

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: Petition for expedited approval of settlement agreement, regarding negotiated contract for purchase of firm capacity and energy from a qualifying facility, with Pasco Cogen, Ltd. by Florida Power Corporation.

DOCKET NO. 961407-EQ

COPY

BEFORE:

CHAIRMAN JULIA L. JOHNSON
COMMISSIONER J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER DIANE K. KIESLING
COMMISSIONER JOE GARCIA

PROCEEDING:

AGENDA CONFERENCE

ITEM NUMBER:

3**PAA

DATE:

April 1, 1997

PLACE:

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1 PARTICIPATING:

2 Jim Fama, Esquire, Joe Richardson and Robert Dolan
 3 representing FPC
 4 Ansley Watson, Esquire representing Pasco Cogen,
 5 Ltd.
 6 Jim Jimmerson (phonetic), Esquire, representing
 7 North Canadian Marketing
 8 Bruce May, Esquire, representing Vastar

9 * * * * *

10 STAFF RECOMMENDATIONS

11 Issue 1: Should the Negotiated Contract, as modified by the
 12 Settlement Agreement between FPC and Pasco Cogen, Ltd., be
 13 approved for cost recovery?

14 Recommendation: Yes. Approval of the Settlement Agreement
 15 mitigates the risks associated with the uncertainty of civil
 16 litigation. On balance, because there is more monetary risk
 17 in rejecting the Settlement Agreement than approving it,
 18 giving at least some intuitive recognition to the reduced
 19 need for replacement capacity due to deregulation increases
 20 the Settlement Agreement's cost-effectiveness, and using
 21 traditional regulatory rate base accounting as the basis to
 22 calculate simple payback, the contract buy-out should be
 23 approved.

24 Alternative Recommendation: No. The proposed Settlement
 25 Agreement should not be approved because it is not cost-
 effective. The modifications to the Contract result in a
 net overpayment of avoided costs of approximately \$17.3
 million NPV. The Settlement Agreement is based on the
 assumption that Pasco would win the ongoing pricing dispute
 in litigated proceedings and that the Commission would be
 forced to pass these prices on to FPC's ratepayers. The
 Commission lacks statutory authority to approve the recovery
 of QF payments which exceed a utility's avoided cost.

Second Alternative Recommendation: No. The proposed
 Settlement Agreement should not be approved because it is
 not cost-effective. It is based on the assumption that
 Pasco would win the ongoing pricing dispute in litigated
 proceedings, it does not properly account for risks
 associated with fuel-prices and inflation, and it does not
 adequately reflect intergenerational fairness.

Issue 2: If the Negotiated Contract, as modified by the
 Settlement Agreement, is approved, how should the energy
 settlement payment and ongoing capacity and energy payments

1 pursuant to the Settlement Agreement be recovered from the
2 ratepayers?

3 Recommendation: The energy settlement payment of \$5.5
4 million and the ongoing energy payments made pursuant to the
5 Settlement Agreement should be recovered through the Fuel
6 and Purchased Power Cost Recovery (FPCR) Clause. The
7 capacity payments as determined and paid pursuant to the
8 Settlement Agreement should be recovered through the
9 Capacity Cost Recovery Clause. The recovery of payments
10 made prior to their inclusion for recovery through the
11 adjustment clauses should include interest from the date the
12 payments were made. Should the Settlement Agreement not be
13 approved, any necessary adjustments to the Fuel Clause to
14 reflect the method of pricing energy under the Contract
15 prior to the settlement should be made at the next fuel
16 adjustment hearing.

17 Issue 3: If the Negotiated Contract, as modified by the
18 Settlement Agreement, is approved, what is the appropriate
19 method of recovering the monthly payments associated with
20 early termination of the Contract?

21 Recommendation: If the Settlement Agreement is approved, 72
22 percent of the buy-out payments should be recovered through
23 the Capacity Cost Recovery Clause and 28 percent should be
24 recovered through the Fuel and Purchased Power Cost Recovery
25 Clause. This split between the clauses reflects the fact
that the payments are justified based on anticipated
capacity and energy savings in the buy-out years. The
recovery of payments made prior to their inclusion for
recovery through the adjustment clauses should include
interest from the date the payments were made.

26 Issue 4: Should this docket be closed?

27 Recommendation: Yes. If no person whose substantial
28 interests are affected by the Commission's proposed agency
29 action files a protest within twenty-one days of the
30 issuance of this order, this docket should be closed.

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P R O C E E D I N G S

CHAIRMAN JOHNSON: Item 3. Staff.

MS. WAGNER: Good morning. I'm here to present Issue 3. On March 13th, 1991, Florida Power Corporation and Pasco entered into a negotiated contract. The term of that contract was for 20 years, beginning July 3rd, 1993, and expiring July 31st, 2013. Committed capacity underneath this negotiated contract was for 109 megawatts. The capacity payments were based on 1991 pulverized coal-fired avoided unit.

On July 1st of 1991, the Commission approved this negotiated contract for recovery in Docket 910401. In August of 1994, a dispute arose between Florida Power Corporation and Pasco Cogen relating to Florida Power Corporation and Pasco Cogen's interpretation of the methodology to be employed in determining the pricing under Section 9.12 of the negotiated contract.

In November of 1994, Florida Power Corporation petitioned this Commission to interpret Section 9.12 of the negotiated contract. This Commission determined that it did not have jurisdiction to interpret contract disputes. This order was issued under Docket Number 940771, Order Number PSC-95-0210-FOF-EQ.

Staff feels that it would be appropriate to summarize that order, and it would help facilitate your

1 understanding of the recommendation and the issues that
2 are presented within this docket. This order stated
3 that our rules are limited when it comes to negotiated
4 contracts, that the Commission may use standard offer
5 contracts at guidelines in interpreting the
6 cost-effectiveness, the cost-effectiveness of the
7 negotiated contract, but that the Commission does not
8 require the standard provisions to be included in the
9 negotiated contract.

10 The Commission also said in its order that it
11 would not interpret negotiated contracts and defers to
12 the courts to answer any questions of contract
13 interpretation. The Commission limited involvement in
14 negotiated contracts and contract formation process and
15 to cost recovery. The Commission decided in this order
16 that it could not revisit cost recovery issues unless
17 there was present fraud, misrepresentation, or a
18 mistake.

19 Florida Power Corporation and Pasco proceeded to
20 litigate their dispute in the Sixth Judicial Circuit in
21 Pasco County. After considering the contested issues,
22 the litigation expenses, and the benefit that the
23 parties would receive, Florida Power Corp and Florida
24 Power Corporation's ratepayers entered into a
25 settlement agreement with Pasco Cogen Limited. This

1 settlement agreement contains four components. The
2 first component is a new pricing for energy and
3 capacity. The second is a buy-out of the last four
4 years of the contract in seven months; an agreement by
5 Pasco to curtail energy deliveries during the off-peak
6 periods; and, fourth, that PSC would reimburse Pasco
7 for disputed energy payments during the period from
8 August 9th, 1994 until September 30th, 1996.

9 Staff has produced a recommendation that has three
10 alternatives to Issue 1, should the Commission approve
11 this settlement agreement. I prepared these two charts
12 to help with my -- to help you understand the
13 recommendation. In this chart right here Pasco
14 represents the litigation dispute in the Sixth Circuit.
15 If Pasco were to prevail, the settlement agreement
16 represents a 39 million net present benefit to the
17 ratepayers. However, if it is determined in the
18 litigation that Florida Power Corporation would
19 prevail, this settlement agreement represents a 17.3
20 negative savings to the ratepayers.

21 In understanding the recommendation you have to
22 know that all the recommendations are based somewhat on
23 what the outcome of the litigation dispute, with how it
24 would be resolved. The primary recommendation is for
25 approval of the settlement agreement. It is based on

1 risk assessment, replacement capacity, and
2 intergenerational equity. The risk assessment
3 contained is based on the circuit court would find for
4 Pasco and award treble damages. The Commission would
5 then allow cost recovery of these damages.

6 If both of these events were to occur, then
7 Florida Power Cooperation's ratepayers would experience
8 approximately 56.3 million in additional payments to
9 Pasco over the term of the contract. So what the
10 primary recommendation did was they tried to split the
11 difference. And they started at a midpoint analysis of
12 the litigation dispute. And what they determined was
13 that there would be a 10.8 million net present value
14 benefit to the ratepayers if you were to determine that
15 you could not tell who would win and took the 50
16 percent split.

17 Also, this recommendation says that the
18 cost-effectiveness of the settlement agreement
19 increases if you assume that you will not need to
20 replace capacity in the future. And also this
21 recommendation states that there is no
22 intergenerational equity question.

23 The first alternative staff recommendation is for
24 denial of the settlement agreement. Specifically, the
25 recommendation contends that the modified energy

1 payments which reflect Pasco's court position of 100
2 percent firm energy for all hours are not based on a
3 representative calculation of avoided cost. This
4 recommendation maintains that Florida Power
5 Corporation's modeling of avoided units results in a
6 more appropriate avoided cost study, and that this
7 Commission cannot approve recovery of payments that are
8 in excess of the utility's avoided cost.

9 The recommendation's starting point for its
10 determination is that the Florida Public Service
11 Commission can only allow recovery for cost less than
12 the avoided cost. Staff determined that this
13 settlement agreement when compared to the avoided cost
14 analysis would have a negative savings of 17.3, so it
15 would exceed cost by 17.3 million and, therefore, it
16 should not be cost-effective. This recommendation also
17 looked at the package deal and determined that Florida
18 Power Cooperation's ratepayers would have an increase
19 in payments compared to the existing contract and,
20 therefore, it should not be approved. And, third, when
21 it looked at the Auburndale, Ridge and Orlando Cogen
22 settlements agreements, which we previously had before
23 us, this recommendation determined that additional
24 benefits were not found in this docket.

25 The second alternative recommendation is also for

1 denial of the proposed settlement agreement but for
2 different reasons. The recommendation is based on the
3 Commission's previous decision to refrain from
4 interpreting negotiated contracts especially in regards
5 to the pricing provisions. Since this agreement awards
6 all disputed payments to Pasco, it contains an implied
7 interpretation of a negotiated contract. The
8 recommendation, this recommendation suggests that it is
9 more appropriate for the Commission to consider the
10 potential outcome of the pricing dispute rather than to
11 attempt to do a contract interpretation. This second
12 alternative believes that the court would apportion the
13 disputed amounts between the parties, thus the
14 cost-effectiveness of the settlement agreement is
15 estimated in the recommendation based on a 50/50 split
16 of the disputed amount.

17 It then takes into account fuel prices,
18 alternative natural gas forecasts, a moderate inflation
19 risk, and a GTP inflator used instead of a CPU. The
20 recommendation maintains that the proposed agreement
21 should be denied since it is not advantageous to the
22 ratepayers under scenarios involving moderate legal and
23 economic risks, and since the proposed settlement
24 agreement lacks intergenerational equity.

25 Issue 2 addresses how the revised energy and

1 capacity payments should be collected. Staff
2 recommends that if the settlement agreement is
3 approved, the energy payment should be recovered
4 through the fuel clause. The capacity payment should
5 be recovered through the capacity recovery clause.

6 In Issue 3, staff addresses how the buy-out
7 payments should be recovered. Consistent with Commission
8 past actions, staff recommends a percentage approach
9 because the early termination could result in both
10 capacity and energy savings. Florida Power Corporation
11 and Pasco Cogen Limited, along with other interested
12 parties, which consist of Vastar Gas Marketing and
13 North Canadian Marketing are here today to present
14 their positions on staff's recommendations. Staff is
15 also available to answer any of your questions.

16 CHAIRMAN JOHNSON: Commissioners, how would you
17 like to proceed? Would you like to ask staff questions
18 first or hear from the parties?

19 COMMISSIONER DEASON: I would rather hear from the
20 parties.

21 CHAIRMAN JOHNSON: Very well. Issue-by-issue or
22 just their general presentations?

23 COMMISSIONER DEASON: General presentation.

24 CHAIRMAN JOHNSON: Florida Power Corp.

25 MR. FAMA: For Florida Power Corp, I'm Jim Fama.

1 With me today is Joseph Richardson, he is our
2 President, and Robert Dolan, our Cogeneration Manager.
3 We have a handout that was provided to staff yesterday,
4 and Mr. Nixon and Mr. Foley are going to walking around
5 the handout to the Commissioners and to others in the
6 room. We would like to divide our presentation into
7 three parts. Mr. Richardson would like to begin with
8 some opening comments, Mr. Dolan will come next and
9 take you through the handout and take you through the
10 numbers in the case, and I will come last and deal with
11 the legal issues in the case.

12 MR. RICHARDSON: Thank you. The settlement --
13 for the record, I'm Joe Richardson, President of
14 Florida Power. The settlement of the Pasco Cogen
15 matter which is being reviewed today is one of several
16 PURPA contract issues that has or will be before the
17 Commission. You have approved three, one was denied,
18 and there are two more that are scheduled in the near
19 future. Before we get into the specifics of the Pasco
20 settlement today, though, I want to just take a moment
21 and make some comments on the broader PURPA contract
22 issues and the impacts that they are having on Florida
23 Power and what we are trying to accomplish with all of
24 these activities that are coming before you.

25 Florida Power has PURPA contracts of approximately

1 1100 megawatts. It is a substantial part of the
2 production of our company, roughly 17 percent of the
3 energy that we sell is produced by PURPA generators.
4 All of this purchased power is substantially higher in
5 cost than today's avoided cost. And this is not unique
6 to Florida Power, most PURPA contracts throughout the
7 country are in this situation. To further compound the
8 problem, some of these contracts extend as far out as
9 2025.

10 Florida Power recognized that the cost of the
11 PURPA contracts is probably the single greatest adverse
12 impact on the price of our product. I guess to put
13 this in perspective, if you could somehow overnight
14 just replace all of the PURPA contracts with combined
15 cycled gas plants similar to what we are building in
16 Polk County, you would probably drop our residential
17 bill by about \$5 a 1,000. It's a significant impact on
18 the price of our product.

19 As a result of this, a few years ago we
20 implemented very extensive actions which were intended
21 to mitigate the long-term adverse impact of the PURPA
22 contracts, and the matter before you today is the
23 result of that effort, one of the results of that
24 effort. We recognize that this comes before the
25 Commission at a very unfortunate time. The extended

1 outage of the nuclear plant is putting significant
2 price pressure on our product, and it has attracted a
3 great deal of attention. I can assure you nobody is
4 feeling the pressure and the heat of that more than our
5 management team, and we take it very, very seriously.
6 And we are doing what we can as rapidly as we can to
7 rectify that.

8 But the nuclear situation is -- while it is a big
9 issue, it's a relatively short-term issue when compared
10 to the PURPA contracts. These PURPA contracts are -- I
11 personally believe are a bigger long-term issue, and
12 maybe the biggest long-term issue facing Florida Power
13 right now. But, as much effort and energy as we may
14 put into trying to mitigate these costs, unfortunately,
15 there is no real meaningful long-term benefit that you
16 gain, that you can achieve without some short-term
17 cost.

18 All I would ask is that as you make your
19 deliberations today we sincerely believe that our
20 mitigation strategy which has been in effect for a
21 couple of years and you're seeing all of these cases
22 coming before you, is the soundest approach for the
23 long-term benefit of the ratepayer, and we would just
24 ask your support in helping us achieve that.

25 With that I would like to turn it over to Robert

1 Dolan, who will present our case.

2 MR. DOLAN: I'm Robert Dolan with Florida Power.
3 I believe you have the handout in front of you. I'm
4 not going to through this line-by-line, so you don't
5 have to worry about that. When the Commission
6 originally approved this contract in the summer of '91,
7 the economic analysis attached to the order showed firm
8 energy price all the time to Pasco Cogen and the other
9 contracts. In August of '94, FPC due to some changes
10 in our system and as-available prices implemented
11 Section 9.1.2 of the contract and created the dispute
12 with Pasco Cogen. The settlement that we bring before
13 you, as demonstrated on Chart 1, achieves an additional
14 \$27 million in savings over the original contract
15 projection of 3.3 million. So this settlement is
16 almost ten times greater in savings to the customer
17 than the economic analysis that the Commission used to
18 approve this contract. And Chart 1, I believe,
19 demonstrates that fairly clearly.

20 COMMISSIONER GARCIA: Sorry, could you go over
21 that again.

22 MR. DOLAN: Yes. When the contract was originally
23 approved by the Commission it showed a savings to the
24 ratepayer of 3.3 million out of a \$516 million
25 projected cost of that contract. Those economic

1 analyses that the Commission relied on to approve the
2 contracts showed firm energy prices all the time, and
3 still was projected to be below FPC's avoided cost at
4 that time. This settlement before you today brings
5 another \$27-1/2 million in savings over those original
6 economic justifications from 1991 that the Commission
7 relied on to approve this contract for cost recovery.

8 COMMISSIONER DEASON: Those numbers are based upon
9 the assumption that the firm energy payment would be
10 required at all times?

11 MR. DOLAN: Yes, sir. And that assumption is
12 based on the analysis and the attachments to the orders
13 of the Commission showing firm all the time.

14 COMMISSIONER GARCIA: Forgive me, I'm sorry, you
15 have said it twice and I missed it. How much was the
16 original contract slated to save the ratepayers?

17 MR. DOLAN: 3.3 million.

18 COMMISSIONER GARCIA: Thank you.

19 MR. DOLAN: If you go to the next page, and this
20 is the rate increase or rate decrease issue. Only
21 because of the way FPC implemented Section 9.1.2 is
22 this settlement appearing like a rate increase. We
23 could have been paying Pasco Cogen firm all the time
24 keeping a tracking account and asking the court to
25 refund the difference to FPC, and then this settlement

1 could look like a rate decrease.

2 But because we were recovering FPC's position, not
3 Pasco's, it makes it appear like a rate increase. If
4 you go to Chart Number 2, this is the economic
5 justification. The blue line is Pasco's position, the
6 black line is FPC's position, and the green line is the
7 settlement.

8 The green line, as Joe Richardson alluded to, has
9 a contract buy-out over the last four years and seven
10 months and, therefore, you are paying above Pasco's
11 position when you consider the buy-out. We believe the
12 buy-out has a long-term benefit, and you're going to
13 have to pay some cost to get the benefit out in the
14 future years.

15 Chart 3 is basically just a flowchart of the
16 actions that have got Florida Power and Pasco Cogen to
17 this settlement. The Commission originally approved
18 the contract in '91. We began paying firm energy
19 payments to Dade County in November of '91. We
20 implemented this four parameter pricing in August of
21 '94. In February of '95, the PSC declined the
22 jurisdiction and asked the courts to interpret that
23 section of the contract. Since that time we have
24 established five settlements out of the six that we had
25 a dispute with. This Commission has approved three of

1 those settlements; Auburndale, Orlando Cogen, Ridge
2 Generating. Pasco Cogen is before you today and Lake
3 Cogen will be later in the month.

4 And to quote out of your docket where you declined
5 jurisdiction, "In this case we will defer to the courts
6 to resolve that dispute. We have made it clear that we
7 will not revisit our cost recovery determination absent
8 a showing of fraud, misrepresentation, or mistake."
9 And that was in Docket 940771. In another docket,
10 910603, where you were interpreting negotiated
11 contracts, the Commission made a statement, "QF costs
12 must equal avoided cost at the time they were signed,
13 not at a later time." We believe this settlement --

14 CHAIRMAN JOHNSON: When did we say that, which
15 docket?

16 MR. DOLAN: "QF costs must equal avoided cost at
17 the time the contracts were signed, not at a later
18 time." So you cannot go back and review your avoided
19 cost determination at a later date using new
20 information.

21 CHAIRMAN JOHNSON: I'm sorry to interrupt you. In
22 which order did we say that?

23 MR. DOLAN: It was in Docket 910603, I believe the
24 Order Number is 25668.

25 COMMISSIONER CLARK: But what docket was that,

1 what did it relate to, what was the case?
2

3 MR. DOLAN: That was the spin out of the 91004
4 docket where you --

5 COMMISSIONER CLARK: Numbers don't help me.

6 MR. DOLAN: You separated out standard offer and
7 negotiated issues in '91, and that was the docket where
8 you were interpreting negotiated issues as they relate
9 to the contracts.

10 CHAIRMAN JOHNSON: Let me make sure I'm following
11 you. I was looking at the pink box where you say we
12 declined jurisdiction over pricing. And as I
13 understand you, you are saying in February of '95 we
14 kind of told the courts you guys decide avoided cost,
15 or that we have done all we are going to do on the
16 avoided cost issue. Now, using the -- trying to go
17 back to your first -- when you first entered into this
18 agreement, we were using firm energy prices at all
19 times and the methodology showed that to be the
20 appropriate analysis. In '94, when you all went back
21 and did your audit, you saw that that wasn't, in fact,
22 the proper methodology. And in using the proper
23 methodology, you determined that it wouldn't be firm
24 energy prices at all times.

25 MR. DOLAN: That's correct.

CHAIRMAN JOHNSON: Now, when you came to us to

1 kind of, I guess, help you through that, you are
2 suggesting that we at that point in time that we just,
3 we decided that we were out of the avoided cost
4 business, that we had made the first determination and
5 that was it, and, therefore, it was just up to the
6 court to interpret the contract.

7 MR. DOLAN: That's correct. And there are some
8 quotes from some of the Commissioners in that order
9 that Mr. Fama will present.

10 CHAIRMAN JOHNSON: So you're saying we can't go
11 back and say we need to use a different avoided cost
12 methodology, because we have already determined firm
13 energy price at all times would be applied.

14 MR. DOLAN: That's right. You have to rely on the
15 economic analysis that was done when the Commission
16 approved the contract.

17 COMMISSIONER DEASON: Just because a specific
18 economic analysis was done that showed positive net
19 present value does not mean that then we said that was
20 going to be the standard which would always be applied
21 in interpreting that contract, now did we?

22 MR. FAMA: Commissioner Deason, maybe I can answer
23 that question. I think what is confusing here is the
24 focus on the 1995 order. I think really you need to go
25 back to the 1991 order when the contract was originally

1 approved, and the projections that were presented to
2 the Commission at that time showed the avoided unit
3 being on all the time, so it was a firm energy all the
4 time. Those were the projections. And the Commission
5 determined at that time that even if that were to
6 occur, that Florida Power would not be paying more than
7 full avoided cost.

8 COMMISSIONER DEASON: Worst case scenario, it was
9 still positive net present value.

10 MR. FAMA: Yes, worst case scenario. And since
11 that time, of course, litigation positions and
12 settlement positions have all been kind of below that
13 cap. So I think legally it works like this: You can't
14 revisit your initial avoided cost determination as far
15 as this contract is at or below avoided cost. But it
16 is a separate question as to whether or not the
17 Commission has jurisdiction to interpret contract
18 provisions that are in cogen contracts and are tied up
19 with the Commission's rules.

20 If you may recall back in '95, Florida Power asked
21 you to look at Section 9.1.2 to see if it was
22 consistent with your rules, because you have some very
23 detailed cogen rules. And that's really a separate
24 legal question. You decided back then at the time you
25 didn't have jurisdiction to make that contract

1 interpretation. I think the Commission can revisit
2 that decision if it wants to, but only in a prospective
3 manner going forward.

4 I'm not in anyway saying we don't support these
5 settlements or you should revisit it with respect to
6 the parties that have already come before you or are
7 pending before you, but for the future the Commission
8 could decide, you know, that you don't like the
9 jurisdictional ruling you made before and you do want
10 to make some interpretations and you do want to have
11 some more control over these cogen issues that are
12 related to your rules.

13 MR. DOLAN: Well, just to continue, Florida Power
14 in one of our cases has already lost our position on
15 the Section 9.1.2. Judge Briggs in the Lake Cogen case
16 ruled that it had to be a operable real unit. So the
17 four parameter unit at least in one court --

18 COMMISSIONER CLARK: Had to be a what?

19 MR. DOLAN: An operable real unit, as if you had
20 built the unit using all the parameters that would be
21 associated with a unit that had been constructed.

22 COMMISSIONER CLARK: Do you construe that to be
23 favorable to your position or favorable to Pasco?

24 MR. DOLAN: Well, it clearly said we can't do the
25 four parameter, so it's not favorable to our position

1 on the four-parameter issue. Pasco Cogen contends that
2 it supports their position. And if you modeled a real
3 unit with all the start-up times, and shut-down times,
4 and costs, and all of that, that the unit would be on
5 all the time, that you would always be paying firm
6 energy payments if you had built that unit. That's
7 Pasco's position.

8 COMMISSIONER CLARK: What is your position?

9 MR. DOLAN: We feel like that you could build a
10 unit in that time frame that could cycle. It wouldn't
11 cycle, obviously, as much as a four-parameter unit.

12 COMMISSIONER CLARK: That's my dilemma. I don't
13 think what the judge has ruled in the case is all that
14 clear as to whether it favors your position or it
15 favors Lake.

16 MR. DOLAN: Yes. I think that can be demonstrated
17 due to the Lake Cogen settlement, you know, that
18 dispute was settled even though Lake won the summary
19 judgment, Lake Cogen won the summary judgment, Florida
20 Power was denied.

21 COMMISSIONER CLARK: All right. Let me ask you
22 this. Is the Pasco settlement the same as Lake on that
23 issue?

24 MR. DOLAN: The Pasco and Lake settlements are
25 very similar. They are not exactly the same, but it

1 was within half a percentage point of the dispute
2 amount.

3 COMMISSIONER CLARK: Okay.

4 MR. DOLAN: And obviously they resolve all of
5 these issues in the litigation, we entered into this
6 settlement agreement. We feel the ratepayers are in a
7 better position today than they were prior to August of
8 '94 with this settlement, and especially in a much
9 better position if Pasco prevails in the litigation. I
10 will now just talk briefly about the three
11 recommendations. Obviously we support the primary
12 recommendation. This settlement has certainty. FPC's
13 ratepayers are receiving 61 percent of the disputed
14 amount.

15 We think the Commission should approve the
16 settlement and allow FPC to resolve this longstanding
17 litigation. And that looking at all the history and
18 the evidence, we think the settlement should be
19 approved including the buy-out, and even the buy-out is
20 in the best interest of the ratepayers when you look at
21 it on a long-term net present value basis.

22 On the alternate recommendation --

23 COMMISSIONER DEASON: Before you go to the
24 alternate, how did you determine 61 percent? You're
25 saying the 27.5 million represents 61 percent of what?

1 MR. DOLAN: The disputed amount we estimated on an
2 NPV basis is 45 million.

3 COMMISSIONER DEASON: That depends on your
4 interpretation of the contract versus Pasco's
5 interpretation?

6 MR. DOLAN: Yes. If you look at Chart 4, the
7 numbers are on there for the Pasco settlement. It's
8 Page 8. Staff has up here on their chart shown the
9 dispute as 39 million. The 39 million is from today
10 forward. There is also about a 5-1/2 or \$6 million
11 past dispute, so that's where you get -- the 45 million
12 includes the disputed amount from August 9th, '94
13 through the contract life. We estimate the customers
14 are going to receive 27-1/2 million of that savings,
15 which is approximately 61 percent.

16 Now, while we are at this chart, in the staff
17 alternative recommendation they made a comment that
18 this settlement was not as good as the other
19 settlements that had been previously approved and,
20 therefore, it should be denied. Now, you can clearly
21 look on this chart that it's 61 percent, the best
22 settlement that the Commission approved was 68 percent,
23 and these were the percentages of the dispute at the
24 time the settlements were approved. The lowest number
25 was 40 percent. The one you just approved a few months

1 ago, Ridge was 61.8 percent. So it clearly is much
2 better than the OCL settlement, and is almost in line
3 with the Ridge settlement.

4 So we think that the statement in the staff's
5 alternative recommendation that it doesn't compare
6 favorably with the other settlements just has no basis
7 in any of the numbers we have presented. And those are
8 also the numbers that I think if you look through the
9 staff recommendation, the orders that were attached by
10 the Commission staff.

11 The other flaw in the alternative recommendation
12 is that FPC's position is correct and we will prevail
13 in the litigation. Now, as I stated earlier, in at
14 least the Lake Cogen case in state court, which is the
15 next district over from the Pasco court, the judge has
16 said our position is incorrect. Now, we don't know
17 until we model the real unit and a jury or the judge
18 agrees to what are the real parameters, but we know
19 it's going to cycle less than the four parameter unit.
20 And there is a good chance that the Pasco court could
21 agree with the Lake judge.

22 And, the staff also in our opinion, they concur
23 with our position that that closely calculates avoided
24 cost and they have tried to ignore the history of these
25 contracts that firm all the time was the estimate of

1 avoided cost at the time these contracts were approved.
2 FPC thought the unit due to our as-available prices and
3 the fuel forecast and the fuel cost at the time that
4 this unit would not cycle, that we would pay firm all
5 the time.

6 And a final point on the alternate, you know, if
7 the Commission decides not to approve this settlement,
8 then our ratepayers will have to rely on the outcome of
9 the litigation being better than the settlement, and
10 that is uncertain as to how that litigation will turn
11 out.

12 The second alternative recommendation, in our
13 opinion, has a couple of flaws.

14 CHAIRMAN JOHNSON: Could I ask you something about
15 the first one?

16 MR. DOLAN: Yes, ma'am.

17 CHAIRMAN JOHNSON: Because it appears to me -- I
18 agree with a lot of the things that you're saying, and
19 it appears to me that what staff is saying there is
20 that if firm all the time was the estimate of avoided
21 cost and -- let me try to rephrase that. That the
22 staff would never have approved an avoided cost that
23 said firm all the time indefinitely, because they
24 understand that fuel cost and all of these issues are
25 fluid and that that is not what we were agreeing to.

1 And that if that was then that was a mistake. And if
2 it was a mistake, then we can unwind this thing because
3 it was a fraud, mistake, or whatever the third one was.

4 That's kind of what I hear them saying, that,
5 well, the methodology that you all did when you did the
6 audit was a much better methodology, and that's what
7 they would have expected to occur, not for the
8 Commission to bind itself to a firm all the time, and
9 that that's not what the engineers or the people that
10 viewed this, they saw it as an estimate, but not as
11 binding throughout for the next 20, or however many
12 years. And, in fact, that Florida Power Corp has the
13 same original thoughts, too, and that's why you went
14 back in and did some remodeling and said, okay, it's
15 not firm all the time. And that's kind of where they
16 are going with at least that first alternative.

17 MR. DOLAN: Yes. Clearly we felt like we had the
18 authority to implement that section of the contract
19 which started paying as-available and turning the
20 avoided unit off. We could have, and I don't
21 necessarily agree with staff's first opinion, we could
22 have not had that section in the contract and just paid
23 firm all the time, and it would have met the PURPA
24 requirements for avoided cost.

25 CHAIRMAN JOHNSON: And would we have approved

1 that?

2 MR. DOLAN: I can only speculate on whether you
3 would have or wouldn't. I think you would have. If
4 you read the order out of that 910401 docket, it
5 mentions that contract's section, but it doesn't
6 mention any of it in the cost justification or how that
7 might play out in the future.

8 CHAIRMAN JOHNSON: Okay. Thank you. Sorry to
9 interrupt.

10 MR. DOLAN: On the second alternative, clearly in
11 our opinion it starts from a flawed point in that the
12 staff knows how the court is going to -- the outcome in
13 the litigation is going to come out, and the court is
14 going to rule 50/50. Now, I don't totally understand
15 how a court could do that. I could see how the
16 Commission could or an arbitration or mediation could.
17 The Court is going to decide whether FPC's position is
18 correct or Pasco's position is correct on these issues,
19 not that -- it's not clear who is correct, I'm just
20 going to split it down the middle. We don't see any
21 way the court could come to that outcome.

22 If you look at their sensitivity analysis, they
23 did 12 sensitivity analyses on FPC's base case, they
24 called one of them the base, but it's not FPC's base
25 case. Nine out of the 12 are above the 50/50 split.

1 And, in fact, the worst one goes all the way down to 47
2 percent in FPC's ratepayers. It's 1.9 million over the
3 life of the contract less than a 50/50 split, or 3
4 percent, and, therefore, the settlement shouldn't be
5 approved. Nine out of the 12 are better than the 50/50
6 split, so it seems to me if you just averaged those 12
7 you are at about a 60 percent split of the dispute,
8 don't just look at one sensitivity.

9 In another sensitivity that the primary says the
10 Commission should think about, of the 12 sensitivities
11 they were ignored. One is you may not have to replace
12 the capacity in the buy-out in the exact year the
13 buy-out took place. And if that capacity can be
14 deferred, each year you do not have to replace that
15 capacity because you may not have a need on that exact
16 date in 2009, it saves an additional 5 million per
17 year.

18 The other thing on the intergenerational issue,
19 and we are having trouble with that intergenerational
20 issue that first came up in the OCL docket in that we
21 cannot find in the Commission's regulations or law what
22 is the basis of determining intergenerational equities.
23 And, in fact, the only rules we can find in cogen
24 contracts that this Commission has adopted says that --
25 to quote it, it's Rule 25-17.0832(2)(b), states that

1 the Commission shall consider the evaluation of the
2 cumulative net present value over the term of the
3 contract. It never says look at five years here and
4 five years there and then the next five.

5 And, in fact, if you used the intergenerational
6 issue as a basis, then FPC probably can never build any
7 capacity again, or any utility in the state, because
8 when you build new construction it's front loaded. So
9 today's ratepayers are paying more than their fair
10 share than the guys on the back years. So,
11 traditionally utility ratemaking creates an
12 intergenerational issue in that you pay more up front
13 and get more of a benefit in the later years.

14 The QF contracts, you all have recognized that you
15 could levelize the payments. This Commission has
16 approved levelization where you pay the same each year.
17 This Commission also in its rules say that you can pay
18 early. You can actually pay a cogenerator prior to the
19 in-service date of the avoided unit, and that could be
20 up to as many as seven years. And this Commission has
21 approved contracts like that. This Commission has
22 approved accelerated contracts. So, we think the
23 intergenerational issue is a nonissue in that the
24 Commission has always looked at cogeneration and system
25 planning whether we are building the right units or the

1 NPV over the term of the contract or the life of the
2 generating facility.

3 The conclusion -- and I'm sure you will hear that,
4 glad to hear that, that I'm about to conclude -- we
5 think the Commission should approve the Pasco Cogen
6 settlement. We think it's going to achieve a potential
7 savings of 27.5 million. FPC concurs with the staff's
8 primary recommendation that the settlement agreement is
9 the best resolution of the dispute and should be
10 approved. The primary recommendation recognizes that
11 the Commission has deferred to the courts for the
12 implementation of Section 9.1.2, and the settlement
13 does not have a preconceived notion as to how the
14 courts will decide on that litigation.

15 And a final comment, we have been proactive in
16 trying to reduce the PURPA cost to FPC's ratepayers.
17 The Commission has approved, prior to OCL, every one of
18 our negotiated efforts, and we believe the PSC should
19 continue to endorse FPC's mitigation efforts to reduce
20 these PURPA costs.

21 Thank you.

22 MR. FAMA: Commissioners, I'm going to address
23 briefly a couple of legal problems we have with the
24 alternate recommendations. Obviously we support the
25 primary recommendation. I think there are two legal

1 problems with that first alternative recommendation.
2 The first alternative recommendation would have you
3 believe that the Commission has the authority to
4 revisit its 1991 determination originally finding that
5 the Pasco contract is below Florida Power's avoided
6 cost. I don't think the Commission has the legal
7 authority do that.

8 COMMISSIONER CLARK: Let me ask you that. Absent
9 fraud or mistake, could we revisit it if there was
10 fraud or mistake involved?

11 MR. FAMA: Fraud or mistake, those are exceptions
12 to administrative finality. Commissioner Clark, I
13 think the mistake that is usually talked about in those
14 cases is not if a Commission makes a mistake or an
15 adjudicating body makes a mistake, but there is a
16 fundamental mistake between the parties.

17 COMMISSIONER CLARK: Well, let me propose
18 something to you, that you presented to us a contract,
19 and in interpreting that contract -- and let's just use
20 the firm energy, that it was presented to us -- let's
21 say it was presented to us on the basis that it would
22 not be on all the time and you wouldn't be paying firm
23 energy all the time. And on that basis we were able to
24 approve it. And then there later becomes some dispute
25 that goes to a court, and the court says, no, we

1 interpret it as requiring you to pay firm all the time.
2 And if you go back and plug in that interpretation, it
3 is no longer cost-effective. Are you saying that we
4 cannot then say we will not allow cost recovery of that
5 amount that represents in excess of what we would have
6 approved or what we did approve?

7 MR. FAMA: Well, Commissioner, in your
8 hypothetical still the Commission approved a contract
9 with a formula in it.

10 COMMISSIONER CLARK: And suppose in that order we
11 said we anticipate that it will not be on all the time,
12 and on that basis we feel it can be cost-effective.
13 And later a court interprets that contract and says we
14 interpret it as requiring you to pay all the time. Are
15 you saying that we can't go back and disallow that
16 recovery?

17 MR. FAMA: Commissioner, I don't mean to be
18 dodging your question, but I don't think you would have
19 approved a formula, an open-ended formula that would
20 have allowed you go to up to this cap, and said, well,
21 we are going to approve it because we don't think we
22 will really ever go up against the cap, even though the
23 formula is in there and that could happen.

24 COMMISSIONER CLARK: Let me put it -- I'm still in
25 agreement with our decision that we don't have the

1 authority to interpret contracts, I do think that is
2 uniquely a judicial province. But I do think that
3 based on their interpretation, if it is not the basis
4 on which we approved it, that we can go back, we can
5 then disallow it. And I'm getting to your theory that
6 we cannot go back and revisit it under those
7 circumstances. Mr. Fama, let me be clear. I'm not
8 saying that that's what we have today.

9 MR. FAMA: Commissioner Clark, I think you're
10 going to run into the Freehold case in that situation,
11 that the Commission made a finding that -- Freehold
12 says that if you approve a contract that is consistent
13 with avoided cost, just, reasonable, prudent, that you
14 can't reconsider it, and it is preempted by federal
15 law.

16 Your administrative finality cases in Florida say
17 the Commission has an inherent authority to modify its
18 orders, and it talks about there is a changed
19 circumstance exception. I don't think we are in that
20 situation here. We might be under your hypothetical,
21 but I don't think we fall under this line of cases in
22 the situation that occurred in 1991. I think that
23 staff's first alternative is unlawful. It suggests
24 that you do something unlawful, that you revisit your
25 avoided cost determination and essentially lower that

1 avoided cost bar. And I think that's the primary
2 problem with that recommendation. And the second
3 problem with the recommendation is kind of a -- it's a
4 legal procedural problem. You've got --

5 CHAIRMAN JOHNSON: Could you we go back again?
6 Now, why can't we revisit our determination? You said
7 that the PSC doesn't have the authority to revisit its
8 determination or its initial finding on avoided cost,
9 and now why can't we revisit that?

10 MR. FAMA: Okay. You have a -- the 1991
11 determination is what we are talking about when the
12 contract was originally approved. Under the doctrine
13 of administrative finality that eventually orders of
14 administrative agencies -- and I'm referring to the
15 Peoples Gas case, it's at 187 So.2d 338. It's a 1966
16 case. And I will just read a couple of sentences out
17 of it and maybe that will help. "Orders of
18 administrative agencies must eventually pass out of the
19 agency's control and become final and no longer subject
20 to modification.

21 This rule assures that there will be a terminal
22 point in every proceeding at which the parties and the
23 public may rely on a decision of such an agency as
24 being final and dispositive of the rights and the
25 issues involved therein." Under this line of cases,

1 the Commission can reconsider final orders still under
2 their control. But once things are out of the
3 Commission's control and the parties have relied on
4 them to their detriment, in the example of Pasco, they
5 spent \$80 million or whatever and built their power
6 plant, and Florida Power adjusted its rates and
7 whatnot. So in a nutshell, I think that's the
8 situation.

9 CHAIRMAN JOHNSON: Okay.

10 COMMISSIONER DEASON: I don't understand your
11 comment that staff's alternative recommendation is
12 unlawful. Their recommendation is to deny the
13 settlement. How is denying the settlement unlawful?

14 MR. FAMA: No, Commissioner, I'm sorry if I wasn't
15 clear on that point. Absolutely the Commission has the
16 authority to deny the settlement. If you think it's a
17 bad deal, you have authority to deny it, and say I want
18 to wait until the litigation runs its course, or you
19 folks retrade this settlement and bring one back.
20 Absolutely you have the authority to deny it.

21 What I was speaking to when I talked about the
22 unlawful piece is that there is a premise or a
23 predicate in that first staff recommendation that the
24 Commission can revisit its avoided cost and lower than
25 bar, and I think that's unlawful. I don't think you

1 can do that. That's what I was speaking of.

2 The other -- I will be brief on this one. The
3 other legal problem we have kind of already talked
4 about. You've got kind of a bird in the hand here, you
5 know where this settlement gets you, you know it's
6 better than firm all the time. And if it is rejected,
7 which you have the right to do, if it is rejected you
8 don't know where the Commission is going to end up.
9 You know, Pasco asked for a jury trial, I'm not sure a
10 jury is going to understand hypothetical units turning
11 on and off, and I'm not sure they are going to
12 understand this contract. There is a big question.
13 There is a big question.

14 Gauging whether we have a good deal or not, under
15 the Commission's rules, it talks about modifications to
16 existing contracts should be judged against the
17 original revenues, if you will, under the existing
18 contracts. That's your Rule 25-17.0836. And
19 Commissioner Kiesling, back in '95 when this was
20 discussed at the agenda conference on that order on
21 9.1.2, put your finger right on it. This is what you
22 said. You said, "If this Commission allows the circuit
23 court or federal court, the trial level court to
24 interpret this provision of the contract, is there
25 interpretation which is being argued to the court which

1 would result in cost recovery greater than that which
2 we have already approved?"

3 And she was asking that to Mr. Ansley Watson. And
4 the answer, of course, is no. And you said a few pages
5 later in the transcript, "And the effect of Florida
6 Power's interpretation of 9.1.2 currently is that the
7 payments that they would make to the QFs will be
8 reduced below the level which have been made in the
9 past and which were used to determine cost recovery at
10 the time the contracts were approved."

11 So I think your point at that time, Commissioner
12 Kiesling, if I might, was that if we litigate to get
13 something better that the ratepayers will benefit and
14 we went another route here. We said we will settle to
15 get something better on behalf of the ratepayers.
16 Again, I think that is the proper way to gauge it, we
17 made a better deal off the existing contract
18 originally, as originally projected it would work out
19 by the Commission.

20 The second alternative recommendation, I think Mr.
21 Dolan has already talked about the legal problems in
22 sort of a split-the-baby approach. We don't think a
23 court would split the difference. Commissions
24 sometimes do, but courts don't have the authority to
25 rewrite contracts. They are going to go with either

1 one party or the other. Somebody is going to lose and
2 somebody is going to win.

3 COMMISSIONER CLARK: Mr. Fama, is that the only
4 issue before the court?

5 MR. FAMA: In Pasco?

6 COMMISSIONER CLARK: Yes, that contract provision.

7 MR. FAMA: No, there is antitrust issues.

8 COMMISSIONER CLARK: Yes. They may not split the
9 baby on the issue, but overall they do split the baby
10 sometimes.

11 MR. FAMA: Yes, I would agree with that. I mean,
12 there is certainly some discretion. Of course, in an
13 antitrust situation the jury is not told about treble
14 damages. In their rule on damages they don't realize
15 we treble things like that.

16 And, Commissioner Clark, I would agree with you,
17 with what I think you might have been thinking during
18 the colloquy with Mr. Dolan, that if we end up with a
19 real unit, as the late judge said we should have, and
20 it's modeled and it may turn on and off in a fashion
21 that kind of gets you about halfway between the
22 parties' position, that is conceivable. That could
23 happen. So there is that potential middle ground.

24 But, again, as Mr. Dolan said, even if you use a
25 50/50 benchmark to gauge the settlement, we are well

1 within that benchmark, and there is a lot of savings in
2 this deal for the ratepayers. Obviously I don't think
3 the first alternative has any legal problems, so I'm
4 not going to speak to that. And that's really all I
5 have on the legal issues.

6 CHAIRMAN JOHNSON: Thank you. Pasco.

7 MR. WATSON: In a minute here I have some prepared
8 comments that I wanted to make, but some of the
9 discussion has prompted others. And I will try not
10 to --

11 CHAIRMAN JOHNSON: Who are you representing?

12 MR. WATSON: Ma'am?

13 CHAIRMAN JOHNSON: Who are you representing?

14 MR. WATSON: I'm Ansley Watson appearing for Pasco
15 Cogen Limited.

16 CHAIRMAN JOHNSON: Okay. We just wanted to
17 confirm that.

18 MR. WATSON: Thank you, Madam Chairman. Some of
19 the comments and questions, however, have prompted
20 additional comments. I think on the issue of mistake,
21 my own opinion is that if you found that a mistake had
22 been made to the extent that the \$3.3 million net
23 present value in savings on which your order in 1991
24 was based approving the contract between Pasco and
25 Florida Power for cost recovery, if you found that the

1 mistake was such based on the facts before you in 1991
2 that that 3.3 million in savings really wasn't there, I
3 would agree you might have authority to go back and
4 change that decision.

5 I lost a case years ago urging that the Commission
6 had made a mistake. I was told by the Supreme Court of
7 Florida that the Commission speaks through its orders
8 and that the order reflected no mistake. I don't
9 believe the doctrine of mistake is an exception the
10 doctrine of administrative finality contemplates -- and
11 I don't want to accuse anyone of this, but I will say
12 it anyway -- contemplates conjuring up a mistake as
13 justification for changing a decision made in the past
14 based on hindsight.

15 Now, if the Commission were to find in this case
16 that a mistake had been made, it may turn out to be a
17 mistake here in Tallahassee. I can assure you that if
18 you do that, however, you will give Pasco Cogen a real
19 leg up before the circuit court in Pasco County.
20 Because what may be a mistake here will be a fraud on
21 Pasco Cogen Limited. Florida Power Corporation was
22 partners with affiliates of Peoples Gas System when the
23 Pasco Cogen project was developed. Peoples Gas didn't
24 know anything about cogeneration, or avoided units, or
25 electricity. They relied on Mr. Dolan and others with

1 Florida Power to tell them is this a good deal, is this
2 something that we want to put \$10 million into and
3 borrow in excess of \$90 million to construct?

4 Every pro forma on this project was run by Florida
5 Power Corporation. So what you may find, if that's the
6 route you choose to go, was a mistake here, I can
7 assure you we will make every effort to paint as a
8 fraud, and I think we have got a reasonable chance of
9 success at doing so before the court in Pasco County.

10 Let me go back to what I think is a very important
11 point, and that is the starting point is this
12 Commission's approval of this contract for cost
13 recovery in 1991. And based on the \$3.3 million in
14 savings on a net present value basis over Florida
15 Power's avoided cost for a 1991 pulverized coal unit,
16 this Commission approved the contract for cost
17 recovery. Now, this is not only the starting point
18 here today, but if you look at the chart prepared by
19 staff over there, it's also the right-hand side of that
20 chart. Because Pasco prevails is Pasco's litigation
21 position, and that is firm energy all the time based on
22 what was represented to Pasco by Florida Power
23 Corporation and based on what this Commission approved
24 in 1991.

25 So we consider that the starting point, and it

1 also happens to be equivalent to Pasco's position in
2 the lawsuit. This agreement and the amendments made to
3 it by the settlement agreement that the parties have
4 entered into are not here before you today on Florida
5 Power's whim. They are the result of lengthy and
6 contentious litigation between the parties, which
7 Florida Power has agreed to settle rather than incur
8 the time and expense, and more importantly the
9 substantial risks associated with pursuing the issues
10 in the suit to final judgment.

11 I'm told I don't get up here as much as I used to,
12 that three recommendations on one issue happens with
13 some frequency. I have been coming up here for 27
14 years and it's the first time I have seen it. Of the
15 three recommendations before you today on Issue 1,
16 which is should the settlement agreement be approved,
17 only the primary recommendation reflects any
18 appreciation whatsoever of the risks faced by Florida
19 Power and its ratepayers if the litigation in Pasco
20 County continues. That recommendation focuses solely
21 on the issue raised by Florida Power's petition before
22 you, and that issue is are the payments required by the
23 amendments to the power purchase agreement that are
24 made by this settlement agreement prudent expenditures
25 for FPC for cost recovery purposes. Now, I think we

1 need to bear that in mind.

2 Each of the alternate recommendations would have
3 you deny approval of the settlement based on staff's
4 suppositions about how the contract dispute will be
5 resolved. The first alternate and all of the
6 calculations in it are based solely on the premise that
7 Florida Power wins the lawsuit. Now that is probably
8 the least likely of all of the scenarios before you.

9 The second alternate is also based on what I
10 consider at least to be totally unrealistic analysis,
11 that in addition is inconsistent and contradictory. It
12 arbitrarily ignores all of staff's own sensitivity
13 numbers which support approval of the settlement. It's
14 premised on a 50/50 split. Now, Commissioner Clark
15 said that the summary judgment in the Lake case is not
16 that clear. What is clear is that it is against
17 Florida Power's four parameter coal unit. They call it
18 a four parameter unit, but in reality it's only a two
19 parameter unit. It's a fuel cost and a heat rate. And
20 it turns off sometimes for an hour at a time.

21 Why isn't a win by Florida Power or a 50/50 split
22 reasonable to assume? There are two reasons for that.
23 First is that the primary issue, at least on this
24 contract dispute before the court is the interpretation
25 of the contract. As Mr. Dolan indicated, one of the

1 parties is going to be proven right in its
2 interpretation and the other wrong. There will be a
3 clear winner and a clear loser, not a split decision.
4 The second reason is that Florida Power Corporation has
5 already effectively lost in court.
6

7 Only the primary recommendation in this case
8 before you recognizes the significance of the summary
9 judgment issued by the court in Lake County against
10 Florida Power on the issue of liability for breach of
11 contract. In fact, maybe the only shortcoming in the
12 primary recommendation is that it doesn't emphasize
13 enough the importance of that summary judgment and just
14 what it says. What it says is that Florida Power's
15 attempted interpretation of the contract is wrong. It
16 says that Florida Power cannot model the avoided unit
17 in the way it tried to do. It says that the unit
18 referenced in Section 9.1.2 of the contract is not the
19 unit Florida Power argued it was, but must be modeled
20 as a real operable electric generating facility which
21 has operating characteristics in addition to a heat
22 rate and a fuel cost.

23 COMMISSIONER CLARK: May I ask you a question?

24 MR. WATSON: Yes, you may.

25 COMMISSIONER CLARK: It's a summary judgment.

MR. WATSON: Summary judgment.

1 COMMISSIONER CLARK: What is a summary judgment?
2 Is it a decision on a pleading?

3 MR. WATSON: Yes, the pleadings and the affidavits
4 before the court.

5 COMMISSIONER CLARK: Okay. So the court could
6 change its mind after it had full evidence. It simply
7 said based on what you give me today I cannot find for
8 Power Corporation.

9 MR. WATSON: The summary judgment has been entered
10 and there will be no evidence presented at trial on the
11 issue of liability for breach of contract.

12 COMMISSIONER CLARK: You moved for a summary
13 judgment. Pasco moved for a summary judgment.

14 MR. WATSON: We have not.

15 COMMISSIONER CLARK: I guess I'm confused. Who
16 moved for the summary judgment?

17 MR. WATSON: This is in the Lake Cogen suit in
18 Lake County against Florida Power.

19 COMMISSIONER CLARK: And it's a summary judgment
20 in that case.

21 MR. WATSON: Yes, on the issue of liability alone.

22 MR. FAMA: Commissioner Clark, maybe I can help,
23 because I was at the losing end of that summary
24 judgment. Judge Briggs -- Lake moved for a summary
25 judgment to knock out the four parameter unit viewpoint

1 that Florida Power had, and they were successful in
2 doing that. And a judge said basically, Florida Power,
3 you need to go model a real avoided unit, that's what
4 this contract says you're supposed to do. You're
5 supposed to model that unit and pay them on the basis
6 of how that unit operates. And that is the piece that
7 hasn't been done yet.

8 COMMISSIONER CLARK: And how is that different
9 from your position with respect to the contract
10 provision?

11 MR. FAMA: Our position with respect to the
12 contract provision is that all we needed to model were
13 four parameters, and as Mr. Watson says, really just a
14 minimal number of parameters. In other words, it was a
15 proxy unit. There was no point in having a big debate
16 about how a real unit -- because this was just a
17 pricing proxy. That's our position.

18 COMMISSIONER CLARK: Okay. Go ahead.

19 MR. WATSON: Commissioner Clark, that partial
20 summary judgment is Attachment 2 to the staff
21 recommendation. Let me just make one little point
22 about how Florida Power's modeled the two parameter
23 unit or the four parameter unit. As I mentioned
24 earlier, it was off for very short periods of time that
25 are totally inconsistent with the way a coal plant

1 operates. A shorter period is one hour, and this is
2 because it was not an operational decision. It was not
3 an operational commitment of this unit to turn it on or
4 off. It was pure math. I mean, you have the heat rate
5 and the fuel cost and --

6 COMMISSIONER CLARK: Mr. Watson, if you're
7 dwelling on that for my benefit, I think I've already
8 gotten it now.

9 MR. WATSON: Okay. The point I wanted to go on
10 and make, though, is that there would be times if it
11 was a real coal unit, depending on how it might be
12 modeled, that if the real coal unit was scheduled off,
13 that the as-available rate would be during a number of
14 hours greater than the firm energy rate that is called
15 for under the contract. That couldn't happen, as I was
16 going to say, under Florida Power's model, because if
17 the firm rate was less than as-available, this avoided
18 unit was scheduled off. So firm became a cap on what
19 they would pay. It was basically the old lesser of
20 methodology for determining what the QF got paid.

21 So here we have a situation where Florida Power
22 has lost already in at least one court where the issue
23 of this four parameter unit versus a real coal unit has
24 been presented. As one of Pasco's attorneys who in
25 connection with our own litigation has looked at about

1 a million pages of documents, either attended or read
2 the transcripts of approximately 100 depositions taken
3 in six states, I have a very strong feeling that they
4 are going to lose again if this Commission sends the
5 parties back to court and the case must proceed to
6 trial.

7 You should also know that FPC's exposure in the
8 Pasco litigation is perhaps greater than in the Lake
9 case because Pasco has pending additional meritorious
10 claims in that lawsuit that Lake did not have. Now,
11 this Commission ruled in 1995 that the court --

12 COMMISSIONER CLARK: Let me ask you a question.
13 Do you have pending claims that you label meritorious?

14 MR. WATSON: Yes.

15 COMMISSIONER CLARK: All right. Did they have any
16 pending claims? Does Lake have any --

17 MR. WATSON: Florida Power?

18 COMMISSIONER CLARK: No, in the other case, does
19 Lake have any pending claims?

20 MR. WATSON: They don't have the same claims that
21 Pasco has in its lawsuit. They don't have antitrust
22 claims, they don't have claims for manipulation of the
23 index price per coal that drives the firm energy price.

24 COMMISSIONER CLARK: I guess what I'm asking, but
25 the claim of meritorious is your characterization of --

1 MR. WATSON: Obviously the court hasn't decided.

2 COMMISSIONER CLARK: -- of Lake's, too. You're
3 saying that -- they also have pending claims.

4 MR. WATSON: They have a claim for breach of
5 contract on the energy pricing provision.

6 COMMISSIONER CLARK: And that's it?

7 MR. WATSON: That's it, to my knowledge.

8 COMMISSIONER CLARK: Okay.

9 MR. WATSON: This Commission ruled in 1995 that
10 the courts have jurisdiction to decide the contract
11 dispute between Florida Power and Pasco and these other
12 QFs. A court has already decided against Florida Power
13 and in favor of the QF on one of the very issues in the
14 Pasco case. What the staff in the alternate
15 recommendations is asking you to do is to substitute
16 staff's judgment for that of the court that has already
17 ruled.

18 Now, Commissioner Clark indicated, as I said
19 earlier, that the summary judgment is not all that
20 clear. There are no sure things, but there is one
21 before you on that chart up there. And that is the
22 middle position that is labeled 50 percent for the
23 primary recommendation, because that represents the
24 settlement that Florida Power has agreed to enter into.
25 It's the only one of the choices before you that is a

1 sure thing today.

2 The primary recommendation, primarily for that
3 reason, is the only one of the three recommendations on
4 Issue 1 that really makes any sense. It recognizes the
5 summary judgment in the Lake case which supports in all
6 important respects Pasco's interpretation of the
7 contract. It recognizes the risk to Florida Power's
8 customers in the event the Commission does not approve
9 the settlement now before it. Look at the number on
10 Page 5 of the staff's recommendation, and the number at
11 the far right on the chart before you. \$39 million net
12 present value additional cost to the ratepayers if
13 Pasco wins the lawsuit.

14 Finally, the primary recommendation concludes the
15 only way it logically should by recommending approval
16 of the settlement because there is more monetary risk
17 to the ratepayers if the settlement is rejected than
18 there is if the settlement is approved. It basically
19 says that Florida Power is prudent in entering into the
20 settlement of this litigation.

21 The Commission has always encouraged settlements.
22 This particular settlement confers substantial benefits
23 on Florida Power's ratepayers, since it's costs are
24 less than the costs approved by the Commission when it
25 approved this contract for cost recovery in 1991. I

1 know that the costs are less because as a
2 representative of Pasco I know Pasco will be paid less
3 per the settlement, in substantial measure less than it
4 was entitled to receive under the contract as approved
5 for cost recovery, and I think the court in the Lake
6 case would agree.

7 The Commission's adoption of anything other than
8 the primary recommendation on Issue 1 will disadvantage
9 Florida Power and its customers. It will send the
10 parties back to court and leave in place the terms of
11 the original contract approved by the Commission, which
12 according to staff's own calculations is \$39 million
13 net present value more expensive than the settlement
14 that is before you today. We submit the settlement is
15 prudent and should be approved by the Commission.

16 CHAIRMAN JOHNSON: Thank you very much. Staff.

17 MS. WAGNER: Chairman Johnson, there are present
18 interested persons that would like to address this
19 Commission regarding the issues.

20 CHAIRMAN JOHNSON: Okay. We are going to take a
21 five-minute break. Yes, let's take a five-minute break
22 and we will go back on the record after that.

23 * * * * *

24 CHAIRMAN JOHNSON: Item 3. Now, where were we in
25 that process? Staff, you were suggesting that there

1 were some other individuals that wanted to participate?

2 MS. WAGNER: Yes, there is. There are two
3 interested parties that -- excuse me, not parties.
4 There are two interested persons that would like to
5 participate, Vastar Gas Marketing and North Canadian
6 Marketing. Both are present today, and they feel that
7 they have some concerns that should be brought to your
8 attention.

9 COMMISSIONER GARCIA: I think you might have
10 missed someone. You were waving?

11 UNIDENTIFIED SPEAKER: She didn't see me. I'm
12 with North Canadian.

13 COMMISSIONER GARCIA: Okay.

14 MS. WAGNER: But I did mention them. John
15 Jimmerson is here on behalf of North Canadian Marketing
16 and Bruce May is here on behalf of Vastar Gas
17 Marketing.

18 MR. WATSON: Madam Chairman, I will be very brief,
19 and I wouldn't normally do this, because I understand
20 that the Commission generally lets virtually anyone
21 speak on a PAA item on its agenda. However, on
22 March 24th, Commissioner Garcia as the prehearing
23 officer in this docket entered separate orders denying
24 petitions to intervene as parties of both North
25 Canadian Marketing Corporation and Vastar Gas

1 Marketing. So in view of the prehearing officer's
2 determination that both of these entities lack standing
3 to participate in the proceeding, I would feel remiss
4 if I didn't submit that it would be inappropriate to
5 hear from either of them today.

6 CHAIRMAN JOHNSON: One second.

7 COMMISSION STAFF: Staff finds or believes that it
8 would be appropriate and that it is within your
9 discretion to allow North Canadian Marketing and Vastar
10 Gas Marketing to participate, because this is a PAA
11 order and interested parties can participate, staff
12 believes it may be helpful to you to hear their
13 concerns. Staff would suggest or recommend that you
14 allow both of these parties or both of these
15 participants a limited time to discuss their positions
16 to you.

17 CHAIRMAN JOHNSON: Commissioners, any comment?

18 COMMISSIONER CLARK: Yes. I'm confused. I think
19 in the past we have had PAA actions where people have
20 wanted to speak and they haven't been able to show that
21 they would be substantially affected, and I don't think
22 we have allowed them to speak on that basis. Am I
23 wrong?

24 MS. WAGNER: It was my understanding it is within
25 your discretion.

1 COMMISSIONER CLARK: I understand that it is
2 within our discretion, but I want to know what we have
3 done in the past.

4 COMMISSIONER KIESLING: My recollection, at least
5 since the time I have been on the Commission, is
6 consistent with yours that it is within our discretion,
7 but if entities or participants who come before us do
8 not show what their interest is in the matter, then we
9 have not permitted them to participate. And I would
10 suggest -- my, at least, feeling is that since these
11 parties have already tried to participate in the
12 proceeding as a party and that has been denied, that I
13 am unclear on what they would have to contribute at
14 this point that would have any bearing on this PAA.

15 UNIDENTIFIED SPEAKER: Can I be heard on that
16 limited point?

17 CHAIRMAN JOHNSON: One second. Staff.

18 MS. WAGNER: Staff believes it may be helpful if
19 you were to understand where they were coming at from
20 their position. Pasco Cogen is supplied gas through
21 North Canadian Marketing. North Canadian Marketing has
22 a gas purchase agreement with Pasco. They allege that
23 this agreement, which is now being arbitrated in Texas,
24 is essential to your understanding of all the issues,
25 and that perhaps that this dispute that they have

1 ongoing with Pasco could in some way affect Florida
2 Power Corporation. They allege that Florida Power
3 Corporation --

4 COMMISSIONER GARCIA: Wait a minute. The only
5 reason you're allowing them to speak here is because
6 this is a PAA, is that why?

7 MS. WAGNER: Yes, it is.

8 COMMISSIONER GARCIA: But that is the only
9 justification we are using?

10 MS. WAGNER: Yes, it is. Staff during our
11 discussions in our analysis of Pasco Cogen allowed
12 North Canadian Marketing, or we felt it was appropriate
13 to listen to their concerns. So staff had numerous
14 meetings with North Canadian Marketing, Vastar Gas
15 Marketing, and Florida Power Corporation and Pasco
16 Cogen. And because we felt at that time that it might
17 be appropriate to listen to them, I thought maybe
18 perhaps you might want to be addressed, also.

19 COMMISSIONER GARCIA: If I recall, though, and the
20 Commissioners who have been here a little bit longer
21 may have a better memory of this, I think, Lorna, and
22 this is right, although I ruled differently in the
23 proceeding that's going on but that is beginning, I
24 just in this particular issue when we have PAAs, I
25 think we have generally been very liberal about who we

1 have allowed to speak. If we are going to hold them to
2 that standard, that's fine, but I think generally we
3 tend to be pretty liberal.

4 CHAIRMAN JOHNSON: Ms. Wagner, you said you
5 believe that there is information that is relevant to
6 this case that they could provide?

7 COMMISSIONER GARCIA: I wouldn't go -- if it was
8 something that was relevant to the case itself and that
9 is the standard, then I think we have to step back. I
10 think, if I understood you correctly, is that we are
11 letting them speak because we generally allow in PAA
12 decisions parties to speak.

13 COMMISSIONER KIESLING: They are not parties.

14 COMMISSIONER GARCIA: I'm sorry, any interested
15 persons to speak.

16 COMMISSIONER CLARK: I think that we have done
17 that cautiously, and we have done it in areas where we
18 think, as the Commission, that they may bring something
19 to the table that the parties do not. And I don't see
20 in this instance where the suppliers of -- why it would
21 be appropriate to allow the suppliers to Pasco to
22 present a position in this, and if we do it here we
23 have opened that door wide open. And if we think
24 today's agenda has been long, we are in for some real
25 long agendas. And I just don't think it's appropriate

1 in this instance.

2 CHAIRMAN JOHNSON: Any other thoughts,
3 Commissioners?

4 COMMISSIONER KIESLING: I agree.

5 CHAIRMAN JOHNSON: Is there a motion?

6 COMMISSIONER KIESLING: Was that a motion?

7 COMMISSIONER CLARK: Do we have to make a motion?

8 CHAIRMAN JOHNSON: I mean, I thought that --

9 COMMISSIONER CLARK: I would recommend that we
10 hear only from the parties to this case, and the fact
11 being that the prehearing officer has already found
12 that they are not substantially affected, that we not
13 hear from them at this time.

14 COMMISSIONER DEASON: Well, I hope we are not
15 setting the precedent that someone has to be an
16 intervening party to make a presentation on a PAA
17 matter.

18 COMMISSIONER CLARK: I'm not setting -- I think we
19 are trying to walk a fine line between allowing
20 presentations of people other than parties when it's
21 appropriate and we feel that we can benefit from them,
22 and establishing a precedent where anyone who feels
23 they have something to say on an issue can come and
24 speak. Because I didn't think we want either one of
25 those extremes. And in this case we already have had

1 them petition to intervene and their intervention has
2 been denied. It's not like they are a member of the
3 public or a governmental body. And I think it's
4 another thing because we have made exceptions.

5 CHAIRMAN JOHNSON: My only concern is that I
6 thought I was hearing from staff that perhaps there was
7 some relevant information to be gained, and that they
8 have been participating in at least the staff meetings
9 and procedural whatever, I don't know what kind of
10 meetings there have been, but that they have been
11 active participants.

12 COMMISSIONER CLARK: I think it's entirely
13 appropriate for staff to contact anyone who may have
14 information for them. It doesn't make them
15 substantially affected, and it doesn't make them an
16 entity that we ought to hear from in the agenda.
17 That's my only point.

18 MS. WAGNER: Staff would agree with Commissioner
19 Clark on that. And also because it is open to the
20 public, and when staff is contacted by outside persons
21 who say that they are interested in the proceedings, it
22 is incumbent upon us to keep them informed and allow
23 them to attend all informal meetings that we have.

24 But whether or not Vastar Gas Marketing and North
25 Canadian Marketing has something relevant to say, that

1 is completely -- I can't tell you that. We did not
2 feel -- or, excuse me, Commissioner Garcia did not
3 believe that they had a substantial interest, and staff
4 also agrees with that.

5 COMMISSIONER CLARK: I would point out it is
6 significant that their intervention was opposed and
7 they have been found not to have a substantial interest
8 in this case.

9 CHAIRMAN JOHNSON: Then yours is a motion that we
10 -- there was no formal request to participate, but I'm
11 assuming it was an oral request for participation and
12 something that we need to rule on one way or the other.
13 Now, do we give the parties an opportunity to say
14 anything or do we just act on a motion?

15 MR. MAY: Madam Chairman (inaudible; microphone
16 not on).

17 COMMISSIONER KIESLING: Mr. May, you have to speak
18 in a mike, otherwise the recorder cannot pick you up.

19 CHAIRMAN JOHNSON: Briefly, Mr. May, if you could.

20 MR. MAY: Madam Chairman, my name is Bruce May.
21 I'm with the law firm of Holland and Knight. We
22 represent Vastar Gas Marketing. Out of an abundance of
23 caution, and in an effort to advise all parties to this
24 proceeding, we filed a petition to intervene. We
25 certainly had the prerogative and had the right not to

1 file that petition to intervene in advance of this
2 proceeding. And I feel like denying us the opportunity
3 to address the Commission for three or four minutes at
4 the most would be basically sending a message to people
5 not to petition to intervene in a PAA proceeding, but
6 simply address the Commission and then file a protest
7 later. We didn't think that was fair. We didn't think
8 that was sufficient. We wanted to give you notice that
9 we had an interest in this proceeding. We want to
10 provide just very brief information today, and we would
11 also point out that the order denying our standing is a
12 non-final interlocutory order, and the opportunity to
13 seek reconsideration expires on April 3rd. We would
14 urge you and respectfully request a brief opportunity
15 to address the Commission during this PAA process.

16 From a precedential standpoint, in the order
17 involving the modification to the Orangeco Cogeneration
18 contract, which this proceeding is, it involves some
19 modifications of a contract, you allowed the lenders to
20 participate at the agenda conference in that PAA. We
21 don't think we are in a different position than the
22 lenders. We think we have relevant information to
23 provide, and we also think that we could limit our
24 remarks appropriately.

25 COMMISSIONER CLARK: Mr. May, were the lenders --

1 did they petition to intervene and was their
2 intervention opposed or were they there at the request
3 of one of the parties?

4 MR. MAY: They had petitioned to intervene and it
5 was my understanding that there was no opposition to
6 that.

7 CHAIRMAN JOHNSON: Commissioner Clark, was that a
8 motion?

9 COMMISSIONER CLARK: I still have a -- I guess my
10 motion was not to hear from them at this time.

11 COMMISSIONER KIESLING: I second it.

12 CHAIRMAN JOHNSON: There is a motion and there is
13 a second that we not hear from these interested
14 persons, I don't want to call them that, that we not
15 hear from the interested persons. All those in favor
16 signify by saying aye.

17 COMMISSIONER CLARK: Aye.

18 COMMISSIONER KIESLING: Aye.

19 CHAIRMAN JOHNSON: Opposed, nay. Nay.

20 COMMISSIONER DEASON: Nay.

21 COMMISSIONER GARCIA: Nay.

22 CHAIRMAN JOHNSON: Is there a subsequent motion?

23 COMMISSIONER DEASON: I move that we hear from the
24 interested persons, but we put a time limit on it. We
25 are spending an awful lot of time on this. I mean, I

1 know it's important, but it's the noon hour now and we
2 are just on Item 3 of a 28-item agenda, or 29 items.

3 COMMISSIONER GARCIA: I'm going to second it, and
4 I just want to clarify. Clearly I know the decision I
5 made in this, but clearly I have always thought that in
6 these proceedings we generally are very liberal, and we
7 allow most anyone. Clearly it's our right to limit it
8 to any time, and I agree with the motion that we limit
9 the time on this. So I will second it.

10 CHAIRMAN JOHNSON: There is a motion and a second
11 that we allow the interested persons to participate.
12 All those in favor signify by saying aye. Aye.

13 COMMISSIONER DEASON: Aye.

14 COMMISSIONER GARCIA: Aye.

15 CHAIRMAN JOHNSON: Opposed, nay.

16 COMMISSIONER CLARK: Nay.

17 COMMISSIONER KIESLING: Nay.

18 CHAIRMAN JOHNSON: And we will put a five-minute
19 limit on the presentations. And you may begin.

20 MR. JIMMERSON: Thank you, Madam Chairman and
21 members of the Commission. My name is John Jimmerson,
22 I'm here from the law firm of Brady and Gillener
23 (phonetic), and I'm representing the North Canadian
24 Marketing Corporation. I do want to take a second to
25 compliment the Commission on the courtesy, helpfulness,

1 and professionalism that has consistently been shown to
2 us by your staff.

3 North Canadian is not just virtually anybody.
4 North Canadian is the primary natural gas supplier to a
5 plant that depends entirely on natural gas. And it has
6 provided that plant, Pasco, with a steady supply of
7 natural gas at prices referenced to coal prices.

8 North Canadian, along with Pasco and other
9 parties, have made very significant investments in
10 reliance on the long-term nature of that contract and
11 the structure of contracts, which is the basis on which
12 this plant operates. And what you really have before
13 you today is the question as to whether that entire
14 long-term structure should be jettisoned on the basis
15 of short-term expediency.

16 North Canadian believes that the settlement
17 agreement before you today represents the capitulation
18 of Pasco to the destruction of that long-term
19 agreement. Given the strength of Pasco's litigation
20 position, which we believe is recognized in the circuit
21 court decision granting summary judgment in the Lake
22 matter, we were surprised and disappointed at this
23 capitulation. Then we realized that Pasco had managed
24 to defend its own interest by shifting a major portion
25 of the losses represented by its settlement upstream to

1 its gas suppliers, which it is now fighting vigorously
2 to keep from being before you.
3

4 Since North Canadian's gas sales were so linked to
5 the power purchase agreement's power sales, North
6 Canadian had required as a condition of its
7 participation and its investment that its formal
8 consent be obtained before any amendment of the PPA be
9 entered into, which had a material and adverse effect
10 on North Canadian. This requirement was not observed
11 by Pasco and Florida Power as well knew about the
12 requirement before the settlement was entered into.
13 North Canadian is materially and adversely affected by
14 the settlement, so is Vastar, the upstream supplier of
15 gas to North Canadian. The increased curtailability of
16 the plant and the shift of variable operations and
17 maintenance expenses into fixed charges against all
18 ratemaking precedent both serve to reduce the sales and
19 revenues of North Canadian below the amounts originally
20 committed to and relied upon.

21 According to a narrow reading of your own rule in
22 this controversy, you have no basis to be concerned
23 that the deal before you represents the product of such
24 sharp practices. You are merely asked whether the
25 revised pricing under it should be passed through to
ratepayers. North Canadian submits that the questions

1 before you are actually broader than that. You may be
2 facing an individual case, but you are really being
3 asked whether electricity restructuring in Florida
4 should be pursued on the basis of ad hoc every party
5 for itself deals, sharp practices settled by regulatory
6 and courtroom shootouts, or whether electricity
7 restructuring should proceed on a consensus basis to
8 the extent possible with recognition of all affected
9 interests and a modicum of respect for the long-term
10 arrangements which were originally put into place to
11 assure ratepayers of reliable supplies of power.

12 You may be facing an approval of an arrangement
13 worked out between private parties, but you are really
14 being asked whether the Florida ratepayers are better
15 off to renege on this or any long-term contract when it
16 offers a short-term disadvantage. We agree with
17 Florida Power that your staff is wrong to suggest that
18 you are legally required to ignore a long-term
19 commitment to a given avoided cost structure originally
20 adopted whenever a short-term situation seems to be
21 advantageous. To adopt such a stance certainly would
22 make the notion of contract sanctity a quaint idea.

23 You look at this deal from the ratepayers'
24 perspective, and from that perspective perhaps we are
25 one level out of your sight and out of your minds, but

1 we submit, however, that our interests coincides with
2 the ratepayers' interest and the integrity of long-term
3 commitments made in their name and made to serve their
4 long-term interest. We also submit that the federal
5 law, PURPA, under which this deal and many others were
6 entered into contemplates the support of long-term
7 investments and such conservation activities as this
8 cogeneration plant, and could not be implemented or
9 supported if any time those long-term investments
10 appear to be at odds with somebody's new prediction of
11 future they were overturned and made unenforceable.

12 Reaching a consensus on restructuring issues
13 requires goodwill and intent that all involved
14 interests be taken into account and at least a few
15 weeks of time to operate. None of these factors will
16 be present without an order from you that requires
17 them. We are running along a track, and there is a
18 train on it, and we recognize that. We believe it is
19 within your discretion to defer action on this matter
20 pending the record on it that adequately reflects the
21 broader interests involved.

22 Thank you very much.

23 CHAIRMAN JOHNSON: Mr. May.

24 MR. MAY: Madam Chairman and Commissioners, my
25 name is Bruce May with the law firm of Holland and

1 Knight representing Vastar. I won't belabor the point.
2 Vastar supplies approximately 75 percent of the natural
3 gas that is ultimately burned at the Pasco Cogeneration
4 facility and, therefore, is a major stakeholder in how
5 that plant is operated. I recognize that this matter
6 today is being processed and treated under your PAA
7 process, and that there may be further proceedings, so
8 I won't talk for a long time, and I will limit my
9 remarks to one general observation.

10 While the document before you has been titled a
11 settlement agreement, what it actually does is to
12 radically restructure a long-term energy supply
13 agreement between Florida Power Corporation and one of
14 its competitors. As a result, this docket is part and
15 parcel of the electric restructuring debate that is
16 ongoing around the country. And we would respectfully
17 ask that you keep that in mind as you adopt procedures
18 and standards and issues in this case, because we
19 believe that will inevitably have an effect on how you
20 address the utility restructuring debate in the future.

21 Commissioners, fuel suppliers and other major
22 stakeholders are closely monitoring this proceeding and
23 other proceedings that are currently ongoing before you
24 that involve cogeneration contract modifications,
25 buy-outs, and buy-downs. The message we have gotten

1 thus far is that the fact that these restructuring
2 proceedings will impact fuel suppliers is of no real
3 consequence to the Commission. If that is the message
4 and the fuel supply relationships are to be
5 dramatically altered during the course of a Florida
6 Public Service Commission proceeding without the fuel
7 suppliers having a voice in those proceedings, I think
8 it's fair to say that my client and other fuel
9 suppliers in this state will dramatically alter the way
10 they do business.

11 I want to thank you for the opportunity to speak
12 to you today. And, again, we would ask and
13 respectfully request that you carefully consider the
14 interests of fuel suppliers as you address this
15 sensitive and other sensitive issues regarding electric
16 restructuring.

17 Thank you.

18 COMMISSIONER CLARK: Mr. May, do I take it your
19 position, then, is that we reject it and take our
20 chances as to whether the ratepayers will have to pay
21 \$39 million more?

22 MR. MAY: Absolutely not, Commissioners. We are
23 asking to slow the process down, to bring all
24 stakeholders, major stakeholders into the loop, let
25 them be at the table and reach an informed decision

1 after having all the facts before you.

2 COMMISSIONER CLARK: I'm still confused as to what
3 you're asking us to do.

4 MR. MAY: We are asking for an opportunity to
5 participate in this proceeding and not to be excluded
6 from this proceeding.

7 COMMISSIONER CLARK: And what would your position
8 be in the proceeding?

9 MR. MAY: It's my understanding that there has
10 been no discovery conducted in this proceeding. At
11 this point in time we do not know whether this
12 settlement is, in fact, in the interest of the
13 ratepayers. We think that there could be a possibility
14 that it may be in the interest of the ratepayers, but
15 at this point in time we are not in a position to give
16 you an informed response on that point. We know that
17 staff has done an excellent job in trying to quantify
18 the cost of this settlement. We are not sure that
19 staff has adequately analyzed who pays that cost. I
20 know that the ratepayers certainly have been identified
21 as someone who will bear some of those costs. We are
22 concerned that what is happening here, what might
23 happen here is there might be an attempt to pass the
24 price tag of this settlement on to fuel suppliers. We
25 not sure that's being done, we are not -- I mean, I

1 have no --

2 COMMISSIONER CLARK: Is that within our
3 jurisdiction to handle?

4 MR. MAY: We are not asking you to arbitrate or to
5 adjudicate a contract dispute between us and Pasco or
6 Florida Power Corporation. We think it's important for
7 you to have these facts before you, and a critical
8 issue is who is going to pay these costs, whether it be
9 the ratepayers, Florida Power Corporation shareholders,
10 or the fuel suppliers. And if indeed it is determined
11 as part of this proceeding that fuel suppliers will
12 shoulder some of the cost of this settlement, we would
13 respectfully ask for an opportunity to participate in
14 this proceeding so you would have the input from us on
15 that issue.

16 COMMISSIONER DEASON: Are you volunteering to
17 shoulder some of the burden to make it more attractive?

18 MR. MAY: We think we have longstanding fuel
19 supply agreements and we would ask the Commission in
20 the proceeding to recognize the integrity and sanctity
21 of those contracts.

22 COMMISSIONER CLARK: But that is a contract
23 between you and Pasco, is it not?

24 MR. MAY: Actually it's a contract between I think
25 Norson (phonetic) and Pasco. We supply gas --

1 COMMISSIONER CLARK: But it's not with Florida
2 Power Corp?

3 MR. MAY: That's right.

4 CHAIRMAN JOHNSON: Any other questions?
5 Florida Power Corp.

6 MR. FAMA: Thank you, Madam Chairman. I just want
7 to make a few brief points, because I understand -- I
8 realize the Commission has spent a lot of time on this
9 procedural issue. North Canadian is a vendor to the
10 Pasco project. Vastar is a vendor to the vendor.
11 Vastar is a vendor to North Canadian. You have no
12 jurisdiction whatsoever over those contracts. They
13 have disputes going on which are -- there is a dispute
14 between North Canadian and Pasco which is being
15 arbitrated in Texas.

16 Florida Power is not in privy of contract with
17 these people. We did not cut a deal, we did not enter
18 into a contract with North Canadian. We did not enter
19 into a contract with Vastar. Florida Power and Pasco
20 stand ready to go forward with their contracts, which
21 is the contract that this Commission has jurisdiction
22 over.

23 Mr. May says that they want to slow the process
24 down. Well, what we think they want to do is get
25 leverage over Pasco and get leverage over Florida Power

1 to somehow maybe make their contracts better because we
2 are going to have to assume those contracts. I'm
3 sorry. I'm sorry, I lurched into the Tiger Bay
4 proceeding for a second. We have a debate going in
5 there. Strike that last sentence.

6 They are seeking some leverage and they are
7 seeking to use this Commission to gain some leverage,
8 and I think Commissioner Deason put his finger on the
9 point. Are these gas suppliers going to step up and in
10 any way lower their prices so that this is a better
11 deal for the Florida ratepayers? I think the business
12 about electric restructuring is a smoke screen. I
13 don't think this is an electric restructuring docket,
14 and I think that PURPA says nothing about protecting
15 the interests of vendors. Let me just say as a
16 procedural matter, I think that if you let in this
17 vendor, other vendors are going to come in. Why not
18 the gas turbine vendor? Maybe he wants to put some
19 leverage on the project. What other vendors are out
20 there that are going to come before the Commission and
21 try and use the Commission, if you will, to their
22 advantage? So Florida Power continues to object to the
23 positions taken by Vastar and North Canadian.

24 CHAIRMAN JOHNSON: Thank you. I think we have
25 heard all the arguments by the parties and the

1 interested persons.

2 Staff, are there any comments, or, Commissioners,
3 any questions?

4 MS. WAGNER: Staff would like to bring to your
5 attention, because I feel it would be remiss if I
6 didn't, the partial summary judgment that you heard
7 Florida Power Corporation speak to and Mr. Watson speak
8 to. This partial summary judgment is on Page 34 of the
9 recommendation and Page 35 and 36. Mr. Watson, as a
10 quote from him, said that Florida Power Cooperation has
11 effectively lost in court. He bases this decision on
12 this partial summary judgment. What I would like to
13 point out to you is that this partial summary judgment
14 is for the Lake Cogen, it is not for the docket that
15 you have in front of you right now, the Pasco Cogen
16 settlement agreement.

17 On Page 35, what this partial summary judgment
18 says is that, at the very bottom on Paragraph 1, it
19 says that a partial summary judgment is hereby entered
20 for Lake Cogen against FPC on the issue of liability
21 for Florida Power Corporation's failure to pay the Lake
22 Cogen at the firm energy cost rate when the avoided
23 unit with operational characteristics of an operable
24 1991 pulverized coal unit contemplated by the Lake
25 Cogen/Florida Power Corporation agreement would have

1 been operating -- would have been operating and at the
2 as-available energy cost rate during those times when
3 said avoided unit would not have been operating.

4 Commissioners, staff fees that this really says
5 nothing. When is it operating, when is it not
6 operating? These are still disputed issues and there
7 is no way at this point in time that one could say that
8 Florida Power Corporation had won or lost its dispute.

9 COMMISSIONER CLARK: You disagree, then, with
10 their representation that they have at least rejected
11 the hypothetical parameters, the two -- a proxy, that
12 they rejected that.

13 MS. WAGNER: Well, actually what this says is that
14 they will use a more real unit. That is all this says.
15 So the two parameters, yes, that could be rejected.
16 But what you have to remember in this Pasco Cogen
17 limited settlement agreement, what you have before you
18 is slightly different than what was going on in this
19 Lake Cogen docket. In Pasco, in the Pasco settlement
20 agreement, Pasco says that they should be given 100
21 percent firm energy payments. Florida Power
22 Corporation says that it should be based on this two
23 parameter, or if would you relate back to this, this
24 more real unit.

25 COMMISSIONER CLARK: Okay. And how is that

1 different from Lake?

2 MS. WAGNER: In the Lake docket or underneath this
3 settlement, or the partial summary judgment, what Lake
4 contended was that it should be a more real unit and
5 that it should not be based on the two parameter. So
6 it's slightly different. While both of these are
7 looking at Section 9 -- have I lost you?

8 COMMISSIONER CLARK: No, I'm just -- Lake never
9 contended that they were entitled to 100 percent firm?

10 MS. WAGNER: That is correct, Commissioner Clark.
11 And actually -- I just lost my train of thought for one
12 moment. I will stop there.

13 COMMISSIONER CLARK: You're contending it's a
14 slightly different factual issue, and because of that
15 it's not at all clear that a rejection of the two
16 parameter hypothetical that Power Corp has suggested
17 and Pasco would be rejected?

18 MS. WAGNER: That is correct. Even if it were
19 based on a more real unit, what is a more real unit?
20 These are still issues that would be at dispute. All
21 that is in this that is similar to the Lake Cogen,
22 Pasco and Lake, is that Section 9.1.2 is at dispute.

23 At this point what I would like to suggest is that
24 I have with me Mr. Futrell, who would like to speak
25 regarding staff's Alternative Issue 1, or staff's first

1 alternative issue, and Mr. McNulty would like to speak
2 to the second alternative recommendation.

3 CHAIRMAN JOHNSON: Go ahead.

4 MR. FUTRELL: Commissioners, the first alternative
5 is based strictly on the principle of avoided cost.
6 Chapter 366 clearly gives the Commission the authority
7 to determine avoided cost and to allow recovery for
8 those costs that it determines. Now, in our
9 recommendation we are not revisiting the '91 order
10 approving the negotiated contract. We are looking at a
11 comparison of the costs associated with the contract as
12 modified by the settlement agreement versus the cost
13 associated with the original contract. That's all we
14 are looking at. And that comparison shows --

15 CHAIRMAN JOHNSON: Say that again.

16 MR. FUTRELL: We are comparing the costs of the
17 contract as modified by the settlement agreement versus
18 the costs of the original contract, and that shows a
19 negative \$17.3 million savings. Now, it has been
20 stated that the Commission set in 1991 --

21 COMMISSIONER CLARK: Let me ask you, the negative
22 17 percent is assuming they are correct with respect
23 to --

24 MR. FUTRELL: What we are saying is that that is a
25 more appropriate calculation of avoided costs. We are

1 silent, and we are not addressing the outcome of the
2 litigation. We are simply saying that avoided cost
3 appears to be as Florida Power has calculated it, and
4 comparing that calculation to the costs of the
5 settlement shows a negative \$17.3 million savings.

6 COMMISSIONER CLARK: I don't understand. What
7 avoided cost are you talking about, the avoided cost at
8 the time they entered into the contract? The current
9 avoided cost.

10 MR. FUTRELL: The current avoided costs as they
11 have calculated it pursuant to the contract.

12 COMMISSIONER CLARK: So we are using -- we are
13 saying if you looked at it now, their contract is now
14 above avoided cost.

15 MR. FUTRELL: In '91 that was -- as approved then
16 gave a projection of fuel prices. It did not lock in
17 what those fuel prices would be. It did not guarantee
18 recovery of the fuel prices as projected. If that was
19 the case, then the cost as represented of \$516 million
20 is higher than all of these other totals on Page 5.

21 COMMISSIONER CLARK: Yes, but it's not higher than
22 what they would have to pay under the contract.

23 MR. FUTRELL: But what we are simply saying is
24 that --

25 COMMISSIONER CLARK: Is that true?

1 MR. FUTRELL: What we think is under the contract
2 is the calculation of avoided costs using the four
3 parameter unit, which we think more closely approximate
4 the avoided costs.

5 COMMISSIONER CLARK: Well, then we disagree with
6 what the court has concluded.

7 MR. FUTRELL: We don't know what the court has
8 concluded. We don't know what a real operable unit is.

9 COMMISSIONER CLARK: Okay.

10 MR. FUTRELL: Continuing, we are --

11 CHAIRMAN JOHNSON: Let me ask you one thing.
12 Florida Power Corp, if I understand the position, is
13 saying that what you're doing, we can't do. It's like
14 you can't come back and revisit the avoided cost
15 determination, that you made that at the front end with
16 respect to the contract. The original contract as to
17 what the avoided cost was then, and you can't say,
18 well, this is the current one, and you can't keep
19 changing that number that we were locked in after we
20 made that determination of avoided cost. And if we
21 were to say otherwise, then I guess that Pasco or
22 someone would have an argument of detrimental reliance
23 or some other legal argument that they would make if we
24 started changing what we meant by avoided cost.

25 How do you respond to that?

1 MR. FUTRELL: Avoided cost is made up of the
2 capacity payment and the energy payment. Clearly, in
3 our orders and in this contract signed by Pasco and
4 Power Corp there are firm capacity payments which are
5 guaranteed. Those numbers listed on Page C-5 of the
6 contract, the capacity payments are guaranteed and
7 locked in. The energy payments are variable. That is
8 a variable cost.

9 The Commission has consistently recognized that
10 fuel markets can change, fuel price projections are
11 always wrong. In '91, as signed in the contract on
12 Page C-5, it states that the energy payment is an
13 estimate, that those costs at that time were estimated
14 costs. To give you a sense of that, in that forecast
15 in '91, Florida Power estimated that oil was going to
16 be \$40 a barrel in '97. It's now \$20 a barrel. Also,
17 those prices estimated on coal to be \$68 a ton in 1997.
18 They are now \$43 a ton. The Commission has
19 consistently recognized that fuel can vary and it
20 should not lock in those prices.

21 CHAIRMAN JOHNSON: So it is, then, your position
22 that there is -- that we did not intend to set avoided
23 costs in the abstract and in perpetuity, that that's
24 not something we do as it relates to energy.

25 MR. FUTRELL: We looked at the time the projection

1 of costs associated with the contract and the avoided
2 cost at that time, and we looked at it and it showed it
3 to be cost-effective. Going forward, there is no
4 guarantee that fuel costs will be recovered as
5 projected originally.

6 CHAIRMAN JOHNSON: Because those were just
7 projections and estimations.

8 MR. FUTRELL: Correct, because it can vary. And
9 it go up to the benefit of the cogenerator, it can go
10 down. It can vary. And we recognize that. And
11 ratepayers should not be locked into a fuel forecast
12 and have to recover those costs because it can vary.

13 CHAIRMAN JOHNSON: And you believe that Pasco
14 understood the nature of that, for lack of better word,
15 that risk, that there was no guarantee?

16 MR. FUTRELL: They signed the contract;
17 yes, ma'am.

18 CHAIRMAN JOHNSON: And that the contract provision
19 is that that 9-point-whatever-whatever gave, put them
20 on notice that we would come book and make an avoided
21 cost kind of determination?

22 MR. FUTRELL: It clearly allowed that during hours
23 when the unit did not operate they would receive
24 as-available energy, and when they did operate they
25 would receive firm energy.

1 COMMISSIONER CLARK: I am concerned that your
2 argument would allow us to revisit all contracts that
3 provide for energy payments if the avoided energy
4 payment, the current avoided energy payment is less
5 than the firm energy payment that was committed to be.
6 Assuming it was committed to be paid, that any time
7 that amount goes less, then the ratepayers have a right
8 to pay the lesser amount.

9 MR. FUTRELL: I don't think we committed to
10 guaranteeing them that energy price. We didn't do
11 that. That was not done in the order.

12 COMMISSIONER CLARK: Is the logical extension of
13 what you're saying is that every time the avoided
14 energy cost is less than the energy cost we projected
15 in the contract, we can go back and expect a credit to
16 be made in the ratepayers' benefit from that change in
17 price?

18 MR. ELIAS: And we believe that that --

19 COMMISSIONER CLARK: Is the answer yes?

20 MR. ELIAS: When you say revisit, we believe the
21 calculation of avoided cost in this instance is based
22 on the appropriate interpretation of this contract
23 based on the methodology that was approved by the
24 Commission in 1991. We are not going back and
25 advocating changing that methodology. We are simply

1 taking out the estimated numbers and plugging in the
2 real world numbers. This doesn't constitute a change
3 in the way we calculated the cost under this contract
4 based on the language of the contract. If this
5 contract were firm all the time, then of what mean
6 would the provision in Section 9.1.2 that speak to when
7 the unit is as-available would be operating as an
8 as-available unit mean is our point.

9 COMMISSIONER CLARK: I guess my point is that if
10 we accept that rationale, doesn't it then argue that we
11 must go back in every other case where you paid for --
12 you have a price for energy as part of the contract,
13 that any time the current avoided energy price is less
14 that we have a right or the ratepayers have a right to
15 expect that they get a credit for the lesser price?

16 MR. ELIAS: We think that that's what the contract
17 provides. That the contract provides that the
18 ratepayers get the as-available energy price in that
19 circumstance.

20 COMMISSIONER DEASON: Let me address it for a
21 second. The way I understand staff's recommendation is
22 that what we approved in the contract was the cost of
23 an avoided unit. All right. How do you determine what
24 that cost is? I do not accept the argument that we
25 approved as the avoided unit a unit that was going to

1 run firm 100 percent of the time. That would be like
2 saying to Power Corp if they could not have gotten this
3 cogeneration contract or something that was attractive
4 and they had actually built a pulverized unit, we would
5 say, "We want you to run this 100 percent of the time
6 regardless of what the economics are, regardless of
7 what the cost of fuel is, or regardless of the
8 operations involved in running a pulverized coal unit."

9 We wouldn't expect them to do that. We would
10 expect them to look at the economics of running that
11 plant if that plant truly had been built. That is the
12 avoided cost standard. That is the standard in the
13 contract. That is what we approved. And we have an
14 overriding responsibility to protect the ratepayer and
15 see that they get the benefits of decisions that are
16 made to run the unit in an economic sense. And that is
17 what I understand staff is recommending that we do by
18 their alternative recommendation. Now, if I'm
19 incorrect, let me know, but that's the way I understand
20 it.

21 COMMISSION STAFF: That is correct.

22 COMMISSIONER CLARK: Well, here is my concern, is
23 that we have -- that I think to reach the result you
24 want to reach we have to conclude that we cannot --
25 that the interpretation of all of these contracts is

1 within our jurisdiction and we ought to reverse our
2 decision to determine that the courts have a right to
3 interpret the contract. Because that's what -- if that
4 is the rationale on what you base it, we are, in
5 effect, saying that contract provision says that we are
6 saying this is how we interpreted that contract
7 provision then, and this how we are going to apply it.

8 COMMISSIONER DEASON: And perhaps we do. I had
9 great difficulty when we made that decision. And as I
10 recall it was basically told that we have absolutely,
11 just without question any jurisdiction when it comes to
12 interpreting contracts. And even with that
13 admonishment, I still had great difficulty with
14 reaching that decision. And if there is any
15 inclination on the Commission's part to revisit that, I
16 will be the first to say let's look at it again.

17 But as I understand staff's recommendation, we
18 really don't have to reach that question. That the
19 contract speaks for itself, and that is the standard
20 within the contract. And that while we are not
21 interpreting that contract to bind the parties, I guess
22 that's what is done in the court, what we have a
23 responsibility to do is interpret that contract as it
24 affects the ratepayers. We have that obligation to do
25 that, and I think that's consistent with staff's

1 alternative recommendation.

2 MR. FUTRELL: Commissioner Clark --

3 COMMISSIONER CLARK: Evidently the contract is
4 speaking different things to different parties is what
5 is happening.

6 MR. FUTRELL: Commissioner Clark, let me try to
7 help you.

8 COMMISSIONER DEASON: But it says something to me.
9 And if these contracts are brought to us for approval
10 on the initial end, I think we have got to have some
11 say about how that is interpreted when it affects the
12 pocketbooks of the ratepayers.

13 COMMISSIONER CLARK: But as I understand what
14 staff is saying is that we should look at it at a new
15 point in time and the new point of time being now, and
16 looking at the avoided energy cost now.

17 MR. FUTRELL: You look at the energy cost
18 recovered pursuant to this contract at every fuel
19 adjustment hearing. The costs associated with the
20 energy component of this contract is tied to the cost
21 of Crystal River Units 1 and 2, those coal prices. As
22 those coal prices change, that's what drives the energy
23 payment to the cogenerator, and you look at that every
24 fuel adjustment hearing. If that goes above or below
25 what was originally projected, you determine if those

1 costs are prudent or not and pass those through to the
2 ratepayers.

3 MR. BALLINGER: Let me asked one more thing. We
4 are not doing this on our own motion to go back and
5 revisit a contract. What you have before you now are
6 two contracts. You have the existing contract and you
7 have a proposed modified contract. We are comparing
8 those two. And the energy component of both of those
9 contracts we are saying that the modified contract is
10 completely wrong, 100 percent firm energy is not right.
11 The only other alternative we have is FPC's four
12 parameter unit, that's what we are using as a basis.

13 COMMISSIONER CLARK: Well, let me ask you this, do
14 you think it's pretty clear the court is not going to
15 agree with that? If the court says, if the court -- I
16 guess what it boils down to is the risk we are looking
17 at for the ratepayer. And are you saying it is
18 appropriate to conclude that the court will agree with
19 the four parameter test?

20 MR. BALLINGER: I don't know that they will agree
21 with that. I think the Commission has the authority of
22 cost recovery.

23 COMMISSIONER CLARK: All right. If they don't
24 agree with it, and they say -- they give them something
25 more than we would, do we have the authority to go back

1 and say, well, we are sorry, even though they have
2 interpreted the contract that way, we are not going to
3 allow that extra amount for cost recovery?

4 MR. BALLINGER: I think we do. It's just like
5 when FPC enters into a brand new contract, they do that
6 at their own will. They go negotiate the contract,
7 they come to us for approval for cost recovery. If we
8 don't approve cost recovery, then they have to work out
9 with the cogenerator what to do, whether they pay them
10 or not. And they may invoke a reg out clause if there
11 is one in this contract, but the bottom line is they
12 can go negotiate whatever they want, it's up to us to
13 approve what gets recovered. And I think the same
14 would be true even if a court said this is what the
15 contract says, I still think we have the authority to
16 say what gets recovered.

17 COMMISSIONER CLARK: So, in effect, we could trump
18 their interpretation.

19 MR. BALLINGER: Not necessarily trump. I think it
20 would just have to come out of FPC stockholders at that
21 point.

22 CHAIRMAN JOHNSON: Is there a regulatory out
23 clause here?

24 MR. BALLINGER: I think there is.

25 COMMISSION STAFF: Yes.

1 COMMISSIONER CLARK: So would it come out of their
2 stockholders?

3 MR. BALLINGER: That remains to be seen. It's a
4 chain of events. I guess, if they initiated the reg
5 out clause there might be a challenge whether they
6 lawfully could. I would think ultimately the court
7 would say, in my opinion, the court would say you have
8 to pay it, FPC, pay it out of your stockholder money.

9 CHAIRMAN JOHNSON: And then we tell them they
10 don't have to pay it. So aren't we putting them in a
11 position where they would have to try to activate the
12 regulatory out clause?

13 MR. BALLINGER: I don't know. I would hope that
14 the court would see the wisdom of 100 percent firm is
15 truly not avoided cost. I think, as somebody else
16 pointed out, that obviously --

17 COMMISSIONER GARCIA: But you're saying that we
18 are not hoping with the ratepayers' money at that
19 point?

20 MR. BALLINGER: No. I think someone pointed out
21 earlier that this judgment is not very clear, otherwise
22 why did Lake settle? If Lake had won its major
23 argument in a partial summary judgment, why did they
24 capitulate further in a settlement agreement?
25 Obviously that judgment is not very clear to them that

1 they would win, either.

2 COMMISSIONER GARCIA: I think it's kind of tough
3 for them to come in here and give up the fight.
4 Clearly that's yet to be decided, but you don't want
5 them to come in here and make the other side of the
6 argument for the parties that they are opposing.

7 COMMISSIONER CLARK: I just have one question. Do
8 you have any concern that your recommendation on
9 Alternative 1 has an adverse impact on the stability of
10 purchased power contracts? I mean, don't we want to
11 see that that market continues and people are willing
12 to enter into those contracts in Florida? And if we
13 make that kind of decision, what impact do you think it
14 will have?

15 MR. BALLINGER: I don't think it has any impact,
16 because we are still saying approve the original
17 contract, they would still go on getting their
18 payments. Yes, they have court costs.

19 COMMISSIONER CLARK: But the original contract as
20 we interpret it and not as it has been interpreted by
21 the court.

22 MR. BALLINGER: And as how Power Corp has
23 interpreted it.

24 COMMISSIONER CLARK: I guess to me the bottom line
25 is we are essentially saying we are going to interpret

1 all the contracts and what the court says is of no
2 consequence to us.

3 CHAIRMAN JOHNSON: It does seem like you have to
4 interpret the contract to get to the cost recovery
5 issue.

6 COMMISSIONER GARCIA: Joe, give me the long view
7 here. I know you don't agree with this, but give me
8 your view. I think you're on primary, on how this
9 works out in terms of the long --

10 MR. JENKINS: I'm not sure about how it works out
11 in the very long-term as we go to, I guess, a
12 competitive wholesale market. The problem I have with
13 the first alternative recommendation is that it never
14 answers what is avoided cost. It says we should not
15 pay avoided cost. I agree with that. But it never
16 says truly what it is. If you look to the very last
17 page here, or, excuse me, the second page from the end,
18 Page 37. Do you have that? This is that chart called
19 Pasco settlement. The primary -- excuse me, the first
20 alternative says that as you have heard a number of
21 times here, that we should hold them to the standard of
22 Column A. But what if the judge rules for Column B?
23 They never really solidify as to why they are willing
24 to not accept Column B as a potential avoided cost.
25 We, in a sense, have abdicated our authority or

1 jurisdiction to the courts to determine avoided cost,
2 and now we must live with the consequences. I'm simply
3 saying look at the extremes, look at your exposure, and
4 decide whether you want to continue to fight or stay
5 in. If you look at Page 5 --

6 COMMISSIONER CLARK: Joe, let me ask you, what do
7 you think our exposure is?

8 MR. JENKINS: Your exposure is shown on Page 5 on
9 the table I've put there on the bottom of the page.
10 And somebody has said this at least an hour ago, if you
11 go with the first alternative --

12 COMMISSIONER CLARK: What is our exposure? What
13 is the risk? Is it the 39?

14 MR. JENKINS: It's the 39 million. I'm simply
15 looking at 39 million is roughly 2-1/2 times greater
16 than 17.3 million. I make no real judgment as to 50/50
17 or anything else. I say that is the range. And on a
18 2-1/2 to 1 bet, you might as well take it.

19 COMMISSIONER DEASON: Now, you bring in a risk
20 question which I think is relevant, and that is
21 addressed by Alternative 2, which looks at we know that
22 under this settlement there is going to be an up front
23 payment of a given amount. You could be able then to
24 purchase yourself out of this contract. And over the
25 long-term of the contract there are so many variables

1 and unknowns and risks associated with that, according
2 to staff's alternative recommendation there is --
3 according to their numbers, it's actually negative, but
4 basically the way I interpret that it is so close to
5 call, why guarantee or impose a burden on today's
6 ratepayers to make these up-front payments when we
7 don't think the benefits may actually exist in the
8 long-term?

9 MR. JENKINS: I don't think you have a choice to
10 pick and choose. You're going to have to live, if you
11 go with one of the alternatives, with the court
12 outcome. If you turn to Page 13, and I think this was
13 said already, even with their projections, their
14 scenarios, I see at the very top of the page a
15 potential 14.5 million benefit. And the very worst
16 scenario is a 1.9 negative. That's roughly a 7 or
17 8-to-1 ratio. So I think the ratepayers on balance,
18 without assigning risk probabilities and all that of
19 statistical science, are better off. Granted, there
20 might be a combination of extreme scenarios where the
21 ratepayers might not be better off if we have high
22 inflation and high fuel costs. I guess it's sort of
23 like the old adage of the glass half empty or half
24 full. Here I see a glass that is three-quarters full,
25 but somebody's calling it one-quarter empty, or calling

1 it empty.

2 MR. McNULTY: Commissioners, if I could just try
3 to describe these sensitivities just for a moment to
4 give you an idea of what I was trying to get at here.
5 I was looking at --

6 COMMISSIONER CLARK: You're addressing Alternative
7 2 now?

8 MR. McNULTY: Yes, I am.

9 COMMISSIONER CLARK: Let me ask just one question
10 before you get there. Joe, do you support the primary?

11 MR. JENKINS: I am the primary.

12 (Laughter.)

13 COMMISSIONER CLARK: Well, let me ask do you have
14 any other support for your primary position?

15 MR. JENKINS: They have all deserted me.

16 COMMISSIONER CLARK: I congratulate you for
17 willing to just step out there.

18 MR. McNULTY: Commissioners, in discussing the
19 chart on Page 13, I just would like to caution that
20 these are sensitivities, these are sensitivities based
21 upon moderate assumptions. This is assuming a 50/50
22 split of the disputed payments, and it is assuming, you
23 know, the possibility of using alternative fuel
24 forecasts in place of FPC's fuel forecast for both coal
25 and natural gas. And also assuming what if you had

1 moderate fluctuations and inflation, what would happen?
2 My concern here is that even using these moderate
3 assumptions, you can end up with negative NPV numbers.

4 And if these, in fact, are moderate assumptions
5 and some of these are negative, then I have a real
6 source of concern with this agreement. Because
7 basically I would think that there are three parties to
8 consider here, Pasco, FPC and, of course, FPC's
9 ratepayers. And in this case it doesn't look as though
10 in all cases involving moderate assumptions that FPC's
11 ratepayers are clearly advantaged by this agreement.

12 Now, what we do know for certain is that initially
13 \$42 million in net present value is going to be paid
14 through a vehicle known as a special payments, and they
15 will be paid through the year 2005, and they are skewed
16 so that they happen earlier rather than later. So that
17 you have \$9.5 million being paid in 1997, and going
18 down to 2.4 million in 2005.

19 So, we know that those payments are certain.
20 However, it's 14 years before the cumulative net
21 present value of this agreement turns positive, even
22 using FPC's proposal. According to the agreement, 14
23 years before a cumulative positive NPV. Now, six years
24 ago this agreement -- excuse me, six years ago this
25 contract when it was approved looked like it was good

1 for the utility's ratepayers. Today, six years later,
2 we know that that original agreement is not good for
3 the utility's ratepayers, and we have no idea of what
4 it's going to be looking like in 2009 when that
5 replacement capacity comes on line, or 2013 when the
6 whole period has played out. So, our basic position
7 here is that this looks like it has a preponderance of
8 risk for the ratepayers, and for that reason we have
9 chosen on the second alternative to recommend denial.

10 CHAIRMAN JOHNSON: Any other questions,
11 Commissioners? This Chart 4 that was in Florida Power
12 Corp's information, does staff agree with this? And if
13 so -- did you agree with this Chart 4?

14 MR. McNULTY: I think the problem I have with this
15 chart in particular is the second line labeled customer
16 savings. There is an assumption here that needs to be
17 identified. Under Pasco, that customer savings is
18 assuming that 100 percent of the disputed payment are
19 awarded to Pasco. If you look at --

20 CHAIRMAN JOHNSON: Say that again.

21 MR. McNULTY: That 100 percent of the disputed
22 energy payment would be awarded to Pasco. In other
23 words, as was filed in this agreement, the settlement
24 agreement, that full firm pricing is being allowed in
25 terms of energy payments.

1 CHAIRMAN JOHNSON: From the original contract?

2 MR. McNULTY: Yes. The original contract,
3 obviously it's in dispute as to what avoided energy
4 pricing was meant. We know it was the 1991 avoided
5 unit, but exactly how that's being interpreted
6 obviously has been a difficulty for both this
7 Commission as well as the civil court. But my point
8 here is that you're not making the same assumptions
9 under all of these cases, and it would seem fair to me
10 that you should make the same assumption under each
11 case. The others, especially Auburndale, awards almost
12 100 percent to FPC of these disputed payments.
13 Therefore, that greatly affects the percent of dispute
14 to ratepayers at the bottom of the page here, and so as
15 far as I'm concerned these numbers are meaningless.

16 CHAIRMAN JOHNSON: Florida Power Corp.

17 MR. DOLAN: Yes. I don't know why he considers it
18 meaningless, because those are the numbers that were
19 filed with the Commission when we submitted our
20 petition for approval of those settlement agreements.
21 And they were not disputed in the Ridge and OCL and
22 Auburndale case as to not being legitimate numbers.
23 And the customer savings, we have always said the
24 customer savings is often a disputed amount as if you
25 went to their position. I mean, we could have shown it

1 in another format, but when we started Auburndale it
2 was a lot cleaner to go to their position to do savings
3 down. Since everybody in these cases had -- they felt
4 like they should have been getting 100 percent firm.
5 There was a lot of variability.

6 COMMISSIONER CLARK: In all of these cases, and
7 that was my question?

8 MR. DOLAN: Yes. Every one of these cases was
9 done the same.

10 COMMISSIONER CLARK: In Ridge, OCL, and Auburndale
11 is the assumption the same with respect to the avoided
12 cost the same all the way across?

13 MR. DOLAN: Yes.

14 COMMISSIONER CLARK: Do you agree with that, Mr.
15 McNulty?

16 MR. McNULTY: That's not my understanding. I
17 would like any other staff member who has an opinion on
18 this to speak up.

19 COMMISSIONER CLARK: Well, what was the issue in
20 the Ridge, OCL, and Auburndale?

21 MR. BALLINGER: I can speak to Auburndale, I
22 worked on that one. I don't recognize those savings.
23 They may have been what FPC offered as savings. I
24 think if you read that order, it picks apart the parts
25 of the settlement agreement, whether they are savings

1 or whether there is costs. My recollection of that is
2 it showed a slight benefit to the ratepayers, not \$39
3 million worth.

4 COMMISSIONER CLARK: Well, let me ask you this.
5 If staff takes issue with the Pasco and the Lake
6 numbers of customer savings, if they take issue based
7 on the fact that it assumes that Pasco and Lake win
8 that issue, and they have to be paid firm, isn't it
9 important to get for comparison purposes to know if
10 that say assumption was made in Ridge, OCL, and
11 Auburndale?

12 MR. BALLINGER: I think what Mr. Dolan has put
13 here is a consistent assumption --

14 COMMISSIONER CLARK: Tom, would you answer my
15 question?

16 MR. BALLINGER: Well, let me see if I understand
17 the question. He has put together consistent
18 assumptions that in calculating customer savings, it's
19 all as if the cogenerator had won in litigation. So,
20 in that essence, these numbers are correct of showing
21 it at least from the standpoint. What staff did in
22 evaluating the Ridge, OCL, and Auburndale is we looked
23 at the existing contract and the total payments
24 increase or decrease. In all three of those, the total
25 payments decreased looking at both capacity and energy,

1 how they restructured the new contract. In the Pasco
2 case, the total payments increased. That's why we are
3 recommending denial.

4 COMMISSIONER CLARK: And the total payments
5 increased because -- if you use the new avoided energy
6 costs.

7 MR. BALLINGER: Not new avoided energy, it's
8 looking at the existing contract and looking at the
9 modified contract. It has nothing to do with new
10 avoided energy costs. Where we are getting confused is
11 new avoided energy costs now saying it's firm sometimes
12 and as-available other times. All of these we took
13 from the standpoint of the existing contract.

14 COMMISSIONER CLARK: Go back again. You took it
15 from the standpoint of the existing contract, but it
16 was your interpretation of the existing contract.

17 MR. BALLINGER: Let me give you an example. In
18 the Auburndale contract it had an exact provision of
19 9.1.2 that said when it's on it's firm, when it's off
20 it's as-available. The modified contract said that
21 when it's on it's firm, when it's off you get 90
22 percent of firm or as-available, whichever is greater.
23 It slightly did it. We asked them to quantify that,
24 compare it to the original on firm, off as-available.
25 It yielded a net increase in total cost to the

1 ratepayers to the tune of about \$3 million over the
2 life of the contract.

3 That showed me, though, that it was pretty close
4 to how the unit would have been dispatched at that
5 time. That's why we recommended approval. In the
6 Pasco case, just because of timing and the difference
7 between as-available and firm energy prices, there is a
8 much greater disparity and you also have it going to
9 100 percent firm all the time.

10 COMMISSIONER CLARK: What goes to firm 100 percent
11 all the time?

12 MR. BALLINGER: In Pasco, the energy payments.
13 Where in Auburndale they went to firm when the unit was
14 on, they went to 90 percent of firm when the unit was
15 off, which was very close to as-available energy. Now,
16 I can see I really have confused you with that one.

17 COMMISSIONER CLARK: Yep.

18 MR. BALLINGER: I apologize.

19 COMMISSIONER CLARK: It's not your fault.

20 CHAIRMAN JOHNSON: Let me ask another question.
21 If we go back to what happened, I guess, in '95 or '94,
22 when Florida Power Corp did the modeling that staff
23 believes -- I guess staff is saying you believe FPC was
24 required to do the additional modeling.

25 MR. FUTRELL: We think it's their obligation to

1 find a way to provide cost, the lowest possible cost to
2 the ratepayers. If in doing this they were providing
3 lower cost, they are under that obligation to do so.

4 CHAIRMAN JOHNSON: Under this particular contract
5 because of that one provision?

6 MR. FUTRELL: Correct.

7 CHAIRMAN JOHNSON: So it looks like Florida Power
8 Corp originally, they were interpreting the contract in
9 a similar way to the way that staff was interpreting
10 the contract.

11 MR. FUTRELL: The provision says what it says,
12 that they can -- when the unit is off it's
13 as-as-available and when the unit is on they pay firm.
14 We think that's pretty clear.

15 CHAIRMAN JOHNSON: And they probably thought it
16 was clear, too, until we sent it over to a court and
17 the court said it wasn't so clear.

18 MR. FUTRELL: Correct.

19 CHAIRMAN JOHNSON: So we put somebody in a box,
20 including ourselves. And that's why I kind of have a
21 problem trying to determine how we get out of this box.

22 MR. FAMA: If I could, Chairman Johnson, I mean,
23 you have put us in a box. We argued in '95 for that
24 interpretation of 9.1.2, and this is what the
25 Commission said. And we asked for you to interpret it

1 in accordance with your rules, and this is what you
2 said. You said, "Florida Power is not asking us to
3 interpret the rule, it is asking us to decide that its
4 interpretation of the contract pricing provision is
5 correct. We believe that endeavor would be
6 inconsistent with the intent of PURPA to limit our
7 involvement in negotiated contracts once they have been
8 established." So whatever it was that you approved in
9 that contract in 1991, you gave to the court to
10 interpret.

11 CHAIRMAN JOHNSON: That's what it sounds like we
12 did. Perhaps we shouldn't have done that, but I better
13 understand Joe's analysis to say that we gave -- and
14 maybe we don't even have the legal authority to give
15 away the avoided cost analysis, but it looks as if we
16 punted to the court, because you've got to interpret
17 the contract to get to the cost recovery issue. And
18 they were asking us to do that and we said we can't do
19 that, so the court did it for us. And now we don't
20 like what the court said, so here we are.

21 MR. JENKINS: I think we are somewhat obligated,
22 at least morally, if not legally, to live with the
23 results of the court. We sent it to the court, we got
24 at least a strong signal back, and I think we need to
25 take that strong signal and go on. It's not that much

1 above the avoided cost that Florida Power now
2 calculates.

3 There is another perspective on this. Florida
4 Power really did not have to come and search out to
5 reduce customer costs. They could have easily gone
6 ahead and paid full avoided cost as they were doing in
7 the early years of this contract. It was only because
8 they were trying to lower the cost recovery charges and
9 they were facing competition is probably why they did
10 it, that they got into this, quote, box.

11 CHAIRMAN JOHNSON: The part that is most
12 disturbing, though, is I understand the staff's
13 interpretation of that provision and how we should
14 generally look at avoided cost analysis, and I
15 understand what Florida Power Corp tried to do with its
16 modeling was to try to accomplish just that. Somehow
17 procedurally maybe in that decision on the contract,
18 perhaps we made a mistake. It's tough for me, though,
19 because I don't want to see the ratepayers suffer, and
20 I don't want to see the cogenerator get a windfall.
21 But perhaps they aren't, because now we are in a
22 litigation situation and perhaps we have somehow
23 shuffled the deck unavoidably so. But --

24 Any other questions?

25 COMMISSIONER CLARK: Well, Commissioner, I think

1 you have done a good job of summarizing the dilemma.
2 And as I recall that case we had -- it was one of the
3 better cases, I recall, in terms of laying out the
4 issues as to what our jurisdiction is, what it should
5 be, and the down sides and the benefits to each kind --
6 to either way we went. And as I recall, one of the
7 down sides was that, you know, if the contract
8 interpretation is left to the courts, there may be some
9 things that are unpleasant to live with.

10 The up side was that these were contracts and it
11 would be beneficial to the independent power market to
12 know that these contracts would be litigated as
13 contracts and contract disputes. We specifically said
14 that that did not change our jurisdiction to determine
15 whether or not the contracts were still eligible for
16 cost recovery. And I do believe if a court would come
17 out with an interpretation that would squarely conflict
18 with the basis on which we made a decision then we
19 could go back and determine that it is not eligible.
20 But in this case, I still think we have to go back to
21 the point in time that it was approved and live with --
22 we have to take the view that we may have to live -- we
23 would have to live with their interpretation on this
24 provision. And then we have to assess the risks from
25 that standpoint. That's the box we are talking about,

1 I think.

2 COMMISSIONER DEASON: Let me say that I'm not so
3 sure that I agree 100 percent with what you're saying,
4 because I draw a distinction between our jurisdiction
5 and authority to interpret a contract and bind the
6 parties to that contract consistent with our
7 interpretation. I think it was argued to us that we do
8 not have that jurisdiction. And that if we were to
9 assert that jurisdiction and order a certain
10 interpretation and try to bind the parties that most
11 likely the parties would say you don't have the
12 authority over us to bind us to that anyway, and that
13 they would take it to court anyway, and it would end up
14 there anyway.

15 My concern is that we undoubtedly without question
16 have jurisdiction to set the rates of Florida Power
17 Corporation. And we have an obligation to set those
18 rates at what we consider to be fair, just, and
19 reasonable. And I think what we are trying to do, and
20 this is consistent with our staff's alternative
21 recommendation, is to look at that contract, interpret
22 that contract as to what is appropriate for cost
23 recovery purposes, and when we make that determination
24 and apply that standard to the settlement offer, the
25 settlement offer is no longer cost-effective. It does

1 not have positive net present value benefits under that
2 interpretation. And for that reason they are
3 recommending that it be denied.

4 I am not convinced that since we said, parties,
5 take this contract dispute to the court to see how the
6 court tells you that you have to abide under that
7 contract, that then that binds us for -- and so we
8 somehow abdicate our responsibility to the court when
9 it comes to determine what is a fair rate for the
10 customers to pay. I see a distinction.

11 COMMISSIONER GARCIA: So you would hold that the
12 court decides, this goes forward, and we deny the
13 settlement, then you would look at the contract and say
14 that the recovery then is justified even though it may
15 be more?

16 COMMISSIONER DEASON: That's another issue, and
17 that's something that I guess that we would have to
18 decide at that point. What I'm saying it would be a
19 fair issue to determine whether --

20 COMMISSIONER GARCIA: You realize, though, the
21 problem is we don't have much choice at that point. I
22 mean, we can't go back because we don't like the
23 court's decision and say, well, this isn't what this
24 meant, and so, stockholders, you've got to eat it. I
25 mean, I guess in theory we could, but I think it

1 negates where we began this process, which the company
2 came in here --

3 COMMISSIONER DEASON: What it would do is perhaps
4 trigger the regulatory-out clause.

5 COMMISSIONER CLARK: Well, I guess, Commissioner
6 Deason, see, I see that as if that is the route we want
7 it to take then we ought to go back and revisit our
8 decision on contract interpretation. Because basically
9 what we are saying is, yes, we'll allow the courts to
10 interpret the contract and if we like it, we will allow
11 it to be recovered. If we don't like it, we won't
12 allow it, and you get to the same place. The parties
13 don't have the ability -- in effect, we are saying the
14 deal wasn't -- we don't like the new deal, we don't
15 like the interpretation, and we are going to reject it
16 by not allowing cost recovery and the regulatory out
17 clause comes into play and you get to the same place.

18 COMMISSIONER DEASON: See, to me it is no
19 different than if a utility that we regulate entered
20 into a contract to purchase something, let's say
21 something absurd, paper clips. And they enter into
22 that contract, and we look at the cost of paper clips
23 in their expenses, and we say you paid too much for
24 paper clips, we are not going to allow full recovery.
25 Now because we disallow that cost does not mean, then,

1 that we somehow have tried to interpret their contract,
2 or said that contract is invalid and that we are
3 somehow saying, now, you don't have to pay your vendor.

4 If that is a valid contract, they have got to pay
5 their vendor regardless of what we say is a prudent
6 cost to be passed on to ratepayers. The difference is
7 that this is a contract that came to us first, I assume
8 under the rules of PURPA or whatever, for us to approve
9 it. We approved it. We approved it, and we applied
10 the standard saying that even under the worst case
11 scenario assuming that we are going to have to pay 100
12 percent firm all the time, there is still going to be
13 3.3 or whatever the number was, million dollars of
14 present value benefits.

15 But that did not mean that we were going to
16 consistently apply that standard to determine what a
17 prudent and reasonable cost that we pass-through to the
18 ratepayers. It was just a standard. It was a margin
19 of comfort to say even under this scenario this is
20 going to be a good deal for the customer, because it
21 assumes 100 percent firm, and we don't know if it is
22 going to 100 percent firm or not. And it goes back to
23 my previous example. If we didn't have an -- applying
24 the cost standard as it is being interpreted by Pasco
25 would be the same for us just to tell Power Corp that

1 if there were never an avoided unit to say we want you
2 to build this pulverized coal unit and run it 100
3 percent of the time, and we don't care about prices of
4 fuel that may change in the future, or different
5 economics that may result in you being able to take
6 that unit off line and it be an economic decision. Run
7 it 100 percent of the time, and we are going to make
8 the ratepayer pay for that.

9 We would never in our right mind put an obligation
10 on the company to do such a thing or put a burden on
11 our ratepayers to pay those rates. And when you look
12 at an avoided unit, that's exactly what an avoided unit
13 is. They didn't build the unit, they avoided the coal
14 unit. But how would you run that coal unit and what
15 would be the economics involved in running that coal
16 unit in an economical manner? And that's what we said
17 should be the cost standard, that should be the avoided
18 cost, and that's all that we should pass through and
19 ask the ratepayers to pay in rates.

20 COMMISSIONER CLARK: I would only respond to you
21 the reason I can't support you on that is I think with
22 respect to the paper clip issue, if we say we don't
23 think the contract is interpreted correctly, and we are
24 not going to approve that for cost recovery, it doesn't
25 change the obligation of Power Corp to pay for those

1 paper clips. But in this instance the contract would
2 not have gone forward but for our approval and it being
3 cost recovery, and if we say it is not eligible for
4 cost recovery, Power Corp has no obligation to pay it.

5 And that is getting to the same point as if we had
6 simply interpreted the contract ourselves and not sent
7 it to the court. And with respect to your example on
8 if they had built it themselves, I agree with you that
9 we would not -- if it was not cost-effective for them
10 to run it, that we would be telling them, you know,
11 don't run it, do something else. But in that instance
12 the ratepayer and the company has the risk that the
13 costs go up or they go down, and in a contract case you
14 are contracting away that kind of risk and in this case
15 the risk was not --

16 COMMISSIONER DEASON: No, I disagree with you.
17 The way Pasco is asking this contract to be interpreted
18 both at this Commission earlier and at the court is
19 they wanted all of that -- they did not want it to go
20 up or down, they wanted one interpretation, and it be
21 fixed at that amount, and that we did not get the
22 benefit of contracting that risk away under that
23 interpretation of the contract. And what I'm saying is
24 when we approved that we approved it under the
25 interpretation that it was avoided cost, and when you

1 have an avoided unit that unit sometimes it would run
2 and sometimes it would not run.

3 COMMISSIONER CLARK: I just get back to the point
4 that that is -- then we are getting into the contract
5 interpretation. And if we want to do that, then we
6 should revisit our decision that contract
7 interpretation should go to the court.

8 COMMISSIONER DEASON: I don't have a problem with
9 revisiting that decision, but I think the issue in
10 front of us is more narrow than that. And it simply is
11 does this settlement agreement, is it in the best
12 interest of the ratepayers? And I think clearly it is
13 not. And that's the decision that we have in front of
14 us today. I think it's not even in the interest of the
15 ratepayers even under the staff Alternative 2 when you
16 look at the fluctuations of the parameters that could
17 exist and the fact that all of the money is going to be
18 paid up front and the benefits do not start until -- I
19 forget how many years. Is it 14 years?

20 MR. McNULTY: 14 years.

21 COMMISSIONER DEASON: 14 years. And this original
22 contract was just signed, what, some six years ago, and
23 we are already in the situation where we are saying,
24 "Well, we know this is no longer good." Now we are
25 saying, "Well, let's redo this one and let's place a

1 lot of money up front with hopes that 14 years from now
2 all of our assumptions are going to be true and then we
3 will start getting some benefits." I would submit to
4 you that it is very likely that if we take this action
5 and we approve this settlement six years from now we
6 may look back and say, "We never should have approved
7 that settlement. Let's go have Power Corp renew this
8 contract and pay a bonus to Pasco to extend the
9 contract, because it's such a great deal six years from
10 now."

11 CHAIRMAN JOHNSON: One question, you stated that
12 perhaps the question we should be asking is is this
13 settlement in the best interests of the ratepayers?
14 And it's funny, because I was asking myself that
15 question. And I said, "Well, I guess it is determined
16 on who gets to determine avoided cost. If the court
17 determines it, then perhaps not. If we get to
18 determine it based upon the methodology that we have
19 applied, then the answer is no, the settlement isn't in
20 the best interest." A question still for me is did we
21 -- have we allowed, or have we set up a forum and a
22 process whereby the court does have the ability to make
23 that decision, and that we have relinquished our
24 ability to make a determination on avoided cost. And I
25 guess Joe is saying we have, because the contract says

1 what it says, and the court has interpreted it to say
2 what it says. And staff is saying, no, that's not
3 something that we can relinquish. We can't relinquish
4 our authority to make these kind of -- or at least
5 Primary 1 -- we can't relinquish our authority to make
6 those kind of determinations, even if wanted to.

7 MR. BALLINGER: That's correct, Commissioner. I
8 think the statute clearly states that we have authority
9 to set avoided cost and allow recovery for what the
10 Commission determines the avoided cost to be.

11 MR. ELIAS: And I think it's important to note
12 that the standard for avoided cost that we are
13 comparing here is what is in the existing contract.
14 The comparison is between the existing contract and the
15 modification.

16 COMMISSIONER CLARK: But it's the contract as we
17 interpret it.

18 MR. ELIAS: It's the contract as we approved it,
19 and approval is the significant part, not --

20 COMMISSIONER CLARK: But you agree that it's
21 different than what the court has done.

22 COMMISSIONER GARCIA: Exactly.

23 MR. ELIAS: I don't think that you can draw any
24 conclusion about what the court would do in this case
25 based on what the court did in the other case. The

1 comparison is to what our basis for approval when we
2 initially approved the contract was, and our
3 interpretation of the agreement based on what we
4 thought we were approving at the time. I think that
5 under --

6 COMMISSIONER GARCIA: But what we thought we were
7 approving at the time is what we approved, and is what
8 this company walked out of this building with, or the
9 other building with. And the reason that this all came
10 about is because we approved it. I'm not saying that
11 we are the primary creator of all of this, but clearly
12 they came to us for approval, they've got a contract,
13 and now it is being interpret in a way that is not
14 beneficial to the ratepayers. And what the
15 alternatives are saying is, "Well, let's interpret that
16 contract differently."

17 MR. ELIAS: The interpretation is based on the
18 contract, not what the court did. I mean --

19 COMMISSIONER GARCIA: But the court has
20 jurisdiction over the contract.

21 MR. ELIAS: And as to this contract no court has
22 acted.

23 COMMISSIONER CLARK: Let me ask it differently.
24 In the Lake case was the position Power Corp advanced
25 the same as what staff -- is it the same as staff is

1 interpreting it in the first alternative? Okay. Tom
2 Ballinger is shaking his head yes.

3 Now, did the partial summary judgment say find for
4 Lake County, and that that methodology was not correct?

5 MR. ELIAS: In essence, yes.

6 COMMISSIONER CLARK: Okay.

7 COMMISSIONER GARCIA: You know, Commissioner
8 Deason, you stated something about regulatory-out
9 clause in this contract, and if that -- see, I don't
10 think we get there if we don't approve this and then it
11 goes back, and I don't think the company ever gets to
12 that point. And I don't think that brings us back into
13 it. The only way I would see us -- that bringing back
14 into it is if we step back as a Commission and said we
15 will look at all of these and we are going to determine
16 all of these things whether they are right or not for
17 the ratepayers of Florida. And we do a determination
18 that henceforth this is what is approved, or this is
19 what we are going to allow. And it changes the
20 structure of all of those contracts out there. But I
21 don't think that our decision here by not agreeing to
22 this settlement -- by not accepting this settlement, I
23 think what we do is we put ourselves and the ratepayers
24 at great risk. And I don't see how you get us out of
25 that. And perhaps I missed some of your argument.

1 COMMISSIONER DEASON: You're saying by not
2 approving it we put the ratepayers at risk?

3 COMMISSIONER GARCIA: By not approving the
4 settlement, I think, yes. Approval of this settlement,
5 I think, at least puts some protection or some finality
6 to the risks that they are exposed to. And I think
7 it's better than what it could be if we don't make this
8 decision. Now, you're saying if we pass today or we
9 say, no, we don't approve this settlement -- I'm
10 putting this scenario forward. Let's say that Pasco
11 wins. Where does this put this Commission and the
12 ratepayers of Florida?

13 COMMISSIONER DEASON: If Pasco clearly wins then
14 we will have an issue in front of us at some future
15 time as to what is the appropriate amount to pass
16 through the fuel adjustment clause. Is it what was
17 approved by the court or is it the way we interpret it?
18 I don't think we have got to address that question
19 today. I think it's a very serious question, but I
20 don't think that we have to address that question
21 today, because we don't know what the court is going to
22 do. What we have in front of us is given the
23 uncertainty of all of that and the uncertainty of the
24 benefits of this settlement, is it in the best interest
25 of the customers for what we know now. And I say, no,

1 there is too much risk involved. I find it ironic that
2 you tend to be arguing that we should approve it
3 because it mitigates risk. I think by approving it we
4 increase the risk.

5 COMMISSIONER CLARK: But we only increase the risk
6 if we agree that when it comes backs to us we will be
7 able to reject an interpretation that gives them firm
8 energy all the time.

9 COMMISSIONER DEASON: I think that is something
10 that would have to be argued at the Commission, because
11 I think that legally if we -- we could be put in the
12 situation to where we could be abdicating our
13 ratemaking authority to the court. Because I think
14 that when we approve that contract it was with the
15 avoided cost standard. And that when we approved that
16 contract we were telling the ratepayers of this state
17 that, look, you're not going to have to pay any more
18 than if Power Corp had built a pulverized coal unit.
19 In fact, according to our projections, we think you're
20 going to pay less, but you're not going to pay more.
21 We are going to guarantee you that.

22 And that would not be the case if this scenario as
23 you laid it out comes back. And it could be that we
24 would be in a situation of abdicating our ratemaking
25 authority to the court's interpretation of the contract

1 inconsistent with our own interpretation. And that
2 could be an illegal proposition. But I'm not
3 speculating on that. The only thing I'm saying
4 is that --

5 COMMISSIONER GARCIA: But we won't have a choice.
6 The problem is that if we don't approve this
7 settlement, then we may be looking at that issue. But
8 then we are looking at -- what is the number, 39
9 million, as opposed to 17 million. And that's what we
10 are looking at. And we may decide that that was
11 correct. I mean, unfortunately the court is going to
12 interpret the contract for us at that stage. I mean, I
13 am one of the ones that had great difficulty with this
14 case, but I thought that in the end it was up to them
15 in this contract. I'm sorry, it was up to the courts
16 to decide this contract.

17 But then if we say, no, we aren't approving this
18 settlement, then we are looking at \$39 million. And
19 that's the exposure. And there is no choice. I mean,
20 Pasco doesn't have to come back from that position.
21 They were not here hat in hand. They are here with a
22 solid contract that this Commission approved. And so
23 my fear is that if we pass up this opportunity to do
24 what is -- I'm not saying that it's good or comforting,
25 but at least it protects them from maximum exposure,

1 the ratepayers. I think we have achieved a lot. I'm
2 not necessarily proud of where we end up, but I think
3 it's better than where we could end up.

4 And, you know, we have used a lot of gambling
5 terminology here today, and I want to stay away from
6 that because that is certainly not what we are doing.
7 What we are doing is making sure -- first of all, this
8 Commission approved a series of contracts which are all
9 over this state and which depend to some degree on this
10 Commission's steps in that area, and there is financing
11 arrangements, all sorts of things that are tied up to
12 these instruments.

13 And perhaps they weren't the best decisions and
14 now we are looking at that, but that doesn't mean that
15 this Commission can step back now and say, "Well, that
16 was your mistake and we are not involved with it." And
17 say, "Florida Power Corp, eat it." I don't think that
18 would be right either, because I think that the policy
19 behind these things was motivated by federal
20 legislation, it was motivated by a broader context that
21 we don't need even to go into here.

22 But what I fear, Commissioner Deason, and believe
23 me your argument is very convincing, what I fear is the
24 other side of it. You know, the paper clip guy I don't
25 worry about. I mean, it's just like, you know, if

1 would have had staples come in here and argue that
2 because of the change in this contract they lose their
3 stationery ability to provide. You know, that's not in
4 my jurisdiction. I clearly voted to allow them to
5 speak simply to make my point better of why I didn't
6 them into the proceedings. And that said, I think that
7 the broader context here is where we end up. And where
8 we are end up if we let this go to the court may be far
9 worse than where we are at today. I'm sorry, if we let
10 it culminate in the courts in that interpretation that
11 may come down.

12 COMMISSIONER DEASON: Well, I agree that there is
13 a risk associated with whatever we do. And I agree
14 with you that there is a certain amount of comfort by
15 -- here again, a gambling term -- cutting our losses.
16 But the way I interpreted that we are going to have
17 losses, it's just that they are not going to be as
18 great. We know they are not going to be as great as
19 they could be by approving the settlement. And I still
20 think there is an opportunity it could be a net
21 benefit, and that's why I'm not willing to approve it.
22 But I understand your argument, and it is an easy
23 position to be in.

24 COMMISSIONER CLARK: Yes. Our argument is not
25 without merit, right, as yours is not without merit?

1 COMMISSIONER DEASON: No, it certainly has merit.

2 CHAIRMAN JOHNSON: Any other comments,
3 Commissioners?

4 COMMISSIONER CLARK: Commissioner Deason, you
5 know, I think this is exactly the scenario we were
6 concerned about when we were dealing with contract
7 interpretation. And it seems to me that we have a lot
8 of trouble sometimes figuring out exactly what the
9 pricing should be, and I suppose we should not be
10 surprised that the court is having difficulty. And,
11 you know, maybe it argues for just taking back or
12 revisiting our decision on contract interpretation, but
13 I think there is benefit in terms of the market itself,
14 the independent power market that I hope will continue
15 to develop and should continue to develop under the
16 FERC decision. And I'm not at this point willing to
17 say we should go back and revisit our decision and
18 determine we have the ability to interpret these
19 contracts.

20 CHAIRMAN JOHNSON: You mean you're not willing to
21 do that in this particular case or --

22 COMMISSIONER CLARK: I'm saying in order to -- in
23 order to conclude that Alternative 2 assesses the
24 appropriate risk, underlying that has to be a view that
25 we can reject an interpretation by the court that would

1 allow any greater recovery than what staff thinks the
2 contract says.

3 CHAIRMAN JOHNSON: And you're saying you don't
4 think we could reject an interpretation.

5 COMMISSIONER CLARK: No, I don't.

6 CHAIRMAN JOHNSON: Because the court does have the
7 authority.

8 COMMISSIONER GARCIA: I would even go further.
9 And I think we also put the company -- you know, the
10 company didn't have to be here, and the truth is that
11 if we tell the company to go away, and they come back
12 with a decision that says 39 million, they should at
13 least be protected from a huge chunk of that because
14 they came here to try to figure a way out of this for
15 the ratepayers of Florida. And that's a bottom line
16 issue for myself. And it's not that I'm trying to
17 forget about -- I'm not just thinking about the
18 company, I'm also thinking about the ratepayers. And
19 if we say to them go away, I'm scared what they are
20 going to come back with. And, again, not gambling,
21 because I don't think we are gambling when we look at
22 what the court has already decided. I think we are
23 already in a tenuous position.

24 COMMISSIONER DEASON: Well, let me say this. I
25 applaud the company for taking the position that they

1 did, and I agree with Mr. Fama, this Commission put
2 them in a box, and it wasn't their fault. And that
3 they were taking an aggressive position trying to cut
4 their costs, which has the benefit of helping their
5 ratepayers. They came forward, they made an issue of
6 it, they brought it to the Commission, and we told them
7 to go to the court. And that's just the chain of
8 events, that's the way it has happened.
9

10 But I applaud the company for taking the
11 aggressive position that they did, but we also need to
12 keep in mind, though, that under the settlement what we
13 are asking the ratepayers to do is pay a lot of money
14 up front, okay? When they are captive customers now,
15 they don't have any choices whatsoever to go to a
16 different provider, and pay the majority of the money
17 in the first few years. And then Power Corp. when
18 there is going to be competition, assuming there is
19 going to be competition even in the State of Florida,
20 then this is a contract that they are going to have out
21 of their way or some additional cost out of their way,
22 so they are going to be in a better position to
23 compete. But who enabled them to do that? The
24 customers who that paid all the money up front when
25 they didn't have the choice. So, Power Corp could
potentially benefit some from this element, as well.

1 I'm not saying that is the reason they are
2 bringing this to the Commission, okay? Because I think
3 they took an aggressive position to start with, which I
4 commend them for, and then we put them in the box,
5 okay? But there are some benefits there. And I think
6 Joe mentioned the fact that we are talking about
7 competition, well, this is -- and we don't know what is
8 going to happen, and what is going to be the most
9 cost-effective source of energy in the future as a
10 result of competition. But we do know that if the
11 settlement is approved that the captive customers that
12 don't have a choice right now are going to be paying to
13 get out of this contract and they are not going to be
14 getting any energy from it in the later years.

15 COMMISSIONER GARCIA: I understand, Commissioner,
16 and perhaps I may be wrong. But in a lot of the places
17 where we are going to -- let me not use the "we" term.
18 In other states where they are going to competition,
19 it's not like the companies are being damaged. The
20 ratepayers are still paying. These contracts are still
21 being paid for. In California they are going to be
22 paid for all the way through. And perhaps some of the
23 decisions made by that Commission that allowed them --
24 again using a gambling term -- to cut their losses,
25 only benefited in the end the ratepayers in that state.

1 And once that is gone, Pasco is not going to walk away
2 with less than what it won, and it will have it in
3 hand. It's not a speculation; it will have it. And we
4 can't reinterpret what the court said when they come
5 back in here.

6 COMMISSIONER CLARK: Commissioner Deason, I
7 understand that it's clear that it would have an impact
8 on rates today, but by delaying a buy-out and perhaps
9 going to competition, I don't think it's a foregone
10 conclusion that they wouldn't be paid for. I mean --

11 COMMISSIONER DEASON: I wasn't making a judgment
12 one way or the other on that. That also is a future
13 issue. But you can't ignore the fact that under the
14 settlement you are asking today's ratepayers to pay a
15 substantial amount of money and that that payment
16 schedule is on an up-front basis. That's a given. We
17 know that will take place.

18 CHAIRMAN JOHNSON: Any more discussion?

19 COMMISSIONER GARCIA: Let me just stay with the
20 line I was. I'm going to go ahead and move primary
21 staff on this. And I think the others are fallouts,
22 right? I mean, they all follow -- yes.

23 COMMISSIONER KIESLING: Why don't we just resolve
24 1, and then we can figure out --

25 COMMISSIONER GARCIA: I guess that will decide it.

1 I will move the primary recommendation in Issue 1.

2 COMMISSIONER CLARK: Second.

3 CHAIRMAN JOHNSON: There has been a motion and a
4 second that we approve primary on Issue 1. Is there
5 any further discussion? Seeing none, all those in
6 favor signify by saying aye.

7 COMMISSIONER CLARK: Aye.

8 COMMISSIONER GARCIA: Aye.

9 CHAIRMAN JOHNSON: Aye. Opposed, nay.

10 COMMISSIONER DEASON: Nay.

11 COMMISSIONER KIESLING: Nay.

12 CHAIRMAN JOHNSON: The motion passes on a
13 three-to-two vote.

14 COMMISSIONER GARCIA: If no one has any questions,
15 I will move Issues 2 through 4.

16 COMMISSIONER CLARK: Second.

17 CHAIRMAN JOHNSON: There is a motion and a second
18 on Issues 2 through 4. All those in favor signify by
19 saying aye. Aye.

20 COMMISSIONER CLARK: Aye.

21 COMMISSIONER GARCIA: Aye.

22 COMMISSIONER DEASON: Aye.

23 COMMISSIONER KIESLING: Can we break them out?

24 CHAIRMAN JOHNSON: Okay.

25 COMMISSIONER KIESLING: Thank you.

1 CHAIRMAN JOHNSON: Issue 2. There is a motion and
2 a second on Issue 2. All those in favor signify by
3 saying aye. Aye.

4 COMMISSIONER CLARK: Aye.

5 COMMISSIONER DEASON: Aye.

6 COMMISSIONER GARCIA: Aye.

7 CHAIRMAN JOHNSON: Opposed?

8 COMMISSIONER KIESLING: Nay.

9 CHAIRMAN JOHNSON: Show it approved on a
10 four-to-one vote.

11 Issue 3. There is a motion and a second to
12 approve staff.

13 COMMISSIONER GARCIA: Just out of curiosity,
14 because I don't want to miss anything, and it's up to
15 you, Commissioner Kiesling, could you give us an idea
16 of why? If you want to keep it to yourself, that's
17 fine, also.

18 COMMISSIONER KIESLING: Mine is more a general
19 feeling, first of all, that I don't think we even
20 should have approved it, and I cast my vote
21 accordingly. But my concern is with how the cost once
22 it is approved it's going to be passed onto the
23 ratepayers. And I still have a significant problem
24 with the structure of it being passed on in the early
25 years. And the only place I can find that I can

1 reflect that is on Issue 2.

2 CHAIRMAN JOHNSON: Issue 3.

3 COMMISSIONER GARCIA: Thank you.

4 CHAIRMAN JOHNSON: There has been a motion and a
5 second on Issue 3. All those in favor signify by
6 saying aye.

7 (Unanimous affirmative vote.)

8 CHAIRMAN JOHNSON: Show it approved unanimously.
9 And Issue 4. There is a motion and a second to
10 approve Issue 4. All those in favor signify by saying
11 aye.

12 (Unanimous affirmative vote.)

13 CHAIRMAN JOHNSON: Show it approved unanimously.
14 That resolves Item 3.

15 COMMISSIONER KIESLING: Oh, yes, and we are moving
16 along.

17 CHAIRMAN JOHNSON: I would like to thank the staff
18 for a very thorough analysis. It wasn't an easy issue.
19 It still isn't. It doesn't make any of us feel any
20 more comfortable, but I think at least we have
21 progressed yet another step. And thank the parties,
22 too, for their participation.

23 * * * * *

CERTIFICATE OF REPORTER

STATE OF FLORIDA)

COUNTY OF LEON)

I, JANE FAUROT, Court Reporter, do hereby certify that the foregoing proceedings was transcribed from cassette tape, and the foregoing pages numbered 1 through 128 are a true and correct record of the proceedings.

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

DATED THIS 10th day of April, 1997.

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