

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

In the Matter of:

DOCKET NO. 100437-EI

EXAMINATION OF THE OUTAGE AND  
REPLACEMENT FUEL/POWER COSTS  
ASSOCIATED WITH THE CR3 STEAM  
GENERATOR REPLACEMENT PROJECT,  
BY PROGRESS ENERGY FLORIDA, INC.

RECEIVED--FPSC  
13 MAY -2 PM 2:21  
COMMISSION  
CLERK

PROCEEDINGS: ORAL ARGUMENT

COMMISSIONERS  
PARTICIPATING: COMMISSIONER EDUARDO E. BALBIS

DATE: Tuesday, April 30, 2013

TIME: Commenced at 10:00 a.m.  
Concluded at 11:37 a.m.

PLACE: Betty Easley Conference Center  
Room 148  
4075 Esplanade Way  
Tallahassee, Florida

REPORTED BY: LINDA BOLES, CRR, RPR  
Official FPSC Reporter  
(850) 413-6734

## 1 APPEARANCES:

2 JOHN T. BURNETT, ESQUIRE, Progress Energy  
3 Service Company, LLC, Post Office Box 14042, St.  
4 Petersburg, Florida 33733-4042, and J. MICHAEL WALLS,  
5 ESQUIRE, Carlton Fields Law Firm, Post Office Box 3239,  
6 Tampa, Florida 33601-3239, appearing on behalf of  
7 Progress Energy Florida, Inc.

8 JON C. MOYLE, JR., ESQUIRE, c/o Moyle Law  
9 Firm, The Perkins House, 118 North Gadsden Street,  
10 Tallahassee, Florida 32301, appearing on behalf of the  
11 Florida Industrial Power Users Group (FIPUG).

12 ROBERT SCHEFFEL WRIGHT, ESQUIRE, c/o Gardner  
13 Law Firm, 1300 Thomaswood Drive, Tallahassee, Florida  
14 32308, appearing on behalf of the Florida Retail  
15 Federation.

16 JAMES W. BREW, ESQUIRE, Brickfield Law Firm,  
17 Eighth Floor, West Tower, 1025 Thomas Jefferson Street,  
18 NW, Washington, DC 20007, appearing on behalf of White  
19 Springs Agricultural Chemicals Inc. d/b/a PCS Phosphate.

20 CHARLES J. REHWINKEL, ESQUIRE, Office of  
21 Public Counsel, c/o The Florida Legislature, 111 West  
22 Madison Street, Room 812, Tallahassee, Florida  
23 32399-1400, appearing on behalf of the Citizens of the  
24 State of Florida.

25

1 APPEARANCES (Continued):

2 KEINO YOUNG, MICHAEL LAWSON, LEE ENG TAN, and  
3 CAROLINE KLANCKE, ESQUIRES, FPSC General Counsel's  
4 Office, 2540 Shumard Oak Boulevard, Tallahassee, Florida  
5 32399-0850, appearing on behalf of the Florida Public  
6 Service Commission Staff.

7 CURT KISER, GENERAL COUNSEL, and MARY ANNE  
8 HELTON, DEPUTY GENERAL COUNSEL, Florida Public Service  
9 Commission, 2540 Shumard Oak Boulevard, Tallahassee,  
10 Florida 32399-0850, Advisors to the Florida Public  
11 Service Commission.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

## 1 P R O C E E D I N G S

2 **COMMISSIONER BALBIS:** Good morning. I would  
3 like to thank everyone for joining me in this meeting to  
4 hear oral arguments concerning the scope of the upcoming  
5 hearings for Crystal River 3 project.

6 As I've stated consistently, this Commission  
7 will initiate an evidentiary hearing concerning the  
8 remaining issues of this case when the issues are ripe  
9 for hearing. We are now at that time.

10 I have issued revised Orders Establishing  
11 Procedures outlining the hearing schedule, as well as  
12 other issues. This meeting is to hear oral arguments  
13 from the parties concerning a threshold question to  
14 further identify the scope of those proceedings.

15 So with that, I'd like to call this oral  
16 argument to order. Staff, could you please read the  
17 notice.

18 **MR. YOUNG:** Good morning. By notice issued  
19 April 16th, 2013, this time and place has been set for  
20 oral arguments before Commissioner Balbis as Prehearing  
21 Officer in Docket Number 100437. The purpose of the  
22 oral argument is set out in the notice.

23 **COMMISSIONER BALBIS:** Okay. Thank you. I  
24 would like to take appearances now, starting with  
25 Progress Energy Florida.

1           **MR. BURNETT:** Good morning, Commissioner.

2 John Burnett and Mike Walls on behalf of Duke Energy.

3           **MR. MOYLE:** Jon Moyle with the Moyle Law Firm  
4 on behalf of the Florida Industrial Power Users Group,  
5 FIPUG.

6           **MR. WRIGHT:** Robert Scheffel Wright on behalf  
7 of the Florida Retail Federation.

8           **MR. BREW:** Good morning. James Brew with the  
9 firm of Brickfield, Burchette, Ritts & Stone for White  
10 Springs Agricultural Chemicals/PCS Phosphate.

11           **MR. REHWINKEL:** Good morning, Commissioner.  
12 Charles Rehwinkel with the Office of Public Counsel.

13           **MR. YOUNG:** Keino Young, Caroline Klancke, Lee  
14 Eng Tan, and Mike Lawson on behalf of Commission staff.

15           **MS. HELTON:** And Mary Anne Helton, advisor to  
16 the Commission. Also here advising you today is the  
17 General Counsel, Curt Kiser.

18           **COMMISSIONER BALBIS:** Okay. Thank you. I  
19 just would like to go over some procedural matters. By  
20 way of background, on April 5th, 2013, the parties  
21 requested clarification as to the scope of the  
22 proceeding in their joint motion of the parties to  
23 resolve disputed case issues.

24           In this joint motion the parties requested  
25 that the Commission clarify the scope of this proceeding

1 by answering the following question: What issues, if  
2 any, does the settlement agreement approved by the  
3 Commission vote on February 22nd, 2012, and in Order  
4 Number PSC-12-0104-FOF-EI preclude the Commission from  
5 determining in this docket?

6 On April 11th of this year I issued Order  
7 Number PSC-13-0155-PCO-EI granting in part and denying  
8 in part the parties' joint motion and setting forth the  
9 procedural schedule for resolution of this issue so that  
10 the case may proceed accordingly and setting this matter  
11 for oral argument today.

12 As set forth in the body of this order, oral  
13 argument today will be no longer than two hours in  
14 duration. Duke and the Office of Public Counsel shall  
15 have 30 minutes each for oral argument. PCS Phosphate,  
16 FRF, and FIPUG shall have 20 minutes each for oral  
17 argument. There shall be no sharing of minutes. I will  
18 reserve my questions until after all the parties have  
19 presented oral argument in this matter.

20 Following the conclusion of oral arguments, we  
21 will also discuss the schedule for this case that is  
22 reflected in the third Order Establishing Procedure that  
23 I issued late last week. So with that, we will begin  
24 oral arguments with Duke Energy.

25 And just a reminder, we do have the light

1 system in place. Green is your time has started --  
2 obviously I'm going to start that in a moment -- but  
3 amber, there will be two minutes left; solid red, there  
4 are 30 seconds left; and flashing red is your time has  
5 been exhausted. So with that, Duke Energy.

6 **MR. BURNETT:** Understood. Thank you. Good  
7 morning, sir.

8 Commissioner, there are several complex legal  
9 arguments and positions in the briefs and a lot of stuff  
10 going on in the briefs, and I'm not going to get into  
11 the legal argument. I'll let the briefs speak for  
12 themselves.

13 But I would, I would submit to you,  
14 Commissioner, there are really three straightforward  
15 questions that you have to determine to resolve the  
16 dispute we have today.

17 The first one is what issue does the  
18 Commission need to decide with respect to the prudence  
19 of our NEIL settlement? The second one is what evidence  
20 can the Commission consider in coming to that  
21 determination? And then finally, how does the  
22 settlement impact on those first two issues?

23 Starting with the first issue, Commissioner,  
24 there is one central issue in this case, and it is was  
25 our settlement with NEIL reasonable and prudent? I

1 think the Intervenors actually said it best in their  
2 initial brief on page 7 when they said that that issue  
3 is the focal point of the remaining dispute between the  
4 parties, and we agree.

5 Now there are lots of positions that the  
6 Intervenors are taking and lots of arguments they want  
7 to make, but that is the central issue. And they're  
8 free to make those positions and those arguments under  
9 that issue.

10 So if the Commission focuses on that ultimate  
11 issue and says that's what we're deciding, it's going to  
12 avoid another issues conference. We've been to three  
13 Issue ID meetings. We've tried our best to agree on  
14 subissues, and the Intervenors want to have several  
15 subissues under that. We're going to, we're going to  
16 continue to fight over that language. We're going to  
17 continue to try to get those neutrally phrased. We  
18 don't need that argument. We can avoid this all by just  
19 saying there's a central issue on the prudence. Let the  
20 Intervenors argue what they want under that. It's  
21 efficient, it's not controversial, and it's fair.

22 Moving on to the second question of if you  
23 frame that central issue, what evidence does the  
24 Commission get to look at in determining that issue?  
25 The simple answer to that question is all relevant



1 evidence that the Commission wants to consider. In  
2 reading the reply briefs, I can tell that there is a  
3 fundamental misunderstanding between what the  
4 Intervenors think our position is or was and what our  
5 position actually is.

6 I believe that the Intervenors were under the  
7 impression that Duke was trying to say, Commissioner,  
8 you and the Commission can't look at evidence beyond a  
9 certain date. Forget history existed before that time  
10 and you can only look prospectively forward at actions  
11 and evidence taken from a date forward until we sign the  
12 settlement agreement. Not our position at all.

13 In fact, we think the Commission should  
14 consider and should know the whole story and the big  
15 picture and get all the facts. So we're in no way  
16 trying to argue that the Intervenor should be limited in  
17 the scope of their discovery or that the Commission  
18 should be limited in the evidence that it can see.

19 In fact, I went through the Intervenor's  
20 initial briefs and made a chart in our reply brief of  
21 all of the evidence that they said was important to them  
22 that the Commission should consider so they could put  
23 their case on. And by each one of these entries I said  
24 we agree, we agree, we agree. So I believe that there's  
25 not a dispute with respect to what evidence you could

1 consider; rather, just a misunderstanding of our  
2 position. So we should have no dispute there.

3 That takes us to the final question of how  
4 does the settlement agreement impact on these first two  
5 issues that we've talked about? Simply put, the  
6 settlement cuts off a look back for prudence from a date  
7 certain but does not compromise the Commission's ability  
8 to consider the ultimate issue that I've framed.

9 To put it in perspective of how this would  
10 work, I'll use an example, Commissioner. We think that  
11 it's important for the Commission to look at the NEIL  
12 policies, to go back and say I understand what NEIL is,  
13 I understand how these policies came to pass, I can see  
14 what these policies say. The Commission may look at the  
15 NEIL policy and say I don't understand some of these  
16 provisions. This provision to me is ambiguous. I might  
17 have written this differently. I might have, if I could  
18 have. That's fair. That's fair for the Commission to  
19 do and understand that.

20 What the Commission and the Intervenors can't  
21 do is go back decades and argue, hey, you were imprudent  
22 for not writing that differently. You were imprudent  
23 for entering into this contract in the first place.  
24 That's barred by the settlement. Those facts are long  
25 behind us.

1           What the Commission can properly do is say  
2 given that policy and what it said, given the facts that  
3 the company had before it, did the company take those  
4 facts and act prudently to ultimately enter into a  
5 settlement agreement that was in the best interest of  
6 all the stakeholders?

7           So that's how it works. You're not precluded  
8 from the big picture, but you are precluded from going  
9 back and the Intervenors are precluded from going back  
10 decades to challenge whether we should have even  
11 contracted with NEIL at all.

12           Now let's talk about, Commissioner, what we  
13 trying to do when we came here from the settlement.  
14 Because I think it's, it's appropriate and important to  
15 give context to what we were trying to do with the  
16 settlement and then talk about what the settlement says.

17           So when we came before this Commission with  
18 the settlement, we made it clear that we were trying to  
19 have a path forward to resolve the important issues that  
20 were still before us then. We needed to make the  
21 repair/retire decision. We needed to come to resolution  
22 with NEIL.

23           The company wanted to get closure for the  
24 issues behind it. So to use a metaphor, we didn't want  
25 to look over our shoulder anymore. The past is the past

1 and we didn't want prudence challenges coming from  
2 behind us. We wanted a path forward.

3 In fact, you may recall some of the, some of  
4 the statements that the parties made to the Commission  
5 during that time, is we want to get the company set up  
6 so it could get a good settlement or a good resolution  
7 with NEIL. We want to make sure that the company is  
8 well positioned to make an intelligent decision about  
9 repair and retire. That was the intent of the parties.

10 Now, the Intervenors are arguing and would  
11 have you believe that notwithstanding the fact that the  
12 company paid hundreds of millions of dollars in refunds  
13 for that settlement and that -- and clearly with that  
14 intent of moving forward, not looking backwards, that we  
15 took care of the steam generator replacement project, we  
16 took care of the repairs that resulted from that, we  
17 took care of the repair/retire, but we left a gaping  
18 hole open behind us that would allow the Intervenors to  
19 go back as far as they wanted in time and challenge any  
20 aspect of NEIL to the beginning of our first  
21 relationship with NEIL. That just doesn't make sense.

22 And if you think about that, what the  
23 Intervenors would argue is to say even if we obtained a  
24 reasonable and prudent settlement with NEIL that they  
25 loved, under their argument they still could go back and

1 say, but, you know what, you should have never  
2 contracted with NEIL -- I suppose we should have  
3 contracted with State Farm Nuclear -- and get an  
4 imprudence determination. That just doesn't make sense.

5           So what did we do to manifest our intent with  
6 the settlement, Commissioner? What we did is what is  
7 commonly done and is practice to do in settlements. We  
8 used broad, sweeping language to say that anything in  
9 connection with, related to, including but not limited,  
10 those kind of terms is what we used, and we said  
11 anything in connection with the steam generator project  
12 or the repairs that arose from that are barred. The  
13 prudence determination is barred. You can't look back  
14 with that.

15           And then in Sections 10 and 11 of the  
16 settlement we set up the exact paradigm that we told you  
17 what we were trying to do: Prospective look forwards.  
18 If we repaired the unit, the Intervenors got to weigh in  
19 on the NEIL decision, they had interaction, they got to  
20 provide us feedback that we would take to our  
21 management. If we retired it, there was talk about how  
22 we would allocate the NEIL funds. But everything is  
23 prospective in that settlement agreement. There's no  
24 looking back.

25           So a clear, sweeping language to include

1 everything that happened in the past is waived,  
2 everything going forward we have a process. That makes  
3 sense. The Intervenors' argument to the contrary does  
4 not.

5 The Intervenors would argue to you that the  
6 NEIL claims are not connected to the steam generator  
7 replacement project or the repairs.

8 Commissioner, I would say, first of all,  
9 that's absurd. We can't call NEIL and say, hey, we  
10 would like you to give us some money today for no  
11 reason. We have to say we have a steam generator  
12 project that has led to damages on the building and we  
13 will file claims. What else could our NEIL claims be  
14 about but the steam generator replacement project and  
15 the repairs?

16 The Intervenors will argue to you that they're  
17 not connected, despite the fact that I read in their  
18 reply brief, the Intervenors say on page 4, "The  
19 Intervenors readily agree that the NEIL claim arose only  
20 because Duke undertook certain actions that led to the  
21 accident that created the delamination." In my view,  
22 Commissioner, that's, that's game over. How can you say  
23 with a straight face that that's the case, but then  
24 argue that our NEIL claims are not related and connected  
25 with the steam generator replacement project? They

1 can't.

2           Commissioner, we assert to you that the plain  
3 language of the settlement, the intent of the parties,  
4 and the circumstances that the settlement was brought to  
5 you show that common sense has to prevail, and there's  
6 no other reasonable way to read this settlement.

7           Commissioner, I don't think I'll even get to  
8 the green light or to the yellow light because, in  
9 closing, I just wanted to tell you that in our reply  
10 brief we've offered up -- to my first point, what is the  
11 real issue, we've offered up language that says this is  
12 how the issue should be framed. And my recollection  
13 from the issues conference is we don't have a lot of  
14 dispute about the framing of the central issue. We just  
15 continue to have disputes about all the subissues that  
16 the Intervenors wanted under it.

17           We've offered an evidentiary ruling that you  
18 may consider to say that the Commission is not barred to  
19 consider all relevant evidence that it needs to hear.  
20 And, in fact, the Commission should hear that evidence  
21 and get the complete picture. And we've offered a  
22 simple ruling that says, with respect to any actions  
23 that took place prior to the implementation date of the  
24 settlement agreement, we're not going to go back in time  
25 and judge the prudence of those, but we are going to

1 answer the ultimate question of was the company prudent  
2 in dealing with those facts in coming to a resolution.  
3 And after hearing the case, if you don't think that we  
4 were, then the Commission is free to say so.

5           Commissioner, it just simply defies common  
6 sense to suggest that any aspect of NEIL going back into  
7 the 1980s, when the plant first came online, can be  
8 considered. It's not what the settlement says; it's not  
9 what the parties intended. And you have issued a new  
10 procedural order with a case schedule. We can make that  
11 happen. And if we keep the issues simplistic as to what  
12 they actually are and not go back to the 1980s, we can  
13 do this, and I'm not sure we can if we're going to go  
14 back in time to the very beginning of this case.

15           Thank you, Commissioner.

16           **COMMISSIONER BALBIS:** Okay. Thank you. Now  
17 we'll move on to the Office of Public Counsel.

18           **MR. REHWINKEL:** Thank you, Commissioner.

19           What the Commission is presented with here is  
20 the case of the billion pound elephant in the room, or  
21 the billion dollar elephant in the room, if you will.

22           What you've just heard from Duke, and we  
23 appreciate the statements that they made about the  
24 evidentiary concessions that they've made in their reply  
25 brief or the clarification they've given, but it doesn't



1 go far enough. But what you hear from Duke is that what  
2 the parties, who negotiated over a period of months one  
3 of the most comprehensive, complicated, and specific  
4 settlement agreements, did was they sat in a room with  
5 this giant elephant, which was the pursuit of the NEIL  
6 claim, and they used specific language to describe  
7 everything else that was waived or resolved and left  
8 that to the vagaries of an interpretation today is, in  
9 our opinion, beyond credibility.

10 Duke has shown you that they know how to write  
11 a release, that they know how to describe what is waived  
12 by the case law they've cited, by the release that they  
13 have entered into with NEIL. And so to say that what we  
14 did -- and all the parties here at this table are  
15 baffled by this notion that we discussed and negotiated  
16 a resolution of something that we would never have known  
17 about until it actually materialized, which it did on  
18 March 28th, is not the case. We were not in that  
19 negotiation that resulted in us putting a specific  
20 waiver provision in the settlement agreement and then  
21 having this broad, all-encompassing waiver language that  
22 covered something that was extant and known to at the  
23 time.

24 The company cites to you cases about  
25 indemnification language that interprets this in

1 connection with language. This is legalese that is  
2 there to cover unknown future events. Unfortunately  
3 these cases don't apply on Duke's behalf to this case  
4 because what is at -- what they say it applies to is  
5 something that was already known. We knew that there  
6 was a delamination on October 2nd, 2009. We knew that  
7 very soon after Duke had filed a claim with NEIL, and  
8 that claim started a monolithic, continuous process that  
9 only ended on March 28th.

10 We know that on December 20th, 2009, Duke and  
11 NEIL entered into a confidentiality agreement that  
12 indicated that there were aspects of the ongoing  
13 negotiation of this claim that would be covered by that  
14 but is indicia that the NEIL claim process was ongoing.  
15 We knew about this. There was no reason to put broad,  
16 all-encompassing language in there to cover a future  
17 event that had already occurred.

18 So the parties' simple position to you is that  
19 this elephant in the room was intentionally set aside  
20 and not covered by the stipulation. You read the issue  
21 at the, at the beginning of the day that the parties put  
22 to you by joint motion to be resolved, and it is what  
23 did the stipulation bar? And the only thing that the  
24 stipulation could have barred are those rights that were  
25 expressly waived.

1           You have reams of paper before you with the  
2 arguments about what was and was not waived. Duke's  
3 argument about what was waived finally kind of  
4 crystallizes in their reply brief, and they're saying  
5 that what the parties waived was this broad waiver in  
6 paragraph 7 that didn't need to be replicated in  
7 paragraph 10B, which they point you to as the real NEIL  
8 process that we agreed would go forward from here.

9           Unfortunately, the language they cite in  
10 paragraph 10B is not a grant of authority or a grant of  
11 rights under the settlement agreement. It is a mutual  
12 agreement by the parties to stay out of each other's  
13 business. We stay out of Progress's or Duke's pursuit  
14 of the claim. They stay out of or don't object to the  
15 rights that we already had to challenge the prudence of  
16 the, whatever resolution they had with NEIL.

17           At the time we had entered the agreement, we  
18 didn't know if they would settle this case by  
19 litigation, by arbitration, or by some sort of  
20 settlement. As it turned out, they settled it. But at  
21 the time we put this language in there, we didn't know.  
22 So there was an ongoing process, and we know that NEIL  
23 would have availed itself of all the facts going back to  
24 the beginning of time, October 2nd, and even beyond,  
25 which would be the policies that they would be

1 interpreting.

2           So what we're asking the Commission to  
3 recognize is that, yes, the facts and the discovery  
4 ought to go back as far as need be to tell the whole  
5 story. But it's also known that, that Duke amended the  
6 policies from time to time. We think it's important for  
7 us to understand and for them to be accountable for  
8 that. But the stipulation does not address, under,  
9 under Duke's theory of the case, it does not even  
10 address the NEIL policy and the formation of that NEIL  
11 policy because it is without question that the NEIL  
12 policy did not arise out of this SGR project.

13           They've told you today that the NEIL policy  
14 has been around for decades. They didn't enter into the  
15 NEIL policy because they were going to do an SGR project  
16 starting in the 2000s. So under their definition, the  
17 stipulation, by its own terms and their theory of how it  
18 applies, cannot act as a bar to you looking at the, the  
19 formation of the NEIL policy. That goes to their  
20 relationship with NEIL and the reason why they had  
21 certain terms in there. It's all in play.

22           And we have cited to you in our, in our -- the  
23 petition that we filed in this case that NEIL -- that  
24 Duke made certain statements to the public and prior to  
25 your vote on the stipulation about the NEIL policy

1 providing full coverage to bring the building back into  
2 service.

3           And so what that says and what we relied on is  
4 that these policies were going to be there to, to pay  
5 for all of the damage at the building, or in the event  
6 of a retirement, they would, they would cover the cash  
7 value or 50% value of the total repair costs.

8           So these are issues that need to be resolved.  
9 There's no reason for them to be foreclosed by some  
10 decision today. We have in good faith sat down with  
11 Duke to try to narrow the issues so they could develop  
12 testimony. But ordinarily issues are allowed to be  
13 raised up until the time of the prehearing conference.  
14 We will be engaged in a formative process and a  
15 winnowing process as we go forward. So there's no  
16 reason, I would contend to you today, that we have to  
17 define issues and go with just the NEIL -- the Duke  
18 language that they want to propose. There's more time  
19 for that to be worked out in the future.

20           Our central position to you is that the NEIL  
21 claims process, as the Duke representative told you in  
22 response to your questions last year at the hearing  
23 approving the settlement, that was on a separate  
24 parallel track, and he told you that the settlement did  
25 not interfere with that process. He didn't say, when he

1 had the opportunity to, that it, that it cut off NEIL --  
2 Duke's obligation to meet its burden of proof or to  
3 prove their activities were prudent with respect to  
4 their pursuit of the claims prior to February 23rd,  
5 2012. He didn't say that. He just said it does not  
6 interfere with. And that's clear evidence that these  
7 are two separate issues. And that elephant was set  
8 outside of the room by the stipulation, and now it's  
9 time for, for the Commission and all the parties to  
10 bring the elephant back in and look at it.

11           You issued an OEP or procedural order in  
12 August before the settlement was entered into that the  
13 settlement references. In your order you do not mention  
14 NEIL in any way whatsoever. If Progress wanted to put  
15 the NEIL pursuit process into the stipulation, they  
16 could have asked us to negotiate it, and we would  
17 perhaps have negotiated or maybe we would have left it  
18 the way we did, which was that's for the future.

19           So that's where we are right now. And I would  
20 urge the Commission to look at it this way. If you rule  
21 the way Duke wants it, you will cut off perhaps an  
22 inquiry into the entire course of action and all of  
23 their actions related to their pursuit of NEIL and we  
24 will never know how that would have turned out.

25           On the other hand, if they are held

1 accountable for the prudence of their activities and  
2 their actions in pursuing this claim, as we say they  
3 should be because it's not barred by the stipulation,  
4 then there's no harm because they have agreed that they  
5 are responsible for showing, for demonstrating that they  
6 entered into a prudent settlement with NEIL and the  
7 number they got was the best number they could get.  
8 Because they were getting this for the customers.

9           We had no voice in how they pursued the claim  
10 and what they were going to advocate. We didn't have a  
11 voice in whether they were going to arbitrate, mediate,  
12 or settle. We had advisory opportunity, as is set out  
13 in 10B, and there was -- the only process that's in 10B  
14 is how we communicated back and forth on that. That's  
15 not the process that the parties agreed to that we would  
16 be judging the prudence of.

17           The prudence issue is all of Duke's activities  
18 and actions in pursuing the NEIL claim. And we would  
19 submit to you that requiring them to meet that burden  
20 and meet their burden of proof there would be no  
21 different than what they've already agreed to in their  
22 reply brief, which is that they have the obligation to  
23 demonstrate that they were, that they were prudent.

24           And I will refrain from responding to the  
25 discussion about how you rule affecting the schedule

1 because this is an enormous case whether you rule one  
2 way or the other, and I don't think setting the issues  
3 is going to influence that. I understand we're going to  
4 talk about that later, so I will not get into, into  
5 that.

6 Commissioner, I would also say there's a  
7 statement in Progress's initial brief that suggests that  
8 we've been arguing that we ought to be past 2014 in  
9 having a hearing in this matter. And I don't know if  
10 that was a typo and they meant 2013, but we, we  
11 certainly don't think that's the case. And I don't  
12 think that should influence the ruling whatsoever in  
13 this case as to what the timeline ought to be. We ought  
14 to get it right upfront. The issues ought to be what  
15 the issues ought to be. And we agree that if it's  
16 barred by the settlement, it shouldn't be in the case.  
17 But we would also strongly submit to you that the  
18 pursuit of NEIL and the prudence of Progress's -- Duke's  
19 actions in the pursuit of its NEIL claims is not barred  
20 in any way.

21 There is an express waiver that you'll hear  
22 more about. There's an express waiver provision that  
23 you'll hear more about, and I would urge and commend to  
24 you that you take those arguments to heart.

25 From the, from the position of the Public



1 Counsel and other customers, this is the most important  
2 issue that we have seen in decades before this  
3 Commission. There's no reason to insert an artificial  
4 bar on looking at Duke's prudence or lack of prudence  
5 with respect to pursuing the NEIL claim. There is  
6 nothing that you have been presented with that says that  
7 on February 23rd there's something about the NEIL  
8 process that became solidified or put to bed.

9           What we do know is from reading the NEIL/Duke  
10 settlement of March 28th, 2013, is that that was the  
11 first time the whole claim had been resolved. There was  
12 no claim that was, that was resolved or partially put  
13 away. Everything was on the table as far as we  
14 understand it. There will be discovery about that, but  
15 there's no reason to assume that today.

16           And they have not argued to you that there's  
17 something good and magical about February 23rd, 2012,  
18 that should be the beginning point of when you look at  
19 their activities in pursuing the claim. They began  
20 pursuing the claim within hours, I'm certain, of the  
21 October 2nd delamination, and all of those actions in  
22 pursuing the claim should be the subject of the  
23 Commission's review.

24           What should not be the subject of the  
25 Commission's review is their actions in repairing the

1 building and their actions in designing and executing  
2 the steam generator replacement. We agree that's off  
3 the table. But their course of dealing with NEIL from  
4 the minute it started should be something that we can  
5 all look at. And to the extent that the policies bear  
6 on that, the policies and their actions in developing  
7 the policies should be part of what everyone gets to  
8 look at.

9           So with that, I would close and turn it over  
10 to the next. Thank you, Commissioner.

11           **COMMISSIONER BALBIS:** Thank you.

12           From PCS Phosphate.

13           **MR. BREW:** Thank you, Commissioner. Good  
14 morning.

15           Let me suggest at the outset that the issue  
16 we're arguing about is less about the law and more about  
17 the context and perspective, and it's actually a context  
18 and perspective that you've already expressed.

19           Mr. Rehwinkel mentioned the original 2011  
20 Order Establishing Procedure where you had talked about  
21 there were facts that we already know and there are  
22 facts that we don't. And the context of the settlement  
23 when it was negotiated and approved by the Commission  
24 was accomplished during a unique circumstance, which was  
25 you had the ongoing prudence investigation relating to

1 the outage and you had Progress's pursuit of its NEIL  
2 claims, both going in tandem.

3           What the settling parties all knew and which  
4 was apparent throughout the discussions was that the  
5 discovery and litigation of the prudence case  
6 effectively worked to the detriment of ratepayers  
7 because there's never been any dispute that every dime  
8 of NEIL recoveries was supposed to go back to benefit  
9 consumers. This was always about reimbursement of  
10 dollars for ratepayer benefit. And to the extent that  
11 the prudence case was litigated, you had the  
12 counterproductive notion of undercutting or potentially  
13 undercutting what Progress is attempting to do with  
14 NEIL, a process that was, as Mr. Rehwinkel mentioned,  
15 was not transparent to the Commission or to the other  
16 parties at all. And so it was in that context that the  
17 settlement agreement reserved those issues.

18           And I would note that even the staff in its  
19 presentation to you on February 20th when talking about  
20 the CR3 repair and some of the waiver provisions  
21 specifically talked about allowing Progress time to  
22 address and resolve the NEIL issues. And so that is the  
23 context in which we've addressed all of these issues.

24           And so when Duke filed its initial brief and  
25 said on page 7 that, that all issues, including the NEIL

1 ones, had been resolved through the implementation date,  
2 that was clearly wrong, which is why PCS filed its reply  
3 in this matter.

4           And I had found actually Duke's reply brief to  
5 be somewhat baffling. And in some respects it takes  
6 sort of a Jekyll and Hyde approach, or what I started to  
7 think of as Progress and Duke, in that, as Mr. Burnett  
8 mentioned, they did acknowledge that the NEIL insurance  
9 claims in its handling and its outcome are clearly an  
10 issue. And Duke goes to pains on page 7 to list a whole  
11 series, a page-long length of subissues that they  
12 consider to be in play. And they say on the next page  
13 that all proper evidence, however far back in time is  
14 required to go, are also a legitimate area of inquiry.

15           So I got to that point and I said, well, then  
16 what are we really arguing about? And then you turn the  
17 next page when it comes to the specific issues of OPC  
18 7 and 8, and now they're back to paragraph  
19 7 accomplishes an all-encompassing waiver. Well, the  
20 fact is you can't do it both ways.

21           They've acknowledged that the NEIL issues have  
22 to be addressed by the Commission. They've acknowledged  
23 that the scope of that, of that inquiry is whatever is  
24 reasonably necessary to get to the bottom of that.

25           Now that could be addressing questions of

1 specific interactions between Duke and NEIL. It could  
2 be NEIL's perception of the repair, all of which the  
3 subissues that are mentioned on Duke's reply brief  
4 plainly say is something to be addressed. But it could  
5 also involve the scope of the insurance policy and the  
6 coverage and how it's changed, which is what OPC's  
7 disputed issues 7 or 8 are trying to get to.

8           And so the basic problem is not do we need to  
9 address the global issue that Mr. Burnett described?  
10 It's really is there any rational basis for arbitrarily  
11 cutting off that inquiry? And the answer is no.

12           And so the only final issue, as Mr. Burnett  
13 mentioned, was, well, what's the impact of the  
14 settlement agreement on that? And the answer is none,  
15 because that issue has been preserved and it was  
16 preserved for a clearly stated reason that everybody in  
17 the room understood because the NEIL process was ongoing  
18 when we did the settlement agreement and no one knew how  
19 it was going to turn out and no one was plugged into  
20 that process.

21           And so the, the provision in the agreement,  
22 10B, specifically talked about Duke advising the  
23 Intervenor about its outcome. Our input was purely  
24 advisory. Because it was purely advisory, that  
25 provision expressly said we reserve all of our rights to

1 address those issues. Not some of them, all of them.  
2 And it was because we were in a process where no one  
3 knew where NEIL was going and how it would affect either  
4 the repair or retire decision and so there was no, there  
5 were no facts to settle. There was no basis for  
6 speculating where they would turn out; whether it would  
7 be for a thousand dollars or a billion dollars. And  
8 because of that, the agreement reserved those issues,  
9 all of them, until it was time. And as you mentioned  
10 today, now is the time.

11           So there's no basis to cut off the inquiry in  
12 terms of the evidence to be considered, which, for  
13 issues that are in play, Duke seems to concede. In  
14 fact, they've expressly said they agree, that you can go  
15 back as far in time as it takes for the issues that are  
16 in play. There's just no basis for their additional  
17 argument that some of the insurance issues aren't in  
18 play because they've been settled because the settlement  
19 did not resolve any of those issues by inference. In  
20 fact, as I mentioned, from the overall context and the  
21 language of the agreement, nobody was shooting in the  
22 dark. Those issues were fully reserved until such time  
23 as it was appropriate to do so, which is now. Thank  
24 you.

25           **COMMISSIONER BALBIS:** Thank you.

1           And from FRF.

2           **MR. WRIGHT:** Good morning, Commissioner.

3 Thank you very much for the opportunity to address you.

4           One thing that we all agree on, and this is  
5 genuine and from our hearts, is that this whole sequence  
6 of events beginning in October of 2009 is a terrible  
7 tragedy. It's a tragedy with far-reaching economic  
8 consequences for Florida.

9           The remainder of this docket is about how the  
10 ultimate economic effects and impacts of this tragedy  
11 are going to be apportioned between Duke and its Florida  
12 customers.

13           Duke's obligation was and is to minimize those  
14 adverse consequences on its customers. Duke's burden  
15 here in this docket is to prove that it satisfied --  
16 satisfactorily fulfilled that obligation.

17           We believe, frankly, just based on the numbers  
18 involved relative to the, relative to the settlement  
19 numbers involved with the NEIL settlement versus the  
20 staggering impacts of this case, we believe that there's  
21 a prima facia case that Duke did not satisfactorily  
22 fulfill its obligation and that's what we're here to  
23 litigate. So you've got basically two issues, and it  
24 looks like maybe we've only got one big issue, and that  
25 is what issues can be litigated in this docket now that

1 Duke has, has apparently agreed that we can look back to  
2 evidence that occurred -- that existed, came into being  
3 before February 23rd, 2012. To the extent that's true,  
4 then I'm going to let that go.

5 But the issues are what can be litigated in  
6 this docket, and there's several specific disputed  
7 issues, disputed in the sense of whether they should be  
8 in here: Did they maintain adequate and appropriate  
9 insurance coverage? Did they maintain a prudent  
10 relationship? Did they govern themselves? Did they  
11 behave reasonably and prudently in their dealings with  
12 Nuclear Electric Insurance Limited? As one of the  
13 largest members of NEIL, a closely related issue, did  
14 they have a, a conflict of interest?

15 We're not completely sure, but it appears to  
16 us that Duke is a major member of this mutual insurance  
17 company and has exposure based on the percentage in  
18 which it participates in NEIL. This, on its face, looks  
19 like a conflict of interest and we want to litigate that  
20 issue.

21 And then finally there's an issue of potential  
22 double counting regarding O&M costs and rates. And,  
23 frankly, I can't see why on earth Duke would object to  
24 that issue, but apparently they do.

25 These are either facial prudence issues or



1 issues that relate to, quote, Duke's course of action,  
2 unquote, with respect to NEIL, which is expressly  
3 reserved as a matter that the parties are free to  
4 litigate in this docket.

5           Regarding the scope of the case, paragraph  
6 two of the settlement agreement, which my colleague  
7 Mr. Burnett never mentioned in his remarks, specifically  
8 provides, "The parties reserve all rights, unless such  
9 rights are expressly waived under the terms of this  
10 agreement." It is obvious on its face that the  
11 settlement agreement contains no such express waiver of  
12 our ability to litigate any of these issues.

13           Mr. Burnett suggests that, that if you allow  
14 litigation of prudence issues relative to NEIL, that  
15 they somehow left a gaping hole in what they thought  
16 they were protecting themselves against. The  
17 corresponding suggestion, the implication of that  
18 argument is that without saying so, because there's no  
19 language in the settlement agreement that says so in any  
20 way expressly or implicitly, the corresponding  
21 suggestion is that the representatives of the consumers  
22 in this case, the Public Counsel's Office, PCS  
23 Phosphate, the Industrial Power Users, and the Retail  
24 Federation, left a corresponding gaping hole, which at  
25 the time we entered into the settlement agreement had a

1 value somewhere north of \$2.25 billion. That was just  
2 the repair cost coverage. And the fuel cost coverage  
3 was another \$490 million on top of that.

4 They would suggest that we left a gaping hole  
5 in our ability to protect our customers' interests in  
6 the subsequent litigation in this docket. This defies  
7 the plain language of the contract. There's no express  
8 waiver, no express limitation, no, no implicit waiver,  
9 no implicit limitation. It defies the plain language of  
10 the contract. It defies common sense. It is patently  
11 absurd. We should be allowed to litigate these issues,  
12 and we agree with the Public Counsel and PCS. Thank  
13 you.

14 **COMMISSIONER BALBIS:** Thank you.

15 Mr. Moyle.

16 **MR. MOYLE:** Thank you. And before I get into  
17 my argument, I just wanted to thank you for giving us  
18 the chance to appear before you to discuss this issue.  
19 It's a, it's a matter that we've briefed extensively.  
20 And I think oral argument hopefully you will find  
21 beneficial to you as you ponder the issue before you.

22 You clearly articulated the issue, you know,  
23 that was before you. I'm going to make some remarks  
24 about Progress's comments because it surprised me a  
25 little bit that they in their remarks said there are

1 really three issues and identified three issues. I do  
2 not see it that way. FIPUG does not see it that way.

3           You know, the joint motion said there was one  
4 issue before you today. And, as you stated, that is  
5 what issues, if any, does the settlement agreement  
6 approved by the Commission in an order preclude the  
7 Commission from determining in the docket? So the  
8 question is what is off the table?

9           And I would suggest while you have to look at  
10 the operative document, which is the agreement, that  
11 almost from a going in standpoint that there should be a  
12 hesitancy to not look at issues as this Commission, as  
13 the entity that oversees rates, that oversees utility  
14 regulation, that serves to strike the right balance  
15 between utilities and customers, that it should almost  
16 be a presumption that you're not going to hamstring or  
17 limit yourself in looking at certain issues.

18           And as Mr. Wright indicates, you know, the  
19 parties did not intend to limit themselves. I mean,  
20 what the parties said, as has been pointed out a couple  
21 of times, is there is an express provision that says  
22 we're reserving all rights unless they're expressly  
23 waived. And that's in paragraph two.

24           So you have to construct the contract by  
25 looking at all the terms. You've got a provision that

1 says we're not waiving anything unless it's expressly  
2 waived under the terms of the agreement.

3           So it seems to follow to me then that the next  
4 part of the analysis is to look at the agreement and to  
5 say, okay, you know, what was expressly waived? And in  
6 my reviewing of the agreement, I've identified a few  
7 areas that were expressly waived, and one is on page 6.  
8 It says, and I'm paraphrasing a little bit, but, you  
9 know, absent fraud, misconduct, or misrepresentation,  
10 quote, the intervening parties cannot and will not  
11 challenge the prudence of PEF's actions on the SGR  
12 project or PEF's repair activities from the inception  
13 date of the SGR project through implementation date in  
14 any PSC or judicial proceeding. So that's, that's one  
15 provision that, that addresses a waiver.

16           On page 10 the parties said we're not going to  
17 challenge the repair, if it was executed and undertaken  
18 before December 31, 2012. It was essentially a term  
19 that said, look, we want you to go forward and repair.  
20 If you do that -- we're not going to, we're not going to  
21 challenge your execution of repair if you, if you begin  
22 to do it before December 31. That was a, that was a  
23 waiver.

24           We, on page 15, waived expressly the right to  
25 challenge the decision to retire or repair. That was

1 expressly waived. So, you know, I point these out  
2 because in construing and constructing a contract it has  
3 to be looked at in toto.

4           We think it's clear that the waivers were very  
5 limited. I mean, that was the intent of the parties.  
6 If it is unclear, we cited in our brief a case, the  
7 *Gladfelter* case at 160 So.2d 740, that suggests that if  
8 uncertainty exists as to whether rights were waived or  
9 not, then the matter should be decided in favor of one  
10 whose rights might be extinguished.

11           And I would couple that case law with sort of  
12 the general policy of this Commission being set up to,  
13 you know, to look at issues and make decisions that  
14 would suggest that the contract be interpreted in  
15 accordance with its plain terms, and that this broad  
16 waiver that PEF -- excuse me -- that Duke is suggesting  
17 not be adhered to.

18           I have some notes, and we, in our brief, I  
19 think made a point about how awkward it would be to try  
20 to put a hard cutoff date of February 22nd in. And at  
21 one point in some of the discussions it was suggested  
22 that anything that occurred before that date from any  
23 standpoint, whether it was a piece of evidence or not,  
24 would not be something that could be inquired into. I  
25 think Progress has conceded that point early on. So I'm

1 not going to spend much time on that, other than to say  
2 it would be really awkward if you were taking a  
3 deposition of someone and you were asking them the  
4 question, "Did your company ever look at the  
5 relationship with NEIL and recognize that there might be  
6 a conflict of interest because Duke, the acquiring  
7 company, has a bunch of nuclear power plants, NEIL is a  
8 mutual company, and there might be a conflict of  
9 interest as you negotiate with them?"

10           If the deponent was then having to try to  
11 remember, well, I had that conversation, but was it  
12 before February 22nd, 2012, or not? I mean, how would,  
13 how would he answer that question? It would be very  
14 cumbersome, very awkward. And we don't -- we think  
15 discovery should be broader than that. I think, I think  
16 Progress has recognized that and conceded that position,  
17 but I did just want to take a minute and make that  
18 point. To try to impose a, you know, a blackout date  
19 with such rigor and rigidity would not, would not work  
20 very well and probably lead to an absurd result, and  
21 there's case law that says you don't construe a contract  
22 in a way that would lead to an absurd result.

23           I want to spend a minute, if I could, and  
24 relate that -- I may have misunderstood, but what I  
25 thought I heard Duke suggest was really this case should

1 be decided as one issue; it's ripe for a one-issue  
2 decision. And we, we reject that for a whole host of  
3 reasons.

4 First of all, *Florida Statute* 120.57 and  
5 120.569 govern this proceeding. There are disputed  
6 issues of fact. Parties have raised disputed issues of  
7 fact. The Florida Retail Federation and OPC has filed a  
8 pleading where they have put a bunch of issues in play.  
9 And parties, pursuant to statute, have the right to have  
10 disputed issues of fact, provided they're relevant and  
11 material, decided by the trier of fact -- in this case,  
12 the Commission.

13 So existing statutory law says we can't all  
14 roll this up into one issue, which is, you know, was the  
15 NEIL settlement reasonable and prudent? That's what  
16 Duke is suggesting, if I heard them, saying there's  
17 really one issue.

18 But as Mr. Rehwinkel says, you know, he  
19 classifies this and characterizes it as a billion dollar  
20 elephant in the room. Maybe, you know, maybe his math  
21 is off, because if you take the property insurance  
22 damage policy, that was 2.25 billion, each of the  
23 replacement power policies was 490, I'll call it 500 for  
24 rounding purposes. There were two events. Were both  
25 events covered? Was only one event covered? You know,

1 if you add those two policies together for another  
2 billion, you know, you're at, you're at 3.25 billion.  
3 And, you know, Progress accepted a significant reduction  
4 from that number; I think less than 25% of it. So, you  
5 know, I think they will say, well, that's a lot of  
6 money, 800 million is a lot of money. But you have to  
7 step back and judge in what context is that?

8           If a homeowner had an insurance policy for  
9 \$325,000 on their house and it got hit by a hurricane  
10 and the insurance company paid them \$800,000, I'm not  
11 sure they would think that they got a real fair,  
12 reasonable, good, prudent deal in that context.

13           So I think the temptation to say this should  
14 all be one issue should be rejected. And I would point  
15 out the magnitude of the case. OPC calls it one of the  
16 biggest ones this Commission has ever considered.

17           I was thinking about rate cases. And, you  
18 know, to take what they suggest to say we could just  
19 have one issue; was the NEIL amount that you settled for  
20 reasonable? Well, we could do the same thing in a rate  
21 case and say is the request for X amount of money  
22 reasonable? But that's not how the Commission does it.  
23 I mean, rate cases typically have over a hundred issues  
24 that are broken out into subsets. And I think that's a  
25 good practice because it has discovery on select issues,



1 it has a rigid, rigorous inquiry.

2 And I counted the issues that have been  
3 identified to date in this case, it's attached to the  
4 brief that Progress filed, and there's 39. That's not  
5 an unmanageable or unwieldy amount of issues for a case  
6 of this magnitude.

7 So I would, on behalf of FIPUG, encourage you  
8 to not accept the proposition that this law can be  
9 decided, you know, as, as one issue.

10 And, furthermore, we're still in discovery. I  
11 mean, we are serving interrogatories. Depositions will  
12 be taken. To the extent that there are issues that are  
13 discovered, as is the Commission's practice, typically  
14 you have until the prehearing conference to identify  
15 issues that will be resolved, and that should not be  
16 changed in this context.

17 If I could just have one minute to review my  
18 notes.

19 (Pause.)

20 To sum up, we think that the agreement is  
21 clear. To the extent that it's not clear, any  
22 uncertainty should be resolved in accordance with case  
23 law in a way that preserves rights, does not have them  
24 forfeited.

25 To the extent that parol evidence would ever

1 need to be taken about what the parties intended, you  
2 know, then that would necessitate a separate evidentiary  
3 hearing. But if there was so much uncertainty, which I  
4 don't think there is because we think the agreement is  
5 clear on its face, then the next proper course of action  
6 would probably be to take some evidence about, about  
7 what was intended when the parties sat down. You've  
8 heard some of the people say here's, here's the  
9 argument. But that would be, you know, a step.

10           So we would encourage you to answer the  
11 question that is presently before you and answer only  
12 that question: What issues were waived? And by going  
13 through the agreement and identifying those that were  
14 waived, not by implication but as the agreement  
15 recognizes, by express terms, I think you would come up  
16 with an answer that would allow the parties to move  
17 forward, you know, to litigate a number of issues.

18           And I did want to make just one clarification  
19 for the, you know, for the record. We've had a number  
20 of issue identifications. In, I think, the reply brief,  
21 Duke suggested that the question of whether it was  
22 prudent to conduct business with an insurance company  
23 that's not properly registered or licensed in the state  
24 of Florida was somehow waived. And, again, we're back  
25 to a waiver argument. But just to make clear, that

1 issue has not, has not been waived. We think that's a  
2 bona fide question and should not, you know, fall  
3 within -- you know, it's not expressly waived in the  
4 agreement and should be one that the Commission  
5 considers when they ultimately make a decision in this  
6 case.

7 So thank you for the, for the time and the  
8 opportunity to express arguments. We appreciate it.

9 **COMMISSIONER BALBIS:** Okay. Thank you.

10 And I want to thank all of the parties for  
11 staying within your time constraints. I was a little  
12 bit generous with that, but I wanted to make sure that  
13 everyone had the opportunity to speak their mind on this  
14 important issue.

15 We're going to move on to the question phase.  
16 I believe staff has some questions of the parties. If  
17 not, I know I have some clarifying questions that I  
18 would like to ask.

19 **MR. YOUNG:** Commissioner, staff had some  
20 questions, but based upon the parties' comments here  
21 today, all of staff's questions as relates to the joint  
22 motion and the parties' briefs have been answered.  
23 Thus, staff has no questions.

24 **COMMISSIONER BALBIS:** Okay. Thank you.

25 And I have a few questions. And, again, I

1 agree with staff; the majority of my questions have been  
2 clarified with the comments from, from Duke and also  
3 with the reply briefs.

4 But I want to make sure there still isn't  
5 confusion in what Duke is agreeing to is an appropriate  
6 scope to discuss during the hearing process. So I'd  
7 like to kind of flesh that out to make sure that  
8 everyone is clear.

9 So for Duke, on page 7 of your reply brief you  
10 had a table that issued 14 assertions that you agree  
11 with the Intervenors on that are appropriate to be  
12 discussed during the, the hearing process. However, a  
13 lot of those activities occurred between the SGR  
14 inception date and the implementation date, which is  
15 counter to some of your arguments that that time period  
16 should be excluded. So I just want to clarify that you  
17 are conceding that activities within that period are  
18 appropriate to be reviewed and discussed and ruled upon.

19 **MR. BURNETT:** Thank you, Commissioner.

20 We certainly agree that if the, if those  
21 issues are important to the Intervenors, they want to  
22 put it before the Commission and have the Commission  
23 consider it, they can do so. Considered, yes, we agree.  
24 Brought to light and discussed, absolutely.

25 Ruled upon as to any independent issue in

1 there, no, if it was prior to the implementation date.  
2 And Mr. Moyle makes the, makes the perfect point. He  
3 wants to go back and challenge was it prudent to even  
4 contract with NEIL at all? So that's an example of  
5 something that you could consider how NEIL was formed,  
6 how the relationship came to be, and look at that big  
7 picture as going forward. But we argue that the  
8 Commission and the Intervenors are precluded from  
9 challenging the initiation of that relationship in the  
10 first instance.

11           So, again -- and I agree with the Intervenors,  
12 it's superficial to suggest that the Commission can't  
13 understand how we got to where we got. The operative  
14 question is after February, the year that we spent with  
15 NEIL after February 2012 up until the date we signed the  
16 settlement, that is the question to say knowing all the  
17 facts of how we got here, did you take those facts and  
18 did you negotiate a reasonable settlement?

19           **COMMISSIONER BALBIS:** My question is  
20 specifically not just from the implementation date to  
21 the time the settlement with NEIL was, was executed, but  
22 from the SGR inception date to the implementation date.  
23 So as soon as the claims process started with NEIL after  
24 the first delamination in October 2009 to the settlement  
25 with NEIL, that period of time, you're conceding, is

1 appropriate for the Commission to review?

2           **MR. BURNETT:** Absolutely, sir, as part of the  
3 determination. But, again, we take issue with going  
4 back and nit-picking to any particular act of, well, you  
5 should have been, for instance, more aggressive with  
6 NEIL on this meeting on Thursday. Had you, had you  
7 pushed that out for two more hours, the Intervenors  
8 might argue, NEIL would have folded. That's a  
9 particular factual issue that they say that was  
10 imprudent. That's what we say is barred. But you can  
11 consider the interaction, just not judge any particular  
12 microaction there.

13           And, really, I mean, to take it back, I'm not  
14 sure what case to put on if we don't have a bright line  
15 there. Under the Intervenors' argument I think they may  
16 say, hey, I want to know whether it was prudent to build  
17 CR3 in the first instance. Under their argument they  
18 say that's not barred under the settlement, it's not  
19 specifically listed.

20           So that's what I'm saying, Commissioner.  
21 You're fully entitled to know the big picture, but there  
22 has to be some credibility given to the settlement and  
23 focus on the what real question is you're trying to  
24 decide.

25           **COMMISSIONER BALBIS:** Okay. Let me change

1 gears a little bit.

2 I issued a second Order Establishing  
3 Procedures that listed 12 items that at a minimum  
4 Progress at the time, now Duke, should provide testimony  
5 in covering the information on those 12 topics. Duke  
6 did not challenge that order. So is it your  
7 understanding and your belief that the specific  
8 information requested in that order be proper and  
9 considered?

10 **MR. BURNETT:** Yes, Commissioner. And I may  
11 have been misunderstood by Mr. Moyle as well. When I  
12 say the central issue, I'm talking about NEIL. All  
13 these briefs are about NEIL. There are a whole host of  
14 issues, the ones that you issued in your order included,  
15 that we've, I believe, agreed upon, and they are set  
16 aside at this point to say we don't have any problem  
17 with these coming in as factual issues, maybe even  
18 stipulated issues. So all those are included and will  
19 be addressed in our case or will be before the  
20 Commission in some manner.

21 But I just wanted to say here I think we're  
22 really just talking about the NEIL issue today.

23 **COMMISSIONER BALBIS:** Okay. And, again, on  
24 page 8 of your reply brief, and you've alluded to this,  
25 you stated that Progress or Duke is in no way suggesting

1 that the Commission cannot consider all proper evidence  
2 put before it going back to well before the  
3 implementation date. Is that a -- I mean, it's a quote  
4 from your reply brief, but you stand behind that  
5 statement.

6 **MR. BURNETT:** I do, sir.

7 **COMMISSIONER BALBIS:** Okay. Because what,  
8 what I need to determine is, again, the question that's  
9 before me, and what issues is the Commission precluded  
10 from considering? So I think that that statement is  
11 very clear.

12 Did you find or put in any language in the  
13 settlement agreement that precludes the Commission from  
14 taking any action?

15 **MR. BURNETT:** I'm sorry. Could you ask that  
16 one more time, Commissioner?

17 **COMMISSIONER BALBIS:** Sure. Is there any  
18 language in the settlement agreement that binds the  
19 Commission?

20 **MR. BURNETT:** Yes, sir, there is. To the  
21 extent that the Commission has ruled that actions from  
22 the -- well, since the Commission has ruled that actions  
23 from the beginning of the SGR to the implementation date  
24 are covered by the settlement and the Commission has  
25 taken action consistent with that ruling in dismissing



1 Phase 1, the Commission and everyone else has that  
2 behind them now. The Commission certainly is not bound  
3 to judge the prudence of our actions after the  
4 implementation date, nor is the Commission bound to  
5 challenge and review the repair/retire decision.  
6 Certainly the Commission is not barred from judging the  
7 ultimate resolution of our prudence with the -- the  
8 prudence of our ultimate resolution with NEIL. But the  
9 issues implementation that date back are, by your order  
10 and approval of the settlement, barred.

11 **COMMISSIONER BALBIS:** Okay. And then I think  
12 this is my last question. But this Commission has a  
13 procedure with dealing with privileged or confidential  
14 information. Do you feel that the standard procedures  
15 that we have to deal with those would be appropriate for  
16 this process or this hearing?

17 **MR. BURNETT:** Certainly with respect to  
18 confidential information, yes, Commissioner.  
19 Absolutely. Privileged information is a different  
20 sorry. Privileged information, if it is, in fact,  
21 privileged, never comes to the Commission. But  
22 certainly your procedure for dealing with confidential  
23 information is appropriate.

24 **COMMISSIONER BALBIS:** Isn't there a procedure  
25 to determine what is privileged and what is not?

1           **MR. BURNETT:** Yes, sir, there is. I don't, I  
2 don't think we're there yet. I don't know that any of  
3 the Intervenors have raised a motion to compel or  
4 challenged any of our objections, but we may be there at  
5 some point.

6           **COMMISSIONER BALBIS:** Okay. And then just a  
7 few questions for the Intervenor parties.

8           And I have a question for the Office of Public  
9 Counsel, and it concerns the disputed issues that were  
10 copied in, I believe, Progress's initial brief, and you  
11 touched upon it in a reply brief and in your statements  
12 today.

13           If Progress or Duke settled for less than the  
14 full coverage amount of the NEIL policy, then why is the  
15 policy amount important --

16           **MR. REHWINKEL:** Just --

17           **COMMISSIONER BALBIS:** -- or appropriate for  
18 this proceeding?

19           **MR. REHWINKEL:** Just so I understand your  
20 question, you're saying if they settled for less than  
21 the policy limits, why is the -- are you asking about  
22 the policy or the, is the policy limit amount relevant?  
23 I apologize.

24           **COMMISSIONER BALBIS:** Well, one of the  
25 disputed issues -- and I don't want to get into arguing

1 the issues of whether or not they're appropriate -- but  
2 this one kind of confused me, and that is the disputed  
3 issue associated with did Duke have the appropriate  
4 policy amount for the NEIL coverage.

5 **MR. REHWINKEL:** Yes.

6 **COMMISSIONER BALBIS:** And we have a situation  
7 where Duke accepted less than the policy amount. So why  
8 would the total policy amount be appropriate?

9 **MR. REHWINKEL:** Okay. Commissioner, the, the  
10 reason that that issue is, is raised is there are 12  
11 policies that were at issue between Duke and NEIL. And  
12 the settlement that they entered into on March 28th  
13 covered -- it resolved all claims against all 12 of  
14 those policies.

15 Now what we're asking about is did -- because  
16 there were public statements made by the CEO and the  
17 Chief Financial Officer of, of Progress I think before  
18 the merger had been consummated, and perhaps even by  
19 Duke -- yes -- by Duke after the merger had been  
20 consummated, that they believed that they had adequate  
21 coverage under the policies to pay for repairs to bring  
22 the plant back into service. That's an issue of fact  
23 because \$2.44 billion is the -- was kind of the high end  
24 of one of the two middle-of-the-road repair estimates,  
25 and those bear on how much the policy pays.

1           So if they said they had enough to cover it  
2 and they made these public statements -- and they made  
3 one of these statements prior to the Commission voting  
4 on the settlement -- that says that they were under the  
5 impression that they had in place prior to the accident  
6 occurring enough coverage to protect them and to  
7 ultimately protect the customers and the people of the  
8 state that they serve.

9           If that turned out not to be true, that's an  
10 issue I think that the Commission needs to have some  
11 ability to take a look at. So that's why that issue is  
12 there.

13           They also made some changes to the policy in  
14 the, in the recent years, including where and how they  
15 arbitrate; what evidence they reply upon in resolving  
16 issues about coverage under the policy. So this is,  
17 this issue may need some wordsmithing, it may need some  
18 shaping, and we're willing to work on that. But the  
19 policy itself has a central role because they're the  
20 ones that entered into the policy and they're the ones  
21 that said this policy is good to go and it'll cover us  
22 for what has happened. And if they settle for less than  
23 that, it may have a bearing upon whether the provisions  
24 of the policy did not actually provide the type of  
25 coverage that Progress or Duke thought it did at the

1 time they entered into it or they made these statements.  
2 So that's the reason why we have that in there.

3           **COMMISSIONER BALBIS:** Okay. And final  
4 question. We have two referenced issues or documents  
5 here. We have the settlement agreement that part of  
6 that agreement required within five days a motion filed  
7 with the Commission to dismiss Phase 1 of the docket and  
8 put a stay on Phases 2 and 3. Well, Phase 1 of the  
9 docket dealt with all of Progress's activities leading  
10 up to the first delamination event. Wouldn't that  
11 dismiss the decades-old insurance issues associated with  
12 NEIL prior to that?

13           **MR. REHWINKEL:** I'm glad you asked that  
14 question, Commissioner, because that really relates to a  
15 point that, that Duke tries to make on page 10 of their  
16 reply brief in footnote 3. They say there the  
17 Intervenors never asserted the right to challenge the  
18 prudence of this insurance decision in the first place  
19 or the terms and conditions of the NEIL policies in the  
20 settlement agreement.

21           At the time that you entered your order and  
22 that Phase 1 was established, there was no point of  
23 entry or there was no reason for any of the parties to  
24 take a position to challenge that. It was not ripe for  
25 decision. It was not an issue that had come up.

1           Those issues that were addressed in Phase 1,  
2 it is our understanding, dealt with the repair and  
3 construction activities that were, that were part of the  
4 SGR project. The engineering that designed the method  
5 of entry into the building, the cutting into the  
6 building, the de-tensioning the building, the movement  
7 of the steam generators, the old ones out and the new  
8 ones in, those are the activities that were addressed  
9 there. Insurance was not an issue prior to October 2nd,  
10 2009. So that, in our view, that could not have touched  
11 those issues because it was not a justiciable issue at  
12 that time for Phase 1.

13           **COMMISSIONER BALBIS:** Okay. And then the  
14 other question I had is the cost associated with the  
15 NEIL insurance policy. I mean, that has been recovered  
16 through rates for decades.

17           **MR. REHWINKEL:** Yes.

18           **COMMISSIONER BALBIS:** And rate cases have been  
19 administered by this Commission and ruled upon by this  
20 Commission that included those and deemed those costs  
21 prudent. When does administrative finality attach  
22 itself to those decisions and those costs?

23           **MR. REHWINKEL:** Well, I think a review of  
24 those decisions, if to the extent that NEIL policies  
25 were ever an issue in this case, would have been the

1 payment of the premiums, who was responsible for the  
2 premium payment, but not whether they had the right type  
3 of insurance in place to cover the, to cover the, the  
4 losses that they could have experienced from accidents  
5 at that plant. That's a different issue in our view.

6 And so administrative finality with respect to  
7 going back and adjusting rates because of the premiums,  
8 yes, that, that ship has sailed a long time ago.

9 But they, they amend this policy every year.  
10 And the issue about whether the policy provisions or the  
11 endorsements in the policy have, have never, in our  
12 view, been, been raised as an issue and, thus, are not  
13 foreclosed. And these amendments occurred even after  
14 the last rate case, which would have been a 2009  
15 hearing.

16 So I don't think there's anything that, that  
17 is in the policy. The specific policy here that went  
18 into effect April 1, 2009, that was not raised as an  
19 issue in the last rate case. And so any changes or any  
20 interpretation of that policy certainly is not, not put  
21 to bed by even the most adventurous interpretation of  
22 administrative finality.

23 **MR. WRIGHT:** Commissioner?

24 **COMMISSIONER BALBIS:** Yes.

25 **MR. WRIGHT:** Just very briefly to respond to

1 your question.

2 I think the way I would say it is this:  
3 Administrative finality attaches to the Commission's  
4 orders as to those issues which were decided. In any  
5 rate case in which the Commission approved the prudence  
6 of premium payments to NEIL, that issue is decided. The  
7 issue of coverage, the issue of the terms and conditions  
8 of the policy was, to the best of my knowledge, never,  
9 ever addressed and, therefore, was not subject to a  
10 final order of the Commission.

11 **COMMISSIONER BALBIS:** Okay. And then one  
12 final wrap up question. And I believe -- I forget if it  
13 was Mr. Brew or Mr. Wright made the statement where  
14 you're not sure what we're arguing about. But I guess  
15 the question for Mr. Rehwinkel, if Progress or Duke  
16 agrees to the 14 assertions, that those are appropriate  
17 issues to be decided and ruled upon, what is left?

18 **MR. REHWINKEL:** Well, I, I think not much. If  
19 the, if the true scope of those issues is that to the  
20 extent they are heard and can be considered in the  
21 total, the overall picture, I would agree with  
22 Mr. Burnett to a degree that, that challenging specific  
23 standalone actions are not what we're after. We're  
24 after the big picture. But the big picture is, is just  
25 that. It's not, you know, something that happened in



1 this month or that month or before February or after  
2 February. As long as the Commission can make  
3 determinations based on the overall evidence that's made  
4 up of these issues, I think we go a long ways towards  
5 getting what the customers want.

6           There are issues that may arise in discovery  
7 that we would not want to commit that they'll foreclose  
8 because they're not on this issue list even though they  
9 might come up in discovery and are not otherwise barred  
10 by the stipulation or some other provision of  
11 administrative finality or relevance or whatever. So I  
12 wouldn't give you a categorical "this is it." But this  
13 is the lion's share of it. And as long as you have a  
14 true look at it, the customers have a fair opportunity  
15 to present evidence on it and to test Duke's evidence,  
16 and Duke does put evidence on and meet their burden of  
17 proof, I think you have the essential elements for the  
18 right type of hearing that you want to hold.

19           **COMMISSIONER BALBIS:** Okay. Thank you. And,  
20 you know, I agree with you. I think that there's not  
21 much left and I think that all the parties are coming  
22 relatively close together and have the same goal that I  
23 do, and that is to have a transparent process that the  
24 Commission has as much information as possible to make  
25 an informed decision.

1           So with that, I will take --

2           **MR. MOYLE:** I'm sorry. Can I -- I had made  
3 notes on the questions that you had asked, and you gave  
4 Mr. Wright a chance. Can I just make three brief  
5 comments on three points that you've raised?

6           **COMMISSIONER BALBIS:** Sure. That's fine.

7           **MR. MOYLE:** Okay.

8           **COMMISSIONER BALBIS:** Just one; you can have  
9 one comment.

10          **MR. MOYLE:** That's like a budget negotiation  
11 process: What's your, what's your top priority?

12           No. You had asked the question, what do you  
13 think that the Commission is precluded from considering,  
14 and Mr. Burnett answered. I would also point out that I  
15 think there's an issue that the Commission is precluded  
16 from considering that is found on page 13 of the  
17 agreement, and it relates to how the NEIL proceeds would  
18 be allocated.

19           And the agreement says, "If PEF determines to  
20 decommission rather than repair CR3 and return the unit  
21 to commercial operation, all NEIL insurance proceeds  
22 will, unless otherwise agreed upon by the parties, be  
23 applied first to offset the consumers' share of  
24 replacement fuel costs incurred after December 31, 2002,  
25 with any remaining proceeds to be applied to any

1 unrecovered CR3 investments; i.e., the remaining  
2 unamortized rate base balance for CR3."

3           So that -- we can agree, the way I understand  
4 this is we can agree to a different allocation, but  
5 that's what we agreed to in the agreement, and the  
6 Commission considered the agreement and approved the  
7 agreement. So that issue has been addressed. Anyway, I  
8 just wanted to bring that, that point to your attention.

9           The point that you had asked Mr. Rehwinkel  
10 about to say, well, wait, you know, if you guys said all  
11 of the insurance stuff is -- you know, the repair  
12 related activity and insurance stuff is off the table,  
13 it seems to me that Mr. Wright made the correct point,  
14 which is if the issue was live and litigated. I mean,  
15 you could have a situation in discovery where if we're  
16 saying let's see the premiums that you paid for NEIL,  
17 and let's say for every year it was \$9 million a year,  
18 but one year before the settlement date it was  
19 90 million and they paid ten times more and it was a  
20 mistake, that issue had never been raised, would never  
21 be brought up. But if we discovered it -- you know,  
22 it's not my understanding that there's, like, a statute  
23 of limitations that would say, well, wait a minute, you  
24 can't raise the, you know, the prudence of paying  
25 90 million and you didn't catch it, nobody caught it

1 when the premium statement only said pay 9 million. So  
2 I wanted to just amplify that point.

3           And then the third point, on your question  
4 about the 14 issues, the attachment has 34. And, you  
5 know, I think as we go through, you know, whatever your  
6 ruling is, it will probably prompt some further  
7 conversations between parties and staff that I would  
8 just urge that -- no hard line, here are the 14 at this  
9 point in the proceeding because you still have discovery  
10 outstanding and other things. And I'm not sure anyone's  
11 made an effort to reconcile the 14 issues that they put  
12 in their brief with the 34 that have been, you know,  
13 identified by the parties. So I would just urge that  
14 you not, you know, come down and say here are the 14  
15 we're going to, we're going to litigate at this point in  
16 the proceeding. Thank you.

17           **COMMISSIONER BALBIS:** Thank you, Mr. Moyle.

18           And the point I was making with the 14 is that  
19 that covered a bulk of the arguments that, that were  
20 made by both parties, and it seemed to me they were  
21 coming to a nexus on those. And that was an example on  
22 how we're really only dealing with a few issues that,  
23 that I'll rule upon.

24           Okay. So with that, that would conclude the  
25 oral arguments phase of this meeting, and I'd like to go

1 into a discussion about the schedule. In --

2 **MR. REHWINKEL:** Commissioner, I was assuming  
3 that we would discuss issues of privilege in the  
4 schedule portion that you're now going into. But to the  
5 extent you had a concern about it in the initial phase,  
6 we, the Public Counsel did have a point we wanted to  
7 raise. But we can deal with it --

8 **COMMISSIONER BALBIS:** Concerning the question  
9 I asked Duke on dealing with privileged and confidential  
10 information?

11 **MR. REHWINKEL:** Yes. Yes.

12 **COMMISSIONER BALBIS:** Yeah. That's fine. Now  
13 would be appropriate.

14 **MR. REHWINKEL:** Okay. I think Mr. Burnett was  
15 correct when he said that you may be seeing issues about  
16 privilege brought up. Our goal is to have something,  
17 our initial motion to compel with respect to privilege  
18 filed sometime this week, and, and that would be  
19 followed shortly by a second. We intend to file at  
20 least two at this stage. And I think that would  
21 followed, Mr. Brew can correct me, by one from White  
22 Springs. So I believe that we are on the cusp of having  
23 privilege issues teed up.

24 There, there may be a need to have further  
25 discussion about the process about privilege. I believe

1 in a BellSouth case back in the '90s, I believe, when I  
2 was working for Chairman Deason at the time, I believe  
3 there were some in camera inspections by at least one  
4 Commissioner in that process that was undertaken. So  
5 there is precedent, we believe, for the Commission to  
6 look at privileged information to make an in camera  
7 determination. However, we do believe a process needs  
8 to be developed because this is a significant issue in  
9 the case. And while there is precedent, we, we'd  
10 certainly be willing to provide input on, on the right  
11 way to do it.

12 **MR. BREW:** Commissioner, I can confirm that  
13 PCS will be filing a motion to compel shortly  
14 thereafter, too.

15 **COMMISSIONER BALBIS:** Okay. Thank you. And  
16 my office will respond to the motions appropriately.

17 Okay. So moving on to the schedule portion of  
18 this. In response to concerns by the parties during the  
19 issue identification meetings with staff, especially  
20 concerning time constraints, I issued a third and final  
21 OEP extending the hearing date from April of this year,  
22 which was originally requested by Progress, to the end  
23 of October of this year. This provides an additional  
24 six months of time for the parties to prepare. I also  
25 adjusted some of the other controlling dates prior to

1 the hearing to give parties additional time.

2 Please let me know if you have concerns about  
3 the controlling dates leading up to and with exception  
4 to the hearing. So with that, I'll start with Progress  
5 Energy.

6 **MR. BURNETT:** Thank you, Commissioner.

7 As long as we get a ruling that -- and  
8 resolution on what issues I actually have to address in  
9 the testimony, we can, we can certainly do the June  
10 date, but I just need to figuratively know what I'm  
11 shooting at first to get the testimony done. But we can  
12 comply with your schedule.

13 **COMMISSIONER BALBIS:** And by the June date,  
14 you're referencing the June 17th where your testimony  
15 and exhibits would be due?

16 **MR. BURNETT:** Yes, sir.

17 **COMMISSIONER BALBIS:** Okay. Thank you.

18 Office of Public Counsel.

19 **MR. REHWINKEL:** Yes. Commissioner, it's with  
20 a great deal of trepidation that I state to you that  
21 these dates are completely unworkable for the Public  
22 Counsel. The passage of about two and a half months  
23 between seeing for the first time what Progress or Duke  
24 says is their basis for settling would be really our  
25 opportunity to decide what we need in terms of an expert

1 witness.

2           We have, we have one of the best civil  
3 engineering witnesses in the world from MIT, but I'm not  
4 sure that those issues will really play a major role in  
5 this case. They may play a smaller role and we may need  
6 his services.

7           We have two nuclear engineering -- nuclear  
8 engineers who may, we may need their expertise in  
9 understanding what was undertaken with respect to  
10 preparing the, the repair estimates that led to the  
11 insurance payouts.

12           But with respect to the insurance policies  
13 themselves, we need to, we need to engage an  
14 engineering -- an insurance expert that will -- and up  
15 until whenever we get a ruling on the scope of this  
16 docket and our ability to actually go forward and take a  
17 deposition of the appropriate people at, at Duke, we  
18 really have not jumped out to try to engage a witness.

19           There are millions of pages of documents  
20 conceivably, or at least hundreds of thousands that we  
21 expect we will need to look at between now and preparing  
22 our case and to bring an expert up to speed.

23           Just, you know, a matter of 70 days just to  
24 put on a case once we know what Duke's case is going to  
25 be is, is just not enough time for an issue that we've



1 never seen before. This is not like a rate case  
2 where -- I mean, when we know a test year letter is  
3 coming or is filed, we, we know, because we've had 30,  
4 40 years of experience in the office, about what we need  
5 to get and who we need to get and where they are and  
6 who's going to do depreciation and who's going to do  
7 accounting and finance and engineering.

8           But this issue is a novel one, it's a first of  
9 its kind, and we really don't know. And I can tell you  
10 right now we're not ready to go to hearing that fast.

11           But that's kind of the little big problem that  
12 we have, because the biggest problem is, is once we file  
13 our case, Progress would then have the opportunity -- or  
14 Duke would have the opportunity to file rebuttal on  
15 October 1st, and then we would have 13 calendar days to  
16 do discovery on what our experience has been is just the  
17 nature of the business that we're in, I'm not saying  
18 there's anything nefarious about it, is that you find a  
19 lot of meaty information and sometimes the real nuts and  
20 bolts of the case filed on rebuttal. Having that amount  
21 of time to, to schedule depositions and conduct  
22 discovery on what could be significant testimony in a  
23 case that has no time clock on it is, is of concern to  
24 us. And I, you know, feel like we just need to be  
25 up-front and tell you that it is a big problem for us.

1           And, you know, not knowing what they're going  
2 to file on direct and not knowing what they would file  
3 on rebuttal, I can't say for absolute certainty that  
4 it's, that it's unreasonable. But my experience and my  
5 knowledge of this docket tells me that it is just not  
6 workable because this insurance issue is, is a new one  
7 and it's a novel one and we're just not ready to go on  
8 that.

9           **COMMISSIONER BALBIS:** Thank you.

10           Mr. Brew?

11           **MR. BREW:** Yes. Thank you, Commissioner. I  
12 would fully support what OPC has just said, and note in  
13 that regard it's been somewhat of my lot to be dragged  
14 into quite a number of prudence cases. And I've found  
15 that, as Mr. Rehwinkel said, universally on rebuttal a  
16 lot comes up. That's the nature of the beast in terms  
17 of the utility's response to the testimony that it saw,  
18 and it's absolutely critical for a Commission decision  
19 that there be adequate time for discovery and  
20 depositions. And so at a minimum, we need a substantial  
21 adjustment there between whenever rebuttal is filed to  
22 allow adequate time for discovery before we move to  
23 hearing. Thank you.

24           **COMMISSIONER BALBIS:** Okay. Thank you.

25           Mr. Wright?

1           **MR. WRIGHT:** I would just add that I agree  
2 with Mr. Rehwinkel and Mr. Brew. Thank you,  
3 Commissioner.

4           **MR. MOYLE:** And FIPUG would support the  
5 comments of OPC. They have been doing cases before this  
6 Commission for years and years and years and will have a  
7 significant laboring oar in this effort. So we would  
8 support them in terms of taking the amount of time that  
9 they feel necessary to have the case ready to go to  
10 trial. Thank you.

11           **MR. REHWINKEL:** Commissioner, I apologize.  
12 Because I did the privilege stuff in the prior phase I  
13 kind of took it out of my thoughts about here. But I  
14 think until the privilege issue is resolved and we know  
15 fully the scope of what's going to be looked at, we're  
16 also a bit at a disadvantage.

17           Progress has -- Duke has lodged objections to  
18 providing discovery, and those will be resolved. But  
19 until we get those resolved and we know where they're  
20 going to go and if we're going to get additional  
21 information, or we're going to know kind of the posture  
22 of their burden vis-a-vis the assertion of a privilege.  
23 In other words, there's a principle in law that you  
24 can't use the privilege as a sword and a shield.  
25 Sometimes you've got to live with the consequences of

1 the privilege you assert. We don't know how that's  
2 going to shake out. Until we do, we won't really fully  
3 know the scope of what the testimony is going to be  
4 about. Thank you.

5 **COMMISSIONER BALBIS:** Okay. Thank you.

6 And I just want to give you my comments on  
7 this matter and my mind-set, where I am with this. And  
8 this is a unique case, and we all understand that. But  
9 one of the unique aspects of this case, which is, I  
10 think, a good thing, is that the settlement agreement  
11 established a procedure for all of the parties to have  
12 an unprecedented coordination and free flow of  
13 information once that settlement agreement was agreed to  
14 on certain issues.

15 At each of the status conferences I asked each  
16 one of the parties as to how that process was working,  
17 how the information was flowing, and if it was a good  
18 process. Each time I asked that, each party indicated  
19 that it was working very well. And I'd anticipated as  
20 the status conferences were going on that it would make  
21 the hearing process easier.

22 It is clear from the proposed issues, the  
23 briefs, the reply briefs, the oral arguments here today,  
24 and, in fact, even, Mr. Rehwinkel, your comments,  
25 there's not much left.

1           In contrast, recent billion dollar rate cases  
2 had up to 192 issues, ranging from liability insurance  
3 all the way up to return on equity. Those are issues  
4 this Commission is used to dealing with, those are  
5 complex issues that we're used to dealing with, and all  
6 the parties here today are used to dealing with.

7           But maybe a more important and appropriate  
8 comparison is the settlement agreement that this  
9 Commission approved. That was a very complex settlement  
10 dealing with multiple dockets, dealing with new nuclear  
11 units, dealing with a rate case, dealing with CR3 and  
12 other issues that were very complicated that we were  
13 able to review and approve because it was in the best  
14 interest of all the parties. In fact, one of the  
15 justifications to review and approve that settlement  
16 expeditiously was, and I'll quote, the speedy  
17 approval -- the parties recognize that the continued  
18 uncertainty related to the issues addressed in this  
19 agreement adversely affects the utility and the  
20 customers.

21           The most important consideration that I need  
22 to make is that Progress Energy no longer exists. In  
23 fact, we have interchanged the Duke Energy and Progress  
24 Energy, but Progress Energy does not exist. It has been  
25 merged with Duke Energy to become the largest electric

1 company in the United States. With that merger comes  
2 expected and unexpected personnel changes.

3           Unfortunately, key personnel associated with  
4 the decision-making process of this important case have  
5 changed and will continue to change: Bill Johnson,  
6 former CEO of Progress Energy, also for a short period  
7 of time CEO of Duke, and he was even on the board of  
8 NEIL, is no longer with Duke Energy; Vinny Dolan, former  
9 president of Progress Energy Florida, has retired; Jeff  
10 Lyash, a key witness in many of our proceedings, has  
11 announced his retirement; and even Jim Rogers, current  
12 CEO of Duke, who was CEO when the final decision was  
13 made to retire CR3, who was CEO when the final  
14 settlement from NEIL was, was approved, may not be in  
15 that position by the end of this year.

16           Information can become stale, memories can  
17 become short, and, more importantly, people can retire  
18 and move on. These issues are ripe for hearing. The  
19 customers and investors cannot afford for this  
20 uncertainty to continue any more than it has.

21           I believe that the additional six months will  
22 afford all of the parties the time needed to prepare,  
23 and will allow the Commission to make an informed  
24 decision. There's not much left, and I think we can  
25 have a thorough hearing process. Because, quite

1 frankly, the ratepayers have waited long enough.

2           So I'll take all of your comments into  
3 consideration and will issue an appropriate ruling.

4 Thank you for your time this morning.

5           (Proceeding concluded at 11:37 a.m.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 STATE OF FLORIDA )  
2 COUNTY OF LEON )

CERTIFICATE OF REPORTER

3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

I, LINDA BOLES, CRR, RPR, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 2<sup>nd</sup> day of May, 2013.

Linda Boles

LINDA BOLES, CRR, RPR  
FPSC Official Commission Reporters  
(850) 413-6734