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Subject:	Docket No. 100437-EI
Attachments:	FIPUG Reply Brief Docket No. 100437.pdf

In accordance with the electronic filing procedures of the Florida Public Service Commission, the following filing is made:

a. The name, address, telephone number and email for the person responsible for the filing is:

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b. This filing is made in Docket No.100437-EI

c. The document is filed on behalf of The Florida Industrial Power Users Group

d. The total pages in the document are 6 pages.

e. The attached document is The Florida Industrial Power Users Group reply to Duke Energy Florida's Brief in Response to Order Granting Joint Motion of the Parties to Resolve Certain Disputed Case Issues.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Examination of the outage and replacement fuel/power costs associated with the CR3 steam generator replacement project, by Progress Energy Florida, Inc.	Docket No. 100437-EI Filed: April 26, 2013

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THE FLORIDA INDUSTRIAL POWER USERS GROUP'S REPLY TO DUKE ENERGY FLORIDA'S BRIEF IN RESPONSE TO ORDER GRANTING JOINT MOTION OF THE PARTIES TO RESOLVE CERTAIN DISPUTED CASE ISSUES

Pursuant to Order Number PSC-13-0155 PCO-EI entered in the above-styled matter, the Florida Industrial Power Users Group (FIPUG), by and through its undersigned counsel, files this Reply Brief in opposition to the Initial Brief of Duke Energy Florida, Inc., formerly known as Progress Energy Florida, Inc., referred to hereinafter as ("DEF").

Argument

I.

The Parties Agreed That No Positions Were Waived Unless Done So Expressly in the Settlement Agreement

The Parties to this docket executed a partial Settlement Agreement dated January 20, 2012 that was accepted by this Commission on February 22, 2012. The express terms of the Settlement Agreement, a contractual agreement, squarely address what unresolved disputed issues are appropriately presented to this tribunal for resolution. The express terms of the Settlement Agreement make clear that FIPUG and the other the intervener parties only waived certain matters identified in the Settlement Agreement, nothing more. Specifically, paragraph 2 of the Settlement Agreement, states in pertinent part **"The Parties reserve all rights, unless such rights are expressly waived under the terms of this Agreement."** (emphasis added). Thus, because the issues interveners have raised were not expressly waived, something required

by the plain, unambiguous terms of the parties' Settlement Agreement for a waiver to be effective, the issues the interveners seek to litigate were properly preserved and are now properly before this tribunal for consideration. (See Exhibit A to DEF Initial Brief for list of issues to be resolved by the Commission). Interpretation of a settlement agreement is governed by contract law. *See Munroe v. U.S. Food Serv.*, 985 So.2d 654, 655 (Fla. 1st DCA 2008). It is axiomatic that contract terms should be given their plain meaning, and it would not be appropriate for this Commission to rewrite the Settlement Agreement to make it more appealing to DEF. *See Churchville v. GACS Inc.*, 973 So2d 1212, 1216 (Fla. 1st DCA 2008). Further, contracts should be construed so that all provisions are given meaning. *See Gen. Star Indem. Co. v. W. Fla. Vill. Inn, Inc.* 874 So2d 26, (Fla. 2nd DCA 2004). While DEF opted to ignore the express reservation of rights provision referenced above in its Initial Brief, this Commission should give effect to the plain meaning of the reservation of rights clause found within the Settlement Agreement.

II.

If Uncertainty Exists as to Whether or Not Rights Were Waived, Waiver by Implication is Disfavored

DEF's argument that certain issues have been waived by implication comes up short. As a matter of regulatory and public policy, waiver by implication should be disfavored. This case, involving unprecedented facts and circumstances flowing from a broken nuclear power plant containment building, and the ultimate issue of who will be responsible for hundreds of millions of dollars, the ratepayers or the utility, should be decided on the facts, not an ill-conceived legal argument that the interveners have implicitly waived the right to not only litigate, but also conduct discovery about anything that occurred before February 22, 2012. Furthermore, as a matter of law, when uncertainty about the waiver of rights exists, waiver by implication is disfavored. *See Loiselle v. Gladfelter*, 160 So. 2d 740, 743 (Fla. 3rd DCA 1964) (When a right is

vested in a party, and there is doubt was to whether such right has been waived, such doubt should be resolved in favor of the party claiming the right).

III.

Application of DEF's Misplaced Argument That All Possible Prudence Issues Are Waived Up To The Date of The Settlement Agreement Is Unworkable.

DEF argues that "the Intervenor Parties to this docket presented the Settlement Agreement to the Commission with the clear and unambiguous intent to resolve all prudence issues in this docket up the Implementation Date of the Settlement Agreement (February 22, 2012)." *See* DEF Initial Brief at page 1. This position is not only unsupported as a matter of law or fact, it would lead to an absurd result when trying to efficiently prepare this case for trial.

DEF indicated during informal issues identification meetings hosted by Commission staff that it would not permit discovery questions about matters that occurred before February 22, 2012. Such a position would interfere with discovery and be exceedingly difficult to implement. The following example illustrates this point:

> Disputed OPC issue 13 states:
>
> As one of the largest members of NEIL, a mutual insurance company, did Duke Energy have a conflict of interest when negotiating with NEIL for insurance proceeds? If so, was that conflict of interest made known to the Commission and the intervening parties?

DEF filed proof of loss claims with the Nuclear Electric Insurance Limited ("NEIL") during calendar years 2010 and 2011 related to Crystal River 3. Hypothetically, assume an internal, non-privileged DEF e-mail was written before DEF's suggested black out date of February 22, 2012. Assume also that the e-mail recognized that DEF has a conflict of interest in negotiating an insurance settlement with NEIL since, following the merger, DEF's parent would be the largest owner of NEIL and could be subjected to additional NEIL assessments, depending on the

magnitude of the settlement. Such a document, if it existed, would be compelling evidence of a conflict of interest between DEF and NEIL.

Whether or not a conflict exists is important and relevant because the Office of Public Counsel ("OPC") and others suggest that DEF was unreasonable and imprudent in settling its insurance claims with NEIL. The hypothetical e-mail described above would, according to DEF, not be discoverable because it was authored before February 22, 2012. This position, if accepted, hardly provides for a full and complete factual record, and infringes upon the due process rights of the interveners.

To further underscore the difficulty of implementing a February 22, 2012 black out date, assume a deposition is taking place of Mr. Little, a DEF employee knowledgeable about the NEIL insurance issue. Mr. Little is asked if he ever recalls discussions or meetings at which the subject of DEF's conflict with NEIL was discussed. Assume that Mr. Little recalls that a number of non-privileged phone calls about the conflict of interest topic took place in early 2011, but cannot recall whether those conversations took place before or after the DEF suggested February 22, 2011 black out date. How does he truthfully answer the question? Does the deposition get postponed for Mr. Little to check phone records to determine exactly when he had those conversations? What happens if Mr. Little had a NEIL conflict conversation on February 28, 2011 that was following up on a NEIL conflict conversation that occurred on February 17, 2011? Do interveners lose the right to understand the context of the February 28, 2011 discussion because they are foreclosed from learning about the content of the February 17, 2011 discussion? Put simply, the case management issues, problems and disputes that would arise if PEF's February 22, 2011 black out date is accepted would be numerous and lead to an absurd result. Contracts should not be interpreted to lead to an absurd result. *See King v. Bray*, 867 So.2d 1224,

1227 (Fla. 5th DCA 2004). (Where one interpretation of a contract would be absurd and another would be consistent with reason, the agreement should be interpreted in a rational manner).

Conclusion

DEF's position as set forth in its Initial Brief is not supported by fact or law as described herein and in the Joint Reply brief filed by OPC and the Florida Retail Federation.[1]

FIPUG requests that the Commission find that the issues identified by the parties to date as detailed in Exhibit A to DEF's Initial Brief were not waived by the Settlement Agreement.

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[1] FIPUG adopts the positions and arguments set forth the Joint Reply Brief filed by OPC and the Florida Retail Federation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by Electronic Mail this 26th day of April, 2013, to the following:

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