BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Cost Recovery Clause

Docket No. 140009-EI
Submitted for filing: August 18, 2014

DUKE ENERGY FLORIDA, INC.'S POST-HEARING BRIEF

Pursuant to Section 366.93, Florida Statutes, and Rule 25-6.0423, Florida Administrative Code, Duke Energy Florida, Inc. ("DEF" or the "Company"), petitioned the Florida Public Service Commission ("FPSC" or the "Commission"), to recover its costs for the Levy Nuclear Project ("LNP" or "Levy") and the Crystal River Unit 3 ("CR3") Extended Power Uprate ("EPU") Project through the Nuclear Cost Recovery Clause ("NCRC"). The Commission held a hearing to consider DEF's request on August 4, 2014. The record in this case conclusively demonstrates that the requirements of Section 366.93 and Rule 25-6.0423 have been met, and the Commission should therefore grant DEF's request. Pursuant to Order No. PSC-14-0384-PHO-EI, issued July 24, 2014, DEF submits its Post-Hearing Statement of Issues, Positions, and Incorporated Arguments in support of its position that the Commission should grant DEF's request.

I. BASED ON THE UNDISPUTED RECORD EVIDENCE DEF IS ENTITLED TO THE RELIEF REQUESTED IN ITS PETITION.

DEF's Petition requested that the Commission grant DEF recovery of its prudently incurred actual costs and its reasonably estimated costs for the LNP and CR3 EPU projects pursuant to Section 366.93 and Rule 25-6.0423. The evidence DEF presented to the Commission on these issues was either stipulated to or undisputed by the parties at the hearing. All CR3 EPU-related issues were resolved by stipulation approved by the Commission at the hearing. (Hrg. Exh. #96; T. 310). This stipulation also resolved the prudence of the LNP 2012 and 2013

project management, contracting, accounting, and cost oversight controls and the prudence of the LNP 2012 and 2013 actual costs. (Id.). No intervener presented any testimony or elicited any testimony from DEF witnesses disputing any of the evidence DEF presented supporting the remaining LNP issues in this Docket. (Hearing Transcript, Vols. 2-3). There is, therefore, no dispute on the record evidence in this proceeding that DEF is entitled to the relief requested in its Petition and, accordingly, DEF requests that the Commission grant DEF the relief requested and enter an Order approving that relief.

The Office of Public Counsel ("OPC") made clear in its opening statement that "its case" was about its request that the Commission direct DEF to credit $54 million for the benefit of customers in January 2014. (T. 375). The Interveners made clear in their opening statements too that this was the only real issue in this Docket. (T. 377-385). There is no factual or legal basis for the Commission to grant the Interveners' request, and accordingly, their request must be denied.

All parties concede that the $54 million "credit" that OPC and the interveners claim for the benefit of customers has never been paid to DEF in January 2014, or on any other date for that matter. There is no factual basis in the record for this "credit" to customers. It is simply a fiction to designate this sum as a "credit" for the benefit of customers in January 2014 (or on any other date). The record evidence does demonstrate, however, that engaging in this fictional "credit" is a violation of Generally Accepted Accounting Procedures ("GAAP"). There is no evidence in the record, then, to support the "credit" requested by interveners.

This claimed "credit" is the sum of two payments DEF made in 2008 and 2009 under the LNP Engineering, Procurement, and Construction ("EPC") contract to Westinghouse Electric Company ("WEC") for Long Lead Equipment ("LLE") for the LNP. The Commission reviewed

and approved the evidence supporting DEF's recovery of these costs and determined that the costs were prudently incurred by DEF under Section 366.93 and Rule 25-6.0423 in prior, final Commission Orders. (Order No. PSC-09-0783-FOF-EI, Order No. PSC-11-0095-FOF-EI). There is no legal basis for the Commission to "credit" customers these payments when the Commission previously found that these payments were prudently incurred.

DEF subsequently elected not to proceed with LNP construction under Section 366.93(6) and expressed its intent to terminate the LNP EPC agreement at a reasonable time because DEF was unable to obtain the Combined Operating License ("COL") for the LNP by January 1, 2014. This decision is reflected in the 2013 Revised and Restated Settlement Agreement ("2013 Settlement Agreement") signed by the interveners that the Commission approved in Order No. PSC-13-0598-FOF-EI. After DEF terminated the EPC agreement, DEF and WEC asserted claims against each other under that agreement. One is DEF's claim for a refund of the $54 million in LLE payments to WEC. Another is WEC's claim for $512 million from DEF. The resolution of these disputed claims is now pending before the federal court in North Carolina which has the jurisdiction to resolve these claims. If the federal district court resolves DEF's claim in DEF's favor DEF will refund customers the $54 million. DEF, however, cannot "credit" customers with a refund that the federal district court has not yet decided it is entitled to receive from WEC.

The interveners do not suggest that the Commission has the jurisdiction to resolve the disputed contract claims between DEF and WEC. They assert that the Commission can, nevertheless, "credit' customers the disputed $54 million claim before that claim is resolved by the federal district court in North Carolina under the Nuclear Cost Recovery Clause ("NCRC") rule because the payments were made for work that was intended to be performed but was never

actually performed or because DEF should assume or share the risk with customers of receiving this refund in the federal court litigation. (T. 375-76, 379-80). Interveners are wrong. The Commission cannot legally require DEF to "credit" customers for prudently made payments under circumstances that later changed. There is a long line of Commission and judicial authority that precludes such "hindsight" determinations, and, the Court, not the Commission, will determine if the changed circumstances entitle DEF to a refund under the EPC agreement. DEF is further entitled to recover its prudently incurred LNP costs under the NCRC statute and Commission rule and DEF is not required to assume or share the risk of recovering prudently incurred costs with customers. The Commission rejected this same argument in Order No. PSC-11-0095-FOF-EI in Docket No. 100009-EI.

There is, therefore, no record evidence or legal basis to support the interveners' claim that DEF should "credit" customers $54 million now for a claim that has not yet been decided by the federal court with the proper jurisdiction to resolve this claim. The Commission cannot and should not take any action on this issue at this time.

II. DEF'S ISSUES, POSITIONS, AND INCORPORATED ARGUMENTS:

A. LEVY PROJECT.

Issue 1: Should the Commission find that during the years 2012 and 2013, DEF's project management, contracting, accounting and cost oversight controls were reasonable and prudent for the Levy Units 1 & 2 project?

Stipulated Position: [1]

> ***Yes, for the year 2012 and 2013, DEF's project management, contracting, accounting and cost oversight controls for the Levy Units 1 & 2 project were reasonable and prudent. ***

[1] Issue 1 was included in the Category II Stipulation that was approved by the Commission on Aug. 4, 2014.

Issue 2: Has DEF reasonably accounted for COL pursuit costs pursuant to paragraph 12(b) of the 2013 revised and restated stipulation and settlement agreement?

DEF Position:

> *** Yes. DEF reasonably and prudently incurred COL-related costs in 2013 that were necessary for the Levy COLA and consistent with the 2013 Settlement Agreement. In 2014, DEF has taken steps to ensure that COL-related costs, as defined in the 2013 Settlement Agreement, are not included in the NCRC proceeding. DEF segregates project costs incurred by specific project code. Accordingly, for 2014, the team charges COL-related labor, NRC fees, vendor invoices and all other COL-related cost items to the applicable COL project codes. Thereafter, the Regulatory Accounting and Regulatory Strategy groups ensures that the COL-related project codes and associated costs incurred in 2014 and beyond are not included in the Company's NCRC Schedules, and thus not presented for nuclear cost recovery. COL-related costs will however continue to be tracked for accounting purposes consistent with the 2013 Settlement Agreement.***

The Undisputed Evidence Demonstrates That DEF Reasonably Accounted For COL-Pursuit Costs Pursuant To The 2013 Settlement Agreement

The undisputed evidence demonstrates that DEF has reasonably and prudently incurred COL-related costs in 2013 that were necessary for the Levy Combined Operating License Application ("COLA") and consistent with the 2013 Settlement Agreement. (T. 395, 530-534). The undisputed evidence also demonstrates that DEF's COL-pursuit costs for 2014 were reasonably accounted for pursuant to the 2013 Settlement Agreement. (T. 405, 498, 552). No one challenged this evidence. Additionally, Staff financial witnesses identified no findings in their audits of DEF's cost recovery request. (T. 351-360). Based on the undisputed record evidence the Commission should find that DEF reasonably accounted for COL-pursuit costs pursuant to paragraph 12(b) of the 2013 Settlement Agreement.

Issue 2A: What jurisdictional amounts should the Commission approve as DEF's final 2012 and 2013 prudently incurred cost for the Levy Units 1 & 2 project?

Stipulated Position: [2]

> ***DEF's Levy Units 1 & 2 project 2012 prudently incurred jurisdictional amounts are $25,335,581 in capital costs, $988,205 in O&M costs, and $48,424,466 in carrying costs. The final 2012 net under-recovery of $3,644,953 is being recovered during 2014 and no further action is necessary. DEF's final 2013 prudently incurred jurisdictional amounts are $88,441,047 in wind-down / exit costs, and $19,593,800 in carrying costs. The final 2013 net over-recovery of $4,727,095 should be included in setting the allowed 2015 NCRC recovery.***

Issue 3: Should the Commission approve DEF's Levy Project exit and wind down costs and other sunk costs as specifically proposed for recovery or review in this docket?

DEF Position:

> *** Yes. DEF dispositioned the LLE in active fabrication and consequently reduced ongoing contractual costs, resulting in savings compared to the committed contractual payments, for DEF and its customers. DEF further reduced WEC's activities and costs to assist with the LLE disposition and wind down the project. DEF terminated the EPC Agreement when it was unable to obtain the COL by January 1, 2014, and, does not owe a termination fee under the EPC Agreement. DEF closed out its relationship with S&W in a timely and cost-effective manner for DEF and its customers. DEF's actions have been and will continue to be reasonable and prudent for DEF and its customers.**
>
> **DEF's testimony and exhibits only present for recovery those costs that are recoverable consistent with the 2013 Settlement Agreement. There has been no evidence presented that any cost presented for recovery does not comply with the NCRC statute or rule or the 2013 Settlement Agreement. Accordingly, the Commission should approve the following costs presented for recovery in this docket.**

Based on DEF's May 1, 2014 filing 2014 Est/Act:

> **Wind-Down / Exit Costs (Jurisdictional) $25,216,773**
> **Carrying Costs $13,534,781**
>
> **The under-recovery of $7,990,738 should be included in setting the allowed 2015 NCRC recovery.**

[2] Issue 2A was part of the Category II Stipulation that was approved by the Commission on Aug. 4, 2014.

The 2014 variance is the sum of under-projection exit/wind-down costs of $12,627,988 plus an over-projection of carrying costs of $4,637,250. (Foster, Fallon).

Based on DEF's May 1, 2014 filing <u>2015 Projection</u>:

Wind-Down / Exit Costs (Jurisdictional) $1,209,912
Carrying Costs $5,479,030

For the LNP, an amount necessary to achieve the rates included in Exhibit A ($3.45/1,000kWh on the residential bill) of the Settlement Agreement approved in Order No. PSC-13-0598-FOF-EI page 176 should be included in establishing DEF's 2015 CCRC. *

<u>The Undisputed Evidence Demonstrates DEF's Exit And Wind Down Costs Should Be Approved by the Commission in this Docket</u>

The undisputed evidence demonstrates that DEF reasonably and prudently incurred exit and wind down costs in 2014, and reasonably estimated or projected costs in 2014 and 2015 that are necessary for the LNP wind down, consistent with the 2013 Settlement Agreement. (T. 406-419, 499-509). No one challenged this evidence. In fact, every party, except the Florida Industrial Power Users Group ("FIPUG") took "No Position" on this issue in the Prehearing Order. <u>See</u> Order No. PSC-14-0384-PHO-EI, p. 22-23. While FIPUG asserted DEF's costs were not "reasonably quantified" and should not be approved, (<u>id.</u> at p. 23), FIPUG did not present any evidence or elicit any testimony from DEF's witnesses that the costs were not "reasonably quantified" or otherwise recoverable by DEF. (T. 475-487, 613-630). Based on the undisputed evidence the Commission should approve DEF's LNP exit and wind down costs.

<u>Issue 4:</u> What action, if any, should the Commission take in the 2014 hearing cycle with respect to the $54,127,100 in Long Lead Equipment milestone payments, previously recovered from customers through the NCRC, which were in payment for Turbine Generators and Reactor Vessel Internals that were never manufactured?

<u>DEF Position:</u>

*** None. The $54 million referenced by OPC was incurred by DEF in 2008 and 2009 based on the circumstances of the project at that time and was determined by the Commission to be a prudent cost incurred by DEF. To the extent OPC or any party**

suggests by this issue that the Commission can review the prudence of a cost it previously determined to be prudent, that is contrary to law and Commission rule. See Fla. Admin. Code R. 25-6.0423(6)(a)(3).

DEF is actively pursuing litigation in federal court against WEC in order to recover any and all costs that it can for customers, including the $54 million payment. If and when a court determines, after appropriate appeal or further review, that DEF is entitled to recover from WEC the $54 million previously paid WEC for LLE, DEF will credit the amount of the court award to customers. As such, the Commission should take no action in the 2014 NCRC on this issue.*

There is No Factual or Legal basis for a $54 Million "Credit" for a Refund of Prudently Incurred and Paid LLE Costs that has Not Yet been Awarded by the Court with Jurisdiction to Resolve This Refund Claim

The Commission should not take any action to "credit" customers for a $54 million refund that has not yet occurred and that is the subject of claims pending at this time in a North Carolina federal district court with the proper jurisdiction to resolve the claims. (DEF Complaint, Hrg. Exh. #97). If the North Carolina federal district court finally determines DEF is entitled to recover from WEC the $54 million previously paid WEC for LLE under the EPC agreement, DEF will credit the amount of the Court award to customers. (T. 623-24). As a result, the Commission does not need to take any action at this time.

Interveners claim DEF should, nevertheless, "credit" customers $54 million effective January 2014, when DEF terminated the EPC agreement, because (1) the $54 million represents prudent LLE payments made to WEC under the EPC agreement with the intention at the time the payments were made that the LLE work would be performed when, due to subsequent events beyond DEF's control, the work was never performed; and (2) DEF should share the risk with customers --- or in their terms have "some skin in the game" or to put the "onus" of collection on Duke --- of the refund of these prudently incurred costs in DEF's pending federal district court claim. (T. 375-76; 379-80; 384). Interveners are plainly both factually and legally wrong.

There is no factual or legal justification for the Commission to "credit" customers the $54 million at this time and the Commission should take no action on this issue.

i. There is no factual basis for the Commission to "credit" customers $54 million in January of 2014 as Interveners request.

OPC (and interveners) request that the Commission order DEF to "credit" customers $54 million in January 2014 for a refund of disputed LLE payments in federal district court in North Carolina that has not occurred and does not exist. (T. 451-452, 454). OPC admitted that the "hypothetical" accounting he questioned Mr. Foster about to reflect this "credit" he wants the Commission to order DEF to record is pure fiction. (T. 451). As Mr. Foster pointed out, DEF did not receive a payment from WEC of $54 million in January of 2014, or at any other time. (T. 451-452, 454). Mr. Foster admits that if DEF had received this money in January 2014, DEF would have reflected that credit in its Nuclear Filing Requirements ("NFR") schedule. (T. 451). DEF cannot legally record in its financial schedules a cash "credit" that it has not received. Mr. Foster explained that recording a cash "credit" that DEF has not received violates GAAP financial standards. (T. 451-452, 454, 459). There is no factual basis for the Commission to order DEF to record this "credit" in January 2014.

OPC and interveners may next argue that the Commission should order DEF to record the $54 million "credit" as a non-cash accrual in its NFR and financial schedules at some future point in time. (T. 459). Again, there is no factual basis for DEF to record a non-cash accrual for a future recovery, or payment for that matter, that is contingent on the future outcome of pending litigation. As explained by Mr. Foster, DEF cannot record a non-cash accrual for the $54 million under GAAP because the $54 million is the subject of contested litigation. It is a violation of GAAP financial standards and the Company's accounting policies and procedures to record a gain --- or a loss --- contingency under these circumstances. (T. 459). In other words, there is no

accounting reason to treat the $54 million DEF claim gain contingency differently from the $512 million DEF loss contingency that arises from the WEC claims against DEF in the same federal district court litigation.

The unremarkable evidence developed by interveners at the hearing that DEF can mathematically perform the calculations to make these "credit" adjustments does not provide the Commission any justification for requiring the Company to make them. The record evidence is clear that there is no factual or accounting basis to order DEF to make either a cash "credit" or non-cash accrual "credit" to its books for the $54 million claim that is the subject of litigation properly pending before a federal court in North Carolina. (T. 455; 459). DEF's firm belief that it is entitled to the $54 million refund from WEC and the fact that DEF is vigorously pursuing this claim in the litigation does not create the certainty required for the refund to be recorded even as an accrual on the Company's books. (Id.). The outcome of DEF's claim is speculative and conjectural and cannot be recorded until the claim is resolved in the litigation.

DEF obviously cannot present its claim against WEC for the $54 million refund to the Commission to resolve because the Commission has no jurisdiction to award damages in breach of contract actions and it therefore has no jurisdiction over the WEC claims. *Deltona Corp. v. Mayo*, 342 So. 2d 510, 512 (Fla. 1977). The Commission simply lacks the jurisdictional basis to require DEF to record a gain contingency in its NFR and financial schedules for rate making purposes --- and, again, there is no reasonable basis to treat DEF's gain contingency different from the loss contingency based on WEC's $512 million claim against DEF in the same contested litigation despite OPC's vigorous attempts to distinguish them. Inclusion of either claim, or portions of either claim, in the Company's NFR and financial schedules as an accrual would be speculative and conjectural and inappropriate. (T. 455; 459).

The interveners' reliance on DEF's decision to record for ratemaking purposes in the Fuel Clause future expected payments from the Nuclear Electric Insurance Limited ("NEIL") for the initial CR3 delamination repair under applicable NEIL insurance policies as a justification for the Commission to order DEF to record the $54 million claim against WEC as a cash or non-cash accrual "credit" for customers is misplaced. (T. 460-465). As Mr. Foster explained, DEF's decision to record future expected NEIL payments through the Fuel Clause for rate making purposes was a very different situation. (T. 461).

First, DEF voluntarily agreed to this credit in the Fuel Clause; there was no Commission order directing DEF to record the credit. (T. 486). Additionally, and more importantly, NEIL had already made payments to DEF for the initial CR3 delamination and, while NEIL stopped making those payments when the second delamination occurred, NEIL never disputed the fact that the initial delamination repair was covered under the NEIL insurance policies. The disputes between NEIL and DEF under the insurance policies did not involve the future expected payments for the covered initial delamination repair that DEF recorded for ratemaking purposes for the benefit of DEF's customers through the Fuel Clause. (T. 493).

These facts are in stark contrast to the circumstances of the current $54 million "credit" that the interveners claim where (1) at no point has WEC offered to pay or even conceded that it owes DEF any part of the $54 million refund that DEF claims; (2) the DEF refund claim is a claim in disputed litigation presently in front of a federal district court judge in North Carolina; and (3) the outcome of this claim in that litigation is beyond DEF's control and therefore is unknown at this time. DEF's voluntary decision to record future, expected and admittedly owed NEIL payments is not analogous and it provides no authority for the interveners to argue that the

Commission should order DEF to record a "credit" to customers for ratemaking or other purposes for the $54 million.

ii. There is no legal authority for the Commission to grant interveners' request for an order requiring DEF to "credit" customers for the $54 million refund claim.

Interveners' request that the Commission order DEF to "credit" customers $54 million for prudently incurred LLE payments violates the Commission rule precluding the Commission from re-visiting its determination that a NCRC cost was prudently incurred and long-standing Commission and judicial authority precluding hindsight review. Rule 25-6.0423(6)(a)2., (c)3., F.A.C. (costs determined to be prudently incurred "shall not be subject to disallowance or further prudence review."); *In Re: Progress Energy Florida, Inc.,* Docket No. 060658-EI, Order No. PSC-07-0059-PCO-EI, 2007 WL 174063 (Fla. P.S.C. Jan. 22, 2007); *In re Aloha Utilities, Inc.*, Docket No. 950615-SU, Order No. PSC-97-0280-FOF-WS, 1997 148679 (Fla. P.S.C. March 12, 1997); *In Re Tampa Electric Co.*, Docket No. 031033-EI, Order No. PSC-05-0312-FOF-EI 2005 WL 733109 (Fla. P.S.C. March 21, 2005); *Richter v. Florida Power Corp.,* 366 So. 2d 798, 800 (Fla. 2d DCA 1979). There is no legal authority for the Commission to grant interveners' request and, therefore, the Commission should take no action with respect to the Company's $54 million claim against WEC at this time.

It is undisputed that DEF incurred the $54 million in its current refund claim against WEC when DEF made LLE payments to WEC in 2008 and 2009 pursuant to the terms of the EPC agreement. (T. 441, 580; Hrg. Exh. #98). It is further undisputed that the $54 million LLE payments were reviewed by the Commission and determined to be prudent. (T. 440-441, 444). The Commission approved the $54 million LLE payments for cost recovery in the Commission's 2009 and 2010 NCRC Orders on Nov. 19, 2009 and Feb. 2, 2011, respectively, and those Orders

are final.[3] DEF agrees that all or most of the $54 million in prudent LLE payments have been recovered from customers. (T. 448).

Circumstances subsequently changed. DEF suspended the EPC agreement and the LLE purchase orders that are the subject of DEF's $54 million refund claim against WEC after the Nuclear Regulatory Commission ("NRC") indicated that DEF would not receive a Limited Work Authorization ("LWA") prior to receipt of the LNP COL. DEF needed the LWA to meet the in-service dates for the LNP under the schedule in the EPC agreement. The Commission determined that DEF's actions and planning regarding the LWA leading up to the signing of the EPC agreement were reasonable and consistent with good business practices. Order No. PSC-09-0783-FOF-EI, p. 30. DEF subsequently evaluated the feasibility of completing the LNP on a schedule shift accounting for the LWA determination, or a longer-term suspension while focusing work on obtaining the LNP COL, against cancelling the LNP and terminating the EPC agreement. DEF decided to continue the LNP and focus on obtaining the LNP COL under the suspended EPC agreement. The Commission reviewed DEF's decision and found that DEF's "decision to continue pursuing a COL for the LNP reasonable." Order No. PSC-11-0095-FOF-EI, page 35. As a result, of these decisions, DEF believes that no work commenced and no work was performed under the LLE purchase orders that are the subject of DEF's $54 million refund claim against WEC. (T. 569, 573, 580). That is the reason DEF has sued WEC for a refund of the $54 million LLE payments now that DEF has cancelled the LNP and terminated the EPC agreement.

Interveners rely on these changed circumstances to assert that the Commission should order DEF to "credit" customers with a refund for the $54 million in prudent LLE payments. They argue that the Commission should order DEF to make this "credit" because no work was

[3] Order No. PSC-09-0783-FOF-EI and Order No. PSC-11-0095-FOF-EI.

performed under these LLE purchase orders. (T. 376, 378). They necessarily require the Commission to review the prior, prudent LLE payments and determine if they remain prudent based on the changed circumstances. Indeed, by demanding that DEF "credit" customers the $54 million before the Court has awarded DEF that refund amount on its litigation claim the interveners in effect ask the Commission to disallow costs previously determined by the Commission to be prudent. That the Commission cannot do. Rule 25-6.0423(6)(a)2., (c)3., F.A.C. (costs determined to be prudently incurred "shall not be subject to disallowance or further prudence review.") (emphasis added).

What the interveners demand the Commission do is quintessential hindsight review. *See In Re: Progress Energy Florida, Inc.,* Order No. PSC-07-0059-PCO-EI. Hindsight review involves applying facts as the Commission and parties know them today to Commission decisions made in the past. *Id.* The Commission has appropriately rejected the application of hindsight review in the past and should reject the application of hindsight review required here to order DEF to "credit" customers $54 million for a refund of previously determined prudent LLE payments. *Id.; In re Aloha Utilities, Inc.*, Order No. PSC-97-0280-FOF-WS; *In Re Tampa Electric Co.*, Order No. PSC-05-0312-FOF-EI; *see also Richter,* 366 So. 2d 798 at 800. In sum, interveners' demand that the Commission order DEF to "credit" customers $54 million for previously determined prudent LLE payments is improper under the Commission's NCRC rule and settled Commission and judicial precedent.

iii. The Commission has already rejected the interveners' risk-sharing concepts as unauthorized and improper under Section 366.93.

Interveners argue that the Commission should order DEF to "credit" customers $54 million because the "onus" of collection should be placed on DEF or because DEF should have "some skin in the game." (T. 376, 380). These arguments are nothing more than arguments that

DEF should either assume or share in the recovery risk for costs prudently incurred for the LNP. The Commission has already rejected this argument because "risk-sharing" for prudently incurred nuclear power plant costs is not authorized by the Florida Legislature under 366.93 and it is therefore improper. The Commission held: "we find that we do not have the authority under the existing statutory framework to require a utility to implement a risk sharing mechanism that would preclude a utility from recovering all prudently incurred costs." Order No. PSC-11-0095-FOF-EI, P. 9. (emphasis added). The Commission, therefore, must once again reject the interveners' arguments that DEF should assume or share the risk of payment for or recovery of prudently incurred costs by having "some skin in the game" or assuming the "onus" of collecting a refund from WEC for prudently incurred costs.

DEF will, of course, vigorously pursue its claim against WEC for a refund of the $54 million in LLE payments to WEC that the Commission previously determined were prudently incurred. The Florida Legislature, however, provided that DEF shall recover all prudently incurred nuclear power plant costs and DEF, therefore, cannot be obligated to share in or assume the risk of payment for prudently incurred costs.

For all of these reasons, the Commission cannot and should not take any action at this time with respect to DEF's claim for a $54 million refund pending in federal district court in North Carolina.

Issue 5: What restrictions, if any, should the Commission place at this time on Duke's attempts to dispose of Long Lead Equipment?

DEF Position:

***None. First, as a factual matter, DEF stipulates that DEF's disposition of the Levy Long Lead Equipment (LLE) is separate and independent from DEF's pursuit of the Levy COL. DEF, accordingly, will disposition the LLE without regard to the status of the Levy COL. DEF will disposition the LLE**

based solely on the reasonable and prudent decisions with respect to the LLE. In no way, will these decisions depend on DEF's decisions with respect to the COL. DEF will continue to pursue the Levy COL consistent with the requirements in the 2013 Settlement Agreement.

Second, as a legal matter, this proposed issue appears to suggest that the Commission can issue some sort of prospective injunctive action against DEF to restrain DEF from actions that it may or may not take in the future. Pursuant to the NCRC statute and rule, the Commission is empowered to review DEF's actual activities and costs to determine if DEF's LNP costs were prudently incurred; however, the Commission has no authority to prospectively enjoin DEF from some unknown, speculative future action, nor does the Commission have continuing jurisdiction in this docket related to DEF's pursuit of the COL post-2013 based on the 2013 Settlement Agreement, which removed post-2013 COL costs from the NCRC. Accordingly, the Commission should take no action in the 2014 NCRC on this issue.*

The Commission Should Not Take Any Action To Prospectively Restrict DEF's Disposition Of The LLE

No evidence was presented at the hearing regarding any restrictions on DEF's LLE disposition decisions. No interveners even asked any DEF witness about prospective restrictions that the Commission should impose on DEF's attempts to dispose of the Levy LLE. (Hearing Transcripts, Vols. 2-3). It is therefore impossible for DEF to respond to what "restrictions" interveners may or may not propose for the Commission to impose on DEF's disposition of the LNP LLE.

The Commission, therefore, cannot fairly consider any proposed restrictions that may now appear for the first time in the interveners' post-hearing briefs and position statements. DEF obviously has not been provided notice of and the opportunity to fairly respond to any such proposed restrictions. For this reason alone, the Commission should reject any proposed restrictions on DEF's LLE disposition decisions and take no action at all on this issue.

Apart from the fact that the interveners wholly failed to present any evidence on this issue at the hearing, the Commission should decline to address any proposed prospective

restrictions on DEF's LLE disposition decisions because the Commission does not have the power to issue injunctive relief. Injunctive relief is a judicial power, not a Commission power. *See Trawick v. Florida Power & Light Co.*, 700 So. 2d 770, 771-72 (Fla. 2d DCA 1997 (an injunction is a judicial remedy); Rule 25-22.030, F.A.C. (Commission may seek relief in circuit court for injunctive relief where entity has violated Commission Order or Rule and such violation impairs the operations or service of the entity); *In Re: Tamiami Village Utility*, Inc., Docket No. 930642-WS, Order No PSC-94-0210-FOF-WS, 1994 WL 90063 at *12 (Fla. P.S.C. February 21, 1994) (though Commission has police powers to protect "health, safety, and welfare" the right to issue injunctive relief is reserved to the circuit court); *In Re: Petition to Investigate, Russ, et al*, Docket No. 060640-TP, Order No. PSC-07-0332-PAA-TP, 2007 WL 1186156 (Fla. P.S.C. April 16, 2007) (noting that Commission does not have the power to issue injunctions). The Commission does not have the power to issue an order that prospectively restricts DEF's future LLE disposition decisions.

The Commission does have the authority to review and determine if DEF's LLE costs as a result of DEF's LNP LLE disposition decisions are reasonable and prudent. DEF in fact has presented costs related to several LLE disposition decisions in this Docket and no party has disputed DEF's evidence that these costs were prudently incurred and these LLE disposition decisions were reasonable. DEF will continue to present its LNP LLE disposition costs from its LLE disposition decisions for Commission prudence review.

Accordingly, for all these reasons, DEF submits that the Commission cannot and should not take any action on this issue at this time.

B. EPU PROJECT.

Issue 6: Should the Commission find that during the years 2012 and 2013, DEF's project management, contracting, accounting and cost oversight controls were reasonable and prudent for the Crystal River Unit 3 Uprate project?

Stipulated Position: [4]

*** Yes, for the year 2012 and 2013, DEF's project management, contracting, accounting and cost oversight controls for the Crystal River Unit 3 Uprate project were reasonable and prudent.**

The IRP (Investment Recovery Project) is an ongoing process that began in 2013 and continues to evolve through 2014 as seen in the stipulated Duke responses to Staff Interrogatories 2 and 3. The NCRC is only concerned with the IRP process that is applicable to CR3 EPU project costs. At this time, that process is not final as to methods, execution or timing. Additionally, the IRP process applies to both the EPU assets and the balance of assets that make up the CR3 Regulatory Asset, which are not the subject of NCRC cost recovery or prudence determinations. For these reasons, the parties agree that the Commission's determination of the prudence of the IRP process should occur in the 2015 hearing. The parties further agree that the costs of the initial designing and the inception of implementation of the IRP, incurred in 2013, as well as any EPU costs incurred in 2013 to disposition EPU assets consistent with the IRP, as proposed by Duke in the testimony of witnesses Foster and Delowery are prudent for cost recovery purposes. However, such determination of prudence of costs is not determinative, by itself, of the prudence of Duke's overall efforts to design and implement the IRP for all CR3 asset disposition efforts.*

Issue 7: What jurisdictional amounts should the Commission approve as DEF's final 2012 and 2013 prudently incurred cost for the Crystal River Unit 3 Uprate project?

Stipulated Position: [5]

***DEF's Crystal River Unit 3 Uprate project 2012 prudently incurred jurisdictional amounts, net of joint owner and other adjustments are $34,217,595 in capital costs, $432,585 in O&M costs, $21,205,814 in carrying costs and a credit of $3,242,310. The final 2012 net under-recovery of $2,596,849 is being recovered during 2014 and no further action is necessary. DEF's final 2013 prudently incurred jurisdictional amounts are $12,399,539 in wind-down / exit costs, and $26,804,602 in carrying costs. The final 2013**

[4] Issue 6 was included in the Category II Stipulation that was approved by the Commission on Aug. 4, 2014.
[5] Issue 7 was included in the Category II Stipulation that was approved by the Commission on Aug. 4, 2014.

net over-recovery of $524,697 should be included in setting the allowed 2015 NCRC recovery.*

Issue 8: Should the Commission approve DEF's Crystal River Unit 3 Uprate Project exit and wind down costs and other sunk costs as specifically proposed for recovery or review in this docket?

Stipulated Position: [6]

Yes. There has been no evidence presented that any cost presented for recovery does not comply with the NCRC statute or rule or the 2013 Settlement Agreement. DEF's estimated / actual 2014 incurred jurisdictional amounts, net of joint owners adjustments, are $854,377 in wind-down / exit costs, and $23,872,966 in carrying costs. An estimated 2014 net under-recovery of $155,210 should be included in setting the allowed 2015 NCRC recovery. The projected 2015 jurisdictional amounts are $343,451 in wind-down / exit costs, $19,549,192 in carrying costs, and amortization of $43,681,007 which totals $63,573,650.

C. ULTIMATE ISSUE.

Issue 9: What is the total jurisdictional amount to be included in establishing DEF's 2015 Capacity Cost Recovery Clause Factor?

DEF Position:

***The total jurisdictional amount to be included in establishing DEF's 2015 Capacity Cost Recovery Clause factor should be $167,195,304 (before revenue tax multiplier). This consists of $63,204,163 for the EPU project and an estimated amount of $103,991,141 for the LNP.**

***For the LNP, the final amount necessary to achieve the rates included in Exhibit A ($3.45/1,000kWh on the residential bill) of the Settlement Agreement approved in Order No. PSC-13-0598-FOF-EI page 176 should be included in establishing DEF's 2015 CCRC revenue requirements. ***

Based On The Record Evidence the Jurisdictional Amount To Be Included in the 2015 Capacity Cost Recovery Clause Factor Is Undisputed

The jurisdictional amount for the EPU project to be included in the 2015 CCRC was established by stipulation as the amount indicated in DEF's position statement. (Hrg. Exh. #96). For the Levy project, the 2012 and 2013 LNP actual costs were stipulated and no intervener

[6] Issue 8 was included in the Category II Stipulation that was approved by the Commission on Aug. 4, 2014.

presented any evidence disputing the reasonableness of the estimated LNP 2014 and 2015 exit and wind down costs that DEF presented for Commission approval. The 2013 Settlement Agreement, approved by the Commission in Order No. PSC-13-0598-FOF-EI, established the jurisdictional amount to be included in the 2015 CCRC as the final amount necessary to achieve the rates included in Exhibit A ($3.45/1,000kWh on the residential bill) of the 2013 Settlement Agreement. Accordingly, based on the undisputed record evidence and stipulations, DEF's position on this Issue should be approved.

III. CONCLUSION.

For the reasons discussed above, DEF respectfully requests Commission approval of its Petition for cost recovery and its Positions as presented in this Post-hearing Brief.

Respectfully submitted on the 18th day of August, 2014,

/s/ Blaise N. Gamba

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing has been furnished to counsel and parties of record as indicated below via electronic mail this 18th day of August, 2014.

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