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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear Cost Recovery
Clause.

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**CITIZENS' POST-HEARING STATEMENT OF POSITIONS
AND POST-HEARING BRIEF ON PROGRESS ENERGY FLORIDA ISSUES**

Pursuant to Order No. PSC-11-0335-PHO-EI, issued August 9, 2011, the Citizens of the State of Florida by and through the Office of Public Counsel ("Citizens" or "OPC"), hereby submit this Post-Hearing Statement of Positions and Post-Hearing Brief on the issues pertaining to Progress Energy Florida ("PEF").

PRELIMINARY STATEMENT

The OPC submits this brief asking the Commission to make the following findings and take the following actions in the 2011 phase of the Nuclear Cost Recovery Clause ("NCRC") docket:

1. Find the uncertainty surrounding the Levy Project in service schedule and public "Plan of Record" ("Program of Record" or POR)¹ was in part within PEF's control to prevent.
2. Due to the uncertainty surrounding the Levy Project in service schedule caused in part by Progress Energy's actions, find that PEF has not satisfied its on-going burden to prove that it has demonstrated the requisite intent to construct the Levy Project according to Section 366.93, Florida Statutes ("F.S."), nor according to PEF's public "Plan of Record."
3. Due to the uncertainty surrounding the Levy Project in service schedule caused in part by Progress Energy's actions, disallow recovery from customers any and all

¹ Throughout this brief, POR, "Plan of Record", and "Program of Record" are interchangeably used to reference the Levy Project March 2011 Integrated Project Plan ("IPP"). However, "Plan of Record" or POR should not be confused with the "March 2010 Scenario Plan of Record" referenced in the "August 2010 SMC strategic scenario analysis." In such instances, the March 2010 Scenario Plan of Record refers to PEF's system wide generation resource plan as of March 2010.

not-as-yet-incurred non-Combined Operating License Application ("COLA") related costs until after receipt of the Combined License ("COL") and after Progress Energy makes an irrevocable final decision to issue the final notice to proceed ("FNTP") and thus proceed to complete the Levy Project by 2021/2022. Until that comes to pass, the Commission should find the continued incurring of non-COLA related costs for the remainder of 2011 and the entirety of 2012 to be unreasonable.

4. Disallow as unreasonable (or defer recovery of) non-COLA costs estimated in 2011 and projected in 2012. The combined estimated and projected non-COLA cost amounts for 2011 and 2012 do not exceed \$6 million.
5. Reduce PEF's proposed rate management plan recovery amount by \$55 million from the remaining deferred rate management plan balance. Due to PEF's over-recovery in 2010 and further decreased spending in 2011, the customers should pay less in 2012. But for PEF's desire to accelerate recovery of this balance, PEF's customers should receive a rate decrease of approximately \$1.75 per customer.
6. Make other findings and determinations as appropriate under the long-term feasibility analysis issue as it relates to PEF's incomplete analysis of enterprise risks, PEF's CPVRR analysis which fails to tie back to the 2008 need determination CPVRR analysis, and recommendations to strengthen PEF's qualitative and quantitative feasibility analyses for the Levy Project.

OPC'S STATEMENT OF BASIC POSITION

It is hard to conceive of more money being spent to achieve so little in the State of Florida. It is time for the Commission to publicly state, "Enough is enough." PEF is on course to spend approximately a billion dollars of customer money (through 2013) and seems unlikely to receive anything meaningful except a few hundred millions of dollars of (potentially spare) reactor parts and a combined license ("COL") for an increasingly unlikely nuclear power plant. Uncontroverted evidence adduced at the 2011 NCRC proceeding reveals the following: 1) the continuing negative trends for nuclear project feasibility in the two critical areas of continued low forecasted natural gas prices and lack of any prospective meaningful carbon regulation, 2) PEF's at-the-time-confidential 2010

strategic scenario planning analyses was considered by the highest levels of Progress Energy's senior management prior to the 2010 NCRC proceeding, and 3) recent changes in Progress Energy's SEC filings to delete any and all reference to a 2021 commercial operation date. In light of these facts and actions, it now appears PEF is, and has been for over a year, actively considering further delays to the commercial operation date for the two nuclear units it proposes to build at the Levy county site ("Levy Project").

Based upon the uncontroverted evidence adduced at the hearing, the Commission must decide whether PEF is actively entertaining a significantly later than 2021/2022 commercial operation date for the Levy Project, and if so, then determine whether there is any reasonable need for PEF to incur any further non-COLA costs prior to receipt of the COL. It is OPC's position that doing so would be unreasonable. If instead the Commission is unable to find that PEF's POR is lacking credibility, the Commission should nonetheless err on the customer's side. Based upon the unrebutted evidence adduced at the hearing, the Commission should find there is no reasonable need to incur the non-COLA costs in 2011 and 2012. As testified by OPC witness Dr. William R. Jacobs, if non-COLA activities are delayed past 2012, then PEF can accelerate work on the non-COLA activities in 2013 and still achieve the 2021/2022 commercial operation date.

For all these reasons and the reasons set forth in this brief, Citizens respectfully asks that the Commission disallow as *unreasonable* all the yet-to-be-incurred non-COLA costs PEF estimates to incur in 2011 and projects to incur in 2012. Alternatively, the Commission should find the following as two conditions precedent before allowing receipt of any non-COLA costs on a true-up basis: 1) the receipt of the COL; and

2) PEF's affirmative and irrevocable decision to issue the FNTP and thus proceed with the Levy Project according to the 2021/2022 commercial operation dates. As such, the Commission would make no finding of reasonableness on the non-COLA amounts and could disallow PEF recovery in 2012 of the estimated 2011 and projected 2012 non-COLA costs until those two conditions precedent have occurred. Once these two conditions precedent have occurred, OPC will not oppose PEF seeking a true-up from the Commission for reasonable non-COLA costs incurred prior to the receipt of the COL. As the evidence indicates, the dollars associated with the non-COLA amount in 2012 are not expected to exceed \$6 million.

This brief will start with Issues 27A, 27B, 28A, 28B as these issues are inextricably bound together. The brief will address Issue 36 next, and then continue with the remaining issues in numerical order.

POSITIONS AND ARGUMENT ON DISPUTED ISSUES

ISSUE 27A: Is it reasonable for PEF to incur any estimated 2011 costs not necessary for receipt of the combined operating license (COL), and if not, what action, if any, should the Commission take?

*Due to uncertainty surrounding the Levy Project in service schedule caused in part by PEF's confidential, high-level strategic scenario planning activities and material changes to its SEC filings, it is unreasonable for PEF to incur any non-COLA *estimated* 2011 costs. If the Levy Project commercial operation date is beyond 2021/2022, then much of the estimated non-COLA costs would have been spent for naught. Within the publicly announced schedule for the Levy Project, there is at least one year of "float" in the schedule to handle delays. Dr. Jacobs' unrebutted testimony indicates the non-COLA activities could be accelerated without affecting the 2021/2022 commercial operation dates. Thus, the estimated non-COLA costs should be disallowed as unreasonable and/or not recoverable in 2012 rates.*

ISSUE 27B: What system and jurisdictional amounts should the Commission approve as reasonable actual/estimated 2011 costs and estimated true-up amounts for PEF's Levy Units 1 & 2 project?

Actual 2011 system and jurisdictional amounts should not be reduced, unless the Commission finds that PEF acted in bad faith by failing to disclose the confidential, high-level 2010 strategic scenario planning activities to the Commission. Absent such a finding which OPC is not advocating, OPC does not contest actual 2011 costs. OPC contests the estimated non-COLA costs and requests that the Commission find and disallow the estimated non-COLA costs as unreasonable until after the receipt of the COL and PEF's affirmative and irrevocable decision to issue the FNTP and thus proceed with the Levy Project in order to meet the 2021/2022 commercial operation dates. Alternatively, defer a finding of reasonableness until then.

ISSUE 28A: Is it reasonable for PEF to incur any projected 2012 costs not necessary for receipt of the combined operating license (COL), and if not, what action, if any, should the Commission take?

**Same argument as for Issue 27A, but pertains to projected 2012 non-COLA costs. **

ISSUE 28B: What system and jurisdictional amounts should the Commission approve as reasonably projected 2012 costs for PEF's Levy Units 1 & 2 project?

** Same argument as for Issue 27B, but pertains to projected 2012 non-COLA costs. **

COMBINED ARGUMENT ON ISSUES 27A, 27B, 28A, AND 28B

Introduction

By way of introducing OPC's combined argument for these issues, OPC urges this Commission to find as unreasonable, and thus disallow for 2012 recovery all not-yet-incurred non-COLA costs. The non-COLA costs OPC has identified for 2011 and 2012 are as follows: \$400,000 in transmission study costs (T. 1859); \$ confidential amount in transmission engineering procurement construction request for proposal ("EPC RFP") and detailed design costs (T. 1860-1861; Confidential transmission EPC RFP amount shown in Ex. 210); \$3 million additional land acquisition costs (T. 1862); and \$200,000

in costs to restart internal pre-FNTP negotiations and long-lead equipment (“LLE”) negotiations (T. 1863). OPC is not asking this Commission to disallow the non-COLA costs which PEF has already incurred, such as LLE contract payments. The total amount that OPC is asking this Commission to find unreasonable and disallow is less than \$6 million. While this amount is relatively small compared with the \$1 billion PEF projects to have spent through 2013, a disallowance of this relatively small amount is very important to the ratepayers who are obligated to pay \$1 billion for a project with a diminishing probability of completion.

Historical Overview of the Levy Project

On March 28, 2008, PEF signed a letter of intent (“LOI”) prior to the execution of the Levy Project engineering procurement construction (“EPC”) to purchase long-lead equipment (“LLE”) from Westinghouse-Shaw Consortium (“Westinghouse” or “Consortium”) related to the construction of two AP1000 reactor units. T. 1667; Ex. 155; Ex. 189, p. 23 of 38 (March 2011 Integrated Project Plan (“IPP”)). This LOI was executed prior to the start of the 2008 need determination hearing for the Levy Project. Id.; Order No. PSC-08-0518-FOF-EI, at 2.² From the moment PEF signed the LOI, PEF may well have been obligated to pay Westinghouse hundreds of millions of dollars if PEF did not execute an EPC. Notwithstanding the unlikelihood that the Nuclear Regulatory Commission (“NRC”) would authorize PEF to proceed with a limited work authorization (LWA) for the Levy Project, on December 31, 2008, PEF executed the EPC contract with

² Order No. PSC-08-0518-FOF-EI, Docket No. 080148-EI, In re: Petition for determination of need for Levy Units 1 and 2 nuclear power plants, by Progress Energy Florida, Inc. Note: the Order granting PEF’s determination of need for the Levy Project does not mention that PEF had already entered into this LOI; it only mentions that PEF intends to execute the EPC before the end of 2008. Id. at 10.

Westinghouse for the construction of two AP1000 units, claiming it had negotiated a good deal for the PEF ratepayers, T. 1999; Order No. PSC-09-0783-FOF-EI, in Docket No. 090009-EI, at 26 (“PEF had obtained a number of key contractual benefits. . .”). Approximately three weeks after executing the EPC contract, the NRC informed PEF that it would not authorize the LWA to commence according to the timetable set forth in the EPC contract and upon which the EPC contract was based. See T. 1999; Order No. PSC-09-0783-FOF-EI, at 28. As a result of the NRC’s decision, the EPC contract and Levy Project schedule ran into trouble, requiring PEF to take steps to preserve the Levy Project option. See Ex. 206, p. 15, Progress Energy’s 10-K SEC filing (“Although we have not made a final determination on new nuclear construction, we have taken steps to keep open the option of building . . . at a greenfield site in Levy County, Florida.”).

Between February 2009 and August 1, 2011, PEF has spent hundreds of millions of dollars of customer money for nuclear preconstruction and construction costs, including millions of dollars on procuring long-lead equipment as well as countless hours (and dollars) renegotiating the EPC contract (Amendment 3) and agreements with the LLE manufacturers (complete or suspend LLE equipment). T. 1668-1676, 1691-1694, 1857; Ex. 165, p. 2 of 2. After two and a half years of uncertainty regarding whether the EPC and LLE contracts could be renegotiated, the Levy Project has now finally reached a state of partial suspension, and, according to Progress Energy’s SEC filings, PEF is postponing or deferring major construction activities on the project until after the NRC issues the COL and Progress Energy decides to build the Levy Project. Ex. 206, pp.4, 9, 15, 17, 26, 33.

Dr. Jacobs pointed out in testimony that since receiving the determination of need in 2008, PEF has been in a retreat mode as it relates to Levy Project. T. 2047. As such, it is apparent that the Levy Project has been in contraction since January 2009. Notwithstanding the paper POR, the project appears to be in the final stages of being wrapped up once the COL is received. Despite this apparent trend in PEF's commitment to the Levy Project, PEF is still aggressively seeking recovery for the unspent non-COLA items.

Progress Energy's Mixed Messages Create Uncertainty and Undermine Confidence in the Public "Plan of Record"

While PEF publicly maintains that the "plan of record" or POR has not changed for the Levy Project, Progress Energy has been sending a mixed message about Levy commercial operation dates. Despite PEF's protestations to the contrary, evidence adduced at the hearing contradicts PEF's assertions. Progress Energy's actions (both publicly and as reflected in the confidential record in this case) have undermined confidence in PEF's public POR for the Levy Project. These mixed messages include the following: Statements in the media by Progress Energy that it has not made a final decision to build the Levy Project (Ex. 169); The serious strategic scenario planning exercises undertaken by Progress Energy's Senior Management Committee ("SMC") on the eve of the 2010 NCRC proceeding (Ex. 170, 191, 207; T. 1773-1830); Material changes to Progress Energy's Security Exchange Commission ("SEC") two most recent 10-Qs, deleting all reference to a Levy Project commercial operation date. (Ex. 206, pp.1-33); and Qualified statements to the NRC and Commission about the project's

commercial operation date. Based upon the preponderance of the evidence, OPC argues that this Commission should find that all non-COLA costs are unreasonable and they should be disallowed.

Dr. Jacobs' Expert Testimony Concerning the Strategic Scenario Planning Exercises

OPC witness Dr. Jacobs testified that "PEF's actions demonstrate that [PEF's] internal resolve to complete the [Levy Project] appears to be weakening." T. 2000. He based his opinion on six different factors, including the extensive and methodical 2010 strategic scenario planning analyses considered by the SMC *specific to PEF*. T. 2000-2004. When the 2010 strategic scenario planning analyses documents were produced to OPC and finally to staff, they were heavily redacted (T. 2004), obliterating nearly all information not directly related to the Levy Project. See Ex.170, and Ex. 191.³ Despite this heavy redaction, Dr. Jacobs testified that in his expert opinion PEF was considering changing the commercial operation date for the Levy Project. T. 2004. He further opined that the Moderate Change Scenario, with its 2027/2029 commercial operation dates for the Levy Project, appeared to be more likely than the other scenarios including the March 2010 Scenario which assumed the current "program of record" for Levy. T. 2004. Once PEF produced to OPC and the intervenors the fully unredacted, but still confidential, strategic scenario planning analyses performed by PEF for consideration by the SMC,

³ Even a cursory review of Ex. 170 & 191 will show that most of the scenario analysis was redacted.

OPC asserts that the fully unredacted analyses support Dr. Jacobs' expert opinion testimony.⁴ See T. 204, 2012-2013; cf. Exs. 170 and 191 with Ex. 207.

Mr. Elnitsky's Testimony Concerning the Strategic Scenario Planning Exercises

The extensive cross examination of PEF's witness Mr. John Elnitsky concerning the strategic scenario planning exercises supports Dr. Jacobs' expert opinion testimony and OPC's assertions about their importance. Mr. Elnitsky admitted he took some part in preparing inputs to the 2010 scenario planning exercises for the SMC. T. 1173. Mr. Elnitsky's rebuttal testimony attempted to recast the serious, in-depth nature of the 2010 strategic scenario planning exercises as merely some annual exercise whereby the SMC "think[s] strategically about hypothetical business environment scenarios that could conceivably occur in the future, however unlikely that may be to occur." T. 2069, 2070-2075. He essentially testified that the 2010 strategic scenario planning exercises had no bearing on current resource, project planning, or business realities facing PEF in 2010. T. 2069. Yet, when asked if it was a waste of the SMC's time, he said it was not. T. 1791.

Additionally, Mr. Elnitsky admitted under cross examination that the 2010 scenario planning exercise process was more involved and extensive than the 2009 and the current 2011 scenario exercises (T. 1826); and that the 2010 scenario planning exercise process involved a greater level of fidelity and broader factors than 2009. T. 1779-1780. While he would not admit that the scenario planning exercise process culminated in the final August 23, 2010 SMC strategic scenario analysis presentation

⁴ Pursuant to a negotiated resolution, OPC received fully un-redacted copies of the four strategic scenario planning exercise presentations on the morning of the August 1, 2011 NCRC prehearing conference.

(T. 1778), he admitted that scenario analyses developed by PEF evolved and were eventually refined into that final scenario analysis. T. 1780-1783.

The final August 23, 2010 SMC strategic scenario analysis presentation to the SMC contained five different planning scenarios. Ex. 207. The analysis considered by the SMC included the following categories for review and comparison with the five scenarios: PEF resource plans, strategic capital plans, system energy mix, residential rate impacts, PEF earnings, and two other confidential categories. Ex. 207. The first part of the scenario analysis is a side-by-side comparison of the March 2010 Scenario with the Moderate Change Scenario, with several comprehensive slides showing all five scenarios. T. 1786, 1793; Ex. 207, pp. 4-16. While Mr. Elnitsky claimed that the Levy Project was a small part of the overall scenario planning analysis, he yet agreed that the Levy Project was the main capital expenditure cost driver. T. 1775, 1794, 1825; see Ex. 207, pp. 7-9.⁵ Following this side-by-side comparison of the two leading scenarios, the slide entitled “Scenario Implications – Four Key Plan Components” shows the four other scenarios (March 2010; BAU; Tech; and Aggressive) being compared *with* the Moderate Change Scenario. Ex. 207, p. 20.

Looking at all the scenarios considered by the SMC, and especially the near-term decisions and long-term considerations facing PEF in August 2010 (Ex. 207, p. 22), it is apparent that the Moderate Change Scenario was treated as superior to all the other scenarios, including the March 2010 Scenario.⁶ The Moderate Change Scenario provided

⁵ Slides 7 through 9 of the August 2010 SMC Strategic Scenario Analysis show a large “capital expenditure mountain” associated with the Levy Project, representing cash flow and capital investment requirements for the nuclear project. T. 1806-1811; Ex. 207, pp. 7-9.

⁶ When presentations compare decision options, the preparer usually selects the best option (or what they believe is the best option or what they anticipate their audience will believe is the best option) and compares all other options with it. This appears to be how the August 2010 strategic scenario analysis was prepared.

PEF the greatest near and long-term value in terms of providing flexibility in its resource plans (Ex. 207, p. 6), deferring huge capital expenditures to the future (Ex. 207, p. 9), minimizing near and long-term residential rate impact (Ex. 207, p. 15), and boosting near and long-term earnings for PEF (something which would logically be attractive to members of the SMC and shareholders) (Ex. 207, p. 16). If the SMC were seeking a confidential, unofficial plan alternative to its public POR, then the August 2010 strategic scenarios analysis indicates that the Moderate Change Scenario would be the clearly favored choice.

Mr. Elnitsky agreed that a prudent utility should engage in scenario planning exercises to remain agile, look at all possible external factors that could affect the utility, and stress the utility's thinking by asking "what-if" questions. T. 1830. He agreed that most utility planning activities remain confidential. T. 1831. He testified that "in general, hypothetical or what-if scenario analysis is only disclosed when it becomes the official plan." T. 1832. He agreed that the 2010 scenario planning exercise activities, which took place on the eve of the 2010 hearing, were not disclosed to the Commission last year. T. 1832-1834. He admitted he was not present for the entire SMC strategic retreat (T. 1934), and he admitted he did not know whether the SMC brought any recommendations to the Board of Directors regarding the scenario planning activities or that the SMC was doing the strategic scenario analysis. T. 1839. He agreed that the SMC does not bring all confidential alternate plans being considered to the Board of Directors' attention, and generally would not take major plan changes to the Board of Directors until the alternate plans have matured into a good recommendation. T. 1838.

Inferences from the Strategic Scenario Planning Exercises

The Commission can infer that a prudent utility's executive management would not waste its valuable (and limited) time on spurious, unrealistic, stupendous, and thus ultimately pointless hypothetical scenario planning exercises. For the strategic scenario planning exercises to have any value in stressing the thinking of the SMC, the scenarios must be based in reality. Some scenarios must be more realistic than others in order to provide some value to the exercise. Further, the Commission should compare the scenarios to the current POR. If the scenarios being compared with the POR are wholly based in fiction or improbabilities, then it would seriously undermine the value of such an exercise. No prudently managed company fritters away its most senior executives' time on frivolous, meaningless exercises. The Citizens ask the Commission to find that the 2010 scenario planning exercises were not mere *hypothetical* exercises, but rather were serious, strategic scenario planning exercises based on real circumstances facing Progress Energy both in 2010 and today. The manner of conducting the strategic scenario planning exercises and the resulting outcome constitute a material reason for doubting the 2021/2022 commercial operation date.

No Rebuttal or Corroboration of Mr. Elnitsky's Testimony by the SMC

While Mr. Elnitsky testified that PEF or the SMC were not considering any confidential, alternate scenarios for the Levy Project, no one from the SMC supplied any corroborating or rebuttal testimony to support his testimony. Mr. Elnitsky admitted he was not a member of the SMC, and that he does not attend every SMC meeting. T. 1835, 1839. He acknowledged that neither Mr. Lyash, Mr. Dolan, nor any other member of the

SMC were present at the 2011 NCRC proceeding; as such, PEF presented no SMC level witnesses who could affirmatively testify under oath that Progress Energy is unequivocally committed to building the Levy Plant according to the POR's timetable. T. 2148-2149. Because Mr. Elnitsky is not a member of the SMC, he cannot be privy to every decision the SMC makes regarding PEF or Progress Energy. Moreover, he may not know with the same level of knowledge what a member of the SMC would know regarding Progress Energy's ultimate commitment to the Levy Project (its commitment in general or to the 2021/2022 commercial operation date specifically). While he might know whether there was a confidential, alternative plan for the Levy Project being considered, it is possible that he would not actually know whether such a plan is being considered by the SMC or the Board of Directors.

Importantly, no member of the SMC provided testimony rebutting Dr. Jacobs' assessment of the import of the 2010 strategic scenario planning analyses or the fact that the Moderate Change Scenario seemed more reasonable than the March 2010 Scenario. The SMC has the inherent power to change the IPP (or POR) for the Levy Project as well as its plans for rest of PEF's generation system. It is reasonable for the Commission to conclude on the record that a prudent SMC would actively consider alternate scenarios when financial, economic, and environmental developments threaten the cost effectiveness and long-term feasibility of the Levy Project.

Therefore, based on the strategic scenario planning analyses alone, the Commission can find that Progress Energy now has a viable, workable alternative to the public POR for the Levy Project. The Moderate Change Scenario, with its 2027 and 2029 commercial operation dates, on its face, appears to be superior to the March 2010

Scenario in all but one category. As a result, the Commission should find that there is significant doubt about the continued viability of the POR for the Levy Project.

Material Changes to SEC Filings Regarding the Levy Project

Following the completion of the confidential, SMC strategic scenario analysis exercises, Progress Energy began quietly making material changes to the Company's Security Exchange Commission ("SEC") filings regarding the Levy Project commercial operation dates. These changes are extremely significant and indicate that Progress Energy may no longer be fully, or even, publicly committed to the 2021/2022 commercial operation date. In its SEC filings (10-Q & 10-K) from June 2010 through February 2011, Progress Energy was publicly committed to those commercial operation dates. Ex. 206, pp. 4, 9, 15, 17. However, after the March 2011 IPP was publically ratified by the SMC (which Mr. Elnitsky testified the IPP embodies the Levy "plan of record" (T. 1744)), Progress Energy materially changed how it describes the Levy Project and deleted all reference to the 2021/2022 commercial operation dates. Ex. 206, pp. 26, 33.

As Mr. Elnitsky admitted, he may or may not have contributed or reviewed the Levy Project language in the SEC filings. T. 1759-1760. Based upon his responses during cross examination, it appeared the Mr. Elnitsky was not personally familiar with the content of Progress Energy's SEC filings, nor was he personally aware that Progress Energy's SEC filings had materially changed with respect to how the Levy Project was described or that the 2021/2022 commercial operation dates were deleted. T. 1760-1767.

At the hearing, Mr. Elnitsky acknowledged that the public statements to investors and the SEC had changed. Id.

It is common knowledge that publicly traded companies, like Progress Energy, do their very best to provide the SEC and Wall Street investors accurate, complete, and current information. A prudently managed company carefully reviews its SEC filings for accuracy and completeness to include present and likely future realities facing the company. It is quite likely that scores of company officials, including attorneys, review the SEC filing. If something materially changes between SEC filings, it is incumbent upon the company to appraise the SEC and investors of that change. It is quite likely a legal duty.⁷ Failure to be candid regarding possible material changes can lead to potential SEC investigations, shareholder derivative suits, and other problems for the publically traded company.

Clearly, it is significant that Progress Energy deleted all references to a commercial operation date for the Levy Project in its two most recent SEC filings. This is especially telling because the 2010 SMC strategic scenario planning exercise analyses were considered by the SMC only last year. Taken together, record basis exists for the Commission to conclude that the SMC, ultimately responsible to the Board of Directors, is actively (and confidentially) considering alternative commercial operation dates for the Levy Project. Otherwise, there would be absolutely no need to delete the 2021 commercial operation dates from the SEC filings.

⁷ See SEC Rule 12b-20 (17 CFR §240.12b-20), which states: “In addition to the information expressly required to be included in a statement or report, *there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.*” (emphasis added); see also SEC Rule 12b-2 (17 CFR § 240.12b-2); definition of “Material”: “The term ‘material,’ when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered.”

Commercial Operation Date Qualification to the NRC and Commission

As discussed above, following the 2010 strategic scenario planning exercises, PEF changed how its SEC filings described the Levy Project, carefully omitting all reference to the 2021/2022 commercial operation dates. Further, following the 2010 strategic scenario planning exercises, PEF has carefully crafted its answers to the NRC and Commission as it relates to the Levy commercial operation dates. PEF provided a caveat or qualification in its annual information submission response to the NRC new reactor office. In a letter dated December 14, 2010, PEF told the NRC the following: “Current schedule based on economic needs are to complete [the Levy Project] with a commercial operation date in 2021 or later.” Ex. 205, unnumbered p. 1 (emphasis added). When asked about the qualification in the letter to the NRC and whether PEF is committed to bringing Levy Unit 1 “. . . into service in 2021, or will it be 2021 or later. . .”, Mr. Elnitsky testified: “My testimony remains that our project plan currently is to bring the plant in service in 2021.” T. 1748.

OPC asserts this “2021 or later” caveat or qualification was carefully crafted to maintain before the NRC PEF’s public commitment to the 2021/2022 commercial operation dates in order not to affect the priority by which the NRC processed the Levy Project COLA. In light of the desired outcome of achieving the COL, this is a reasonable public posture to take given the circumstance PEF finds itself in today. Even so, it does not mean that PEF will not change its commercial operation date to a date later than 2021/2022 after receiving its COL.

Under cross examination, Mr. Elnitsky explained the importance of maintaining its commitment to those commercial operation dates before the NRC, and the possible

adverse effect a much later commercial operation date could have on NRC's processing of the COLA. When asked a hypothetical about a nuclear project being delayed by more than five years, Mr. Elnitsky agreed that could potentially demonstrate to the NRC that a COLA applicant may not have the requisite intent to build a nuclear power plant or move forward with construction of a nuclear power plant. T. 1754. Mr. Elnitsky also agreed that if a nuclear project slipped by more than five years, the NRC could do one of three things: 1) continue processing the COLA on the current schedule and license priority; 2) reprioritize and process other COLA applications ahead of PEF's COLA; or 3) recommend that the applicant suspend activities associated with the licenses. T. 1754-1755. He also testified that PEF did not make the NRC aware of the strategic scenario planning activities which showed other commercial operation dates for the Levy Project. T. 1756.

PEF provided a similar caveat or qualification in its July 18, 2011 discovery response to Commission Staff.⁸ PEF stated: "Since it had been determined that the earliest feasible year for the Levy in service is 2021, these units are shown with the 2021 and 2022 dates." Ex. 177, p. 00132 (emphasis added).⁹ While Mr. Elnitsky was not directly questioned about this particular discovery response, OPC asserts this "earliest feasible year" qualification was carefully crafted to maintain before the Commission PEF's public commitment to the 2021/2022 commercial operation dates. The language "shown with" also indicates a perfunctory superficiality in the dates.

OPC would argue that PEF must publicly maintain its commitment to these commercial operation dates in order to continue receiving recovery through the NCRC

⁸ PEF's response to Staff's Fourth Set of Interrogatories, No. 17, filed on July 18, 2011.

⁹ Context: PEF was answering a question about generation resource additions shown in an exhibit attached to Mr. Elnitsky's May 2, 2011 prefiled testimony.

process. If the Levy Project commercial operation dates were significantly later than 2021/2022 (e.g., 2027/2029 as shown in the Moderate Change Scenario), then PEF would be hard pressed to say that it is actually committed to making the Levy Project a reality in the reasonably near future or that it is demonstrating the requisite intent to build the Levy Project as required by Section 366.93, F.S. (as discussed further in Issue 23).

When the Legislature enacted and the Governor signed into law the NCRC statutes in 2006 (with subsequent amendments in 2007 and 2008) to facilitate the construction of nuclear power plants in Florida, they envisioned nuclear power plants coming into commercial operation within approximately ten years or so of enactment. Now the possibility of new nuclear generation in Florida has slipped to at least 15 years, and quite possibly to 20 or more years. Because of this slippage, PEF's current customers are faced with a tremendous intergenerational inequitable burden of paying for a nuclear power plant today that may or may not come into commercial operation by the time their children start having children. OPC argues this was not the intent of the Legislature or the Governor, and is unfair, unjust, and unreasonable.

The totality of the circumstances (confidential strategic scenario planning for a later commercial operation date; material changes in Progress Energy's SEC filing regarding the commercial operation date; and the small caveats in PEF's responses to the NRC and Commission) all serve to cast further doubt on PEF's public commitment to the public "plan of record" and serve to reinforce further OPC's argument that PEF may as a matter of practicality be considering a confidential, alternate plan that includes a significantly later commercial operation date. For these reasons, OPC asserts that PEF's

request to recover estimated and projected costs for non-COLA items would be an example of unreasonably incurring a potentially reasonable cost.

Unreasonably Incurring a Potentially Reasonable Cost

OPC asserts that Sections 366.93, and 403.519(4), F.S., (“NCRC Statutes”), pertain to the advanced recovery of “prudently” incurred costs. See § 366.93(2) and (6), and 403.519(4)(e), Fla. Stat. (2010). Between Sections 366.93, and 403.519(4), F.S., the word “reasonable” is mentioned only once, and that was in the context of “the need for adequate electricity at a reasonable cost.” § 403.519(4), Fla. Stat. (2010). Neither statute even defines the meaning of “reasonable.” While the word “reasonable” is mentioned several times in Rule 25-6.0423, Florida Administrative Code (F.A.C.) (“NCRC rule”), this rule does not define “reasonable.”¹⁰

Black's Law Dictionary (9th ed. 2009), defines “reasonable” as: “Fair, proper, or moderate under the circumstances.” Thus, “reasonable” can mean “whether a cost should be reasonably incurred under circumstances surrounding a project” or “whether the cost was reasonable in amount under the circumstances surrounding a project.” Reasonable can be used in two different contexts, and the rule certainly does not at all limit the Commission to only using the definition of “reasonable” to mean “reasonable in dollar amount.”

OPC asks the Commission to consider that, while the cost of something may be reasonable in amount under the totality of the circumstances, the incurring of that cost

¹⁰ The NCRC rule does not define the terms “reasonable” or “prudent.” Further, there is ambiguity in how the Commission should determine a cost to be “reasonable” and/or “prudent.” Sometimes the Commission is required to determine that a cost must be “reasonable and prudent” (see Rule 25-6.0423(5)(a)2., (6)(b), F.A.C.) and at other times “reasonable or prudent.” See Rule 25-6.0423(5)(b)3., (5)(c)3., F.A.C.

may also be unreasonable at the time it is incurred under the totality of the circumstances. The circumstances surrounding the timing of the incurred cost is as important to the determination of the reasonableness as is the amount of the cost itself.¹¹

The Commission may not have had the occasion to consider this distinction in the application of reasonableness (“unreasonably incurring a reasonable cost”). However, this distinction naturally falls within the ambit of Issues 27A, 27B, 28A, and 28B and the consideration of whether this Commission should disallow as unreasonable the non-COLA costs until after the NRC issues PEF the COL for the Levy Project and Progress Energy issues the FNTP to build the project according to its public POR. Further, there is nothing explicit or implicit in the NCRC statute or rule that precludes the Commission from denying as unreasonable (for the time being) unspent, non-incurred dollars related to the Levy Project.

The NCRC statute requires the Commission to determine prudence by the preponderance of the evidence. § 403.519(4), Fla. Stat. The NCRC rule explicitly charges the Commission to evaluate whether a cost associated with the project is reasonable (and/or prudent).¹² Rule 25-6.0423, F.A.C. If a cost or action to incur a cost is not reasonable, then implicitly, it must be disallowed. Thus, interpreting the NCRC statute and rule together, if it is not *reasonable* to incur a cost by the preponderance of the evidence, then it would be *imprudent* to incur, and should be disallowed. Additionally, dollars estimated or projected by PEF to be spent in a certain time period are not the same

¹¹ Analogy – If a person or company cannot currently afford to make monthly utility, house, child support, or payroll payments, then that person or company should not incur additional costs to lease a new BMW even if the lease payments were a reasonable \$200 per month. Under the totality of the circumstances, while a \$200 lease payment for a new BMW may be reasonable in amount, the incurring of a \$200 lease payment is unreasonable given that the person or company cannot satisfy its other financial obligations.

¹² Supra prior footnote.

as dollars or costs actually incurred by PEF. Therefore, the non-COLA costs not yet incurred can and should be disallowed for 2012 recovery before PEF unreasonably incurs them.

From a Scheduling Perspective, No Need to Incur Non-COLA Costs in 2011 and 2012

Notwithstanding the mixed signals being sent by Progress Energy regarding the commercial operation date for the Levy Project, from a strict scheduling perspective there is no need for PEF to start any non-COLA projects in 2011 and 2012, incur those costs, or recover those dollars from the ratepayer in 2012. With the possible exception of starting the in-house pre-negotiation preparations related to the FNTP, all the non-COLA activities can and should be prudently delayed until after the receipt of the COL. According to Progress Energy's June 30, 2010, 10-Q SEC filing, "PEF will postpone all major construction activities on the project until after the NRC issues the COL..." (Ex. 206, p. 9) and in its most recent June 30, 2011, 10-Q SEC filing, PEF is "deferring major construction activities on Levy until we receive the COL." (Ex. 206, p. 33).

Progress Energy's SEC filings fail to reference any of the non-COLA activities as being necessary for achieving the 2021/2022 commercial operation dates. Based on the SEC filings alone, this Commission should find that the non-COLA items are not critical to the success of either the COL receipt or 2021/2022 Levy Project commercial operation dates. This argument is further bolstered by the testimony on the Levy Project Schedule.

OPC witness Dr. Jacobs testified that PEF should only spend money needed to support receiving the COL. T. 2041. He testified that the costs associated with the non-COLA items are:

... minor in terms of the overall project. But in some way they're symbolic that the company need to spend only what's needed to get the COL [B]y that point in time [COL receipt] they will have spent a billion dollars on this project and not have decided whether to go forward or not. It's time to draw a line in the sand and say only spend what's needed to get the COL and no more.

T. 2038-2039. When asked if doing that would "push the schedule back," Dr. Jacobs opined that it would not have any schedule impact, citing there is probably at least a year of "float" in the Levy Project schedule which could handle the delays. T. 2041.¹³ When asked whether PEF could wait on the transmission study until after receipt of the COL, Dr. Jacobs opined that the transmission study "... work could be accelerated to have no overall schedule impact." T. 2041. Dr. Jacobs further testified that pursuing activities that are necessary to obtain the COL are what PEF should be doing, and doing only such would not affect the commercial operation date for the Levy Project. T. 2042.

When asked whether the "transmission work, land purchases, et cetera, are not on the critical path for the project schedule," Dr. Jacobs testified that they were not critical path items. T. 2042. Dr. Jacobs testified that while he only reviewed the project schedule in the Levy Project IPP, he was familiar with the schedule required to build an AP1000 unit due to his work on the Vogtle project in Georgia; he knew the Vogtle project schedule in detail; he knew the durations of the activities that are required to build an AP1000; and, based on reviewing the Levy Project IPP and knowing the Vogtle

¹³ T. 2041 (Dr. Jacobs testified that PEF is "planning to receive their COL in 2013, and have Unit 1 online. . . some five years later. Georgia Power is going to do that in a four-year period. So I think there is probably a year of float . . . in [PEF's] schedule.").

project schedule, there was “. . . enough float in the Levy Count schedule to complete any work that was needed, any work that would be delayed.” T. 2043. While PEF’s Levy Project still is mostly on paper, the Vogtle project is well underway, and familiarity with the Vogtle schedule adds weight to Dr. Jacobs’ testimony on the matter of scheduling.

When PEF witness Mr. Elnitsky was asked in rebuttal whether he agreed with Dr. Jacobs’ testimony that the non-COLA items were not critical path items, he disagreed. T. 2162. Mr. Elnitsky testified that PEF had a detailed project schedule that laid out critical path activities necessary to maintain the current 2021 commercial operation date. T. 2162-2163. By way of example, he testified that if PEF stopped paying for the LLE already in process, that would break the contracts; then PEF would have to renegotiate those contracts which would affect where PEF was in the LLE queue; and that would directly impact the commercial operation date. T. 2163. These are not the items or costs which OPC challenges.

Non-COLA Items are Non-Critical Path Items

The evidence shows that Dr. Jacobs and Mr. Elnitsky disagree, not about whether the non-COLA items must be accomplished sometime before the Levy Project goes into service, but about the timing of when to start the non-COLA items identified by OPC and whether incurring costs in 2011 and 2012 are necessary to achieve the 2021 commercial operation date. OPC agrees that the non-COLA items must be accomplished sometime before the 2021/2022 (or the 2027/2029) commercial operation date for the project, assuming PEF is actually going to pursue building it. OPC strongly contends, however,

that these costs cannot be reasonably or prudently incurred in 2011 and 2012 while the Levy Project 2021/2022 commercial operation dates seem so unlikely.

OPC highlights the fact that Mr. Elnitsky did not rebut Dr. Jacobs' testimony that the work on non-COLA items could be restarted after receipt of the COL in 2013 or that work could be accelerated to achieve the 2021 commercial operation date. It important to point out that Mr. Elnitsky had the opportunity to rebut Dr. Jacob's expert testimony concerning acceleration of non-COLA activities, but he failed to do so.

Moreover, it is well established by the 2010 NCRC hearing final order that PEF purposefully built-in a significant amount of "float" or allowance for delays into the Levy Project schedule when it received permission from this Commission to delay the Levy Project by five years. Order No. PSC-11-0095-FOF-EI, in Docket No. 100009-EI, at 32 ("The 36-month [Levy Project] schedule shift scenario appeared to lack 'float' or allowance for delays in the project schedule. PEF witness Lyash stated that, 'the totality of our assessment that moving it to the 2021/2022 in service time we felt was the optimal decision.' ").¹⁴ Further, the transmission study and transmission EPC were not included in the April 2010 IPP submitted to this Commission for review. Ex. 190, p. 13 of 23. It stretches credulity that such items which were unnecessary in 2010 are now essential for the 2021/2022 commercial operation date.

According to Dr. Jacobs' unrebutted testimony, one year's worth of float should be sufficient to handle the delay of the non-COLA activities until after receipt of the COL. T. 2043. While OPC concedes that in an actual construction scenario these non-

¹⁴ Quoting Order No. PSC-11-0095-FOF-EI, at 29 ("After a detailed review of these factors, PEF came to the decision that a 36-month delay would not provide enough 'float' time should other uncertainties further jeopardize the schedule. PEF, therefore, adopted a 60-month shift as the best schedule for its customers and the Company, thus giving LNP Unit 1 an in-service date of 2021.").

COLA activities must be accomplished sometime before the 2021/2022 (or 2027/2029) commercial operation date, OPC disputes whether these non-COLA projects must commence in 2011 and 2012. OPC also disputes whether it is necessary to recover those non-COLA costs from the ratepayer in 2012, as nothing prohibits PEF from spending dollars not included in its 2012 projected costs and later recovering those dollars in a subsequent true-up proceeding should the Commission find those unbudgeted costs reasonable.

Lastly, PEF witness Mr. Elnitsky's "stop payment on LLE contracts" example (T. 2163) is "a red herring" drawing attention away from the real issue and misstates what non-COLA costs OPC is requesting that the Commission disallow or defer a finding of reasonableness. The OPC is not asking PEF to stop payments on any currently incurred obligations (like LLE contracts); however, OPC is arguing that PEF should cease incurring any additional, nonessential costs. OPC has identified estimated and projected non-COLA costs totaling less than \$6 million as costs that PEF should not incur until after receipt of the COL and a definitive decision by the Progress Energy to actually build the Levy plant by the 2021/2022 commercial operation dates.

FNTP Timeline Belatedly Admitted Into Evidence

Regarding the Levy Project timeline belatedly entered into evidence by PEF, OPC notes that this timeline is entitled "Levy Nuclear Project FNTP Readiness Requirements Timeline." It appears to relate to a potential negotiation related to achieve the full notice to proceed ("FNTP"), that is, assuming EPC Amendment 4 terms and conditions can be satisfactorily negotiated. T. 1683, 1695-1696. It is happenstance that the FNTP readiness

timeline references other Levy Project items that must be completed sometime before the 2021/2022 commercial operation dates. Ex. 212. This FNTP readiness timeline contains more detail than the timeline shown in the March 2011 IPP; however, as testified by Mr. Elnitsky, there is another timeline which contains even more detail which was not entered into evidence. T. 2180 (quoting “There is a more detailed schedule that’s down below this [FNTP readiness timeline], it’s the next level of project management below it.”).

OPC also notes that Mr. Elnitsky testified that this FNTP readiness timeline is updated on a monthly basis and that this timeline was dated December 2010 and signed January 2011. T. 2180-2181; Ex. 212. As such, this FNTP readiness timeline was more than eight months stale by the time it was proffered into evidence at the hearing at the eleventh hour by PEF. It is common knowledge that project timelines are always subject to subsequent change, modification, update, and revision especially as a complex project continues to progress towards completion. While the FNTP readiness timeline might have been accurate when it was first provided to the Commission audit staff in January 2011, by the time it was proffered into evidence at the August 2011 hearing, the FNTP readiness timeline was stale, out-of-date, and not the “best evidence” available to this Commission regarding the Levy Project schedule. Therefore, it should not be relied upon as authoritative. Nevertheless, the FNTP readiness timeline document demonstrates that significant construction time exists in the Levy Project schedule to support Dr. Jacobs’ expert testimony that transmission activities (and other non-COLA activities) can be accelerated if truly needed after 2012.

Notwithstanding the circumstances surrounding how this timeline came to be entered into evidence at the eleventh hour, OPC asserts that this FNTP readiness timeline

is merely an attempt to bolster PEF's flagging argument that incurring costs in 2011 and 2012 for non-COLA items are somehow essential to achieving the 2021/2022 commercial operation date. It seems incredulous to argue these non-COLA items (totaling less than \$6 million) if not performed in 2011 and 2012 will somehow delay the Levy Project.

Conclusion

Despite the ever increasing costs associated with the Levy Project, the Commission made the decision last year not to halt or cancel the Levy Project. See Order No. 11-0095-FOF-EI. By asking the Commission to disallow less than \$6 million in estimated and projected non-COLA costs, OPC is not asking the Commission to halt or cancel the Levy Project, nor is OPC making a collateral attack on the Commission's prior decision. OPC believes that PEF, by asking this Commission to approve potentially unreasonable and imprudent non-COLA costs, has placed the Commission in an uncomfortable position. Evidence adduced at the hearing clearly indicates that PEF possibly is, and has been, actively planning for a much later commercial operation date for the Levy Project. If the Commission disallows non-essential non-COLA costs, OPC does not believe that will hinder the timely completion of the Levy Project by the publicly announced 2021/2022 commercial operation dates.

Given the relatively small amount of dollars at issue here, it is not critical for PEF to recover those dollars in 2012. The carrying costs on those dollars would be minimal. Moreover, PEF has not affirmatively stated PEF would delay the Levy Project if the Commission did not approve recovery of the dollars in 2012. If PEF spent the non-

COLA dollars and then irrevocably reaffirmed its commitment to the Levy Project by 2021/2022 following the receipt of the COL, and the Commission determines that the dollars spent were reasonable and prudent, OPC would not contest PEF recovering those dollars in a subsequent true-up proceeding. However, if the Commission allows recovery of the non-COLA costs not yet incurred and if the Levy Project is delayed significantly beyond 2021/2022 or canceled, then those non-COLA dollars will have been needlessly spent.

The apparent uncertainty in the form of mixed signals surrounding the Levy Project commercial operation dates are due directly to events within the utility's control. OPC is not asking the Commission to find the non-COLA costs imprudent, as the prudence of these costs is not at issue at this time. However, OPC asserts that if a cost is unreasonable in amount or unreasonably incurred, then it is *per se* not prudent for recovery purposes at this time. Similarly, a reasonably incurred cost can later be determined to be imprudent in light of the circumstances known or knowable to the utility manager at the time the cost was incurred. The prudence standard set forth in Section 403.519(4)(e), F.S., states:

. . . the right of a utility to recover any costs incurred prior to commercial operation . . . shall not be subject to challenge unless and only to the extent the commission finds, based on a preponderance of the evidence adduced at a hearing before the commission under s. 120.57, that certain costs were imprudently incurred. . . . Imprudence shall not include any cost increases due to events beyond the utility's control."

Therefore, if the utility manager knows or should know that the Levy Project commercial operation dates will or quite likely will be later than 2021/2022, then incurring those non-COLA costs in 2011 and 2012 would be unreasonable and therefore not prudent by the Commission's standard. By the preponderance of the evidence adduced at the hearing,

OPC asks that the Commission find that the not-yet-incurred non-COLA costs proposed by PEF to be unreasonable in light of the uncertain circumstances surrounding the Levy Project commercial operation dates and the fact there is at least a year of "float" in the Levy Project schedule.

ISSUE 36: What amount from the deferred balance of the Rate Management Plan approved in Order No. PSC-09-0783-FOF-EI should the Commission approve for recovery in 2012?

The Commission should approve no more than \$60 million from the Rate Management Plan approved by Order No. PSC-09-0783-FOF-EI. The Rate Management Plan was voluntarily entered into by PEF and approved by the Commission. The Commission retains the authority to determine the annual amount of the recovery and how quickly that amount can be amortized. Since PEF has over-recovered in other areas, PEF customers are due a refund of approximately \$1.75 per month. However, PEF seeks to offset the refund by accelerating the amortization of the Rate Management Plan to the detriment of the ratepayers.

ARGUMENT

In 2010, the Commission authorized PEF to collect \$173 million, including tens of millions for overestimated 2011 costs related to disposition of long lead materials ("LLM"). The costs were incurred by PEF to minimize costs associated with the hasty 2008 execution of the Levy Project engineering, procurement and construction ("EPC") contract. In 2011, PEF informed the Commission that it had over collected nearly \$61 million from its customers, primarily related to the LLM disposition costs. T. 1396-1398; 1483; 1550; 1608-1609; 1674-1676; Ex. 151, Sched. TOR-1, p. 3. In 2009, when PEF was advising the Commission that the LWA was not going to be approved by the NRC, PEF sought Commission approval to defer \$273 million of costs associated with its fast start up of the now-stalled LNP. PEF asked the Commission to authorize the recovery of this amount over a period of up to five years. This was referred to as PEF's Rate

Management Plan or (“RMP”). The Commission approved the request in Order No. PSC-09-0783-FOF-EI, issued November 19, 2009, in Docket No. 090009-EI.

In 2009, the year of the RMP authorization, PEF was authorized to recover \$36,618,113 during 2010. For 2011, the RMP amortization included in rates was \$60,000,000. In both years, a carrying cost (statutory AFUDC rate) on unrecovered balance was also recovered.

For 2012, PEF proposes to recover \$60 million (similar to what it requested in 2011) plus an additional \$55 million. This additional amount, however, is proposed due to the unexpected over collection of and in order to avoid a resulting “refund” of \$61 million. As such, the Company proposes to tack on an additional \$54,998,361 for a total RMP of \$114,998,000. The Company is also requesting \$15 million in carrying costs on the unrecovered deferred balance. T. 1554. The sole basis for this request in the Company’s direct case is 17 lines in PEF witness Mr. Foster’s May 2, 2011 Direct Testimony. T. 1555, 1610-1611.

On behalf of the Company, Mr. Foster puts forth just two reasons for the extra \$55 million. One, the carrying costs associated with the deferred balance to be borne by the customers will be reduced and two, PEF essentially argues that acceleration will make room for the revenue requirements associated with actually constructing LNP on the so-called “Program of Record.”

The Citizen’s urge the Commission to put no stock in PEF’s second asserted basis for increasing the amortization. There is no credible evidence that PEF is actually taking any affirmative steps toward constructing the Levy Project. The only affirmative steps that are being taken are in pursuit of the COL. For the same reasons discussed *infra*

under issues 27A, 27B, 28A and 28B, the Commission should not approve an additional \$55 million in revenue requirements based merely on theoretical activities to achieve a commercial operation date of 2021.

As to the impact of the carrying costs, the Citizens acknowledge the Commission approved a carrying cost for any deferred balance equal to the statutorily imposed carrying cost. Order No. PSC-09-0783-FOF-EI at 6. If this were the dispositive rationale for this issue then the RMP would never have been authorized in the first place. However, the RMP was created and the carrying cost is not the controlling consideration. Additionally, the RMP having been authorized, PEF's justification taken to its logical conclusion would call for the entire deferred balance to be recovered in 2012. Yet, PEF is not requesting this.

PEF would not be proposing to nearly double the annual amortization for 2012 had they not overestimated 2011 revenue requirements by \$61 million. Mr. Foster admitted that \$60 million "...was the amount we assumed in our 2010 rate management plan when we looked at 2012, yes." T. 1608; Ex. 159, TOR-1, Appendix A (showing clearly that the \$60 million was the presumptive recovery amount). The \$55 million is even described as 2012 additional amortization. Id. The presumptive recovery amount (\$60 million) is the amount the Commission should approve for 2012 recovery. The Commission has the discretion to determine the amount to be amortized from the RMP as evidenced by PEF's request and acknowledged by Mr. Foster. T. 1604-1605.

As Dr. Jacobs testifies, the acceleration would adversely affect customers in these trying economic times. T. 2009. He further testifies that customers' bills should be no higher than absolutely necessary. Id. Consistent with what the Public Counsel has

observed as growing customer restlessness and resentment with paying for PEF's stalled nuclear plan, Dr. Jacobs also urges that the Commission refrain from increasing what the customers would pay for 2012 in light of the existing impacts on bills related to PEF's nuclear construction efforts, namely:

- The CR3 replacement steam generators' related revenue requirement. The revenue requirement associated with these assets was included in base rates, beginning January 1, 2010, even though the steam generators have not gone into service due to the extended outage at CR3 caused by engineering and construction activities overseen by PEF;
- Replacement power costs for the extended outage at CR3 caused by engineering and construction activities overseen by PEF; and
- Costs for the LNP plant which contribute nearly \$5 per month to the residential bill.

T. 2009-2010.

The OPC can find no reference in any of the past NCRC Orders, governing statutes or rules, that direct or suggest that establishment of a certain level of customer rate impact is a goal or consideration in rate setting. The Commission should not presume that customers have developed some comfort level or acceptance for paying \$5.00 per month for PEF's stalled nuclear "construction" program. This is especially true when the existing \$5.00 per month charge was inflated based on the \$61 million over collection.

Apart from the RMP (which PEF proposed), nuclear costs incurred by PEF have been passed through to customers as governed by the NCRC process. But for the correction to PEF's over collection, \$60 million was going to be the presumptive amount from the RMP for recovery in 2012 and the customers were going to get bills reduced by

\$61 million. OPC concedes that the Commission did not fix a specified annual amortization in authorizing the RMP. However, the Commission did authorize collection of the \$273 million (related to PEF's fast-start to now-stalled project) over a five-year period, and PEF and the customers were both operating under that presumption.

Clearly, PEF is entitled under the statute to recovery of the balance of the RMP. OPC does not dispute this fact or the Company's right to ask for acceleration, under the 2009 NCRC order. Instead, the Citizens challenge the use of the RMP to offset a monthly \$1.75 monthly reduction that long-suffering customers should receive after overpaying by \$61 million in 2011. The customers ask for a respite.

PEF will get its money within the five year horizon that PEF initially requested and will recover carrying costs associated with it. However, 2012 is not the year the Company should double-up on the amortization just to maintain a rate impact level that was artificially inflated due to PEF's overstating the 2011 revenue requirements. The Commission should limit 2012 RMP recovery to the presumptive \$60 million authorization level.

This brief will continue with the remaining disputed Issues in numerical order.

ISSUE 20: Should the Commission approve what PEF has submitted as its 2011 annual detailed analysis of the long-term feasibility of completing the Levy Units 1 & 2 project, as provided for in Rule 25-6.0423, F.A.C? If not, what action, if any, should the Commission take?

*No. There is insufficient evidence to support PEF's analysis of feasibility. Two key enterprise risks are trending against the cost effectiveness of the LNP project and there is substantial doubt that the LNP project will meet the 2021/2022 commercial operation date ("COD") assumed in the feasibility analysis submitted by PEF. It appears that for the Commission to truly evaluate PEF's feasibility analysis, PEF would need to provide a feasibility analysis based upon a COD of 2027/2029 – some nineteen years after the need was determined by the Commission. PEF failed to evaluate the enterprise risks facing the

Levy Project according to Progress Energy's own risk management documents. PEF should be required to do so. *

ARGUMENT

Negative Trends Continue in Two Key Levy Project Enterprise Risks and Project Cost Drivers

As testified by both PEF witness Mr. Elnitsky and OPC witness Dr. Jacobs, two key Levy Project enterprise risks and project cost drivers are continuing to trend negatively against the cost-effectiveness of the Levy Project. T. 1724-1725; T. 2001-2002. Continued low forecasted natural gas prices and lack of meaningful greenhouse gas ("GHG" or "carbon") regulation are causing the Levy Project to become less and less cost effective. T. 1724-1725; T. 2001-2002; Ex. 161; Ex. 208.

This downward trend in cost effectiveness is self-evident when the 2010 and 2011 CPVRR analyses for the Levy Project are compared. Ex. 208, pp. 5, 7. When the 2010 and 2011 100% ownership Fuel Sensitivities cases are compared, the Levy Project was cost effective in 76% of the 2010 cases ($19 / 25 = 76\%$), but only cost effective in 67% of the 2011 Fuel cases ($10 / 15 = 67\%$).¹⁵ Similarly, when the 2010 and 2011 100% ownership Capital Expenditure ("CapEx") Sensitivities cases are compared, the Levy Project was cost effective in 93% of the 2010 cases ($28 / 30 = 93\%$), but only cost effective in 73% of the 2011 CapEx cases ($22 / 30 = 73\%$).¹⁶ There is a similar downward trend in cost effectiveness in both the Fuel Sensitivities and CapEx Sensitivities cases for 80% and 50% joint ownership. Ex. 208, pp. 5, 7.

¹⁵ The cost effectiveness percentage is calculated by dividing the number of "cost effective" cases by the total number of "possible cases."

¹⁶ OPC notes that for some reason the CapEx Sensitivities cases are less cost effective in 2011 than 2010, and that PEF provided no explanation concerning why the 2011 CapEx Sensitivities were less cost effective.

It should be noted that the only meaningful change to the 2011 CPVRR analyses was the update to PEF's fuel forecast sensitivities. Ex. 161, p. 3 of 18. This update to PEF's fuel forecasts alone caused the Levy Project to be less cost effective in more Fuel Sensitivities cases than in 2010. OPC asserts that the continued downward trend in the Fuel Sensitivities, combined with the lack of any meaningful carbon regulation in the near future, are indicative of a trend that the Levy Project is becoming less and less cost effective when compared with the All Gas Reference Plan.

While Mr. Elnitsky hesitates to opine whether a fundamental change has taken place in the natural gas markets, it appears that such a fundamental change is occurring. T. 1725. It is well established that since the Levy Project determination of need the forecasted price for natural gas has continued to decrease. This is evidenced by the different fuel forecast inputs utilized by PEF for each CPVRR analysis since 2008. Ex. 208, pp.1, 3, 4, 5, & 7. Furthermore, the CPVRR cost inputs for carbon regulation (or the lack thereof) have changed substantially since 2008. Ex. 208, pp.1, 3, 4, 5, & 7. While PEF believes carbon costs to be a future certainty (T. 1922), there are certainly no costs currently associated with carbon. Therefore, this Commission should require PEF (and any other utility seeking to build a nuclear power plant) to identify a point certain in the future whereby if the two key project cost drivers and CPVRR inputs (natural gas and carbon costs) do not start significantly improving, then PEF should seriously consider cancelling the Levy Project. Alternatively, a point certain should be identified as an issue for a future NCRC proceeding. The customers of PEF would appreciate some assurance regarding a point certain prior to the enormous rate impact projected to start adversely affecting PEF's customers starting in year 2013 and 2014. T. 1919, 1922.

Changing Inputs Undermines the Usefulness of the CPVRR Analysis

As testified by PEF witness Mr. Elnitsky, there are three main inputs to the CPVRR analysis – future fuel costs, future carbon costs, and future capital costs. T. 1872-1873. As evidenced by the CPVRR analyses performed by PEF since the 2008 Levy Project need determination, each of these three main inputs have changed substantially. See Ex. 208. Every year PEF updates the fuel forecasts, and OPC agrees that should be updated annually. Second, PEF has updated the future costs associated with carbon once since the need determination. PEF's carbon costs are at best an educated guess. While OPC does not take issue with PEF's estimated carbon cost sensitivities, as noted above, there is no certainty as to when or whether carbon regulation will be enacted. Lastly, PEF has updated the discount rate used to determine the CapEx cost for the Levy Project once since the need determination, and this only served to make the Levy Project appear more cost effective than perhaps it will be in the future (see discussion below concerning the relationship between ROE and CPVRR cost effectiveness).

OPC asserts that changing these key CPVRR inputs on a regular basis seriously undermines the effectiveness of the CPVRR analysis as a long-term quantitative analytic tool for evaluating the overall trend in the continued cost effectiveness (or non-cost effectiveness) of the Levy Project since the 2008 need determination. Perhaps this is why Mr. Elnitsky testified: “. . . the CPVRR analysis should not be considered a litmus test for the [Levy Project]. . . . [T]he Company continues to believe that the long-term projections upon which the CPVRR analysis are based on are necessarily uncertain and subject to change from year-to-year.” T. 2077.

The annual CPVRR analyses performed by PEF are not apples-to-apples comparisons of cost effectiveness. Each subsequent CPVRR analysis does not allow effective comparison with the 2008 need determination CPVRR analysis nor allow the Commission to determine whether the Levy Project is becoming more or less cost effective. The only similarities between CPVRR analyses are the types of inputs – fuel, carbon, and CapEx – but the outputs vary widely from 2008 to 2011, thus reducing the usefulness of the analyses for long-term trends. While OPC does not think the Commission should abandon the use of CPVRR analyses as a means to quantitatively measure cost effectiveness for the feasibility analysis required by statute and the rule, OPC asserts that the utilities should devise a better analytical tool to capture the long-term trends of whether a nuclear project remains currently more or less cost effective than it was at the determination of need.

In addition, the utilities should “weight” each of the CPVRR cases as being more or less likely than another. For instance, the mid fuel reference case is probably more likely than the low and high fuel reference cases, and should be weighted accordingly. Similarly, the low to no carbon cost cases are more probable than the high carbon cases, and should be weighted accordingly. Adding weight to the CPVRR cases would add fidelity to and increase the value of the CPVRR analyses.

Therefore, in light of the issues with the CPVRR analysis noted above, the Commission should require utilities seeking recovery under the NCRC statute to develop a new analytical tool or analysis for evaluating cost effectiveness which compares the cost effectiveness of the nuclear unit to the cost effectiveness provided in the need determination. In addition, any input data that is significantly different from the input

data used in the need determination cost effectiveness evaluation should be identified and the impact on cost effectiveness due to the difference in input data should be provided. As a result, this new analytical tool or analysis would allow the Commission to ascertain a cost-effectiveness trend which ties back to the need determination.

Until such a new analytical tool or analysis is developed, the Commission could require the utilities to repeat the need determination CPVRR analysis changing only one input at a time. For example, update the fuel sensitivities using 2011 fuel forecasts, but retain the 2008 carbon and CapEx costs; and update the CapEx cost, but retain the 2008 fuel and carbon costs. Keeping two of the three major CPVRR inputs the same will allow the Commission to see how current input data changes tie back to the 2008 need determination CPVRR analysis. It will further serve to strengthen PEF's quantitative feasibility analysis for the Levy Project, and enable the Commission to detect long-term cost effectiveness trends sooner.

Effect of Authorized ROE on CPVRR Cost Effectiveness

The discount rate used in the CapEx Sensitivities is affected in part by the utility's authorized return on equity ("ROE"). T. 1874. In 2010, PEF updated its CapEx discount rate to reflect a lower authorized ROE; therefore, PEF's calculated discount rate for the 2010 CPVRR analysis decreased from 8.1% to 6.75%.¹⁷ See Order No. 11-0095-FOF-EI, at 22-24; Ex. 208, pp. 5, 6. The effect of the reduced discount rate on the CPVRR analysis was to make the Levy Project cost effective in more CapEx Sensitivities cases. With a higher 8.1% discount rate, the Levy Project was cost effective in only 70% of

¹⁷ PEF's authorized ROE went from 11.25% to 10.50%. Order no. 11-0095-FOF-EI, at 23.

CapEx cases (21 / 30 = 70%). However, with a *lower* 6.75% discount rate, the Levy Project became cost effective in 93% of CapEx cases (28 / 30 = 93%).

While OPC does not take issue with PEF's lower discount rate for its 2011 CVPRR analysis, OPC notes that PEF is very likely planning to file a rate increase case within the next 12 months, and presumably will ask for an increase in its authorized ROE. Should an increase in authorized ROE be granted, that would likely decrease the number of CapEx Sensitivities cases that are cost effective.¹⁸ This relationship between increased ROE and discount rate is something OPC would like the Commission to consider in the 2012 NCRC proceeding. OPC would ask that the Commission order PEF to perform its regular CPVRR analysis based on its current discount rate, and a separate CPVRR analysis based upon the discount rate derived from its *requested new ROE* in its 2012 rate case filing. This will allow the Commission to see what, if any, effect a higher ROE would have on the cost effectiveness of the Levy Project.

PEF Failed to Properly Evaluate Levy Project Enterprise Risks According to Progress Energy's Internal Risk Management Documents

PEF's qualitative feasibility analysis of the enterprise risks facing the Levy Project are incomplete, and should be reevaluated according to Progress Energy's internal risk management documents. As testified by PEF witness Mr. Elnitsky, PEF evaluates COLA and non-COLA risks according to Progress Energy's "*Project Risk Management*" (*PJM-SUBS-00008*) document and uses the impact scale from "*Enterprise Risk Management Framework*" (*ERM-SUBS-0021*) for these risks. T. 2131-2134; Ex. 189,

¹⁸ For instance, if the Levy Project 2011 CapEx Sensitivities utilized a higher discount rate, keeping all inputs the same except CapEx, that would make the Levy Project cost effective in fewer cases than it already currently is.

pp. 13-18 of 38 (March 2011 IPP); Ex. 211. Mr. Elnitsky testified he or his group participated in the continuing development of these two documents. T. 2131-2032. For the COLA and non-COLA risks evaluated in the March 2011 IPP, PEF utilized a risk matrix that shows probability, impact, and quantification of risk for each of the identified risks. Ex. 189, pp. 13-18 of 38. When asked whether PEF evaluated the Levy Project *enterprise risks* in accordance with Progress Energy's "Project Risk Management" and "Enterprise Risk Management Framework" documents, Mr. Elnitsky stated that PEF does not. T. 2134.

Overview of Progress Energy's Two Risk Management Documents

The purpose of "Project Risk Management" document is set forth as follows: "This document provides guidance on project risk management, including execution of the risk management process and reporting of standard risk metrics. It also provides a comprehensive and consistent approach to understanding risk." Ex. 211, p. 11NC-OPCPOD4-26-000003. This document also describes the risk management process, how to assess probability and impact of a risk, how to respond to and mitigate a risk, and monitor and control risks. Ex. 211, p. 11NC-OPCPOD4-26-000005-000008. "At a minimum, a project should compile a risk register and associated risk matrix, prior to the end of the planning phase. . . ." *Id.* The risk matrix shows both probability and impact of an identified risk, similar to the risk matrix show in the March 2011 Levy Project IPP. *Id.*; Ex. 189, pp. 13 and 15 of 18.

The applicability of the "Enterprise Risk Management Framework" document is set forth as follows: "Risk is the exposure to unfavorable outcomes that differ from

Company plans and objectives. Risk management is the process of identifying, assessing, and responding to risk. This framework outlines the *standardized procedure all business units shall use* for managing and communicating their key organizational risks.” Ex. 211, p. 11NC-OPCPOD4-24-000001 (emphasis added). Similar to the Project Risk Management document, the Enterprise Risk Management Framework consists of three sequential activities: identify risks, assess probability and impact of risks, and responding to and mitigating risks. Ex. 211, p. 11NC-OPCPOD4-24-000002. The document also sets forth instructions on how to accomplish each of these three activities. Ex. 211, p. 11NC-OPCPOD4-24-000002-000009. Unlike the Project Risk Management document, the Enterprise Risk Management Framework contains a “table show[ing] the Company’s ten standardized Risk Types, their definition, and examples of the kinds of risk events associated with a particular Risk Type.” Ex. 211, p. 11NC-OPCPOD4-24-000010-000011. The ten standardized Risk Types are as follows: Market; Liquidity/Funding; Credit; Accounting, Tax and Financial Reporting; Operations; Regulatory Policy & Public Relations; Workforce; Safety; External/Emerging Events; and Construction and Project Complexity. *Id.* Further, this document also requires that a risk matrix be created to show the probability and impact of the identified risks, as well as a quantification of the dollar impact if the risk is not mitigated. *Id.* at 000012-000013.

OPC asserts that each of the enterprise risks identified by Mr. Elnitsky in his May 2011 testimony are capable of being analyzed according to the ten standardized Risk Types identified in its Enterprise Risk Management Framework document, and as such

PEF's feasibility analysis is incomplete. The following table¹⁹ contains a list of Levy Project *enterprise risks* Mr. Elnitsky identified in his May 2011 testimony and its corresponding standardized Risk Type from the "Enterprise Risk Management Framework" document which PEF failed to utilize.

Enterprise Risks	Standardized Risk Types
1) Access to capital (T. 1705)	<i>Liquidity/Funding</i>
2) Progress Energy's credit rating (T. 1706);	<i>Liquidity/Funding</i>
3) Near-term capital costs (T. 1708);	<i>Liquidity/Funding</i>
4) Customer ability to pay for and support new nuclear development (T. 1709);	<i>Market</i>
5) Economic conditions in Florida (T. 1709);	<i>External/Emerging Events</i>
6) Decreased retail customer energy use and flat sales revenues (T. 1710-1715);	<i>Regulatory Policy & Public Relations</i>
7) Demand side management ("DSM") goals for PEF (T. 1715-1716);	<i>External/Emerging Events</i>
8) Florida regulatory and legislative actions and decisions (T. 1717-1719);	<i>Market</i>
9) State and Federal support for new nuclear development (T. 1719-1720);	<i>Regulatory Policy & Public Relations</i>
10) State and Federal climate control and greenhouse gas ("GHG") legislation and regulation (T. 1720-1724); and	<i>Regulatory Policy & Public Relations</i>
11) Trend toward lower natural gas fuel prices (T. 1724-1725)	<i>Regulatory Policy & Public Relations</i>

PEF could have and should have analyzed the enterprise risks facing the Levy Project according to these two internal risk management documents. Accordingly, OPC asserts that the Commission should find that each enterprise risk falls within the ambit of the list of Standardized Risks Types shown in the Enterprise Risk Analysis Framework document and that PEF's own qualitative analysis of the enterprise risks is lacking and deficient. For the 2012 NCRC proceeding, the Commission should order PEF to analyze the enterprise risks according to these documents, providing a risk matrix that shows probability, impact, and quantification of risk for each of the identified enterprise risks.

¹⁹ This table is based upon comparing the identified enterprise risk to one of the ten Risk Type based upon the Risk Type definitions and examples of risks supplied in the document. Ex. 211, p. 11NC-OPCPOD4-24-000010-000011.

Doing so will serve to strengthen PEF's qualitative feasibility analysis for the Levy Project and provide the Commission a better analysis of the overall risks facing the Levy Project. Further, the Commission should not approve PEF's long-term feasibility analysis because of this deficiency in analyzing the enterprise risks.

Critical IPP Non-COLA risks

The March 2011 IPP identified two critical non-COLA risks, that if not properly mitigated could critically and adversely impact the success of the Levy Project. See Ex. 189, pp. 15-17, 37 of 38. When asked whether failing to mitigate confidential non-COLA risk number four would cause PEF not to go forward with the project, Mr. Elnitsky demurred. T. 2135. However, he agreed that if PEF failed to mitigate confidential non-COLA risk number eleven, then that would cause PEF not to continue with the Levy Project. T. 2135. Thus, it is possible that failing to mitigate one or both of these risks could be PEF's justification to cancel the Levy Project.

Lack of Joint Ownership Risk

PEF witness Mr. Elnitsky did not identify lack of joint ownership as an enterprise risk in his May 2011 testimony. T. 1732-1734. It is an undisputable fact that PEF has been unable to secure joint ownership, and presently believes it can proceed without any joint owners. T. 1870 ("We have repeatedly stated we could go forward with the project without joint ownership, however we recognize the significant impact of a project of this cost. . . ."). However, OPC asserts that total estimated project cost including AFUDC and escalators is a major factor in the success or failure of the Levy Project. For this

reason, all the August 2010 SMC strategic scenario analysis scenarios assumed 50% joint ownership. See Ex. 207.

OPC asserts that joint ownership is and remains a preeminent critical risk which must be mitigated in order to prevent cataclysmic rate increases starting in 2013 and 2014. T. 1919, 1922. However, OPC asserts that Progress Energy's own confidential activities regarding the SMC strategic scenarios planning exercises and recent material changes in its SEC filings only serve to further undermine prospects of joint ownership. Last year's five-year delay in the project and the continued downward trend in two key enterprise risks and project cost drivers – natural gas and carbon costs – serve to make the Levy Project unattractive to prospective joint owners, so much so that the Florida Municipal Power Agency ("FMPA") recently announced it signed a letter of intent to purchase a share of an out-of-state nuclear project located in South Carolina. Ex. 209. Until PEF receives the COL for the Levy Project and until it unequivocally commits to building the Levy Project by 2021/2022, the prospects for joint ownership anytime soon remain bleak to nonexistent.

Conclusion

For the reasons discussed above, the Commission should not approve what PEF has submitted as its 2011 long-term feasibility analysis for completing the Levy Project. PEF failed to adequately analyze the two critical enterprise risks trending against the successful completion of the project. Similarly, actions within PEF's control are jeopardizing the likelihood of securing any joint owners in the near future. If in fact the COD for the Levy Project is 2027/2029, then PEF's CPVRR analysis should reflect that.

The Commission should consider requiring utilities seeking recovery under the NCRC statute to propose a new analysis that allows the Commission to establish a cost-effectiveness trend in the CPVRR analyses which ties back to the 2008 need determination CPVRR analysis. Finally, PEF failed to analyze all the enterprise risks facing this project according to its own risk management documents, and as such, its long-term feasibility analysis should not be accepted.

ISSUE 22: What is the total estimated all-inclusive cost (including AFUDC and sunk costs) of the proposed Levy Units 1 & 2 nuclear project?

COMBINED POSITION AND ARGUMENT

According to PEF, the total estimated all-inclusive cost of the LNP is \$22.5 billion dollars. However, this estimate is based on an increasingly unlikely COD of 2021/2022. The true total estimated all-inclusive cost is inscrutable. PEF's estimated cost is not reasonable and likely exceeds the cost of other alternate generation sources especially if the COD is 2027/2029, in which case the estimated cost would likely be substantially greater due to automatic cost escalators contained in the EPC and an additional 16 years of accumulated AFUDC. At some point, it would be cheaper to cancel the existing EPC and execute another EPC without all the current automatic cost escalators and AFUDC costs ballooning the final project cost.

ISSUE 22: What is the estimated planned commercial operation date of the planned Levy Units 1 & 2 nuclear facility?

* Despite PEF's public "plan of record," evidence adduced at the hearing indicates that PEF is likely actively planning for a COD of 2027/2029. If this is in fact true, then it is unreasonable to continue to allow advanced cost recovery for any and all Levy Project costs even under the "demonstration of intent" standard set out in Order No. PSC-11-0095-FOF-EI. *

ARGUMENT

As discussed above, the prospect of the Levy Project coming into service by 2021/2022 is increasingly unlikely. Evidence of this fact is discussed at length under

Issues 27A, 27B, 28A, and 28B. At some point, it would be cheaper to cancel the existing EPC and execute another EPC without all the current automatic cost escalators and AFUDC costs ballooning the final project cost. Despite PEF's public "plan of record," evidence adduced at the hearing indicates that PEF is likely actively planning for a COD of 2027/2029. If this is in fact true, then it is unreasonable to continue to allow advanced cost recovery for any and all Levy Project costs even under the "demonstration of intent" standard set out in Order No. PSC-11-0095-FOF-EI. For all these reasons and the totality of the problems facing the Levy Project, a commercial operation date of 2027/2029, if at all, is more likely.

ISSUE 23: Do PEF's activities to date related to Levy Units 1 & 2 qualify as "siting, design, licensing, and construction" of a nuclear power plant as contemplated by Section 366.93, F.S.?

COMBINED POSITION AND ARGUMENT

*No. If creating, maintaining, and proceeding according to a paper POR demonstrates the statutory required intent, then perhaps PEF's satisfies the statutory intent requirement. At this time it does not appear by the totality of circumstances that PEF is demonstrating the requisite intent to construct the Levy Project as contemplated by Section 366.093, F.S. and Order No. PSC-11-0095-FOF-EI. Based upon the facts adduced at the hearing and the reasons discuss above, PEF has not met its burden of demonstrating reasonable intent. In fact, the strategic scenario planning activities and material changes to SEC filings rebut PEF's claims that it has demonstrated the intent required by the NCRC statute and Order No. PSC-11-0095-FOF-EI. *

ISSUE 37: What is the total jurisdictional amount to be included in establishing PEF's 2012 Capacity Cost Recovery Clause factor?

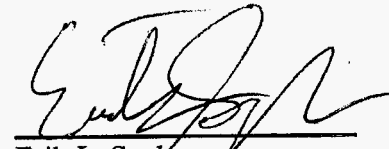
COMBINED POSITION AND ARGUMENT

*Only those costs which PEF has affirmatively shown are absolutely necessary for receipt of the COL for the Levy Project and no more than \$60 million from the Rate Management Plan should be included. No non-COLA costs should be included in PEF's

2012 Capacity Cost Recovery Clause factor. Therefore, the amount requested by PEF should be reduced accordingly.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and foregoing **CITIZEN'S POST HEARING STATEMENT OF POSITIONS AND POST HEARING BRIEF** has been furnished by electronic mail and U.S. Mail on this 8th day of September, 2011, to the following:

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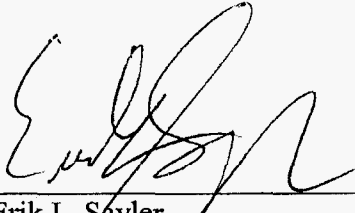
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