be presented to the court or before a jury at trial. . . . [W]e also explicitly hold that if attorney work product is expected or intended for use at trial, it is subject to the rules of discovery.") (emphasis added).

61. Any work product privilege over documents may cease once the materials or testimony is intended for trial use. See *Huet v. Tromp*, 912 So. 2d 336, 338 (Fla. 5th DCA 2005).²¹ Thus, work product privilege may be waived (or may already have been waived) by Duke if Duke intends to rely upon any of the documents currently under such claim of privilege in a subsequent proceeding at the Commission for Duke to meet its burden to prove that it was prudent in its actions in settling with NEIL.

62. OPC asserts that for Duke to carry its burden of proof and establish that it was prudent in its dealings with NEIL in settling with NEIL for a dollar amount well below the maximum obtainable under the NEIL policies, Duke would need to rely upon these documents containing the factual basis for its decision to settle with NEIL. For example, if the CR3 delamination was a covered accident (a critical fact to support a claim for full coverage from NEIL), Duke must necessarily rely upon some or all of these documents that related to Duke's assertion that it was a covered accident, including, but not limited to, Duke's assessment of the policy, scope of coverage, engineering documents, all of which would enable Duke to establish that it had a valid claim under the NEIL policies when it was negotiating with NEIL. Therefore, in order for Duke to establish it was prudent in dealing

²¹ The court in *Huet* held:

"[A] party may waive the work product privilege with respect to matters covered by an investigator's anticipated testimony when a party elects to present the investigator as a witness. See *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed 2d 141 (1975).

In *American Motors Corp v Ellis*, 403 So.2d 459 (Fla. 5th DCA 1981), *rev. denied*, 415 So.2d 1359 (Fla. 1982), this court held that a waiver of work-product privilege had occurred, relying in part on *Dodson v. Persell*, 390 So.2d 704 (Fla. 1980). In that case, the Florida Supreme Court held that the contents of surveillance films and materials are subject to discovery in every instance where they are intended to be *339 presented at trial, either for substantive, corroborative or impeachment purposes. The court reasoned that if materials are to aid counsel in trying a case, they are work product, but any work product privilege that existed ceases once the materials or testimony are intended for trial use. See *5500 North Corp. v Willis*, 729 So.2d 508 (Fla. 5th DCA 1999). See also *Alamo Rent-A-Car v. Loomis*, 432 So.2d 746 (Fla. 4th DCA 1983); *Wackenhut Corp. v. Crant-Heisz Ent., Inc.*, 451 So.2d 900 (Fla. 2d DCA 1984)."

and settling with NEIL in this proceeding, it is highly likely, if not absolutely necessary, that Duke will need to rely upon these documents it developed prior to and during its negotiations with NEIL. If Duke must rely on these documents to establish it was prudent, these documents become subject to discovery under this exception.

63. On February 5, 2013, when Duke announced that it had reached a settlement with NEIL for substantially less than the full policy limits, the posture of this heretofore construction and repair prudence docket changed. Prior to that day, Duke and the Intervenors were operating under the terms of the Settlement approved 12 months prior. However, once it became known that Duke settled with NEIL for substantially less than the policy limits, that knowledge was the trigger point for litigation in this administrative proceeding. While attorney-opinion and fact work product privilege would attach to documents created by Duke after February 5, 2013, the fact work product documents may still be subject to “need” and “undue hardship” exceptions.

G. Work product privilege ended when Duke settled with NEIL

64. Work product privilege attaches when materials are prepared in anticipation of litigation. *Ford Motor Co. v. Hall-Edwards*, 997 So. 2d 1148, 1152 (Fla. 3d DCA 2008) (citing *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So.2d 1377, 1384 (Fla.1994)).²² In the insurance context, documents concerning a covered incident are generally deemed *work product* because they were prepared when it was foreseeable that litigation could arise. See e.g., *Marshalls of MA, Inc. v. Minsal*, 932 So. 2d 444, 446 (Fla. 3d DCA 2006). In this case, assuming that work product privilege applies to arbitration proceedings (which Florida law

²² However, work product does not apply to materials created or assembled in the ordinary course of business or pursuant to public requirements unrelated to litigation. See *Cotton States Mut. Ins. Co. v. Turtle Reef Assoc.*, 444 So.2d 595 (Fla. 4th DCA 1984) (citing *United States v. El Paso Company*, 682 F.2d 530, 542 (5th Cir.1982) reference the Federal Rules of Civil Procedure Rule 26(b)(3) advisory opinion).

does not support), it is logical that Duke could foresee arbitration with NEIL following the October 2009 or March 2011 delamination.

65. In a court of law, qualified work product privilege *generally* continues once the underlying matter is resolved, subject to claims of need and undue burden. *See e.g., Alachua Gen. Hosp. v. Zimmer USA, Inc.*, 403 So. 2d 1087, 1088 (Fla. 1st DCA 1981). However, that is not necessarily true in insurance cases. One aspect of the prudence matter being decided by the Commission is whether Duke prudently interacted with its insurance carrier on behalf of the customers.

66. In essence, the Intervenors allege that Duke may have negotiated imprudently (or in what would be analogous to bad faith in the traditional insurance arena), taking a lower settlement than would be otherwise achievable under the NEIL policies. Therefore, it is helpful to look to bad faith insurance cases to see whether any work product privilege continues once the insurance claim is settled. The short answer is that work product privilege generally ends after the insurance claim is resolved, and by analogy, work product privilege should end for documents related to the claim settlement between by Duke and NEIL on March 28, 2013.

67. In an insurance claim where bad faith exists or is alleged, when an insured institutes a first party or third party bad faith insurance claim, work product protection over the insurer's claim file ends following resolution of or payout for the underlying insurance claim. In making its determination whether that work product privilege over what is effectively Duke's "claim file" ended when the underlying insurance claim between Duke and NEIL was settled, the Commission should look to first party or third party bad faith insurance claim cases for guidance. *See e.g., Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121,

1129-30 (Fla. 2005). *Ruiz* was a case resolving uneven treatment of work product privilege in the context of first or third party bad faith insurance claims once the underlying insurance claim was resolved between the insured and insurer, and the insured initiated a bad faith claim. *Id.* Here, OPC is not alleging that Duke should pursue a bad faith claim against NEIL; however, the customers have doubts that Duke negotiated with NEIL *in good faith*, especially after the events leading up to and including the July 2, 2012 merger with Duke and the Board Room coup that ousted Bill Johnson. This case centers in part on (1) whether Duke pursued claims and negotiated with NEIL in good faith on behalf of its customers, who are a real party in interest as third party beneficiaries under the NEIL policies, and (2) whether Duke was prudent in its entire pursuit of insurance proceeds and course of dealings with NEIL on the customers' behalf. Under the regulatory compact, discussed below, Duke is obligated to negotiate with NEIL in good faith and maximize insurance payments from NEIL. However, Duke has now settled its NEIL claim for what could be as low as 25 cents on the dollar²³ despite Duke's claims that the delaminations were covered accidents under the policies and after expressing its confidence to investors and the general public that the insurance coverage was adequate under the policies to repair and return CR3 to commercial operation.

68. The *Ruiz* case applies the same rule allowing discovery of the "claim file" to all bad faith claims brought by an insured against an insurer when the insurer refuses to pay its claim. Once the insurer pays its claim, the matter giving rise to the claim is resolved, thereby

²³ The aggregate settlement with NEIL was for \$835M of which \$490M was specifically allocated by the agreement to the accidental outage policy. Under a repair scenario, the NEIL policies limits are \$2.25B. Under a retirement scenario, it is unclear if the policies provide for coverage at half of the estimated repair cost \$1.22B (\$2.44B/2) or half of policy limits \$1.125B (\$2.25B/2). Regardless, whether \$1.22B or \$1.125B was available under the retirement scenario, settling the property damage portion of the claim with NEIL for \$345M (\$835M less \$490M), leaves a gap of between \$780M to \$875M to be made up in the CR3Regulatory Asset payments by the customers

work product privilege over the insurers' claim file ends when the insured brings a bad faith claim. The rationale set forth in *Ruiz* to allow access to otherwise protected work product after the resolution of the underlying NEIL insurance claim is compelling. The Commission should apply its rationale to the work product privilege being asserted by Duke as it relates to Duke-NEIL work product.

69. In this case, the Citizens are challenging the prudence of Duke's actions in pursuit of the insurance proceeds, which is analogous to a first party bad faith claim. There is a fiduciary relationship between the customers and Duke. Likewise, as a monopoly, Duke is obligated to act in the captive customers' best interest. For any costs not covered by the NEIL policy, Duke will seek recovery from its captive customers and not its shareholders.²⁴

70. OPC, on behalf of Duke's customers, is alleging that Duke did not prudently pursue its claim for insurance coverage with NEIL, that Duke may have bungled its NEIL claim, and/or that Duke may not have pursued its claim with NEIL in good faith on behalf of all its customers, a real party of interest under the NEIL CR3 policies and the mediation with NEIL. Inasmuch as Duke settled for far less than the policy limits, a question is raised as to whether Duke acted prudently, and in good faith, in dealing with NEIL? It is imperative that the customers and the Commission have access to the equivalent of Duke's "claim file" developed for pursuing its NEIL claims in order to gauge whether Duke prudently dealt with NEIL. From the documents produced to date by Duke to the Intervenors (essentially through the end of 2010), it would be impossible for OPC or anyone other than Duke to reconstruct Duke's "claim file" which contains many crucial documents Duke developed in anticipation of arbitrating its claim with NEIL.

²⁴ Ultimately, the customers indemnify Duke for the consequences of all its actions taken in regards to CR3, including negotiating and settling with NEIL.

71. Under the rationale of *Ruiz, supra*, the documents which Duke created in anticipation of arbitrating with NEIL no longer should be afforded any work product privilege whatsoever. At the very least, the Commission should review these documents in camera to make the determination whether any privilege applies and, if so, whether it is attorney-client privilege, attorney-opinion work product, or fact work product privilege.

IX. Duke's Duty to Its Captive Customers

A. Duke has a duty to act prudently and assumed a duty to act in its customers' best interest.

72. In pursuing recovery of insurance proceeds for the damaged CR3 plant, Duke owed a duty to its customers similar to the duty an attorney owes his or her client²⁵ or the insurer owes its insured.²⁶ Both the attorney and insurer are bound by ethical and legal obligations to represent the best interests of their clients. Under the regulatory compact²⁷ and Florida law, Duke has an affirmative duty to act prudently and in its customers' best interests. The attorney and the insurer can assert privilege on behalf of their clients during disputes. However, if the attorney or insurer breach their duty to their client or insured, the client or insured can bring a malpractice suit or bad faith insurance claim and the attorney or

²⁵ "A lawyer owes to his or her client a duty to exercise the degree of reasonable knowledge and skill which lawyers of ordinary ability and skill possess and exercise." *Home Furniture Depot, Inc. v. Entevor AB*, 753 So. 2d 653, 655 (Fla. 4th DCA 2000) (citing *Stake v. Harlan*, 529 So.2d 1183, 1185 (Fla. 2nd DCA 1988)).

²⁶ "An insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business. . . . Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith." *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 668-69 (Fla. 2004) (quoting *Boston Old Colony Insurance Co. v. Gutierrez*, 386 So.2d 783 (Fla. 1980))

²⁷ The regulatory compact requires utilities to provide safe and reliable service to all customers within its service territory, requires no undue price discrimination, and requires charging just and reasonable rates established by a commission. In exchange for being a monopoly, the utility forfeits its rights to earn monopolistic profits. "All of these requirements are designed for the expressed purpose of limiting the potential for monopoly abuse." "AN ECONOMIC AND LEGAL PERSPECTIVE ON ELECTRIC UTILITY TRANSITION COSTS," by Kenneth Rose, Ph.D., The National Regulatory Research Institute, July 1996 at 42 available at <http://www.ipu.msu.edu/library/pdfs/nrri/Rose-Electric-Utility-Transition-Costs-96-15-July-96.pdf>.

insurer cannot assert a claim of privilege against the client or insured in a subsequent cause of action for breach of that duty. In both instances, privilege is unavailable.

73. In this case, Duke would not dispute that it has, and has always had, a duty to act in its customers' best interest. Jim Rogers, Duke's president and chief executive officer, acknowledged this when he stated before the Florida Public Service Commission on September 6, 2012, and said: "But let me assure you, in every event, whatever decision that we make, we will make it in the best interest of the customers in Florida."²⁸ Under the evidence code, his statements would constitute an admission that Duke assumed the duty to act in the customers' best interests. § 90.803(18), Fla. Stat. (2003).

74. Further, Duke is also required under the regulatory compact to act in its customers' interest with respect to NEIL. Duke cannot deny that this duty or responsibility included acting prudently in its course of dealing with NEIL and in pursuit of insurance proceeds. OPC is challenging all of Duke's decisions regarding the pursuit and recovery of insurance proceeds from the time it began dealing with NEIL relative to the October 2009 delamination through Duke's final decision to execute the NEIL settlement on March 28, 2013. Duke made multiple decisions along the way in its course of dealing with NEIL and Duke has the burden to prove it was prudent in all of its decision making in this regard. The Intervenor's need to have access to the documentation supporting the decisions or bearing upon them. Many of those decisions are contained, referenced, influenced, or memorialized by the documents over which Duke is asserting privilege.

75. The customers are a real party of interest as beneficiaries to the NEIL policies as well as the outcome of the mediation between Duke and NEIL because they have been paying the premiums for the NEIL insurance coverage for decades and will be asked to pay

²⁸ Jim Roger's statements in Docket No. 100347, August 13, 2012 transcript at 35.

for any unreimbursed losses associated with the damage to the plant. The Settlement provides that Duke was to pursue complete coverage to the full extent of coverage limits under the NEIL policies. Additionally, Duke publically told its customers and shareholders that there was adequate coverage under the NEIL policies to pay the cost to repair the plant and return CR3 to operation. Furthermore, pursuant to the Settlement, Duke contracted to provide the customers 100% of the proceeds received from NEIL.²⁹ As a real party of interest and beneficiary, the customers had requested to observe the Duke-NEIL mediation proceedings; however, Duke rejected the customers' request to attend and observe these proceedings. Rejecting the customers' reasonable request underscores Duke's duty to act prudently in all its course of dealings with NEIL. Further, Jim Rogers stated that Duke would provide all the information that formed the basis for Duke's decision:

[O]ne of the things that I keenly appreciate, driven in part because I once was a consumer advocate and once worked as a federal regulator, you cannot share enough information with respect to what's going on. And we're doing our very best to make sure you're fully informed.

...

But let me assure you, in every event, whatever decision that we make, we will make it in the best interest of the customers in Florida. And we will share that . . . decision with the consumers as well as the appropriate people from the Commission because it's very important that when we make such an important decision, that we lay out why we made the decision, what we considered, and we will do that going forward. . . .³⁰

Thus, Duke should be held accountable for its promises and admissions and should provide the customers all the facts having any bearing in any way upon its decision making that Duke

²⁹ A settlement agreement is a contract governed by principles of contract interpretation. *See Robbie v. City of Miami*, 469 So. 2d 1384, 1385 (Fla. 1985)).

³⁰ Jim Roger's statements to the Commission in Docket No. 100347, August 13, 2012 transcript at 19-20, 35.

had before it when it settled with NEIL, including facts contained in documents subject to claims of privilege.

76. OPC agrees with Duke that a central question “the Commission has to answer is whether PEF was prudent in accepting the settlement with NEIL given those policy provisions and the facts that PEF had before it.” Duke’s April 26, 2013 reply brief at 8 (emphasis added). OPC believes the documents over which Duke has claimed privilege contain or bear upon the most important facts and judgments relating to Duke’s reasons for settling with NEIL for such a low dollar amount. Without receiving these documents, the customers will be deprived of essential facts having a bearing on Duke’s decision making leading up to its settlement with NEIL. OPC cannot adequately represent customers in this case without access to these crucial documents detailing and explaining the facts and judgments upon which Duke relied. Without these documents, the customers (and Commission) cannot verify whether Duke satisfied its duty of prudence.

77. Duke has the burden of proof in this matter. As Duke stated during the April 30, 2013 oral argument, privilege cannot be used as a sword and shield and it intends to provide only facts that are not subject to claims of privilege in an effort to show it acted prudently. However, that does not mean that Duke can cloak in a claim of privilege its actions and the facts surrounding its settlement with NEIL. Duke has the burden of proof to show it acted prudently and the Intervenors must have a fair opportunity to test the validity of Duke’s claims or present countervailing facts invalidating Duke’s claim of prudence. Absent the required showing to invoke privilege, all evidence bearing on the prudence of Duke’s pursuit of the NEIL claim must be compelled and evaluated. For these reasons and following an in-

camera review and application of the privilege laws, the Commission should find that privilege does not apply to these documents and Duke must be compelled to produce them.

B. Breach of duty to act prudently and in the customers' best interest

78. As discussed previously, a central consideration that the Commission must evaluate in this phase of Docket No. 100437-EI, is whether Duke prudently pursued its insurance claim with NEIL on behalf of its captive customers. The proceeding currently before the Commission involves a breach of duty of prudence by Duke and seeks to delve into issues pertaining to Duke's prudent pursuit of its CR3 repair claims with NEIL under the NEIL policies on behalf of its clients. One of the issues raised by OPC is whether Duke negotiated prudently with NEIL under the NEIL policies.

79. The following is known evidence showing that Duke breached its duty of prudence: (1) Duke employees consistently asserted the CR3 concrete was sound, the delaminations were unforeseen, and Duke was not at fault for any of the delaminations resulting from the SGR project or subsequent repair efforts; (2) Through the Settlement, Duke committed to pursue insurance proceeds in good faith under all the NEIL policies; (3) Prior to its merger with Duke Energy Corporation, Progress Energy consistently claimed the delaminations were covered accidents under the policies and that there was adequate coverage to return CR3 to commercial service; (4) On September 7, 2012, Jim Rogers told the Commission and the customers that Duke's decision would be in the best interests of its customers and Duke would thoroughly explain what it considered in making that decision to keep the Commission and customers fully informed; and (5) On February 5, 2013, Duke announced it had reached a settlement with NEIL for far less than what it led the customers and the Commission to believe the policy limits would have provided. Duke is now claiming

privilege over the documents containing the very information Jim Roger's stated Duke would disclose. These facts are evidence that Duke has breached its duty to its customers. Based on the admissions by Duke, the customers submit that Duke breached its duty to prudently pursue its insurance coverage with NEIL and thus, imprudently settled its NEIL claims for far less than what the policy limits would have provided. However, the documents over which Duke has claimed privilege may show additional areas where Duke breached its duty, including but not limited to, the prudence of the provisions in its insurance policies; general cozy relationship with NEIL; related-party status to NEIL; settling the NEIL claims for full policy limits might require other Duke owned nuclear units to pay increase assessments; and a change of emphasis in Duke Energy Corporation's pursuit of NEIL claims following the merger.

80. For Duke to prove it was prudent in all these respects, it requires Duke to disclose its strategy for dealing with NEIL from 2009 until the announcement of the settlement; its assessment of coverage under the NEIL policies for a repair versus retirement scenario; and its assessment of going to arbitration versus settlement. Without the disclosure of the documents listed on Duke's privilege log, it is impossible for the customers to know, and the Commission to determine, whether Duke prudently dealt with NEIL. If all the documents containing the essential facts guiding Duke's decision to settle with NEIL are shielded from discovery under a claim of attorney-client privilege or work-product privilege, then the customers will not be able to adequately test Duke's contentions and thus will be denied their fundamental due process afforded under Chapter 120, F.S.

81. In sum, it is without question that Duke owes to its customers a duty to prudently pursue of maximum NEIL proceeds under the regulatory compact between a monopoly and

its captive customers. In order for the customers to know whether Duke satisfied (or breached) its duty to its customers and for the Commission to determine whether Duke acted prudently, all the documents requested must be produced for an in-camera review by the Commission. The Commission should review all the documents in camera and redact any attorney-opinion work product and corporate attorney-client privileges (unless waived) and compel the production of the remainder of the requested documents.³¹

X. OPC's Seventh Request for Production of Documents Nos. 64, 65, 66(a-c)

82. OPC's Seventh Request for Production of Documents were propounded to discover documents that will aid OPC in its case to determine "whether Duke was prudent in *accepting the settlement with NEIL given [the NEIL] policy provisions and facts that Duke had before it.*" Duke's reply brief dated April 26, 2013, at 8. Duke has variously claimed attorney-client privilege and work product privilege for all of these documents. The document requests and Duke's assertions regarding privilege are described below.

83. Request for production No. 64:

Please provide all documents provided to management describing, analyzing or making recommendations relating to coverage available under the NEIL policies since 2000. The request also includes all such documents as they relate to any amendments, endorsements, notices of coverage or any other change(s) to the NEIL Policies.

84. DEF's Specific Objection:

DEF objects to this request to the extent the request calls for the production of documents protected by the attorney-client privilege, the work product doctrine, or other applicable privilege or protection afforded

³¹ Fact work product which contain "an attorney's thoughts or mental impressions concerning the litigation at hand" should be redacted in accordance with the work product privilege. *Acevedo v. Doctors Hosp., Inc.*, 68 So. 3d 949, 954 (Fla. 3d DCA 2011), reh'g denied (Sept. 21, 2011). However, "mental impressions, conclusions, opinions, and theories" of *non-attorneys* retained by Duke to assist it in preparation of its arbitration with NEIL should not be redacted.

by law. Duke will provide a privilege log within a reasonable time or as may be agreed to by the parties to the extent that the document request calls for the production of privileged or protected documents.

85. DEF's Privilege Log: Incorporated herein by reference. Duke claims that POD No. 64 relates to six documents within its possession, custody, or control and claims both attorney-client communication and work product privileges.

86. With regard to attorney-client privilege, OPC asserts it cannot be determined, based on the incomplete information provided, if this privilege even applies since it is unknown (1) whether Duke waived the privilege by distributing these documents outside the zone of privilege, (2) whether they were created for a business purpose as opposed to a legal service, or (3) whether the documents contain privileged communication in accordance with the privilege test established by *Southern Bell, supra*. These are documents created by Duke and were alleged to be distributed internally. These documents may or may not contain attorney client privileged communication. Further, if Duke is relying upon any of these documents to support or defend its claim that it was prudent in settling with NEIL, then reliance upon these documents necessarily requires waiver of the privilege. Duke cannot use privilege as a sword and shield.

87. With regards to fact work product privilege, OPC has presented a *prima facie* case of "need and undue hardship" that provides the Commission a basis for finding that these documents must be produced. After Duke files its direct testimony, OPC will reaffirm by affidavit its showing of "need and undue hardship" with greater particularity. At this time (but before the filing of testimony), Duke is asserting it "was prudent in accepting the settlement with NEIL given [the NEIL] policy provisions and facts that [DEF] had before it." Duke April 26, 2013 reply brief at 8. Based on information known at this time and without

the benefit of Duke's pre-filed testimony, OPC contends that the customers need these documents because (1) as described, they are critical to OPC's ability to present its case and test Duke's case. The OPC believes the documents contain facts which will directly bear on whether Duke breached its duty and acted imprudently in any duty it had toward the customers and/or acted imprudently in its pursuit of NEIL insurance proceeds; (2) as described, the documents pertain to disputed issues in the case such as whether Duke "was prudent accepting the settlement with NEIL given [the NEIL] policy provisions and facts that [DEF] had before it" *Id*; and (3) as described, these documents likely contain facts that are otherwise unknowable to anyone other than Duke. Without undue hardship, OPC cannot recreate the facts contained in the documents because OPC does not know what facts are contained in those documents. Further fulfilling the undue hardship test, it is impossible for OPC to recreate the information contained in "documents provided to [Duke's] management describing, analyzing or making recommendations relating to coverage available under the NEIL policies since 2000." POD No. 64. These documents contain facts heretofore unknown and unknowable to OPC and constitute the "facts which Duke had before it" when it settled with NEIL. More importantly, now that NEIL and Duke have settled all claims with each other regarding CR3, attorney opinion and fact work product privilege may no longer apply to any of the documents in Duke's possession, custody, or control for which work product privilege is now being asserted.

88. OPC is seeking these documents to test the veracity and adequacy of Duke's efforts to meet its burden of proof as to whether Duke was prudent in pursuing the NEIL claim. These documents directly relate to contested issues raised by Duke, OPC, and the Intervenors.

89. Request for production No. 65:

Please provide all documents analyzing, describing or otherwise explaining coverage available to Progress under the NEIL Policies since 2000.

90. DEF's Specific Objection is the same and incorporated by reference.

91. DEF's Privilege Log: Incorporated herein by reference. Duke claims that POD No. 65 relates to 30 of the 31 documents within its possession, custody, or control and claims both attorney-client *communication* and work product privileges.

92. OPC adopts its arguments asserted for compelling Request for Production No. 64 (above). OPC asserts that it has established a showing of "need" for "all documents analyzing, describing or otherwise explaining coverage available to Progress under the NEIL Policies since 2000." As described, these documents are needed in order to determine whether Duke was prudent in settling with NEIL based on the facts that Duke knew prior to and at the time it settled. As described, these documents relate to one or more disputed issues in this case as well as OPC's theory of the case that Duke acted imprudently in its dealings with NEIL. This is a contested issue raised by Duke, OPC, and the Intervenors. Without undue hardship, OPC cannot recreate any of the information contained in "documents analyzing, describing or otherwise explaining coverage available to Progress under the NEIL Policies since 2000" listed on Duke's privilege log. It would be impossible to recreate Duke's internal assessment and explanation of coverage available under the NEIL policies which in turned formed the basis for settling with NEIL. After Duke files its direct testimony, OPC will reaffirm by affidavit its showing of "need and undue hardship" for these documents with greater particularity.

93. Request for production No. 66:

Please provide all documents created since January 1, 2009, containing recommendations analyses or descriptions to management (including the Board of Directors) with respect to:

- a. The availability of coverage under each of the NEIL Policies;
- b. The expected recovery from NEIL related to the CR3 outage under each of the NEIL Policies;
- c. Possible approaches or strategies for recovery of monies from NEIL for losses sustained in the outage at CR3.
- d. Reasons for and against agreeing to the NEIL settlement

94. OPC adopts its arguments asserted for compelling Request for Production No. 64 (above). OPC asserts that OPC has established a showing of “need” for “all these documents” because they pertain to OPC’s theory of the case. Without them, it would be impossible to determine whether Duke was prudent in settling with NEIL based on the facts that Duke knew prior to and at the time it settled the insurance claim with NEIL. Knowing what coverage was available, possible expected recovery amounts under the NEIL policies, Duke’s approaches for recovering money from NEIL, and Duke’s internal business assessment of the pros and cons of agreeing to the NEIL settlement will shed light on whether Duke acted prudently in dealing with NEIL. They are crucial facts which Duke undoubtedly considered when it decided to settle. These facts cannot be replicated by OPC. Duke alone possesses the facts upon which it relied when it settled with NEIL. After Duke files its direct testimony, OPC will reaffirm by affidavit its showing of “need and undue hardship” for these documents with greater particularity.

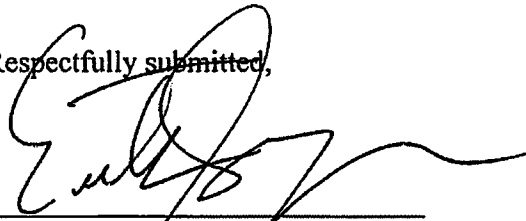
XI. Conclusion

95. This will be the first of two motions to compel discovery of documents subject to Duke’s overly broad claims of privilege. Because Duke is claiming privilege to a large

number of the documents in OPC's Seventh and Eighth Requests for Production, the in-camera inspection process required by case law may take significant amount of time to resolve. OPC is willing to work with Duke in creating a procedure that would expedite the Commission's in-camera review process.

WHEREFORE, the Citizens respectfully request the Florida Public Service Commission to compel Duke Energy Florida, Inc. to produce each of the documents responsive to the Citizens' Seventh Set of Requests for Production of Documents dated February 12, 2013, respectively, including those responsive documents in the possession, custody, or control of the parent company Duke Energy Corporation, and conduct an in-camera review of these documents to determine whether and what type of privilege, if any, applies to the responsive documents identified on Duke's privilege log.

Respectfully submitted,



Erik L. Sayler
Associate Public Counsel

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400

ATTORNEY FOR THE CITIZENS
OF THE STATE OF FLORIDA

CERTIFICATE OF SERVICE
100437-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail and U.S. Mail on this 14th day of May, 2013 to the following:

John T. Burnett
Progress Energy Service Company,
LLC
P.O. Box 14042
St. Petersburg, FL 33733-4042

Jon C. Moyle, Jr.
Moyle Law Firm
The Perkins House
118 North Gadsden Street
Tallahassee, FL 32301

Robert Scheffel Wright, John T.
LaVia
c/o Gardner Bist Wiener Law
Firm
1300 Thomaswood Drive
Tallahassee, FL 32308

Mr. Paul Lewis, Jr.
Progress Energy Florida, Inc.
106 East College Ave, Suite 800
Tallahassee, FL 32301-7740

Michael Lawson
Theresa Tan/Keino Young
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

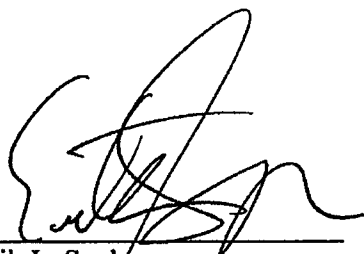
Karin S. Torain
PCS Administration (USA), Inc.
1101 Skokie Boulevard, Suite 400
Northbrook, IL 60062

Matthew Bernier
Carlton Fields Law Firm
215 S. Monroe Street, Ste 500
Tallahassee, FL 32301

George Cavros, Esq.
Southern Alliance for Clean Energy
120 East Oakland Park Blvd, Suite
105
Fort Lauderdale, FL 33334

J. Michael Walls/Blaise N. Huhta
Carlton Fields Law Firm
P.O. Box 3239
Tampa, FL 33607-5736

James W. Brew/F. Alvin Taylor
1025 Thomas Jefferson St. NW, 8th
Flo, West Tower
Washington, DC 20007



Erik L. Saylor
Associate Public Counsel

Docket No. 100437-EI Motion to Compel

ATTACHMENT A

**FIPUG 1st Set of Interrogatories - Questions 5 & 6
Meetings Between Officers of PEF/Duke and NEIL**

Officers Referenced in Responses Below

Progress Energy

Bill Johnson, CEO*
 Jeff Lyash, Executive VP
 John McArthur, Executive VP
 John Elnitsky, VP
 David Fountain, VP
 Jon Franke, VP
 Garry Miller, VP
 Alex Glenn, Gen. Counsel

NEIL Sr. Management Team

David Ripsom, CEO
 Ken Manne, VP
 Harry Phillips, VP
 Bruce Sassi, VP
 Greg Wilks, VP

Duke Energy

Jim Rogers - Chairman, Pres., CEO
 Dhiaa Jamil - Executive VP, CNO
 Marc Manly - Executive VP; Pres. Duke Comm'l Bus. Org.
 Jim Reisch - Director
 Paul Newton, special legal counsel to the CEO

| Meeting Dates | Officer Participants | Subjects/Issues Discussed |
|---------------|--|--|
| 9/20/2010 | Progress - Franke, Miller NEIL - Manne, Phillips, Wilks | NEIL was questioning the secondary (vertical) cracking discovered during Bay 34 repairs. Meeting was to provide NEIL with additional details regarding this cracking. |
| 5/25/2011 | Progress - Franke, Miller NEIL - Sr. Management Team | The meeting was to bring NEIL up-to-date regarding the delamination event on 3/14/2011. Discussed repairs completed and events leading up to the delamination of Bay 56, location of the additional damage, root cause of the additional damage, |

| | | |
|--------------------------|--|--|
| | | condition assessment and status of the Containment Bld, risk mitigation plans and the status of repair plan development. |
| 6/30/2011 | Progress - Elnitsky, Franke, Glenn NEIL - Sr. Management Team | <p>Purpose was to provide additional details and address NEIL coverage questions about the delamination of Bay 56 and other areas of Containment Bld. on 3/14/2011. Progress personnel discussed the repair option identification and evaluation process, repair option selection criteria and the technical, licensing and construction issues considered in selecting the repair option.</p> <p>NEIL discussed their coverage and indicated that no coverage decision has been made. A timeline for NEIL's investigation and making a coverage decision was discussed.</p> |
| 10/18/2011 | Progress - Fountain, Lyash NEIL - Sr. Management Team | <p>Reviewed the additional delamination that occurred involving Bay 12 and other areas, the location of additional damage and the current condition of the Containment Building.</p> <p>The Joint Steering Committee consisting of personnel from Progress and NEIL was formed to hold weekly calls to facilitate the ongoing investigation and claim process.</p> |
| 10/25/2011 12/20/2012 | Progress - Elnitsky, Fountain NEIL - Manne, Sassi, Wilks | Weekly Jt. Steering Committee calls to review open items and provide direction to the working/technical teams from both sides, in order to progress toward resolution of insurance coverage issues before the December NEIL Board meeting. |
| 12/2/2011 | Progress - Fountain, Johnson, McArthur, Lyash NEIL - Sr. Management Group | NEIL management presented the investigation results to-date by their consultants/experts. |

| | | |
|------------------------|---|--|
| | | NEIL indicated that they would not be in a position to make a coverage recommendation at their next Board meeting on Dec. 9, 2011. NEIL also requested that Progress not submit additional claims until some of the open issues had been resolved. |
| 12/6/2011 | Progress - Johnson NEIL - Ripsom | Telephone call - discussed detensioning of Containment Building and builders' risk policy. |
| 2/14/2012 | Progress - Johnson NEIL - Ripsom | Telephone call - NEIL agreed that they would process for payment Progress' claim for costs through July, 2011, associated with the 2009 delamination damage. |
| 2/28/2012 | Progress - Fountain, Lyash, Miller NEIL - Manne and Wilks | Phone call on Feb. 28, 2012, to summarize NEIL's coverage issues. From this, Progress would develop an executive level response to be presented at an executive level meeting with NEIL. |
| 4/16/2012 | Progress - Johnson, Lyash, Fountain, Miller Duke - Jamil NEIL - Sr. Management Team | Primary purpose of the meeting was to respond to issues raised by NEIL in the 2/28/12 call. The focus of discussion was a presentation by Garry Miller covering in detail: events from initial 2009 delamination to present. |
| 5/2/2012 | Progress - Johnson Duke - Rogers NEIL - Ripsom | Discussion of PEF's insurance claims and NEIL's views and issues as well as potential for resolution through mediation. |
| 7/19/2012 9/25/2012 | Duke - Rogers NEIL - Ripsom | Discussion of PEF's insurance claims and NEIL's views and issues as well as potential for resolution through mediation. |

| | | |
|--------------------------|--|---------------------------------|
| 11/19/2012 11/20/2012 | Duke - Rogers, Manly, Jamil, Reinsch, Glenn, Newton NEIL - Ripsom | Discussion re mediation issues. |
| 11/29/2012 11/30/2012 | Duke - Manly, Jamil, Reinsch, Glenn, Newton NEIL - Ripsom | Discussion re mediation issues. |
| 12/21/2012 | Duke - Rogers, Manly, Jamil, Reinsch, Glenn, Newton NEIL - Ripsom | Discussion re mediation issues. |

* Bill Johnson was also a member of the NEIL Board of Directors, but Mr. Johnson did not interface with Duke Energy in that capacity.

Docket No. 100437-EI Motion to Compel

ATTACHMENT B

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

PROGRESS ENERGY FLORIDA, INC.'S *REVISED* PRIVILEGE LOG TO
OPC'S SEVENTH REQUEST FOR PRODUCTION

| Bates No./ Request | Date | Author | Recipient | Description | Privilege |
|---|--------------|----------------------|---|--|---|
| OPC's Seventh Request for Production Nos. 64, 65, and 66 (a-c) Entire document | 8/27-28/2012 | Alex Glenn, Esq. | Jon Franke, Vinny Dolan, David Fountain, Esq. | CR3 Review Team Whitepaper (contains attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 7/31/2012 | David Fountain, Esq. | Marc Manly, Esq. | Progress Energy v. NEIL CR3 Delamination Repair Case Update powerpoint presentation (prepared at direction of General Counsel; contains attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 2012 | John Burnett, Esq. | Alex Glenn, Esq. | Spreadsheet of possible scenarios (contains attorney mental impressions) | Attorney Client Communication Work Product |

| Bates No./ Request | Date | Author | Recipient | Description | Privilege |
|--|-----------|---|--------------------|--|---|
| OPC's Seventh Request for Production No. 65 Entire document | 7/29/2011 | Alex Glenn, Esq. | John Burnett, Esq. | Draft outline of NEIL Coverage Legal Analysis & Recommendations (contains attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 2012 | John Burnett, Esq. | Alex Glenn, Esq. | Timeline/analysis of NEIL coverage (contains attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 1/29/2010 | Peter Gillon, Esq., John O'Neill, Esq. | Dave Conley, Esq. | Memorandum re: Crystal River Unit 3, Initial Coverage Analysis (contains attorney mental impressions and work product) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 5/3/2012 | John Burnett, Esq. | Alex Glenn, Esq. | Draft CR3 Decommissioning Analysis (contains attorney mental impressions) | Attorney Client Communication Work Product |

| Bates No./ Request | Date | Author | Recipient | Description | Privilege |
|--|-----------|--|---|--|---|
| OPC's Seventh Request for Production No. 65 Entire document | 5/26/2012 | David L. Elkind, Esq., Erin L. Webb, Esq. | John Burnett, Esq. | Memorandum re: Crystal River Nuclear Generating Plant, Unit 3 Coverage Overview – Decommissioning Scenario (contains attorney mental impressions/prepared at the direction of counsel) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 5/28/2012 | Mike Walls, Esq. | John Burnett, Esq. | Draft memorandum re: insurance coverage (contains attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 3/21/2011 | Gary Little | John Burnett, Esq. | Email re: NEIL Coverage Details and Options (work product obtained pursuant to and prepared at attorney's request) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 5/23/2012 | Alex Glenn, Esq. | Jon Franke, Vinny Dolan, David Fountain, Esq. | CR3 Retirement Option – Insurance Policy Coverage – Legal Analysis powerpoint presentation (contains attorney mental impressions) | Attorney Client Communication Work Product |

| Bates No./ Request | Date | Author | Recipient | Description | Privilege |
|--|-----------|---|---|---|---|
| OPC's Seventh Request for Production No. 65 Entire document | 6/7/2012 | Alex Glenn, Esq. | Jon Franke, Vinny Dolan, David Fountain, Esq. | CR3 Repair Legal Analysis powerpoint presentation (contains attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 5/17/2012 | L.D. Simmons II, Esq., L. Quinlan, Esq. | David Fountain, Esq. | Memorandum re: Analysis of Coverage Available under the NEIL Policies in the event Progress elects to decommission CR3 (contains attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 7/17/2012 | L.D. Simmons II, Esq. | David Fountain, Esq. | Memorandum re: Progress Energy Florida v. NEIL Proof of loss (contains attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 3/2012 | David Fountain, Esq., Alex Glenn, Esq. | Jon Franke, Vinny Dolan | Crystal River 3 NEIL Update powerpoint presentation (contains attorney mental impressions) | Attorney Client Communication Work Product |

| Bates No./ Request | Date | Author | Recipient | Description | Privilege |
|--|-----------|---|--|---|---|
| OPC's Seventh Request for Production No. 65 Entire document | 11/3/2011 | L.D. Simmons II, Esq. | David Fountain, Esq. | Memorandum/Legal Analysis re: Crystal River Unit 3 Delamination Claim Against NEIL Master Coverage Analysis (contains attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 2012 | Alex Glenn, Esq. | Jon Franke, Vinny Dolan, David Fountain, Esq. | Slides to powerpoint re: scenarios of retirement of CR3 (contains attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 8/1/2012 | David Fountain, Esq. (email); L.D. Simmons, II, Esq., and L. Quinlan, Esq. (memo) | Swati Daji, Garry Little, Keith Bone, Patricia Smith, Esq. | Email attaching 5/17/2012 Memorandum from McGuire Woods re Analysis of Coverage available under the NEIL Policies in the event Progress elects to decommission CR3 (contains attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 2012 | John Burnett, Esq. | Alex Glenn, Esq. | Slides to powerpoint re: scenarios of retirement of CR3 (contains attorney mental impressions) | Attorney Client Communication Work Product |

| Bates No./ Request | Date | Author | Recipient | Description | Privilege |
|--|-----------|--|--|--|---|
| OPC's Seventh Request for Production No. 65 Entire document | 8/7/2012 | Swati Daji | Keith Bone, David Fountain, Esq., Patricia C. Smith, Esq., Gary Little | Email re: 8 am meeting and attached presentation of NEIL update including marginalia on email and presentation (prepared at request of counsel and containing attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 2/12/2010 | Peter Gillon, Esq., John O'Neill, Esq. | Dave Conley, Esq. | Memorandum re: Crystal River Unit 3 Summary of Initial Coverage Analysis (contains attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 5/21/2012 | L.D. Simmons II, Esq. | Alex Glenn, Esq., David Fountain, Esq. | Email re: Analysis of Available Coverage for Property Damage/Outage in the Event of Decommissioning and attachment (contains attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 5/22/2012 | L.D. Simmons II, Esq. | Alex Glenn, Esq. | Email exchange re: RE: CR3 Decommissioning Insurance Coverage Legal Analysis Rev0.pptx and attached draft powerpoint presentation (containing attorney mental impressions) | Attorney Client Communication Work Product |

| Bates No./ Request | Date | Author | Recipient | Description | Privilege |
|---|------------|------------------------|--|---|---|
| OPC's Seventh Request for Production No. 65 Entire document | 5/22/2012 | Lowndes Quinlan, Esq. | Alex Glenn, Esq., L.D. Simmons II, Esq., Joshua Davey, Esq. | Email exchange re: RE: NEIL Drafting History (containing attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 3/26/2012 | L.D. Simmons, II, Esq. | David Fountain, Esq., Frank Schiller, Esq., David Elkind, Esq. | Memorandum re: PEF v. NEIL: Strategy Implications of Outage Policy Coverage (containing attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production No. 65 Entire document | 10/22/2012 | Paul Newton, Esq. | Diane Wilkinson | Email forwarding Gary Little email re: NEIL policy, NEIL policy containing marginalia and draft notes regarding NEIL policy(containing attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production Nos. 64, 65 Entire document | 2012 | David Fountain, Esq. | Jon Franke, Vinny Dolan | PowerPoint re: Other NEIL Defenses (containing attorney mental impressions) | Attorney Client Communication Work Product |

| Bates No./ Request | Date | Author | Recipient | Description | Privilege |
|---|------------|--|--|--|---|
| OPC's Seventh Request for Production Nos. 64, 65 Entire document | 2012 | David Fountain, Esq. | Jon Franke, Vinny Dolan | PowerPoint re: Progress Energy v. NEIL CR3 Delamination Repair Case Update September 2012 (containing attorney mental impressions) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production Nos. 64, 65, and 66 (a-c) Entire document | 9/11/2012 | John O'Neil, Esq., Jack McKay, Esq., Peter Gillon, Esq. | Paul Newton, Esq. | Progress Energy v. NEIL Pillsbury Briefing Binder (contains attorney mental impressions, advice, and attorney work product) | Attorney Client Communication Work Product |
| OPC's Seventh Request for Production Nos. 64, 65, and 66 (a-c) Entire document | 11/18/2012 | Frank Schiller, Esq., L.D. Simmons, II, Esq., David Fountain, Esq., Alex Glenn | David Ripsom, Randy Mehrberg, Greg Wilks, Kenneth Manne, Esq., Eric Green (mediator) | Progress Energy Florida, Inc. v. Nuclear Insurance Limited Mediation Presentation of Progress Energy including discussion of mediation issues and substance of mediation issues. | Mediation/Settlement Privilege |

| Bates No./ Request | Date | Author | Recipient | Description | Privilege |
|--|-----------|--------------------|---|---|---|
| OPC's Seventh Request for Production Nos. 64 and 66 (d) Entire document | 1/31/2013 | Julie Janson, Esq. | Duke Energy Board: James E. Rogers, William Barnet III, G. Alex Bernhardt, Sr., Michael Browning, Harris DeLoach, Jr., Daniel DiMicco, John Forsgren, Ann Gray, James Hance, Jr., James Hylar, Jr., E. Marie McKee, E. James Reinsch, James Rhodes, Carlos Saladrigas, Philip Sharp | PowerPoint, Crystal River 3 Legal Issues (containing attorney mental impressions) | Attorney Client Communication Work Product |