

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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.

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PROCEEDINGS: COMMISSION CONFERENCE AGENDA
ITEM NO. 12

COMMISSIONERS
PARTICIPATING: CHAIRMAN RONALD A. BRISÉ
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER ART GRAHAM
COMMISSIONER EDUARDO E. BALBIS
COMMISSIONER JULIE I. BROWN

DATE: Tuesday, May 14, 2013

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

REPORTED BY: JANE FAUROT, RPR
Official FPSC Reporter
(850) 413-6732

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P R O C E E D I N G S

CHAIRMAN BRISÉ: So we are on Item Number 12, and so we will ask Mr. Young to introduce the item.

MR. YOUNG: Good afternoon, Commissioners. Keino Young, Commission Staff.

Item 12 is staff's recommendation of Office of Public Counsel's motion to accept the motion for reconsideration, Issue 1, and OPC's request for oral argument and motion for reconsideration itself, Issues 2 through 4.

As stated in staff's recommendation, staff recommends that the Commission find that OPC's motion for reconsideration and request for oral arguments are barred because they are untimely and outside the jurisdictional time period afforded to a party to seek reconsideration of a Commission order. Staff does not believe that the Commission has the authority to waive the jurisdictional time period and adjudicate OPC's motion and requests on the merits.

Staff notes that if the Commission agrees with Issue 1, Issues 2, 3, and 4 are moot. If the Commission votes no on Issue 1, staff believes that OPC's request for oral argument and motion for reconsideration should be denied. Staff notes that the Office of Public Counsel, FIPUG, and Duke Energy are here.

1 **CHAIRMAN BRISÉ:** Thank you.

2 Commissioner Brown.

3 **COMMISSIONER BROWN:** Thank you. I'm going to
4 go out on a limb here and step right out and say I fully
5 support Office of Public Counsel's motion here for a
6 couple of reasons.

7 First, I think -- and I will have a question
8 after this, but I disagree with staff's recommendation
9 wholeheartedly. First, I think the motion that was
10 submitted had a time stamp of 4:59. That clearly
11 indicates OPC's good faith effort to submit that as
12 timely before close of business.

13 Second, an important factor, I think, to take
14 into consideration is that neither Duke nor any of the
15 intervenors here oppose the motion for reconsideration
16 as timely. That's important, I think.

17 The third reason is that at the time of the
18 submission of OPC's motion, the third OEP had yet to
19 technically be final. So the question that I have for
20 you, Mr. Young, getting to that is OPC cites several
21 cases supporting its -- in support of their position,
22 and Staff is relying pretty much on the City of
23 Hollywood case denying OPC's motion.

24 I'd like you, if you could, to reconcile the
25 cases that OPC cites with your reliance on Hollywood and

1 why, based on the facts and circumstances before us, you
2 are recommending that.

3 **MR. YOUNG:** Yes, ma'am. And I don't want to
4 put words in OPC's mouth. I'm just going based on their
5 pleading. Those cases that OPC cites, in some of them
6 the Commission did grant the extension of time for
7 motion for reconsideration, but I think OPC is relying
8 on the Southern Bell case where it is saying that
9 during -- for procedural orders, for procedural
10 decisions the Commission has the discretion, broad
11 discretion.

12 We believe, based on pure reading of the case
13 laws, the City of Hollywood case, and the North Fort
14 Myers case, that when dealing with jurisdictional issues
15 the court has specifically stated that there is no
16 express authority -- in the City of Hollywood and the
17 North Fort Myers case, which relied on the City of
18 Hollywood decision, that there is no express authority
19 either in the APA, PURC Rules, or the Rules of Procedure
20 for extending the time for filing of such motions,
21 motions of reconsideration meaning, nor do we believe
22 that the Agency has the inherent power to do so.

23 And they analogize the Agency's inherent
24 powers to that of a court of general jurisdiction. And
25 that's why we believe, based on a pure reading of the

1 cases before us, the cases that we have found in terms
2 of dealing with this question that we believe that OPC's
3 motion is untimely and the Commission does not have the
4 jurisdiction to adjudicate the motion on its merits.

5 **COMMISSIONER BROWN:** And so just to assume --
6 and this is just a final question, really, and this is
7 with all due respect that I disagree with staff's
8 recommendation. But let's assume, though, that this
9 third OEP which has been revised three times by its very
10 nature, you know, it's not necessarily final, it is
11 procedural in nature. Let's assume that it is nonfinal
12 and that it is procedural, would you still recommend
13 that the Commission does not have the authority to hear
14 the motion for reconsideration based on Hollywood and
15 North Fort Myers?

16 **MR. YOUNG:** I think if you are looking at it
17 from a -- if the situation was different, i.e., filing
18 of testimony, which is procedural, I think, yes, you can
19 analogize that. But I think when you deal with the fact
20 that it is an order that governs our procedures and is
21 final unless a motion for reconsideration has been
22 requested or the prehearing officer for some reason
23 revises the OEP, then you can make that argument. But
24 given the fact that none of those situations arises in
25 this case, we believe the order is final.

1 **COMMISSIONER BROWN:** I appreciate your
2 comments, but I respectfully disagree.

3 **MR. YOUNG:** Yes, ma'am.

4 **CHAIRMAN BRISÉ:** Commissioner Edgar.

5 **COMMISSIONER EDGAR:** Thank you, Mr. Chairman.

6 There are so many ways to go here. First of
7 all, I agree with Commissioner Brown's characterization
8 that the time indicated on the filing of the motion for
9 reconsideration does indicate a good faith effort.

10 I respectfully disagree with Commissioner
11 Brown's comment that it is an important factor that
12 other parties to this do not oppose simply because
13 whether parties oppose or whether they do not oppose to
14 me is not necessarily persuasive as to how we interpret
15 the application of our procedural rules within, of
16 course, due process requirements. I do believe that
17 that is within our discretion for the application.

18 However, with that said, and maybe it's
19 partially -- well, it is partially, because I think
20 everybody deserves a five-minute grace period. I
21 recognize the -- and I believe the intent of the staff,
22 and appropriately so, to do a careful review of case law
23 on this point, and the potentially slippery slope of a
24 deadline is a deadline. And if you start to move it
25 when, indeed, does that end. So I'm going to throw out

1 that five minutes is just kind of a personal marker as
2 what I deem reasonable in these types of instances.

3 But with all of that said, Mr. Chairman, I
4 would put out there that we not adopt the staff
5 recommendation on Issue 1, but that we allow oral
6 argument on the motion for reconsideration. And, Mr.
7 Chairman, it would be my preference that the allotment
8 of time be within your purview as presiding officer.

9 **CHAIRMAN BRISÉ:** Thank you.

10 Commissioner Graham.

11 **COMMISSIONER GRAHAM:** I'm not sure if that was
12 a motion, but I will make one if it was not.

13 Commissioner Edgar.

14 **COMMISSIONER EDGAR:** Mr. Chairman?

15 **CHAIRMAN BRISÉ:** I'm not sure that it was.

16 **COMMISSIONER GRAHAM:** Was that a motion?

17 **COMMISSIONER EDGAR:** Mr. Chairman, are we in a
18 motion posture?

19 **CHAIRMAN BRISÉ:** I don't know if everyone who
20 wanted to say something on this has said something on
21 this?

22 Well, then before you go to your motion, I'll
23 make my statement here with respect to this. I think it
24 is within the Commission's discretion to make a decision
25 on this. Looking at the particular circumstances

1 associated with this, we look at the time stamp and all
2 of that. And so with that in mind, we have the broad
3 discretion to make that decision in this instance,
4 understanding that it is not a practice that we want to
5 support, that things that are filed in a late manner
6 that we then turn around and take them back in.

7 So I think staff has done a good job in
8 protecting the interest of the process here, and we in
9 turn have the ability to use our judgment to make -- to
10 use our discretion to apply to the current circumstance.

11 **COMMISSIONER GRAHAM:** Thank you, Mr. Chairman.

12 So to be cautious, I guess for Issue Number 1,
13 I say that I find the motion to have been timely, and
14 that we will -- I guess we have timely -- we have
15 received the request for oral modification and
16 reconsideration in a timely manner, and that's my
17 motion.

18 **CHAIRMAN BRISÉ:** Is there a second?

19 **COMMISSIONER EDGAR:** Mr. Chairman, would the
20 sponsor of the motion allow a friendly amendment?

21 **COMMISSIONER GRAHAM:** Sure.

22 **COMMISSIONER EDGAR:** Thank you.

23 Then I would move that we deny staff
24 recommendation on Issues 1 and 2; that further we hear
25 oral argument on the filed motion for reconsideration,

1 and that we allot the time for oral argument to be
2 determined by the Chairman.

3 **CHAIRMAN BRISÉ:** Okay. Is there a second for
4 that motion?

5 **COMMISSIONER GRAHAM:** I thought you -- yes.

6 **CHAIRMAN BRISÉ:** Okay.

7 **COMMISSIONER GRAHAM:** Well, wait. That was a
8 friendly amendment to my motion --

9 **CHAIRMAN BRISÉ:** So you can't second it.

10 **COMMISSIONER GRAHAM:** I can't second it.

11 Thank you.

12 **CHAIRMAN BRISÉ:** Okay. Is there a second?

13 **COMMISSIONER BROWN:** Second.

14 **CHAIRMAN BRISÉ:** Okay. It has been moved and
15 seconded.

16 Discussion?

17 Okay. Hearing no discussion, all in favor say
18 aye.

19 (Vote taken.)

20 **CHAIRMAN BRISÉ:** All right. Thank you very
21 much.

22 So we are moving on to Issue 3, and we are
23 going to grant -- we decided already that we are going
24 to grant oral argument. We are going to do ten minutes
25 per side. Okay. We are going to do ten minutes per

1 side, and my sense is that since OPC is the maker of the
2 motion that it's their motion, and you can use as much
3 of that time as you would like with that. And OPC will
4 have the opportunity to speak first.

5 **MR. REHWINKEL:** Thank you, Mr. Chairman.

6 Before my time starts, I would like to state that I
7 would like to take -- did you say ten minutes? I would
8 like to take about six or seven minutes and give some
9 time to Mr. Moyle, and reserve 30 seconds to a minute,
10 and I will also make a brief statement on behalf of PCS
11 Phosphate who, because of the emergency nature of this
12 motion, did not travel down here, but did file a
13 concurrence.

14 **CHAIRMAN BRISÉ:** Sure.

15 **MR. REHWINKEL:** Thank you, Mr. Chairman and
16 Commissioners. And I thank you very much for the
17 accommodation, and I apologize for the error on my part.
18 It was solely my fault that this was filed at the time
19 it was, and I appreciate the accommodation.

20 The thrust of what the Public Counsel is
21 arguing in our motion for reconsideration is that the
22 errors, and we assert errors with trepidation because we
23 have a great deal of respect for the Prehearing
24 Officer's role in this case, and his very active and
25 very involved and very educated supervision of this

1 case.

2 The errors that we allege and that we ask you
3 to consider in establishing the schedule for this case
4 are against the backdrop of no statutory or other time
5 constraint on this case. Rates will not be affected
6 until 1/1/17, so we do not believe that there is any
7 urgency to have a hearing that would be in October that
8 would be three days and that would compel the
9 controlling dates that are set out in the order.

10 The errors that we contend are that to the
11 extent there was an assumption in the quarterly meeting
12 process facilitated or gave a running start to this
13 insurance-driven hearing process, we believe that is
14 wrong because those quarterly meetings were not intended
15 for that purpose, and we were legally barred under
16 Section 10F of the settlement agreement from utilizing
17 any information we learned there in the hearing. We
18 have to essentially start discovery all over again.

19 Furthermore, discovery stopped for all intents
20 and purposes on anything having to do with NEIL in
21 January of 2011, so there has not been three years of
22 discovery that have led up to this process. We have to
23 start the 2011 and 2012 NEIL-related discovery anew, and
24 we have started that process as of February.

25 As of with respect to the number of issues and

1 the scope of the issues, it is true that we resolved a
2 significant number of issues in the case. It is also
3 true that we have a significant, and very complex, and
4 novel issue before the Commission that will deal with
5 hundreds of millions of dollars that would be a credit,
6 if you will, against the regulatory asset that will be
7 written off or charged against the customers over a
8 20-year period. This is a significant issue and it will
9 affect customers in a material way.

10 And the Public Counsel has stated that we need
11 time to hire an expert that will be an expert in the
12 areas of risk management and insurance law. We do not
13 have one under contract. We have never before had to
14 hire somebody that would deal with these type of complex
15 issues, and there are four insurance policies for three
16 years that would need interpretation and analysis,
17 including some riders or amendments to those policies.

18 The Public Counsel cannot expend resources
19 between now and the end of the fiscal year, which is
20 June 30th, to have an expert come in and do analysis
21 that may be moot or changed because of the testimony
22 that we won't see until June 17th. So we think that the
23 time that has been allotted that is better than what we
24 had before is insufficient.

25 The main problem we have with the controlling

1 dates, though, is that the rebuttal testimony will not
2 come in until October 1st. The hearing starts on
3 October 21st, and the discovery cutoff is on
4 October 14th. That's 13 days, or I believe I counted
5 eight or nine business days to do discovery. Our
6 experience has been that rebuttal testimony is when you
7 see the lion's share of the real case come in. It's not
8 by any kind of deceit. It's just because that's what's
9 responding to the testimony of the intervenors. That is
10 inherently insufficient given the fact that there is no
11 pressing time statutorily or otherwise by agreement.

12 With respect to there being some kind of a
13 delay that the customers have an expectation will be
14 fixed, we would assert that the customers would prefer
15 that we have a hearing that is fair and gives them an
16 opportunity to be represented over something that would
17 be accelerated. We have made the point in our motion
18 that all of the delay -- and I don't really think it's
19 delay. It has been deliberative analysis by Duke to
20 decide how to repair the building, whether to repair the
21 building, whether to retire the building, and how to
22 pursue the NEIL insurance. That has taken time. It is
23 not on our shoulders that we are at this point today.

24 That is nobody's fault. We are where we are.
25 But because this NEIL case was filed the end of

1 February, that's when the case started. It didn't start
2 back in 2010. It didn't start back when the first OEP
3 was issued, and it didn't start when the settlement was
4 filed and approved.

5 This is a brand new case, and it deserves a
6 reasonable amount of time. We are not asking for the
7 world. We just need more time, and there is no way to
8 make October fit what we need.

9 So, in sum, we are also -- I would also like
10 to make the point, and Commissioner Balbis did list
11 individuals who have left the company. True, they have
12 left the company, but that was between them and Duke.
13 It was not between the customers and those people, and
14 we should not have to pay the price because they have
15 left the company. We have, as you have seen in the
16 attachments to the motion, we have indicated we want to
17 depose some of those people and we want to subpoena
18 them. The Commission has issued eleven subpoenas. We
19 will try to serve those subpoenas, but it will take
20 time.

21 Finally, there is a lot of discovery disputes
22 that will be brought your way. We are filing a lengthy
23 motion to compel today. PCS Phosphate will be filing
24 one within the next few days, and we have a second one
25 in the hopper that we will also file. Those will take

1 time. They need to be dealt with. They will present to
2 you novel issues of privilege, including a mediation
3 privilege that is rarely litigated in the state and has
4 never been litigated by this Commission as far as I
5 know.

6 So, in sum, we urge that you give
7 consideration to the customer's needs to hire an expert
8 witness, to have sufficient time to conduct two years of
9 discovery that we are going to need to catch up on, and
10 to put on the case that the customers expect on a case
11 of this magnitude.

12 We certainly appreciate and understand that
13 the Commission has a desire and a need to put on -- to
14 conduct hearings in a timely, relevant, and efficient
15 manner, but the overarching consideration should be
16 fairness and the amount of time necessary to put the
17 case on.

18 We have to argue that the Commissioner made an
19 error to make our point to you, but we believe that his
20 intention and his ruling was in good faith and was based
21 on facts as he understood them, but we believe that
22 those facts were not to the depth that would be
23 necessary to understand the needs of the customers of
24 the state. And we would urge you to revise the schedule
25 to meet the needs of the customers.

1 Thank you. I don't know how much time I took.

2 **CHAIRMAN BRISÉ:** There's about two minutes
3 left, and you want about 30 seconds in reserve.

4 **MR. REHWINKEL:** Well, Mr. Moyle can take what
5 he needs.

6 **MR. MOYLE:** Thanks. And I just want to make a
7 few points. You have heard a lot today from a lot of
8 different lawyers about a lot of different things, but
9 I'm going to try to be really brief and to the point and
10 just make a couple of points.

11 For the record, Jon Moyle on behalf of the
12 Florida Industrial Power Users Group. It's a motion for
13 reconsideration. Thank you for allowing us to address
14 you as a preliminary issue.

15 During your discussions about using discretion
16 to say, yes, the two minutes is not fatal, I think an
17 analogy was used to a circuit court, and the circuit
18 court is exercising discretion. And I would stick with
19 that analogy in this matter that is before you to say
20 that what you have in front of you on this Crystal River
21 3 is an important issue. Hundreds of millions of
22 dollars. You know, FIPUG is probably going to argue
23 that the number starts with a B, billions, when you
24 start totaling up the insurance policies. But it is a
25 lot at stake. And we would urge that it be done, you

1 know, right, and there is no need to do it fast.

2 And one of the standards on a motion for
3 reconsideration, was there a point of law or fact
4 overlooked, and there was a fact that came in last week
5 that, respectfully, Commissioner Balbis didn't have,
6 which was there was another test year letter filed last
7 week by Gulf Power Company, and you have a statutory
8 clock on rate cases. So that's, I think, according to
9 my information going to put us in a hearing in December.
10 We are going to have to get ready for that hearing.
11 TECO has a hearing, a rate case that they have filed.
12 We are supposed to go to hearing on that in September.
13 And then in between these big rate cases, which as you
14 all know take a lot of time and preparation, we are
15 going to have this Crystal River 3 case, which is going
16 to be another huge case.

17 So I would draw the analogy that the rate
18 cases, TECO and the Gulf rate cases are akin to a
19 criminal case where you have a speedy trial rule. You
20 have got to hear those cases in accordance with the
21 statute. But the Crystal River 3 is akin to a civil
22 case where we can hear it, you can slow it down, and
23 particularly given the presentation by Public Counsel,
24 they have been laboring and doing this out here for
25 decades. They are, as professionals, saying we need

1 more time. And I think you would be well served to give
2 them more time and allow us to prepare the case properly
3 and present it for your thoughtful consideration. So
4 thank you for the chance to address you.

5 **CHAIRMAN BRISÉ:** Thank you.

6 Duke.

7 **MR. WALLS:** Thank you.

8 Mike Walls on behalf of Duke Energy Florida.

9 We support the staff recommendation on the
10 substance of the motion for reconsideration. And I
11 guess one thing I would point out is even if you say the
12 case started in February, that is an eight-month
13 schedule, and eight-month schedules have been routinely
14 handled for rate cases here. This company handled a
15 prudence review involving ten years of their coal
16 purchases at CR-4 and 5 on a six-month schedule. So to
17 suggest that this is not doable, I think, is beyond the
18 scope.

19 We have tried more significant and complicated
20 cases in roughly the same amount of time. And I'd like
21 to point out one thing about -- they talk about this
22 being a new case. We've got to remember the case is
23 about the insurance policies. You know, they are
24 contract documents, and there is going to be a lot of
25 talk in the hearing about that, but they have had those

1 policies for years. And so that's not going to be all
2 that complicated.

3 And, remember, we are talking about the
4 underlying what are those claims about in those
5 policies? Well, that's about what happened at CR-3
6 since 2009, and these parties come to this Commission
7 fully informed about those events over that long period
8 of time.

9 So they are not starting brand new. They know
10 everything about the underlying claims that are going to
11 be tried on the NEIL insurance about whether we
12 prudently settled the case. So we don't think it is as
13 complicated as they make it out to be. And we would
14 point out that, you know, the Commission has established
15 rules under the APA that give the Prehearing Officer
16 wide discretion in setting procedural orders to promote
17 the just, speedy, and inexpensive determination of all
18 aspects of the case. And we believe that that standard
19 certainly has been met here.

20 The Prehearing Officer did consider these same
21 arguments when he issued the third OEP, and I will quote
22 from it. He says, quote, "There were concerns raised
23 during this process by several parties regarding
24 sufficient time to conduct discovery and file testimony
25 and exhibits under the current case schedule set forth

1 in the second revised OEP." Accordingly, he goes on to
2 say that's why I have revised the schedule.

3 So these same arguments were in front of the
4 prehearing officer when he amended the schedule to give
5 them more time. And we're two months into this case
6 now. We still have four months to go before they file
7 testimony, six months until the hearing. It's rather
8 premature to be arguing that we have due process
9 violations at this point. And so we fully support the
10 staff recommendation. And in the words of one of my
11 partners, you know, it's just time to try this case.

12 **CHAIRMAN BRISÉ:** All right. So OPC used --
13 between you and Jon Moyle you used 10 minutes and 45
14 seconds. I'm going to use a little bit of discretion
15 and give you 30 seconds.

16 **MR. REHWINKEL:** Thank you, Mr. Chairman. I
17 appreciate that accommodation.

18 We won't see Duke's case until June 17th. In
19 that case, we will see what the arguments were,
20 hopefully what the arguments were. Why the policy --
21 what NEIL said and what they said. We don't know that
22 today. We have no knowledge of that whatsoever. We
23 have not done any discovery on that, so that's the real
24 issue that we need to know.

25 And I appreciate that the consideration would

1 be about that rather than how long the docket has been
2 open. And if I could just take liberty to say that PCS
3 Phosphate asked to say that they support the arguments
4 that we have made and they have a special concern about
5 the rebuttal to discovery cutoff to hearing time frame.

6 Thank you.

7 **CHAIRMAN BRISÉ:** Thank you very much.

8 All right. Staff.

9 **MR. YOUNG:** Commissioners, Keino Young. We
10 support staff's recommendation. I'm sorry.

11 (Audience laughter.)

12 **MR. YOUNG:** As stated in the staff
13 recommendation, we don't believe OPC has met the
14 standard. And I will be brief, because I think the
15 parties both have made their arguments as previously
16 stated in their brief.

17 First, the argument that the order, the third
18 revised order was based on is a flawed contention that
19 the Prehearing Officer's statement were made at oral
20 arguments regarding the procedural schedule in this case
21 somehow retroactively undermined the words contained in
22 the order. The order speaks for itself.

23 And as Duke pointed out, the Prehearing
24 Officer after three issue identification meetings where
25 the parties had voiced their concerns as it relates to

1 the schedule, he heard those -- we took those concerns
2 back to the Prehearing Officer, and the Prehearing
3 Officer said there were concerns raised during the
4 process by several parties. And I note that OPC, FRF,
5 PCS Phosphate, and FIPUG raised similar concerns as it
6 relates to the expert -- securing an expert, the scope
7 of the issues, the discovery process, the rebuttal
8 process.

9 During the process, several parties regarding
10 sufficient time to conduct discovery, filed testimony
11 and exhibits under the current schedule as stated in the
12 second revised OEP. The Prehearing Officer heard those
13 comments, took those concerns under consideration, and
14 he extended the date, the time for filing, the time
15 where we start the hearing. He extended it from June to
16 October. He extended the filing of testimony for both
17 parties. Progress -- Duke, excuse me, was supposed to
18 file on March the 18th. He extended that to the 17th.

19 Also, let me get it for you. OPC and the
20 intervenors were supposed to file May 10th, they are now
21 going to file on September the 9th. Rebuttal was going
22 to be due May 31st. Rebuttal is now due October 1st.
23 So, thus, the Prehearing Officer heard those concerns,
24 similar arguments that were made here today, and
25 extended the time of the parties for filing and the

1 dates upon which we would commence the hearing. So,
2 thus, we believe the Prehearing Officer took those
3 concerns under consideration and issued an OEP, and the
4 arguments raised by the intervenors do not meet the
5 standard of a motion for reconsideration.

6 Second, overlooking the temporal scope of the
7 issues contained in OPC's motion, the argument that the
8 Prehearing Officer misapprehended the scope of the
9 process in terms of the quarterly meetings, as stated in
10 the recommendation, the status conferences engaged by
11 the parties in this proceeding were undertaken pursuant
12 to the requirements of Paragraph 10B in the 2012
13 settlement from the parties. This assertion that the
14 Prehearing Officer's statement that the status
15 conferences were designed to facilitate communication
16 and the free flow of information during the interim
17 period between February 2012 and PEF's resolution on
18 decision to repair or retire is an accurate statement.
19 It is not a misapprehension of what the process -- the
20 quarterly meeting process was about.

21 Now, third, and I think this is the most
22 critical point as Duke mentioned in terms of the
23 premature arguments that the intervenors are making, the
24 OPC assertion that the schedule set forth in the third
25 revised OEP constitute a mistake because it doesn't

1 afford the parties enough time to conduct discovery,
2 retain witnesses on the NEIL issue, does not meet the
3 applicable standard as stated. Accepting OPC's
4 assertion as true that the Duke February 2013
5 announcement regarding the decision to retire the CR-3
6 unit did substantially impact the issues to litigate
7 this proceeding going forward. The intervenors under
8 the schedule contained in the third revised OEP, as I
9 stated, have additional time, six months to take
10 discovery, retain experts, and prepare testimony. Also,
11 that was a basis for the Prehearing Officer's decision
12 to push the hearing schedule and all critical dates
13 back.

14 Moreover, as noted in PEF's response, OPC has
15 not shown that it has denied any discovery that it's
16 entitled to obtain, that it cannot retain any experts
17 that it needs, or it cannot file testimony months from
18 now in accordance with the third revised schedule.

19 Staff notes that since the inception of the
20 discovery from the February -- using OPC's date from
21 February 13th, 2013, with respect to remaining issues in
22 this proceeding, OPC has proactively participated in the
23 discovery process and propounded more than 100
24 interrogatories to PEF. Thus, staff doesn't believe
25 OPC's motion should be granted.

1 But I would note that if OPC or any party in
2 this docket encounters a problem similar to what OPC is
3 alleging, they can file the appropriate motions, and
4 pursuant to Rule 28-106.211, Florida Administrative
5 Code, the Presiding Officer, in this case the Prehearing
6 Officer before whom the case is pending, may issue any
7 orders necessary to effectuate discovery, prevent
8 delays, and to promote the just, speedy, and inexpensive
9 determination of all aspects of this case.

10 Likewise, we have discovery rule for
11 administrative proceedings 28-106.206 of the Florida
12 Administrative Code that says similar. Thus OPC, if
13 they have a privilege problem, OPC can file a motion to
14 compel discovery. If they have a problem propounding
15 for attendance of a deponent, OPC can file a motion to
16 compel the attendance of a deponent. If OPC has a
17 problem as it relates to meeting the requirements, OPC
18 can file -- in terms of time deadlines, OPC can file or
19 the intervenors can file a motion for extension of time.
20 And if Progress has a problem, Progress -- Duke has a
21 problem, excuse me, Duke can file a motion to quash or
22 limit subpoenas or a motion to strike.

23 Thus, we believe that the process that we have
24 in place, that the Prehearing Officer put in place in
25 terms of the controlling dates are sufficient to meet

1 the need to finish the case.

2 **CHAIRMAN BRISÉ:** Thank you, Mr. Young.

3 Commissioner Balbis.

4 **COMMISSIONER BALBIS:** Thank you, Mr. Chairman.

5 And I want to especially thank former Chairman Graham
6 for assigning me this case. It has been a pleasure
7 being Prehearing Officer for this. I just want to give
8 a little bit of background. These are some points that
9 were made by some of the parties, and I think it's
10 appropriate for me to get out in front of this.

11 When Duke Energy made their announcement in
12 February, they filed a motion with my office to set an
13 original schedule date of April of this year. After
14 reviewing that motion, I issued an order setting the
15 case schedule for June. And as was mentioned by all the
16 parties, there were several issue identification
17 meetings where comments were brought to my attention
18 that they needed additional time. I took that into
19 consideration; I moved it out into -- out to October.

20 Since that time, I issued an order last week
21 clarifying the scope, answering the threshold question
22 that was jointly filed by all of the parties further
23 focusing this hearing. And as Mr. Young stated, there
24 are a number of due process vehicles available for all
25 of the parties if they encounter problems.

1 I am somewhat surprised that we are here today
2 to discuss this in that OPC's motion lists what they
3 consider likely events, problems that they may have,
4 problems that they may encounter as if any of their due
5 process rights have been eliminated. If they have a
6 problem with Duke producing a witness, they can file a
7 motion to compel. If they have a problem with a lot of
8 privilege claims, those come to my office. If they have
9 a problem meeting the response to the rebuttal
10 testimony, they can file a timely motion with my office
11 and I will consider it.

12 In fact, in this case in December of 2011, the
13 parties filed a request for a 60-day extension for the
14 controlling dates. And based on the reasons in that
15 order, I granted it. But I feel the most appropriate
16 process to follow is that if they encounter these
17 problems to file the appropriate motions for
18 consideration and move on. At this time they haven't
19 encountered those. They are all suppositions on what
20 they consider likely, and my office is again open to
21 consider any properly filed motion.

22 **CHAIRMAN BRISÉ:** Thank you, Commissioner
23 Balbis.

24 Commissioner Brown.

25 **COMMISSIONER BROWN:** Thank you. And I would

1 like to thank staff and the rest of the Commissioners.
2 I know we spent a lot of time on this particular motion
3 for reconsideration, so thank you for your efforts here.

4 Mr. Rehwinkel, you said that the overarching
5 concern in your opening here is fairness, to be able to
6 conduct a meaningful educated hearing. I completely
7 agree with you. But what we are looking at here today,
8 we have a -- we're looking at a motion for
9 consideration. We have a limited scope of what we can
10 consider here, which is a mistake of fact of law -- or a
11 mistake -- or a mistake of law. So assuming that we
12 cannot consider any statement made at the April 30th
13 oral argument, I'm just trying to figure out what the
14 mistake of fact is that the Prehearing Officer made,
15 allegedly made here. Is it the quarterly meetings issue
16 that you -- I'm just trying to get more clarification on
17 it. I'm having a hard time finding a mistake of fact
18 here.

19 **MR. REHWINKEL:** Commissioner Brown, when we
20 saw the order on the 26th, it was a procedural order
21 like any other with just some dates in it. What caused
22 us to file the motion was that it was -- we were told
23 that it was final. It was not going to be amended
24 again. At least that's the way we heard it at the oral
25 argument. And all the attorneys went to lunch after we

1 had that and, you know, we were all kind of -- that
2 sounds pretty final and we have to deal with that.

3 So, you know, that was Tuesday. We got the
4 transcript, I don't know, the day or the next day after,
5 and we went there and tried to figure out -- you know,
6 we went back and re-reviewed the comments, and it seemed
7 like that was what was behind the order. And certainly
8 the four corners of the document don't have this
9 explication in it, but we reacted to that.

10 And that's -- the error that we see is that
11 there is this over -- this assumption that we can do all
12 of these things. And these things -- I mean, we filed a
13 40-page motion today. It's going to be filed before
14 4:59.

15 (Laughter.)

16 **MR. REHWINKEL:** And there is -- you know, all
17 of these things we can avail ourselves of, we are a
18 small office, and like Mr. Moyle said, we have got all
19 these other cases going on. He didn't even list the
20 NCRC cases. Those take time, and they take you away
21 from doing what you need to be doing. So that's the
22 error is that --

23 **COMMISSIONER BROWN:** I think we are all
24 sensitive to that. And we are sensitive to very busy
25 calendars, particularly towards the latter part of the

1 year. But what we are charged with here is finding a
2 mistake of fact made in that third OEP at this juncture,
3 and that's what I'm trying to get my arms around here.

4 **MR. REHWINKEL:** You know, I believe the
5 Commission on its own motion can reconsider this
6 schedule, regardless of the status of this other
7 document. And I don't mean that to denigrate the third
8 OEP, it's just I think you have the inherent authority
9 to do that. And, you know, that's all I can say.
10 Because, you know, it's the nature of the time frame is
11 just -- it is ab initio, it's a nonstarter for all the
12 things that we have to do. And, you know, we are not
13 sitting on our hands. We are doing what we need to do.

14 The discovery that people say, well, we'll
15 take Duke's position that they provided it all; no, they
16 haven't. That's what the motion to compel is about,
17 because they held back what we think is the golden nut
18 of what we need to get to, which is all the
19 decision-making. That's what the case is going to be
20 about. And we don't have that, and we won't have that
21 until maybe even courts rule on that.

22 **COMMISSIONER BROWN:** Thank you, Mr. Chairman.

23 And I agree, at this point we don't know what
24 Duke is going to testify and what their testimony will
25 say or what extent you will need expert witnesses. So

1 isn't it premature, then, to be asking for additional
2 time before that testimony is filed?

3 **MR. REHWINKEL:** I guess so. But, you know, we
4 have got to -- what we have to do is we have to -- you
5 know, we are being actually -- you know, it has been
6 said, well, this is two months old, like we're not doing
7 anything. I have been writing pleadings for the last
8 three weeks. And we can't really get the depositions
9 started. I appreciate the order was a very good order
10 that we got out of the Commissioner on the scope of the
11 hearing, but we had to get that in place before we could
12 start the depositions to know what we were going to be
13 asking about. And then we'll have, the other piece will
14 be the privilege piece.

15 This takes a lot of time. And affording
16 ourselves of all the due process we have in our small
17 office with attorneys that are working on all the other
18 dockets there, it is just stretching us beyond
19 resources.

20 You know, I mean, I apologize for filing the
21 thing at 4:59. I worked on it on the weekend; I worked
22 on it, you know, in addition to working on the motion to
23 compel. We are absolutely overworked to get this case
24 underway. And what I fear is we are going to do all of
25 this stuff and then say, okay, now that you're about to

1 break, we will give you some more time.

2 We have got to spend a lot of money to hire an
3 expert. And I can't have the guy -- or the expert, it
4 may not be a guy -- under contract, spend lot of time
5 and effort, and then we find out on June 17th or
6 June 18th, whenever we get to look at the testimony,
7 that we have got to go in a different direction. I just
8 don't know.

9 **COMMISSIONER BROWN:** But your due process
10 rights are not abridged at this moment. I surmise the
11 schedule will be put out based on just on the very
12 nature of the confidentiality and privilege requests and
13 the motions to compel. So I surmise that is going to
14 happen at this point.

15 **MR. REHWINKEL:** I would think it would almost
16 have to. It just seems like we are going to spend a lot
17 of time and effort and resources to adjust the schedule
18 when it's going to have to be done anyway. Anyway, I
19 appreciate the consideration. You have listened to my
20 comments. Thank you.

21 **COMMISSIONER BROWN:** And thank you, Mr.
22 Chairman, for the latitude here. I thought it was
23 important to go through it. Because what we are really
24 dealing with here is a motion for reconsideration. We
25 are not setting the schedule here. We are trying to see

1 if there is a fact or error of law, and I can't see one
2 at this juncture.

3 If I may, I'd like to ask Duke a question --

4 **CHAIRMAN BRISÉ:** Sure.

5 **COMMISSIONER BROWN:** -- in response to a
6 statement you made earlier. You said that you do not
7 believe that the case is as complex as Office of Public
8 Counsel alleges. Now, knowing that some of the issues
9 have been tailored down, particularly ones that Office
10 of Public Counsel can participate in, and the
11 signatories to the settlement can participate in, I just
12 wanted -- this is a huge case, a scenario of
13 unprecedented both in Florida and across the country.
14 So I'd like to give you an opportunity to respond to
15 that statement that you made, because I think complexity
16 is a subjective decision here.

17 Each one of us may think it's complex. You
18 may think it's not. I know what the issues are right
19 now, and I'd like you to have an opportunity to just
20 elaborate on that.

21 **MR. WALLS:** Thank you, Commissioner.

22 Well, first, I guess you're right, complexity
23 is a subjective matter. And, of course, I have been
24 closer to this case for a longer period of time than
25 most of you have. But we have to recognize that the

1 settlement agreement resolved a bunch of issues about
2 this case, about CR-3, and it narrowed the scope of
3 that. And we had a threshold issue that has now been
4 decided, and we know what the scope is. And, again, we
5 expect that it's not going to be as complicated as OPC
6 is making it out to be.

7 And we are sort of talking in generalities
8 here and not about specifics. But one of the things I
9 would point out is that with respect to the issue of the
10 privilege, the company is not going to come in here and
11 tell you that they can't tell you what their management
12 decision was. We are going to put on testimony of
13 management about why they decided to accept the NEIL
14 settlement. So this idea of privilege impairing you
15 learning that management judgment decision is a red
16 herring. It's not going to happen. You are going to
17 hear management take the stand and explain why they
18 accepted the NEIL settlement.

19 They may want our privileged material, but the
20 law is pretty clear you don't get privileged material.
21 And, again, we're starting to argue a motion that hasn't
22 been filed, and we will be in front of you arguing that,
23 but you're going to hear management explain why they
24 accepted this settlement.

25 The NEIL policies issues, again, these are

1 insurance contracts. We retained an expert. I'm sure
2 OPC can retain an expert in a relatively short time. I
3 would assume that expert would look at the policies and
4 make a judgment call about what the policies and
5 exclusions mean, because that's what we're going to be
6 coming in here and explaining to you.

7 We don't see that as overly complicated. It
8 may be, but right now we don't see that. I mean, it's a
9 matter of contract issues, and the documents are what
10 the documents are. And the policies are what the
11 policies say, and that will be presented to you.

12 We were concerned about the intervenors going
13 back 20/30 years to when we first entered into agreement
14 with NEIL about whether we should have done that before,
15 and policies executed 20 years in the past, but we now
16 have the Prehearing Officer's order, and we believe that
17 that has narrowed the scope again to what is going to be
18 presented to you.

19 So we believe this matter that be tried in
20 this period of time. They will get their depositions.
21 We are not objecting to putting forth our people for
22 deposition. They put forth a schedule, and we said
23 we'll give you the first six people right now. You have
24 asked for six people, the first six we'll give them to
25 you. And we only asked for our CEO if they could just

1 reasonably tell us do you really need him after you have
2 taken the first six. That seems to me to be a
3 reasonable request, but it is certainly not an objection
4 to producing him for deposition.

5 And, again, we are at this very beginning
6 stage, and we still have four months to go before they
7 have to file testimony. So to me to be here now talking
8 in generalities doesn't really help. We need to all go
9 out and work on this case. If we end up back in front
10 of you, then we do, but we ought to try to meet this
11 schedule. I would think that that is what we need to
12 do.

13 **CHAIRMAN BRISÉ:** All right. Thank you very
14 much. Before I go to you, Commissioner Balbis, I don't
15 think that there was any mistake of fact or law here,
16 and I will support keeping the OEP as it is in
17 recognition of the fact that, you know, we are all
18 stretched here. That's the reality. I mean, there's a
19 lot of things going on in the last two years, but we
20 can't sort of have an open kind of schedule, not
21 suggesting that that is the idea, to resolve these
22 issues.

23 I think maintaining a relatively tight
24 schedule that has been revised at least twice already
25 puts us on a timeframe that I think sets us for a

1 reasonable timeframe for outcome. And I certainly hope
2 that all of those who are involved will do everything
3 within their power not to slow the process. So as
4 requests are made and where legally possible that
5 information is provided, and witnesses are made
6 available, and so forth, so that we are not slowing this
7 process down. And I think that all of us are seeking a
8 resolution to these issues.

9 We all know that this is, in essence,
10 unprecedented with the issue that we are dealing with
11 with respect to CR-3. And I certainly hope that we will
12 all work within that vein to make that happen.

13 But part of the reality is that we, too, are
14 stretched here. And we don't know what next year is
15 going to bring. So our effort is to make sure that we
16 can contain the time and manage the time that we sort of
17 know what is out there and not have a schedule that we
18 cannot foreseeably manage as time progresses. So I
19 certainly hope that as we do that I have full confidence
20 that our Prehearing Officer will continue to keep us on
21 that path.

22 Commissioner Edgar.

23 **COMMISSIONER EDGAR:** Thank you, Mr. Chairman.
24 Just a few very brief comments. I concur with comments
25 that I have heard here at the bench as to the standard

1 for reconsideration, in my opinion, not being met in
2 this instance.

3 I have read the motion. I actually enjoyed
4 reading the motion, and I did watch the oral argument
5 that was recent. I forget exactly which day, but I did
6 watch the oral argument. And I had two briefings with
7 our staff on this to try to understand the many moving
8 pieces that are involved just with the procedural
9 process aspects of where we are.

10 But even with that, I recognize that our
11 Prehearing Officer has been more integrally involved in
12 this docket than any of the rest of us have, which is
13 our process. And that process, I believe, was duly
14 noted in the motion for reconsideration. I also
15 recognize that our process, and it works, is for the
16 assigned Prehearing Officer to address prehearing
17 matters and then to coordinate hearing dates on the
18 calendar with the Chairman's Office, who is designated
19 as our keeper of the calendar for the Commission as a
20 whole.

21 And I, too, thank former Chairman Graham for
22 not assigning me to this docket --

23 (Audience laughter.)

24 **COMMISSIONER EDGAR:** -- when he had the
25 ability and authority to. So thank you, my friend.

1 But with that, I do recognize, again, that the
2 Prehearing Officer by our process, and also, in fact, is
3 the closest to this. I do not believe that the standard
4 was met, and, therefore, I will be supporting the staff
5 recommendation on Issue 3 at the appropriate time.

6 **CHAIRMAN BRISÉ:** Okay. I think we are in the
7 posture to accept a motion.

8 **COMMISSIONER EDGAR:** I move staff
9 recommendation.

10 **COMMISSIONER BROWN:** Second.

11 **CHAIRMAN BRISÉ:** Okay. It has been moved and
12 seconded.

13 Any further discussion?

14 Seeing none, all in favor say aye.

15 (Vote taken.)

16 **CHAIRMAN BRISÉ:** Okay.

17 **MR. YOUNG:** Issue 4.

18 **CHAIRMAN BRISÉ:** Okay. Issue 4.

19 **COMMISSIONER EDGAR:** I move staff rec.

20 **COMMISSIONER BROWN:** Second.

21 **CHAIRMAN BRISÉ:** All right. Moved and
22 seconded.

23 All in favor say aye.

24 (Vote taken.)

25 **CHAIRMAN BRISÉ:** Okay. Any further comments

1 for the good of the order?

2 Commissioner Balbis.

3 **COMMISSIONER BALBIS:** Thank you, Mr. Chairman.

4 And at risk of making additional comments, I
5 just wanted to reiterate some of the comments that I
6 made earlier. You know, I recognize how important this
7 case is. I think we all do that. We have all made
8 those comments. This is a unique case, but, you know,
9 this is a case that we are prepared to consider.

10 We have a process in place. My office is
11 always open to consider any motions and rule on the
12 merits of such motions. So I, again, want to reiterate
13 the Chairman's comments on encouraging the parties to
14 work together for a free flow of information and any
15 disputes will follow the proper channels. So I want to
16 thank you.

17 **CHAIRMAN BRISÉ:** All right. Thank you.

18 **MR. REHWINKEL:** Thank you, Mr. Chairman and
19 Commissioners, for your consideration. I really
20 appreciate it.

21 **CHAIRMAN BRISÉ:** Thank you.

22 So with that, we thank you for your
23 participation today and we stand adjourned.

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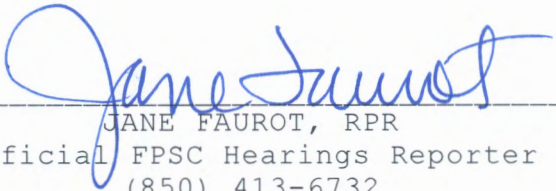
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I, JANE FAUROT, RPR, Chief, Hearing Reporter Services Section, FPSC Division of Commission Clerk, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

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 11th day of June, 2013.



JANE FAUROT, RPR
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