**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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| In re: Petition to approve transaction for accelerated decommissioning services at CR3 facility, transfer of title to spent fuel and associated assets, and assumption of operations of CR3 facility pursuant to the NRC license, and request for waiver from future application of Rule 25-6.04365, F.A.C. for nuclear decommissioning study, by Duke Energy Florida, LLC. | DOCKET NO. 20190140-EI<br><br>FILED: July 23, 2020 |

# CONSUMER PARTIES' JOINT POST HEARING BRIEF

The Citizens of the State of Florida, through the Office of Public Counsel, ("OPC"), The Florida Industrial Power Users Group ("FIPUG") and White Springs Agricultural Chemicals d/b/a PCS Phosphate ("PCS"), collectively the Consumer Parties ("Consumers"), pursuant to the Order Establishing Procedure in this docket, Order No. PSC-2019-0320-PCO-EI, as amended by the First Order Modifying Order Establishing Procedure, Order No. PSC-2019-0384-PCO-EI, and the Second Order Modifying Order Establishing Procedure, Order No. PSC-2020-0105-PCO-EI, hereby submit this Joint Post Hearing Statement and Brief.

## STATEMENT OF POSITION

Duke Energy Florida's ("Duke" or "DEF") proposals in this matter (1) to accelerate the decommissioning and dismantlement of the defunct Crystal River No. 3 nuclear unit ("CR3") through a third party and (2) to sell its spent nuclear fuel, high level waste and its Independent Spent Fuel Storage Installation ("ISFSI") to an affiliate of that party, have certain appeal that the

Consumers support, but only if risks created by the proposed transactions are adequately mitigated and the potential cost to DEF's customers are appropriately resolved. First, the Commission should not, and in fact, cannot approve this transaction if the projected Department of Energy ("DOE") contract breach damages recoveries in the amount of at least $90 million[1] is diverted from the required application to the Capacity Cost Recovery ("CCR") Clause as mandated by official Commission policy contained in a final order. If the Commission approves the transaction, there is no rational justification for placing such amounts in the Nuclear Decommissioning Trust Fund ("NDT") in contravention of the prior Commission orders and a settlement agreement, and the remaining NDT will already be excessively over-funded. The Commission must include a provision in any order approving the transaction prohibiting the deposit of any DOE damage recoveries in the NDT.

Next, Duke and Accelerated Decommissioning Partners ("ADP"), or ("the Joint Petitioners"),[2] are unwilling to guarantee that their proposal will not impose additional costs on long-suffering DEF customers who should finally be released from the shadow of the hulk that used to be the CR3 Nuclear Plant. Any Commission approval of the Joint Petitioners' Petition should either require a guarantee from DEF of no further customer financial impacts or the imposition of additional safeguards to adequately protect DEF's customers from additional costs, liability or harm. OPC expert witness Richard A. Polich offers three no-cost, or low cost, reasonable safeguards that will help insulate customers from additional costs, liability or harm.

[1] The evidence was that this amount could be as much as $131 million EX 39, 41, 42, TR 371- 372; 451- 452 but is at least likely to increase to $104 million based on the $13,967,000 shown in the "spent Fuel Management column. EX 3 at 9; TR 531.

[2] The Consumers refer to DEF and ADP as the "Joint Petitioners." The petition in this docket was filed by DEF but it is clear that the petition presents the concerns and relative equities of both parties to the transaction as having equal weight and gravitas for the Commission to consider. See also EX 34 at 6 where Joint Petitioner Witness Scott State told the NRC that DEF and ADP would submit a joint petition to the Florida Public Service Commission seeking approval of the proposed Decommissioning Services Agreement.

Customers have paid enough for CR3. It ceased generating electricity in 2009, through no fault of the customers. The nuclear decommissioning costs have been sufficiently provided for in rates paid by DEF's customers such that the accrual to fund the NDT ceased in 2002. In rate proceedings and through utility decommissioning studies filed in the ensuing 15 years, the Commission has found the accumulated value of the NDT to be sufficient and correctly seen no need to re-start the accrual. The Nuclear Decommission Fund will have excess funds of approximately $120 million dollars as of October 2020. TR 371. A new generation of customers has already started paying for the replacement generation that was required by the premature demise of CR3. This payment in consumer rates includes decommissioning and dismantlement costs for the new generating facilities.

The Commission has previously determined the rate treatment associated with the disposition of the DOE award funds, but this is its first-ever determination concerning actual nuclear decommissioning and dismantlement. The Commission has been presented with a "take-it-or-leave-it" proposition put together by DEF and a private equity consortium over which the Commission has no regulatory jurisdiction. That, of course, is not how the regulatory process works. Pursuant to its core mandate under Chapter 366, F.S., the Commission must stand up for customers and impose its own risk mitigation and early warning provisions if the record demonstrates such provisions are important to safeguard the public interest. The Consumers strongly advocate for those customer protections.

The premise for DEF's objections to the modest oversight conditions recommended by OPC witness Richard Polich is that the utility claims that it has assessed the transaction's risks, fully addressed them through the safeguards that are proposed in the Decommissioning Services Agreement ("DSA"), and both the Commission and DEF's customers should rely on DEF's

judgment and rest easy. This is a story that the Commission and Consumers have heard repeatedly through the years concerning DEF's nuclear power program to the customers' considerable detriment. Despite DEF's vehement objections over the relevance of its past miscalculations in engineering, operational, financial and nuclear construction risk analysis, the company's request clearly comes before the Commission with a significant amount of baggage in the form of failed stewardship of the CR3 nuclear plant. The staggering costs of the damage to the plant resulting from a bungled 2009 outage to replace the steam generators and upgrade the plant output has saddled the current customers with a 20-year burden of paying off a $1.3 billion stranded cost. In the past four years, customers have paid $331 million toward that obligation that runs through 2036. Between 2009 and 2019, DEF's customers paid an ***additional*** $424 million in costs related to the doomed uprate of the same plant. During the same time frame, customers paid ***another*** $870 million for a proposed new nuclear plant that was never built. See Order No. PSC-2018-049-FOF-EI. These $2.6 billion in stranded costs are relevant because they represent costs to customers of DEF's nuclear power program related to exactly 0.0 kwh of electricity generated to serve customers. All of these costs became stranded and useless as a result of miscalculations of risk analysis performed by DEF.

Economic waste should be avoided – especially during a recession like the one in which DEF's customers are presently ensnarled. TR 605. With regard to DEF's failures to evaluate risk in the nuclear space, the cost to customers and shareholders is conservatively estimated to be more than $2.6 billion.[3] Customers and the public in general do not have the stomach for another costly error in risk judgment. They cannot afford it, especially during these challenging economic times.

[3] The Customer impact does not include other economic losses such as shareholder write-offs and other costs required. See e.g., Order No. PSC-0213-0598-FOF-EI at 17, 23 - 24. It likewise does not include plant closure impacts and costs and job losses.

If anything, DEF's beleaguered customers are entitled to some near-term monetary relief from surplus funds that are not part of the NDT, are prohibited from being deposited in the NDT and are otherwise not required to be deposited in the NDT, as discussed in detail in Issue 4.

Overall, the decommissioning transaction proposal offered by the Joint Petitioners contains some degree of promise that the accelerated DECON proposal might return overpayments to the NDT if the facts and circumstances underlying the assumptions and risks described in Joint Petitioners' petition and testimony play out exactly as DEF and ADP have laid them out. These facts and circumstances, unfortunately, will not manifest themselves for roughly twenty years at best. Given the considerable uncertainty and remoteness in time, the Consumers do not view the possible return of excess funds in the NDT to be a material consideration to the transaction.

Consumers have raised valid and pressing questions about the financial strength and experience of the decommissioning contractors. A combination of protections built into the transaction and the Consumers' recommended protections are reasonable steps the Commission should approve in order to safeguard the hundreds of millions of dollars it ordered DEF to collect from its customers to ensure safe and complete dismantlement, decontamination and decommissioning of the prematurely damaged and retired nuclear power plant. The Commission is ultimately responsible for determining that customer-provided money that the Commission ordered be placed in the nuclear decommissioning fund is prudently spent and that the risks associated with this project are adequately managed and monitored. This means that the Commission has an obligation to take reasonable steps to require that DEF spends the customers' money as it was intended when collected from the customers and held in trust for the eventual dismantlement, decontamination and decommissioning of CR3. As a practical matter, the Commission's last opportunity to establish those safeguards lies in its decision in this docket.

**ISSUE 1:** Should the Florida Public Service Commission approve the transactions as contemplated by the Agreement (Decommissioning Services Agreement), the SNF PSA (Spent Nuclear Fuel Purchase and Sale Agreement), and the Ancillary Agreements (as defined in Article I, Section 1.1.1 of the Agreement)?

**Consumers:** *Yes, but only if approval is accompanied by an express ***prohibition*** on funds recovered from DOE being deposited into the NDT and adoption of the three risk mitigation enhancements recommended in the Direct Testimony of Richard A. Polich to support the protections included in the transaction. These are set out at TR 642-643.*

## Argument

DEF seeks Commission permission to commit 80% of the NDT to pay an untested consortium to decommission and dismantle (D&D) the remaining hulk of the CR3 nuclear plant that was permanently shuttered in February 2013. The consortium, which is ADP, proposes that DEF set aside $540 million to pre-fund its attempt to decommission CR3 using what is known as DECON (accelerated decommissioning) instead of the previously announced SAFSTOR method. EX 2 at 8; TR 107. The former, if successful, would allow decommissioning and partial license termination[4] in less than 10 years, if a number of assumptions and projections prove to be correct.

This approach has merit, and as indicated in the testimony of the OPC's expert, it is "commendable," but it also creates material risks. The stiff-arm reaction the customers have received from DEF and ADP when seeking minimal and reasonable protections on what is a first of a kind transaction is particularly troubling. Duke is, for the first time, attempting an accelerated nuclear decommissioning through a third party. TR 365. ADP's owners (NorthStar and Orano) are in the early stages of attempting its first DECON job in Vermont; however, that process has at

[4] Once decommissioning and dismantlement is complete, spent fuel and high-level wastes ("HLW") will remain on-site until a federal high-level nuclear waste repository is sited, constructed, and begins accepting wastes. DEF currently estimates that will occur by the year 2038, however, no HLW site has been established. TR 57, 62; 225

least 6 years left. TR 92. The Commission has never overseen a nuclear plant decommissioning and will have very limited indirect oversight once the transaction closing occurs. Even so, the Joint Petitioners have insisted that the Commission approve the DSA on what amounts to a "take-it-or-leave-it" basis. TR 683. They essentially left the Commission to guess what added condition(s) would amount to the straw that breaks the deal and leads ADP to walk away from a deal worth more than half a billion dollars and that is central to its business plan. TR 604 - 605.

In the Consumers' view, DEF witness Hobbs and his team have done a reasonably thorough job of canvassing the known and expected risks of this proposed transaction. These risks are surveyed in his rebuttal testimony. TR 688 - 689. As described, DEF and ADP negotiated privately and arrived at an agreed-upon set of protections that would apply in the event the project ran into operational or financial difficulties, or both. These protections were summarized in extensive fashion at hearing. TR 519 - 525; 690 - 692. The Consumers do not dispute that there is value to these provisions. Many of the protection measures were previously approved by the Vermont Public Utility Commission ("VPUC") related to a decommissioning project of a nuclear facility called Vermont Yankee. EX 38. The Vermont Order was issued in December 2018. The Vermont Yankee decommissioning project is a 10- plus year project and is in the early stages. TR 92. To date, however, none of those protections have been tested in Vermont. Although the Vermont experience is of limited value, Vermont recognized that NorthStar historically has had weak financials and neither has had significant substantive experience in performing a large-scale D&D nor has had much experience in being the prime contractor on such a project. EX 38 at 15. The Consumers have concerns about ADP's experience and checkered financial past as detailed, *infra*. These concerns can be satisfactorily addressed by adopting the three customer protections

advocated by Witness Richard A. Polich. His expert recommendations – along with the protections built into the deal – to reasonably mitigate some risk of future problems.

***ADP does not have any experience at a Dismantling & Decommissioning job of this size.***

The Vermont PUC determined in Order No. 8880 ("Vermont Order") that "although NorthStar has relevant expertise in decommissioning, abatement, and cleanup projects, NorthStar has never taken the lead on a nuclear decommissioning project, nor a project of the scale and complexity of the decommissioning of the [Vermont Yankee plant]." EX 38 at 15; TR 128 -131. Exhibits 4 and 5 contain the experience that the Joint Petitioners are asking this Commission to rely on in its determination. TR 55 - 56; 74; 133; 137 - 138. It turns out that their claimed experience is sparse, and the lack of large project experience is consistent with the Vermont PUC's findings. Even more of a concern is that NorthStar's putative experience is limited to less than 10 cumulative MW of decommissioning and demolition work many years ago at a handful of very small, college research reactors. TR 150. ADP CEO Scott State estimated that the combined total cost of the 5 reactor removals was under $50 million. TR 147. These jobs amount to less than one tenth of the CR3 job and approximately 5% of the total contractual value of the CR3 and Vermont Yankee jobs.[5] The work on most of the reactors and the DOE sites was performed before 2014 by a company called LVI Group Services ("LVI"), which was a partial (62.5%) predecessor to NorthStar. TR 133 - 140. The company that contributed the remaining 37.5% of North Star had no nuclear experience. TR 191 - 192, 195. Despite presenting the work as representative of the experience of the company, Mr. State did not demonstrate much familiarity with the size of the reactors, the duration of the jobs or the cost of the projects. TR 134 - 140. Projects relied on

[5] The Vermont Yankee NDT was approximately $500 million. EX 38 at 3.

for experience from before 2010 were based on second-hand knowledge since Mr. State only joined LVI that year. TR 139. The Consumers submit that the Commission should place very little reliance on this minimal amount of experience from the principal contractor in the consortium.

***ADP/NorthStar/WCS have recent history of financial difficulty.***

The Commission should be aware of the nature of the investors that are behind the majority ownership partner of the ADP organization. Mr. Polich expressed reservations and opinions in confidential testimony and in reference to confidential discovery documents. TR 631 - 634; 639 - 649. EX 14. However, there is also publicly available information that casts doubt on the quality of the financial support behind NorthStar/ADP. This information lends additional credence to Mr. Polich's testimony and the recommendations that his testimony supports. He testified that reasonable measures could address these concerns. TR 642.

There was significant testimony about the NorthStar financing structure. Exhibit 34 at 34 demonstrates that NorthStar Group Services, which makes up 75% of ADP, is backed by private equity investors who are to a large degree opaque. Court decisions around the country should give the Commission reason to be concerned about these behind-the-scenes investors to whom the Commission is being asked to turn over $540 million of customer-provided funds without effective monitoring and reporting. Even ADP/NorthStar/Waste Control Specialists CEO Scott State was unable to convince a federal court that he could identify the investors in the tiers of companies above NorthStar.[6] If the CEO cannot identify the backers in federal court – even as an investor

[6]The issue arose on a removal question in litigation involving compensation. The federal court remanded the case to state court because Scott Case and others could not identify the partners and investors to demonstrate complete diversity. *Nardone v. Northstar Group Holdings, LLC*, 2018 U.S. Dist. LEXIS 233376 (United States District Court for the District of Massachusetts January 3, 2018, Civil Action No. 17-11458-FDS).

himself in JFL-NGS Partners, LLC[7] – how can the Commission begin to fully understand the true financial underpinnings of the contractors on this deal?

Also of concern is that one of the investors shown on and referred to in the hearing as having provided recapitalization funding to an ailing NorthStar, is Medley Capital Corporation (Medley). EX 34 at 34; TR 192-193. A Medley affiliate was a defendant in a class-action "rent-tribe" lawsuit brought under Racketeering Influenced Corrupt Organizations Act (RICO) related to payday loans that had interests rates between 496.55% to 714.88%.[8] Additionally, in 2018, a federal court denied a motion, filed by Medley and its principal investors and executives, Seth and Brook Taube, to dismiss similar RICO counts.[9] Additionally, in shareholder litigation alleging a conflict of interest and breach of fiduciary duty in an anticipated March 2019 merger between Medley and two affiliates, a Delaware Chancery court halted the merger.[10] The court's opinion noted that "[s]ince its January 20, 2011 IPO, by every industry measure, Medley Capital has been in a steady financial decline."

In another 2019 Delaware Chancery Court decision, the court declined to dismiss a fraud claim against the CEO of ADP, NorthStar Group Services, Inc., and Waste Control Specialists, Inc., Scott State.[11] In that case which was still pending during the hearing in this docket, the facts show that NorthStar is the product of a merger between the then two largest demolition and

[7] Mr. State testified that he is an investor in the owners of NorthStar. TR 236; EX 11. It should be noted that this is the same company through which Medley Capital Corporation holds an interest in NorthStar Group Services. See also, TR 192 and EX 14 at 111.
[8] *Williams v. Medley Opportunity Fund II*, LP, 2020 U.S. App. LEXIS 21718 (United States Court of Appeals for the Third Circuit, July 14, 2020, Nos. 19-2058, 19-2082.). See, also footnote 20, i*nfra.*
[9] *Solomon v. Am. Web Loan*, 2019 U.S. Dist. LEXIS 48420 (United States District Court for the Eastern District of Virginia, Newport News Division March 22, 2019, Civil Action No. 4:17cv145). This case is subject to a pending Order of Preliminary Settlement Approval of a $141 million settlement submitted by all parties to the class action lawsuit. See, also footnote 20, i*nfra.*
[10] *FrontFour Capital Grp. LLC v. Taube*, 2019 Del. Ch. LEXIS 97* 64 (Court of Chancery of Delaware, March 11, 2019, C.A. No. 2019-0100-KSJM).
[11] *LVI Grp. Invs., LLC v. NCM Grp. Holdings*, LLC, 2019 Del. Ch. LEXIS 1408* 44 (Court of Chancery of Delaware December 31, 2019, C.A. No. 12067-VCG).

remediation companies in the nation – LVI and NCM.[12] TR 195. Within a year of the merger, both of the companies that now make up NorthStar brought claims of fraud and accounting irregularities against each other in Delaware Chancery Court.[13] The irregularities specifically attributable to LVI and the organization managed by Mr. State are noted in the court's decision at pages 26-38. These include allegations of material overstatement of revenues and understatement of costs as well as the inability to estimate jobs correctly. LVI also lodged its own claims of fraud against NCM which form 37.5% of today's NorthStar.[14] The judge notes that the two companies' claims and counterclaims originally "contemplated a wider collection of fraudulent projects."[15]

With respect to the NorthStar company that was created post merger and is approximately two-thirds LVI, the court, observed that:

> NorthStar, starting soon after the Merger, performed poorly. Problems also arose with projects post-close. Losses and write-offs emerged from LVI and NCM legacy projects. In addition, NorthStar entered many new projects that saw costs in excess of expected revenue. A trough in the market price of scrap metal led to additional declines in revenue due to lower-value resales of scrap from demolition projects. As an added trouble, the ongoing litigation between LVI and NCM delayed company audits, which in turn made NorthStar noncompliant with certain lending covenants and damaged its ability to secure bonds. This, in turn, negatively impacted its ability to bid on new jobs.[16]

The court further noted in the December 31, 2019 decision that in June 2017, LVI and NCM sold their equity stakes in NorthStar to JF Lehman for a "zero cash equity return" for either company. The court elaborated that "[i]n other words, JF Lehman purchased NorthStar for an amount less than its total debt, and LVI and NCM received nothing from the sale."[17] NorthStar, as acquired, was hardly a sound company.

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[12] *Id.* at *6.
[13] *Id.* at *11-12.
[14] *Id.* at *8.
[15] *Id.* at *12 (footnote 57).
[16] *Id.* at *38-39 (footnotes omitted).
[17] *Id.* at*40.

Collectively, the disputes and controversy surrounding the NorthStar Group clearly signal that the financial concerns discussed in this docket are valid and material. Implicitly, the Joint Petitioners – especially NorthStar and ADP – are urging the Commission to ignore that "man behind the curtain" and to accept only its attempt to project a carefully curated presentation of financial capability – not unlike its "experience" in nuclear D&D work. The Joint Petitioners might suggest that the events of the period immediately before and after the merger are in the past. However, the facts of the reported cases demonstrate that the allegations of fraud only go back 7 years and that NorthStar has common executive leadership then and now. Moreover, the severe financial struggles that resulted in a negative equity value existed as recently as two and a half years ago.

Further, these concerns cannot be disregarded simply because JF Lehman has recently bought NorthStar. That purchase was a distress sale or what the court called a "zero cash equity" purchase where the purchase price was for less than the total debt.[18] The investors' equity was wiped out due to activities in both companies that led to the litigation and business failures. The difficulties continued beyond the original merger. Additionally, it cannot be ignored that one of the June 2017 rescuers[19] – Medley Capital – shown on the record as a significant equity investor in NorthStar has been (and still may be) subject to pending claims in Federal District Court in Virginia of unlawful lending practices on Indian tribal lands and racketeering.[20]

The recent financial stress and turmoil evident in the public record and caselaw demonstrates that the financial observations and reservations contained in the portions of Mr.

[18] *Id.*, footnote 233.
[19] Mr. State testified that Medley was part of the 2017 recapitalization. TR 192 -193. See also note on the Duke Energy-created document at page 111 of Exhibit 14 under the heading "Counter Party Overview" and TR 236.
[20] See footnotes 8 and 9, *supra*. On June 26, 2020 a federal judge entered an Order of Preliminary Settlement Approval of a $141 million settlement submitted by all parties to the class action lawsuit. *Solomon v. Am. Web Loan*, 2020 U.S. Dist. LEXIS 112782, WL 3490606. (United States District Court for the Eastern District of Virginia, Newport News Division June 26, 2020, 2020 U.S. Dist. 2020).

Polich's testimony (which the Joint Petitioners have deemed confidential) are warranted but can be easily addressed. TR 638 - 640; EX 14 at 111 - 116. Additionally, JF Lehman's financial wherewithal was not affirmatively presented as a factor by the Joint Petitioners for the Commission to consider in support of the transaction. The uncontroverted evidence in the record is that neither ADP nor the Commission have any recourse to the financial resources of JF Lehman.[21] TR 84 - 86; EX 2 at 117 - 132. Clearly, the Commission has no competent substantial evidence upon which to make a determination that JF Lehman supplies a material improvement in NorthStar's financial strength. On the contrary, the evidence in the record that is now squarely before the Commission and is preserved in decisional law shows a history of financial missteps. This should cause the Commission concern and it cannot be ignored. More importantly, the Commission cannot rely on the ultimate investors to make good on any of the commitments made by ADP. TR 83 -86; EX 2 at 115 - 132 (esp. Paragraph 15). However, the Commission can adopt reasonable measures to mitigate the risks that exist in the financial conditions.

The Consumers further point out that the affiliation with Waste Control Specialists (was and is) touted as enhancing the value of the transaction. TR 55 - 56. Also, Duke senior management was told that:

> The ADP team includes Waste Control Specialists, LLC (WCS) which offers a state-of-the-art, high-capacity low level radioactive waste disposal facility and the only facility in the United States that can directly dispose of class A, B and C waste from nuclear power plants. The cost of waste disposal is one of the largest projects [sic] costs. With WCS as part of the ADP team and a sister company to NorthStar, potential increases in waste disposal costs can be mitigated by the ADP team. These costs could be absorbed by WCS and not passed back to the project, preserving funding to pay for other project costs and maintaining the project contingency. Other bidders would need to pay WCS for higher waste disposal costs.

[21] It is interesting to note in Exhibit 14, given the recent history and the Commission's lack of access to support above the NorthStar Group Services, Inc. level, the comparison between the bottom-line amount shown under the 2019 column on page 84 and the last sentence on page 106.

> Additionally, the ADP consortium has the equipment and experience to self-perform almost all work on the project and will rely very little on subcontractors.[22]

While this may sound good on its face, it should be noted that in a July 2017 decision of the Federal District Court in Delaware,[23] WCS told the court during a 10-day antitrust trial that the company was "failing." The CEO at the time further testified that "decommissioning jobs are good jobs but that they are not a silver bullet for the financial issues of WCS and that WCS needs near-term cash to survive and the decommissioning jobs are too far out to save us."[24]

The Consumers submit that there is a clear pattern here. ADP is clothed in financial respectability because it has been rescued by private equity investors. These investors have no ties to Florida. They are not regulated by the Commission. There is no recourse against them should the CR3 project go south. TR 83 - 86; EX 2 at 115 - 132. Some investors have recent financial skeletons rattling around in their closet as demonstrated above. The private equity investors have an interest in accessing the NDT, even if indirectly, in order to make profits. TR 86 - 87; They have their eyes on expansion and other NDTs around the country. They want to position themselves to perform up to six large reactor D&D jobs at one time, possibly even at a point in time before they have completed a single one of the jobs. TR 87 - 88; EX 36 at 6. The private equity investors did not introduce evidence that they are well-equipped to handle financial stress or to avoid being financially or operationally over-extended. In fact, these private equity investors did not even see the need to show up before the Commission to demonstrate their financial strength *bona fides*.

[22] EX 20 at 270.
[23] *United States v. Energy Sols., Inc.*, 265 F. Supp. 3d 415*; 2017 U.S. Dist. LEXIS 109663 **; 2017-1 Trade Cas. (CCH) P80,050, (United States District Court for the District of Delaware, July 13, 2017, Filed Civ. No. 16-1056-SLR).
[24] *Id*. at *432.

It is also clear that the touted ADP experience exists more on paper than on the ground. In some cases, even the touted experience has nothing to do with nuclear facilities. EX 20 at 286. The evidence demonstrates that Orano's predecessors many years ago worked on D&D jobs as a subcontractor. TR 152 - 153. These are the jobs that the Joint Petitioners saw fit to show the Commission as proof of capability. TR 56, 133; EX 5. Cursory scrutiny of their track record demonstrates that the other potential exemplars of experience are for jobs that are either on-going or in the future. TR 494 - 497; EX 20 at 286. As discussed above, NorthStar's contribution to the consortium's experience was through a predecessor that had nothing in the way of large nuclear reactor decommissioning and dismantlement experience, and even that experience was not well-known by the Joint Petitioner witnesses. TR 482 - 484; 492 - 498. Even what ***was*** known was performed by a company – LVI – that was (and to some extent still is) mired in allegations of fraudulent accounting and financial and business mismanagement. TR 196 - 200.

The demolition and remediation business that NorthStar has competed in may be a tough one, yet these circumstances cannot be ignored. They should be acknowledged and can be addressed by reasonable measures. For these reasons, and as a means of allowing a transaction that the Consumers believe has merit to proceed, the Consumers ask the Commission to require additional consumer protections in the form of the three straight-forward and simple measures. These additional safeguards have no material cost and compliment the protections that are built into the transaction as explained and supported by Mr. Polich. TR 630, 642 - 643. He specifically notes that his three recommendations enhance the probability of a successful CR3 decommissioning under the deal DEF has negotiated. TR 622. These are summarized below and addressed in the Consumers' argument in the following order:

1. Amend the ADP CR3 reporting requirements contained in Attachment 9, Section B from Quarterly to Monthly and enhance the information to provide timely insight into conditions that could impair ADP's ability to complete the contract. This includes establishing monthly and annual reporting requirements to the Commission.
2. Establish an Independent Monitor to oversee the CR3 decommissioning activities and ADPCR3's financial status.
3. Amend the Parental Support Agreement to include the State of Florida as a beneficiary and with the same rights as the Nuclear Regulatory Commission ("NRC").

***Meaningful monthly reporting is required.***

To address the obvious weaknesses in the structure of the transaction and to gain some timely monitoring and early warning of stress in the decommissioning process, the Consumers strongly urge the Commission to adopt very minimal monitoring and monthly reporting requirements. Mr. Polich sets out the reporting requirements. They are comparable to the ones NorthStar accepted in Vermont. Ex 38 at 40, 148 -150. In fact, the CEO of ADP, Mr. Scott State, indicated no objection to providing the reports to Florida that are required in Vermont. TR 116 - 127; 250 - 253.

If approved to allow $540 million of customers' money to be committed to an unregulated entity operating in uncharted territory, having more information – not less – is something the Commission should embrace. There was no evidence or claim that such reporting would impose a cost to the transaction or interfere with the work. There was no conclusive evidence that such a requirement would even provide a basis for renegotiation of the DSA. Or more to the point, if the customers who are funding the work demonstrate and/or the Commission determines – either independently or in reaction to the customers' assertions – that such timely reporting is needed,

and the Joint Petitioners nevertheless resist providing that level of visibility and transparency. Why?

Mr. Polich testified that:

> [T]he recommended customer protections in the form of enhancements contained in my testimony are intended to mitigate potential risk and enhance the probability of a successful CR3 decommissioning under the deal DEF has negotiated. None of the recommended enhancements should cause detriment to the finances of this project or the entities involved.

TR 622. A key element of this testimony – apart from the benefits demonstrated – is that there is no apparent cost of the measures involved in real terms or in a cost to the transaction itself. Mr. Polich further demonstrated that the specific recommendation regarding the monthly reporting would have significant benefits in the form of timely information or early warning to DEF, the Commission, and the customers. The recommended change would be to monthly from what can only be charitably called "quarterly" reports.[25] DEF's only real objection is that – in the midst of shedding risk and responsibility – it thinks monthly reporting is not needed. TR 683, 692 - 693, 710, 712 - 713.[26]

As Mr. Polich further testified:

> Quarterly reporting is insufficient to track a project progressing this quickly because, if the project conditions deteriorate, it may be three months before that information would be made available to DEF (and the Commission). Increasing the frequency of reporting to monthly would provide DEF (and the Commission) the opportunity to quickly identify problems and react accordingly.
>
> It will provide the Commission critical information on the progress of CR3 decommissioning and will prevent any surprises. I recommend the following elements be contained in the Commission reporting:

[25] Witness testimony noted that the term "quarterly report" is a misnomer as there are quarterly meetings planned but no reports are actually required. TR 358, 439, 549. Witness Hobbs said for the first year he planned to prepare internal quarterly reports to his superiors at the regional level. Of course, that is voluntary and not required. Notably, the record demonstrates most of the first year of the project involves very low risk activities. EX 2 at 332.

[26] The senior management risk committee was told that the DSA transaction would help reduce risk to the shareholders' image in Florida. Ex 49 at 14.

1. Monthly reporting requirements except as noted below,
2. Project status, activities completed and projection of next quarter activities,
3. Identification of any project delays and causes,
4. Payments from the NDF and projections for next monthly payments,
5. Status of the CPT,
6. Financial reports of ADP, ADP companies and ADP parents (Quarterly Statements), and
7. Identification of critical issues and performance of ADP.

TR 649 - 650. DEF's planned *ad hoc*, limited duration quarterly internal recounting of what will be orally reported at an optional quarterly meeting is inadequate to provide confidence to the customers who are funding the project that the project is proceeding as planned. The Consumers submit that the Commission should have similar concerns. DEF's position that Consumers would receive notice of a material adverse development on the CR3 project by a formal petition being filed at the Commission[27] is inadequate. Timely monthly reporting should be a requirement.

Beyond the obvious, simple prudence of doing so and the demonstrated need for the monthly reporting, ADP CEO Scott State indicated a willingness to provide monthly reporting to the Commission on a basis similar to what NorthStar agreed to in Vermont. TR 250 - 253. He further stated, "we want to provide what people need to know." TR 117. He testified that there was an independent monitor process and monthly reporting as shown in the Vermont Order. TR 116 - 127; EX 38 at 6, 30, 41 and 75-77 (paragraphs 2.f - 2.j).

In contrast to Mr. State's willingness to accommodate reasonable reporting needs, DEF's knee-jerk opposition to monthly reporting is unsettling. Why does DEF resist informing the Commission and the customers about what will be going on and how ***their*** money is being spent? This question was not asked or answered in the hearing, but the Commission should ask itself: Why not receive meaningful monthly reporting? The vague, unrealistic threat that the entire $825

[27] EX 23 at 44.

million deal is so fragile and tenuous that it could unravel over a little sunshine in the form of monthly reports seems a bit much given the potential for ADP to earn hefty profits and DEF's offloading of risk. The customers only seek a no-cost/low-cost, unobtrusive accountability mechanism that works well with the protections built into the deal. The Consumers urge the Commission to call the Joint Petitioners' bluff and require the monthly reporting requirement.

***Requiring an Independent monitor is a prudent measure.***

Establishing an independent monitor is a basic level of transparency the customers seek in light of lingering doubts about the financial history of NorthStar and its principals, the lack of true large nuclear plant D&D experience and the potential for being over-extended. In order to enhance the probability of a successful CR3 decommissioning under the deal DEF has negotiated, Mr. Polich recommends the Commission adopt this simple, early warning safeguard as summarized:

> The independent monitor would provide an unbiased but experienced review of the CR3 decommissioning effort. Although DEF will be monitoring the project, the independent monitor is often able to perform assessments and projections of project outcomes that the owner of the facility cannot without the pressure of management or shareholder expectations. The primary purpose of the independent monitor would be as follows:
>
> > Providing an early warning of technical or regulatory problems.
> >
> > Estimating actual project expenditures relative to project revenue to provide an early warning of financial difficulty.
> >
> > Ensuring that tasks are planned in accordance with the overall project schedule and not selected for the purpose of increasing revenue to ADPCR3.
> >
> > Tracking project expenditures and schedules.
> >
> > Reporting cost overruns.
> >
> > Reporting schedule slippage.

> Tracking, assessment, and reporting on ADP, NorthStar & Orano financials.
>
> Tracking expenditures for Independent Spent Fuel Storage Installation ("ISFSI") and recovery from DOE.

TR 650 - 651. (Bullets omitted). These are common sense informational elements given the project's size and scope and the contractor's limited relevant operational experience and recent, publicly known financial struggles. They make the transaction better and facilitate an acceptable level of risk.

Despite the DEF testimonial denials that an independent monitor was established in Vermont, it appears that NorthStar agreed to one. Perhaps the confusion is one of semantics and labelling only. The Vermont PUC clearly established the functional equivalent of an independent monitor through adoption of the Memorandum of Understanding (MOU). It gave the Commission and other state entities the ability to retain "advisors" with access to the site. EX 38 at 29 - 31 (Paragraphs 108 - 114) and 86. The Vermont PUC further saw the wisdom in adopting the monitoring ***in conjunction with*** the monthly reporting. The MOU provides, in concise terms, that the access (by the advisor(s)) and monthly reporting go together:

> NorthStar shall provide to DPS, ANR, and AGO monthly summaries of all expenditures at the site. Those agencies shall be permitted access to and shall have the right to inspect those expenditures and the books of NorthStar Group Holdings, LLC, NorthStar Group Services, Inc., and NorthStar VY at all reasonable times and at reasonable intervals.

EX 38 at 75. The Vermont PUC more importantly recognized the symbiotic nature of the monitoring and the reporting to give them oversight in the face of a company that had some thin experience in large plant decommissioning to go along with their thin capitalization. The Consumers urge the Commission to take note of the Vermont PUC's view of the importance of the post-closing oversight. They stated:

> ***We emphasize the importance of the post-closing oversight activities by the relevant State agencies in mitigating risks to the State related to funding adequacy.*** In addition to other measures that have the potential to mitigate post-closing risks, ***NorthStar will be providing monthly summaries*** of all expenditures at the site, informative and detailed annual certifications regarding the project's progress, and prompt notification of material developments affecting NorthStar or the project. ***The State agencies will also have significant rights in overseeing the project, including the right to inspect books and records, to access the site, and to object to disbursements from certain funding sources***. Given the importance of project oversight by the State agencies, we trust that the State agencies will retain appropriate resources, devote the necessary time and attention, and constructively manage and coordinate their efforts to ensure that the available tools are effectively used in accordance with the interests of Vermont.

EX 38 at 40. (Emphasis added). NorthStar was praised by Vermont "for its willingness to engage with the parties to this case, other stakeholders, and the public and for its efforts in negotiating and reaching agreement on the MOU…" Moreover, Mr. State indicated his willingness to have some form of an independent monitor involved at CR3. TR 230 - 231.

Thus, the Consumers ask: Why should it be any different for the Florida customers? The Florida Commission and DEF are in uncharted waters. ADP claims to be capable, but they have no significant experience and a somewhat checkered financial past as noted above. Perhaps that is all behind them, but why shouldn't this Commission mitigate the risk that it is not? DEF's desire of minimal reporting requirements while shifting risk in order to protect its shareholders' reputation, should not be the public policy goal of this proceeding.[28] A transparent solution that has been both agreed to and adopted in a similar circumstance cannot hurt and will instead help monitor risks and provide early warning if trouble arises.

[28] Duke Energy senior management was told that one of the impacts of the deal was that "Shareholders are positively impacted by mitigating risk that could damage reputation in Florida." EX 39 at 14.

***Florida should be added as beneficiary of the NRC's parental support agreement.***

The Consumers also urge the Commission to insist upon the zero-cost option of directing the Joint Petitioners to request the NRC staff to add the State of Florida (preferably the Florida Public Service Commission) as a beneficiary alongside the NRC in Paragraph 6 of the Support Agreement.[29] As Mr. Polich testified, the enhancement gives real protection at no additional cost or jeopardy to the transaction:

> The Parental Support Agreement contained in Exhibit H-1 and H-2 of the DSA explicitly states there is no guarantee to third parties other than the NRC of payment of decommissioning costs for CR3. The funding for CR3's decommissioning was provided solely by DEF ratepayer contributions to CR3's NDF. NRC regulations establish requirements of the license holder to fund decommissioning; however, the Commission established the charges to DEF ratepayers to fund the NDF. Since the Commission, as a representative of the State of Florida, is responsible for setting up the funding of the NDF and ultimately the funding of CR3 decommissioning, the State of Florida should have equal treatment in the Parental Support Agreements with that of the NRC. Adding the State of Florida should not cause any additional financial burden on NorthStar or Orano nor should it increase the cost of the Parental Support Agreements.

TR 643.

This added protection is a no-brainer. Mr. State acknowledged that the license amendment document issued by the NRC leaves it up to the NRC staff to approve modifications. TR 207; EX 40. Mr. Polich testified that the State of Vermont similarly required an amendment to the Parental Support Agreement that was approved by the NRC for the Vermont Yankee decommissioning project (ostensibly) as a condition of approving the transfer of ownership to NorthStar. NorthStar agreed to this amendment. TR 644 - 645. This meaningful consumer protection does not require NRC commission-level approval. It can be addressed by the NRC staff. In fact, the draft NRC

[29] The Consumers submit that the simple amendment to be made to the relevant provision in each of Exhibits H-1 and H-2 of the DSA (found at EX 2 at 227 and 230) is illustrated by the edits agreed to and attached to the Vermont Order at Attachment E. (EX 38 at 118-120).

"Amendment to Facility Operating License" document on its face states that "These Support Agreements may not be voided, canceled, or modified ***without the prior written consent of the NRC staff***." TR 207; EX 40 at 4. (Emphasis added).

Mr. State acknowledged that there was a similar provision in the Vermont license amendment and that he did not "know that there would be specifically an extra cost" to adding the State of Florida to the support agreement. TR 207 - 208. Despite his further implication that there could be a delay-induced cost and differences between Vermont Yankee and Crystal River, the Florida Commission should be the sole judge of what is important to protect the Florida consumers who are served by its regulatory authority. The fact that both the Vermont and Florida license amendments only required approval at the NRC staff level does not indicate that delay is at all likely. Nevertheless, DEF's witness, Mr. Hobbs, asserted that the no cost, staff approval condition of adding the Commission as a beneficiary would jeopardize the entire transaction and cause it to be renegotiated. TR 693. No such indication was given from Mr. State. In any event, the Commission should not allow itself to be captive to such vague threats. As was done in Vermont, adding the State of Florida as a named beneficiary of the NRC Parental Support Agreement is a no-cost, easy lift and provides additional customer benefit and protection.

The Consumers assert that there has been no demonstration that there is an urgency to this transaction closing on October 1, 2020 that should cause the Commission to rush past implementing basic customer protections. On March 19, 2019, the Duke Energy senior management was told that the "projected" transaction closure date was July 2, 2020. EX 39 at 2. Currently, the date is expected to be October 1, 2020. This 90-day difference is meaningless in the context of a transaction that was originally expected to be completed 50 years from now. The Joint Petitioners now want to portray the urgency as one that is measured in mere days. The

Consumers urge the Commission to resist being pushed to rush their consideration in a game of brinksmanship that smacks of a "take-it-or-leave-it" proposal. The Commission has one opportunity to act to protect customers. The three measures that the Consumers propose do not impose cost or delay. To the contrary, they would work with built-in protections to enhance the probability of a successful CR3 decommissioning under the deal DEF has negotiated. The Commission should disregard the vague assertion that "some [unstated] parts of the DSA may need to be renegotiated" if the Commission adopts any or all of the Consumers' proposals. Minimal consumer protection changes consistent with those in place in the Vermont nuclear decommissioning project are exceedingly unlikely to derail or delay the deal or its October closing.[30] Perhaps, the Commission should ask itself whether this deal is really that good if it is so fragile that it cannot withstand the most minimal of Commission oversight?

Joint Petitioner witnesses repeatedly pointed out that a return to SAFSTOR was a reasonable safety net if the attempted DECON cratered. The Consumers contend there is a reasonable response to the uncertainties that were created by the Joint Petitioners' stipulated answers to the staff questions.[31] [32] That response is to require the reasonable conditions Mr. Polich recommends. If the DSA is scuttled, the Commission has the comfort of DEF's testimony that SAFSTOR is a completely reasonable outcome. However, the Consumers believe that the deal as

[30] The record does not support that harm will occur if the closing date was extended in November or December of 2020 or even that the enhancements will actually cause the transaction not to close.

[31] Stipulation 1:
If any of the three recommended enhancements that Mr. Polich has testified should be added to the DSA are required by this commission, it is NorthStar's position that parts of the DSA would have to be renegotiated. TR 604.
Stipulation 2:
Q: If the Commission were to adopt any conditions as part of its approval of the transaction, would ADP or DEF require renegotiation of the DSA?
A: For each entity, it would depend on its assessment of the proposed condition. TR 604-605.

[32] The Consumers stipulated that the statements could be admitted into the record but did not stipulate that they were correct. TR 603 - 604.

structured has merit and with relatively minor and reasonable modifications, the transaction should be allowed to close and proceed.

**ISSUE 2:** Is DEF's proposed transaction with ADP and its subsidiaries for decommissioning CR3 consistent with DEF's 2017 2nd Revised and Restated Stipulation and Settlement Agreement (2017 Settlement)?

**Consumers:** *No. As demonstrated in the discussion on Issue 3, diversion of the DOE award funds from the CCR Clause through approval of the 2019 Cost Study to the NDT is contrary to the provisions of the Commission-approved RRSSA at paragraph 5.a.(1).*

**ISSUE 3:** Should the Commission approve DEF's 2019 Accelerated Nuclear Decommissioning Study?

**Consumers:** *No. The Commission Should Reject DEF's Decommissioning Cost Study and Direct DEF to Flow All Damage Recoveries from DOE to Consumers through the CCR Clause. The Commission cannot and, in any event, should not approve the deposit of DOE award funds into the NDT.*

## Argument

***The Commission cannot lawfully approve the deposit of funds in the NDT***

The 2019 Accelerated Nuclear Decommissioning study presumes that DEF would place $90 million in DOE recoveries expected in 2022 in the NDT, where it would remain indefinitely unless a federal high-level waste repository is established and accepts the CR3 spent fuel and other high-level nuclear wastes. EX 3 at 5, 9; TR 225. This would be directly contrary to the specific requirement of the 2nd Revised and Restated Stipulation and Settlement Agreement ("RRSSA") approved in Order No. PSC-2017-0451-AS-EI ("RRSSA Order"), which states that all such funds

received from DOE are to be credited to consumers through the CCR. The study is unlawful and cannot be approved. The Commission ***can*** approve the study with the funding of the project established at $540 million as described in the testimony of DEF's witnesses and the "Agreed Amount" definition contained on page 8 of Exhibit 35. The $120 million amount remaining in the NDT reserve subaccount following the closing of the transaction, combined with the earnings on those amounts, conservatively estimated at 2% growth rate, will be more than sufficient to cover owner's costs and contingencies.

The Commission cannot lawfully approve the study that aims to indirectly modify a prior Commission Order that is the result of a comprehensive settlement under which DEF received, among other benefits, a three-step base rate increase of $200 million as a part of the overall consideration. DEF did not ask the Commission in this docket to modify an order to which administrative finality has irrevocably attached. DEF did not seek the required agreement of the signatories of the RRSSA. A modification that would divert DOE award funds from customers to the NDT would violate Section 120.68(e), F.S. Ultimately such a unilateral modification would cause DEF's customers to surrender the rate benefits they received in exchange for consideration given to DEF in the form of agreed rate increases in 2019, 2020 and 2021.

Safely disposing of nuclear spent fuel and high-level radioactive wastes has always been the Achilles Heel of commercial nuclear power. The Nuclear Waste Policy Act of 1982[33] directed the federal government to develop a high-level nuclear waste repository. It also established a timeline for the DOE to begin accepting such wastes from commercial facilities by roughly 1996. The costs of locating and establishing the federal repository was funded by a fee of one mill/kWh

[33] 42 U.S.C. § 10101, PL 97-425, 96 Stat. 2201.

levied on all nuclear plant output.[34] This fee was passed through to ratepayers in DEF's retail rates for decades.

As has been widely discussed, including on the record of this proceeding, a permanent federal nuclear waste site has never been established notwithstanding efforts over the past thirty-five years to locate such a repository near Yucca Mountain, Nevada. TR 227 - 228. The topic remains politically charged to this day.

Because there is no federal repository, DEF, like all nuclear plant license holders, was forced to store spent fuel from the CR3 nuclear unit on site. With the structural and operational failure forcing early retirement of CR3, DEF constructed an on-site Independent Spent Fuel Storage Installation ("ISFSI") and placed its spent fuel and related HLW in dry cask storage. According to DEF's filings in the nuclear cost recovery clause, the cost of constructing this facility was approximately $132 million.[35] DEF has sued the DOE for full reimbursement of its costs for on-site spent fuel storage. DEF had no expectation or guarantee that it would recover funds in litigation with the DOE. In fact, in the second round of litigation, all of DEF's claims related to CR3 were denied.[36]

Under the proposed transaction, DEF effectively gives the $132 million ISFSI, including the spent fuel, to ADP SF1.[37] DEF will seek full recovery of its spent fuel management costs through the transaction closing date. Pursuit of recovery on those costs following closing will be transferred to ADP.

When CR3 was retired and the remaining asset balance securitized in 2015, the costs associated with the ISFSI were not included in the securitized asset. The Commission permitted

[34] Order No. 12540, 83 FPSC 198 1983 Fla. PUC LEXIS 264*19 (Fla. P.S.C. September 21, 1983).
[35] Order No. PSC-2018-0490-FOF-EI, Attachment A, para. 8.
[36] *Carolina Power & Light Co. v. United States*, 82 Fed. Cl. 23 at 51 (2008).
[37] Section 3.1 of the Purchase and Sale Agreement states that the purchase price is $1,000. EX 2 at 102; TR 530.

DEF to recover ISFSI costs through an amortization schedule incorporated in the CCR.[38] The 2017 RRSSA approved by the Commission in the RRSSA Order addressed the rate treatment of the ISFSI and future expected damage recoveries from DOE by allowing DEF to petition for recovery of such costs through the CCR and by mandating that all amounts recovered from DOE be credited to DEF's customers through the CCR.[39]

In the 2018 NCRC docket, the Commission acknowledged the requirements of the 2017 RRSSA in Order No. PSC-2018-0490-FOF-EI ("2018 NCRC Order") which approved a stipulation that DEF reached with consumers in that docket which directed DEF to credit the retail portion of a prior recovery from DOE relating to the ISFSI and spent fuel claims ($18,266,200) to the CCR. The Commission further affirmed and directed that future DOE recoveries shall be credited to customers through the CCR.[40]

The DEF decommissioning study submitted in this docket to support the proposed transaction completely disregards the settled rate treatment associated with DOE recoveries pertaining to CR3 on-site HLW storage and assumes instead that expected DOE recoveries would be deposited into the NDT. As noted above, the study documents assume that pending DEF claims against DOE will result in a $90 million recovery in 2022. DEF agreed that this amount is an incomplete statement of amounts due to DEF, which should at least include an additional approximately $14 million in spent fuel costs incurred in 2019 and 2020. EX 3 at 9; TR 531.

DEF agreed that there were no Internal Revenue Service ("IRS") or NRC rules[41] requiring that dollars recovered from DOE be placed in the NDT.[42] TR 400 - 401; 516. DEF offered no

[38] Order No. PSC-2015-0027-PA-EI.
[39] RRSSA Order at 17-18 (Paragraph 5.a.(1)).
[40] Attachment A, para. 8.
[41] DEF indicated that DOE funds added to the NDT would be treated as non-qualified amounts, so no beneficial tax treatment would apply to those amounts. TR 393 - 394, 401, 453.
[42] See Exhibit 34 at 43. This license transfer application refers to a January 26, 2015 exemption from the requirements of 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(2) that allowed the use of funds from CR3's decommissioning trust

accounting rule or guideline that would justify changing the settled rate recovery treatment. Accordingly, the Commission should require DEF to revise its decommissioning study to exclude expected DOE recoveries from the NDT reserve balance, and it should re-affirm the prior Commission Orders requiring such amounts to flow through the CCR.

A $90 - $104 million (or greater) diversion of customer funds would be an abuse of discretion and departure from the essential requirements of law, in contravention of Section 120.68(e), F.S. See, *Citizens of Fla. v. Graham*, 213 So. 3d 703 (Fla. 2017) at 713 (adoption of settlement agreement constituted official Commission policy, the departure from which required sufficient explanation). DEF has indicated that it intends to deposit the funds in the NDT in 2022 and convert the funds to a rainy-day fund to protect its shareholders from any of its risk miscalculations. TR 357, 361- 362, 366 - 367, 400 - 401, 454, 528 - 529. This action is prohibited by paragraph 5.a.(1) of the RRSSA, adopted by the RRSSA Order as its official policy for the majority of the rates established for DEF, including the disposition of funds received in litigation awards from the United Stated DOE related to spent fuel management costs. That provision requires that "DEF shall credit" the retail portion of all applicable DOE awards to the CCR. The applicable awards referred to are those related to the $132,426,804[43] of ISFSI capital costs.

DEF did not testify that the diversion of the funds from the customer account was required or even lawful. It did not mention the rate treatment of such recoveries required by the RRSSA and the Commission's 2018 NCRC Order. The best they offered was that "[i]t sure feels right" and that it was "what they intended to do." TR 357, 361 - 362, 366 - 367, 400 - 401, 454, 528 - 529. Testimony and statements provided during the hearing to the effect that the IRS and NRC

for irradiated fuel and site restoration cost (ADAMS ML 14247A545). That NRC decision demonstrates that there was no requirement to place future DOE recoveries related to these costs in the NDT.

[43] See also 2018 NCRC Order at 7 (paragraph 7 provides that "the total retail cost to construct the ISFSI, including AFUDC, was approximately $132,426,804.").

regulations prohibited excess or surplus finds in the NDT from being returned to customers do not apply to the DOE awards because those funds are not ***in the NDT***. TR 584. The Duke Energy board of directors and the NRC were told that this was the intended outcome. At no point did DEF mention to these entities that this disposition was contrary to Commission order and a binding contract with the customers. EXS 34; 39. DEF did not ask the Commission to approve this diversion of funds in its petition filed in this docket or to recede from, repudiate or modify the RRSSA Order. Administrative finality has attached to this order which was issued nearly three years ago. See, *Reedy Creek Utils. Co. v. Fla. Public Serv. Com, 418 So. 2d 249.* (The Commission retained the ability to correct an error two-and-a-half months later in contrast to the facts in *Peoples Gas System, Inc. v. Mason, 187 So. 2d 335* and *Austin Tupler Trucking v. Hawkins, 377 So. 2d 679*, where the orders were issued four years and two years earlier, respectively, and thus administrative finality had attached).

The required enforcement of the RRSSA Order will not imperil the DSA transaction or require it to be re-negotiated. In short, the diversion of customer money to the NDT reserve subaccount is irrelevant to the DSA transaction and adherence to the terms of the RRSSA will avoid an appellate review of the Commission's action under Section 120.68(e), F.S. The Commission should direct DEF not to deposit the DOE funds into the NDT but instead to follow the law and maintain them outside of the NDT and to include them as a credit to the CCR in the year after receipt.

***Regardless of the applicability of the RRSSA Order, the Commission should prohibit the deposit of the DOE award funds into the NDT.***

Assuming, arguendo, that that the RRSSA Order has somehow been rendered a nullity or that paragraph 5.a(1) does not apply to the DOE awards, the Consumers submit that the Commission should nevertheless order DEF to not deposit future DOE award funds into the NDT.

The Joint Petitioners' testimony demonstrated that it is supremely confident that it has covered all of the risks of the transaction and has locked in its cost at $540 million with what is described as a fixed cost contract, implemented an exhaustive list of contractual safeguards and that it has ample cushion to cover owners' costs and still have money left over to return to customers. TR 353 - 354; 387. Thus, there is no need to tie the Commission's hands by needlessly encumbering the funds in the unqualified portion of the NDT. Nowhere in the record has DEF made the claim that the DOE funds are a required element of the transaction for which it is seeking approval. The funds are not tied to the DSA. DEF's counter party to the transaction, ADP, makes no claim in reliance on the funds. EX 34 at 59.[44] A search of the record and Exhibit 35 demonstrates that the contracting documents neither mention the DOE award funds nor (obviously) place any reliance on them in order for the DSA to be given effect. The same can be said for the DEF pleadings and the testimony filed in the case. No mention is made of the DOE funds being an essential component of the transaction or seeking express Commission approval of the diversion.

In effect, DEF cannot have it both ways. If it has adequately covered the cost of CR3's decommissioning and dismantlement with the fixed fee arrangement with ADP and the other listed safeguards of the DSA, the NDT reserve account will be substantially over-funded and dollars recovered from DOE should flow back to consumers as the Commission has already directed. If those protections are not adequate and the risk of non-performance is materially greater than DEF has testified, the Commission clearly should not approve the transaction as proposed.

The DOE recoveries should be set aside for customers and refunded to them. To the extent the funds are not refunded immediately upon receipt (through the CCR clause as required by the

[44] In this regard, the NRC was specifically told that the information presented to the NRC "shows that the amount of decommissioning trust funds in the CR-3 NDT being made available to ADP CR3 under the DSA will be adequate to fund the costs of decommissioning CR-3 and eventual costs of decommissioning the ISFSI." $540 million is the amount made available to ADP under the DSA. EX 2 at 8.

RRSSA and as agreed by the parties), they should be maintained outside of the NDT in a funded, income earning account that is not available for DEF's general corporate purposes. If DEF's thorough identification of all risks and implementation of all security measures in the form of guarantees, performance binding letters of credit, provisional trust, retainage, etc. are as effective as it claims and the deal does not need any further enhancement or oversight by the Commission, then under no circumstance will the surplus DOE award funds be required before 2026 – if ever. If the unthinkable arises – and DEF witnesses stated repeatedly they cannot conceive of a scenario where they would[45] – then the Commission could hold a proceeding to determine if additional funds can be collected from customers. In no event should the funds be placed in the NDT in a manner that would allow them to end up in ADP's bank account.

**ISSUE 4:** What is the appropriate annual accrual in equal dollar amounts necessary to recover the proposed decommissioning costs of CR3?

**Consumers:** *$0.*

**ISSUE 5:** What is the appropriate accrual effective date for adjusting the accrual amount, if any adjustment is needed?

**Consumers:** *The last opportunity to adjust any accrual appears to be December 31, 2021 pursuant to the RRSSA. *

**ISSUE 6:** Should the Commission approve DEF's request to waive, if necessary, the future filing of CR3 decommissioning studies every five years as provided in Rule 25-6.04365, F.A.C.?

**Consumers:** *No, not unless the Commission imposes suitable reporting requirements as detailed in FIPUG's position on Issue 7 and an independent monitor to oversee the project

[45] TR 466 - 467, 502, 696.

on behalf of the Commission and consumer parties is put in place. The reports described in the testimony of Richard A. Polich at TR 649 - 650 should – at a minimum – be required if the Petition is approved. See discussion on Issue 1.*

## Argument

The Commission should require that DEF provide it with timely and regular reports to ensure that decommissioning and spent fuel activities in the DSA are completed, that NDT funds are prudently spent and that sufficient funds remain to complete the decommissioning and spent fuel activities. The Commission should not grant any rule waiver or other waiver request to delay or excuse the submission of these or similar reports related to the handling of nuclear waste.

**ISSUE 7:** What reports should be given to the Commission to ensure that the decommissioning and spent fuel activities outlined in the DSA are completed, and NDT funds are reasonably spent, and sufficient funds remain to complete the decommissioning and spent fuel activities?

**Consumers:** *The reports described in the testimony of Richard A. Polich at TR 649 - 650 should – at a minimum – be required if the Petition is approved. See Discussion on Issue 1.*

**ISSUE 8:** Should this docket be closed?

**Consumers:** *No. The docket should remain open until any action approved, if at all, by the Commission is completed satisfactorily.*

Dated this 23rd day of July 2020.

Respectfully submitted,

JR Kelly
Public Counsel

/s/ *Charles J Rehwinkel*
Charles J. Rehwinkel
Deputy Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Rm 812
Tallahassee, FL 32399-1400

Attorneys for Citizens of Florida

*/s/ Jon C. Moyle*
Jon C. Moyle, Jr.
Karen A. Putnal
Moyle Law Firm, P.A.
118 North Gadsden Street
Tallahassee, Florida 32301
jmoyle@moylelaw.com
kputnal@moylelaw.com

*Attorneys for the Florida Industrial Power Users Group*

**STONE MATTHEIS XENOPOULOS & BREW, PC**

*/s/ James W. Brew*
1025 Thomas Jefferson Street, NW
8th Floor, West Tower
Washington, DC 20007
Telephone: (202) 342-0800
Facsimile: (202) 342-0807
Email: jbrew@smxblaw.com

*Counsel for White Springs Agricultural Chemicals, Inc., d/b/a PCS Phosphate*

**CERTIFICATE OF SERVICE**
**Docket No. 20190140-EI**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Consumers Joint Brief has been furnished by electronic mail on this 23rd day of July 2020, to the following:

Dianne M. Triplett
Duke Energy Florida
299 First Avenue North
St. Petersburg FL 33701
dianne.triplett@duke-energy.com

Matthew R. Bernier
Duke Energy Florida
106 E. College Avenue, Ste. 800
Tallahassee FL 32301
matthew.bernier@duke-energy.com

Bianca Lherrison
Suzanne Brownless
Office of General Counsel
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
sbrownle@psc.state.fl.us
blherris@psc.state.fl.us

Shutts Law Firm
Daniel Hernandez/Melanie Senosiain
4301 W. Boy Scout Blvd., Suite 300
Tampa FL 33607
DHernandez@shutts.com
DEF-CR3@shutts.com
msenosiain@shutts.com

*s/Charles J. Rehwinkel*
Charles J. Rehwinkel
Deputy Public Counsel