BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 110009-EI

In the Matter of:

NUCLEAR COST RECOVERY CLAUSE.
_____/

VOLUME 1

Pages 1 through 134

PROCEEDINGS:	HEARING
COMMISSIONERS PARTICIPATING:	CHAIRMAN ART GRAHAM COMMISSIONER LISA POLAK EDGAR COMMISSIONER RONALD A. BRISÉ COMMISSIONER EDUARDO E. BALBIS COMMISSIONER JULIE I. BROWN
DATE:	Wednesday, August 10, 2011
TIME:	Commenced at 9:30 a.m. Concluded at 12:25 p.m.
PLACE:	Betty Easley Conference Center Room 148 4075 Esplanade Way Tallahassee, Florida
REPORTED BY:	LINDA BOLES, RPR, CRR Official FPSC Reporter (850) 413-6734

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APPEARANCES:

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JAMES S. WHITLOCK, ESQUIRE, Gary A. Davis & Associates, 61 North Andrews Avenue, Hot Springs, North Carolina 28779, appearing on behalf of The Southern Alliance for Clean Energy.

CHARLES J. REHWINKEL, JOSEPH A. MCGLOTHLIN, ERIK L. SAYLER, and PATRICIA CHRISTENSEN, ESQUIRES, Office of Public Counsel, c/o The Florida Legislature, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400, appearing on behalf of the Citizens of the State of Florida.

APPEARANCES (Continued):

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I N D E X

WITNESSES

EXHIBITS

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1	Comprehensive Exhibit List	19	
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76	WBD-1	19	
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106	WRJ(FPL)-5	19	
107	WRJ(FPL)-6	19	
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110	WRJ(FPL)-9	19	
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117	KLW-1	19	
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147	JF-10	19	
148	JF-11	19	
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NUMBER:		ID.	ADMTD.
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163	JE-9	19	
164	JE-10	19	
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166	WRJ(PEF)-1	19	
167	WRJ(PEF)-2	19	
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169	WRJ(PEF)-4	19	
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171	CC-1	19	
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173	JAS-2	19	
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NUMBER:		ID.	ADMTD.
184	TGF-8	19	
185	TGF-9	19	
186	JF-12	19	
187	JF-13	19	
188	JF-14	19	
189	JE-12	19	
190	JE-13	19	
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192	JE-15	19	
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P R O C E E D I N G S

CHAIRMAN GRAHAM: Good morning, everyone. Boy, everybody is nice and enthusiastic today. I'm glad you guys all made it here safely today.

I'm going to go over a few housekeeping things before we get started. The first thing, I plan on taking, most important, is lunch. I plan on taking a lunch break at around 1:00, between 1:00 and 1:30, whenever we get to a breaking point. Probably only plan on breaking for about 30 minutes, so whatever you guys need to do to make sure that you can get your food and get back here, it's appreciative.

If you want to eat your food here, there's the Internal Affairs room next-door that's available, and we have a room upstairs. And there's very few places over at Internal Affairs, but upstairs there is a room, Room Number 234, and that'll seat about 70 people or so. So there's plenty of room up there. You can get up there through the elevator or through the stairs. It's one of our training rooms. Or you don't have to stay here to eat; you can always go get something, you know, and come back. But we're going to try to get it done in about 30 minutes.

I plan on stopping at the end of the day about 6:30 or 7:00; once again, when we get to a stopping

point. You know, we'll either a start a witness or complete a witness, and depending on however that, that falls out.

Friday, I plan on ending this thing probably about 1:00, 1:30. So there's a lot -- I know a lot of Staff have other things to do on their desk to get back to. I'm sure a lot of you have traveling to do or other things you need to get back to, so, once again, I'll try to shut this thing down about, between 1:00 and 1:30 on Friday. And we'll start back up again normal time -- I can't remember if it's Monday or Tuesday of next week.

We'll take a five-minute break every two hours for the court reporter, make sure that she doesn't wear out her little fingers there. And what else do I have on this list?

Oh, if I can get everybody to raise your right hand. Right hand. Now reach down and grab your cell phone and make sure it's on vibrate. Because everybody forgets. Let's go ahead and get it done now.

(Laughter.)

Now don't make me have to embarrass you when somebody's phone goes off.

Okay. That all being said, we will convene this hearing. It is Docket Number 110009-EI. And let the record show it is August 10th. It is 9:38 a.m.

And if I can get Staff to read the notice, please.

MR. YOUNG: Good morning, Commissioners. By notice issued July 20th, 2011, this time and place was set for a hearing in Docket Number 110009-EI, the nuclear cost recovery clause. The purpose of the hearing is set out in the notice.

CHAIRMAN GRAHAM: Okay. And let's take appearances. Who have we got?

MR. ANDERSON: Good morning, Chairman Graham. My name is Bryan Anderson. I'm here today with my colleague Jessica Cano. Also Mitchell Ross. My colleague Ken Rubin, R-U-B-I-N, will also be appearing for Florida Power & Light Company. Thank you very much.

CHAIRMAN GRAHAM: Thank you.

MR. WALLS: Good morning. My name is Mike Walls with Carlton Fields on behalf of Progress Energy Florida. I'd also like to enter appearances for Alex Glenn and John Burnett on behalf of Progress Energy Florida.

MS. HUHTA: Good morning, Commissioners. Blaise Huhta with Carlton Fields, also for Progress Energy Florida. Thank you.

MR. WHITLOCK: Good morning, Mr. Chairman, Commissioners. Jamie Whitlock on behalf of the Southern

Alliance for Clean Energy. Thank you.

MR. REHWINKEL: Good morning, Commissioners. Charles Rehwinkel and Erik Sayler on behalf of the Office of Public Counsel.

MR. McGLOTHLIN: And Joe McGlothlin also with OPC. Good morning.

MS. KAUFMAN: Good morning. Vicki Gordon Kaufman of the law firm Keefe, Anchors, Gordon & Moyle, on behalf of the Florida Industrial Power Users Group. And I'd also like to enter an appearance for Jon Moyle.

MR. BREW: Good morning, Commissioners. My name is James Brew. I'm here for White Springs Agricultural Chemicals, PCS Phosphate. And also appearing with me is F. Alan Taylor.

MS. WHITE: Good morning, Commissioners. I'm Karen White on behalf of Federal Executive Agencies.

MR. YOUNG: Good morning, Commissioners. Keino Young and Anna R. Norris on behalf of Commission staff.

MS. HELTON: And Mary Anne Helton, Advisor to the Commission. And I'd also like to make an appearance for Samantha Cibula, who hopefully will be helping me fill in some.

CHAIRMAN GRAHAM: All right. Preliminary matters. Staff, are there any preliminary matters to

deal with?

MR. YOUNG: Yes, sir. The first preliminary matter is the Comprehensive Exhibit List. Staff has prepared a Comprehensive Exhibit List, and the list itself is marked as Exhibit Number 1. If there are no objections to the Comprehensive Exhibit List, Staff would request -- Staff will request that Exhibit Number 1 be entered into the record after opening statements or at the Chairman's pleasure.

CHAIRMAN GRAHAM: Okay.

MS. KAUFMAN: Mr. Chairman, just to be clear, we're only entering the list at this time as opposed to the exhibits themselves? Okay. Thank you.

MR. YOUNG: Yes.

Also, Mr. Chairman, Staff -- Staff has handed out to the parties a stipulated exhibit, which is included throughout the Comprehensive Exhibit List, and Staff requests that the exhibit be entered into the record after opening statements as relates to FPL. And we will find out about Staff's stipulated exhibits as relates to Progress Energy Florida during that time.

CHAIRMAN GRAHAM: Okay.

MR. YOUNG: Also, Mr. Chairman, Staff requests that the Comprehensive Exhibit List and Staff's Stipulated Exhibit List be marked as numbered in the

Comprehensive Exhibit List, and that any other exhibits proffered during the hearing be numbered sequentially following those listed in the Staff's Comprehensive Exhibit List.

(Exhibits 1 through 199 marked for identification.)

CHAIRMAN GRAHAM: All makes sense so far. Are there any stipulated witnesses?

MR. YOUNG: Yes, sir. It's my understanding that Kathy Welch is, the parties have agreed to stipulate and the Commissioners do not have any questions for Ms. Welch. It's my understanding that we're waiting on Jeff Small -- from a party to state whether they will stipulate to Jeffery Small.

CHAIRMAN GRAHAM: Who are we waiting on to hear from for Jeffery Small?

MR. YOUNG: I think we're waiting on FIPUG and the Office of Public Counsel.

CHAIRMAN GRAHAM: And when do we anticipate hearing?

MR. YOUNG: Before the start of the Progress hearing.

CHAIRMAN GRAHAM: Okay.

MR. REHWINKEL: Mr. Chairman, Charles Rehwinkel. The parties on the Progress side of the case

are, are working on additional stipulations with respect to witnesses, and we will be advising the Staff as soon as we have some information about that.

CHAIRMAN GRAHAM: That's fine.

MR. REHWINKEL: But well in advance of getting to the Progress point.

CHAIRMAN GRAHAM: All right. So you don't anticipate we're going to get there today?

MR. REHWINKEL: I'm sorry. What was that?

CHAIRMAN GRAHAM: So you don't anticipate we're going to get there today?

MR. REHWINKEL: No.

CHAIRMAN GRAHAM: All right.

MR. YOUNG: Mr. Chairman, the stipulated witness prefiled testimony exhibits can be entered into the record in turn as the witnesses are called at the hearing.

CHAIRMAN GRAHAM: Okay.

MR. YOUNG: At that time Staff would request that the testimony of the stipulated witness be inserted into the record as though read, and that the stipulated exhibits be, of that witness be moved into the record.

CHAIRMAN GRAHAM: All right. Pending motions?

MR. YOUNG: Staff would note there are two pending motions that the Prehearing Officer referred to

the full Commission for a ruling.

The first is PEF's motion to defer approval of the long-term feasibility and reasonableness of the projected construction expenditures associated with the carrying costs for the CR3 uprate project.

Issue A in this proceeding addresses the motion, and the issue reads thusly: "Should the Commission defer the approval of the feasibility and the reasonableness of the projected construction expenditures and associated carrying costs for the CR3 uprate project?"

Staff recommends that the Commission grant PEF's motion to defer. If the Commission grants the PEF motion to defer, Issue A becomes moot and the Commission will not have to make a decision on Issues 29, 34, 35 in this year's NCRC proceeding.

Staff will also note that in conjunction with the motion PEF filed a petition for emergency rule waiver of Rule 25-6.0432(5), subsection (c)(2) of the *Florida Administrative Code*, which states that each year the Commission stall determine the prudence of the prior year's actual construction costs and the reasonableness of the projected construction costs, and Rule 25-6.0432(5)(c)(5), *Florida Administrative Code*, which states that PEF shall submit each year for the

Commission review and approval the long-term feasibility of completing the power plant.

PEF's motion is -- Staff believes PEF's motion is okay (phonetic), and PEF agrees to a motion of continuance. Thus, Staff agrees with PEF that the rule waiver in this instance is not necessary. The motion is unopposed.

CHAIRMAN GRAHAM: The motion is unopposed. Is there anybody that wishes to be heard?

MS. KAUFMAN: Chairman Graham, I wish to be heard just briefly. We do not oppose the motion, but I just wanted to be clear that the deferral will not interfere with our rights to challenge the costs at the time that this is taken up by the Commission, whenever that may be. And I think that is Progress's understanding as well.

CHAIRMAN GRAHAM: Progress?

MS. HUHTA: Yes, that's correct.

CHAIRMAN GRAHAM: Staff?

MR. YOUNG: Yes, sir. That's our understanding as well.

CHAIRMAN GRAHAM: Okay. I guess we'll bring it back here to the board.

Commissioner Brisé.

COMMISSIONER BRISÉ: Thank you. Thank you,

Mr. Chairman. And as the Prehearing Officer on the nuclear cost recovery process for this year, I thought it was important for the full Commission to address this issue because it's a major issue as we move forward, considering how we're looking at nuclear and some other related aspects that are going on, not only here in Florida but all over the world.

I am completely in support of the deferral of this item, but I just wanted us to have an opportunity to make that decision as a collective body to, to ensure that we well thought out this issue.

CHAIRMAN GRAHAM: Was that a motion?

COMMISSIONER BRISÉ: Yes, that is a motion.

COMMISSIONER BROWN: Second.

CHAIRMAN GRAHAM: It's been moved and seconded to defer.

Commissioner Edgar.

COMMISSIONER EDGAR: Thank you, Mr. Chairman. I have reviewed the documents and also the discussion that took place at the prehearing on this item recently, and it is my understanding and belief that to grant the motion and to include in that the rule waiver in whatever is the proper procedural posture is the best way for us to proceed at this time to address the issues that are before us today and into the future.

I appreciate the decision of the Prehearing Officer to bring this forward to us for discussion and to be addressed this morning, but I also would like to say that from my perspective it does not set any precedent as to the Prehearing Officer's authority on a go-forward basis in this instance and in all others to address prehearing motions, and I am in support of the motion.

CHAIRMAN GRAHAM: Any other comments? It's been moved and seconded to grant the motion to defer.

Legal, are we in the correct, in the correct posture?

MR. YOUNG: I'll just -- two clarifications. One, Staff doesn't believe that you need to rule upon the rule waiver to make -- you don't need to vote on the rule waiver. And, two, the issues will be deferred until the 2011 NCRC proceeding.

CHAIRMAN GRAHAM: Okay.

MR. YOUNG: I'm sorry. 2012. We're in 2011.

CHAIRMAN GRAHAM: Now are we in the correct posture?

MR. YOUNG: It's my understanding I think we are.

CHAIRMAN GRAHAM: Okay. All -- Commissioner Edgar?

COMMISSIONER EDGAR: I'm sorry. I forgot one other thing I wanted to say, which has, has been already addressed, but that it is my understanding and my belief that the point raised by FIPUG, that we are all on the same page and understanding that there is no infringement on a go-forward basis, but that we are making this decision in order to efficiently and with better and more complete information address the issues in the future.

CHAIRMAN GRAHAM: All in favor, say aye.

(Ayes unanimous.)

Any opposed?

(No response.)

By your action, you've granted the motion to defer.

MR. YOUNG: And, Mr. Chairman, I would note by your actions Issue A becomes moot. 29, 34, and 35 are deferred until the 2012 NCRC proceedings.

CHAIRMAN GRAHAM: All right.

MR. YOUNG: The second motion, Mr. Chairman, is FPL's motion to strike OPC's testimony collaterally challenging the Commission's need determination, requesting implementation of a risk-sharing mechanism, and proposed Issues 10A, B, 10B, 16, 17, and 18.

Staff would note that these previous -- that

they were previously -- the issues were previously marked as Issue 3, which is now 10A; Issue 4, which is now 10B; Issue 5A, which is now 16 and 17; and Issue 5B, which is now 18. The Prehearing Officer granted the motion in part by excluding Issue 10A as, as a separate issue in this proceeding, but referred the remaining, the remainder of the motion to the full Commission per FPL's request.

The Commission needs to rule on the remainder of the motions, i.e., PEF's request that the Commission strike certain, certain OPC testimony in Issues 10B and 16 through 18. Staff recommends that the Commission allow FPL ten minutes for oral arguments on the motion, followed by ten minutes for oral arguments from OPC, and ten minutes for oral arguments by FIPUG, the two parties who have filed responses to the, in opposition of the motion.

MR. McGLOTHLIN: Before you begin arguments, sir, Joe McGlothlin with OPC. I think there's an important clarification that might be helpful in terms of the ruling during the Prehearing Conference.

As I recall, the Prehearing Officer ruled that 10A could be addressed in the broader Issue 10, so that's very different than saying that he struck 10A, because we have testimony addressing it.

MR. YOUNG: 10 -- the Prehearing Officer ruled that 10A was, 10A was subsumed in Issue 10. Thanks for the clarification.

CHAIRMAN GRAHAM: Okay. So are we hearing oral arguments right now?

MR. YOUNG: Yes, sir. Staff recommends that you hear oral arguments right now.

CHAIRMAN GRAHAM: I guess since this is FP&L's motion, with your ten minutes I'll give you the option of if you want to take it all up front, if you want to save some of it for rebuttal, or however you want to split that up.

MR. ANDERSON: Thank you. We'd like to reserve a few minutes. The other thing we'd just note is that our motion is really directed at Public Counsel. And, you know, I note that there's 20 minutes on the other side really supporting Public Counsel's position to our ten. I will work to keep my initial remarks short, but I would wish to reserve some, some time.

CHAIRMAN GRAHAM: All right. Like I said, I'm not going to re-guess what the Prehearing Officer did.

MR. ANDERSON: Yes, sir.

CHAIRMAN GRAHAM: But you guys have ten minutes, and you can take as much of it as you want up front and take whatever the balance is left as the

rebuttal.

MR. ANDERSON: We will do that.

CHAIRMAN GRAHAM: Okay.

MR. ANDERSON: Prior to proceeding, I'd ask that Mr. Laux --

CHAIRMAN GRAHAM: Sure.

MR. ANDERSON: What's being handed around are various excerpts of orders and statutes and rules that pertain to the motion, and this has previously been provided to Public Counsel. I'll let you get settled. Then when you're, when you're ready, I'll begin.

CHAIRMAN GRAHAM: Whenever you're ready.

MR. ANDERSON: Thank you, and good morning.

FPL moves to strike portions of the testimony of Public Counsel witnesses William Jacobs and Brian Smith, and for exclusion of related issues proposed by Public Counsel for decision in this case. My remarks address only the portions of testimony and issues identified in our motion. I'll focus on two main points.

First, how the Florida Legislature's statutes and this Commission's decisions as rules made it possible for the extended power uprate project to be constructed. Second, why Public Counsel's testimony and claims are diametrically opposed to *Florida Statutes* and

the Commission's regulations and your prior orders that govern this proceeding and should be stricken.

There's a real basic legal rule at issue here. Issues are governed by the substantive law that's given to us by the Legislature, and we're asking you here today to focus on that law, focus on your prior decisions, and uphold those things.

In 2006, the Legislature enacted provisions in Section 366.93 and 43.519 to promote investment in additional nuclear generation to serve Florida customers with greater reliability and fuel diversity. That legislation came on the heels of two bad storm seasons, 2004, 2005, where FPL's natural gas and fuel oil supplies were interrupted by hurricanes. FPL maintained service without using rotating blackouts, but it was a close call.

Following the Legislature's directions, the Commission adopted the nuclear cost recovery rule which governs the proceeding today, and FPL responded to that policy direction from the State of Florida from the Legislature and this Commission. In 2007, we filed a need determination request to construct the extended power uprate project on an expedited basis, which is the fastest and most cost-effective way to add more nuclear capacity to serve customers.

I have handed out to you handout A, which is an excerpt from our need determination petition, and I've highlighted and tabbed the portion where we very, very clearly told the Commission, absent the increased regulatory certainty and cost recovery provisions that have been provided by the Florida Legislature and the Commission, FPL would not be encouraged to undertake such capital intensive nuclear uprates on such an expedited basis.

There was no ambiguity in what FPL was proposing. In our filing we included a robust economic analysis and considered a wide range of fuel and environmental costs. The Staff of the Commission conducted extensive discovery, probing the economic analysis, all aspects of the phase.

Public Counsel could have but did not intervene or file testimony. They did not say the EPU project was a bad project. They did not say that the economic analyses were or should have been different. If those positions were desired to be pursued, they had the opportunity and did not do so.

I've also included in the handout this Commission's EPU project need determination order. You can glance at it. You will see that in it the Commission confirmed application of the nuclear cost

recovery framework to the EPU project. Relying on that order, FPL proceeded with the EPU project on an expedited basis. The project today is already delivering additional nuclear megawatts, benefiting FPL's customers. It's on track for completion on an expedited schedule.

With this background, you will understand why FPL is shocked by Public Counsel's claims in 2011 that FPL was imprudent for proposing the EPU project on an expedited basis in 2007, which the Commission approved in 2008.

The heart of Public Counsel's case could not be more clear. It's at pages 24, lines 14 to 22, of Dr. Jacobs' testimony. He says, "I conclude that the decision to fast track these projects" -- now remember, that's back 2007 -- "and to pursue them without performing a breakeven analysis" -- that's a criticism of the economic analysis back in that case -- "was an imprudent decision on the part of FPL management."

Then he goes on and says that, based on this claim four years later that could have been brought four years ago, the company should be ordered to perform a breakeven analysis, and then this scheme for disallowing capital costs if the EPU project generation were to cost more than gas generation.

That's not what the law says. That's not what your rules provide. We submit that the portions of rule and testimony that we've submitted should be stricken for at least five legal reasons. We've developed those in detail in our brief.

Let's start with the first direction from the Florida Supreme Court. The *Florida Power Corp vs. Garcia* decision, it's handout C, I've included it in total. And the basic legal principle you can see in the tabbed portions, I've highlighted them also, is -- it goes back to something I was taught in law school by my professor Jo Desha Lucas. He said, "You don't chew your cabbage twice."

That's the legal principle here, is that where parties have a full and fair opportunity to litigate a claim and a decision is rendered, you don't come back four years later saying, you know what, we'd like to assert a position that's directly contrary to that order. That's not the law, and we ask the Commission to uphold that.

The second point is our handout D, is Section 403.519(4)(e), and the statute plainly says in the portion that you have there, that proceeding with the construction of a nuclear plant following a Commission order approving need shall not constitute or be evidence

of imprudence.

What did FPL do? We proceeded with the construction of the EPU project on an expedited basis after receiving a need determination order. That is exactly what Public Counsel claims is imprudent. Their position, their testimony, and the related issues should be stricken on those points.

Handout E you have there, our third point, is you look at the substantive law that governs this proceeding, it's the nuclear cost recovery rule, and your Staff has correctly set out the issues. This year is about the prudence of 2009 and '10 costs, reasonableness of 2011 and '12 costs, and whether to accept the feasibility analyses.

Simply put, 2007 decisions are not 2009 decisions, they're not 2010 decisions. Under the very careful framework structured at the direction of the Legislature, those are simply out of bounds, irrelevant, and not proper.

Fourth, the Public Counsel's claims violate the legal prohibition on hindsight. This is like a, almost a treatise in public utility law, this one motion, because when you look at Public Counsel's claims and the portion we're seeking to strike, they criticize the 2007 decision by relying on information from 2009

and 2010.

If you look at handout F, which is a portion of your order issued earlier this year, Public Counsel's testimony seeks to establish an unauthorized risk-sharing mechanism. Our position is that's contrary to what this Commission ordered last year. In that order the Commission rejected Public Counsel's 2010 request to find that the Commission has authority to order a risk-sharing mechanism, disallowing project costs above some threshold.

But now, in August, Public Counsel is back for another bite at that apple. Now they can tell you what that threshold is. Before they said some threshold. Now they say the Commission should disallow all costs greater than the breakeven cost from the amount that FPL seeks to collect. And that's Mr. Jacobs' testimony, page 8, lines 3 to 4. Couldn't be clearer.

This would set a threshold for cost recovery that is not based on the prudence of FPL's decisions as required by law, but on matters outside of FPL's control such as future natural gas prices.

During Dr. Jacobs' deposition last week, he said, yeah, in my opinion, FPL assumed the risk of future gas prices when it's made its decision. That's exactly the type of hindsight and inappropriate claim

that we feel should be precluded here.

Now, we are mindful of the special role that Public Counsel plays in Florida regulation. They're empowered by the Legislature, the same Legislature that set these clear statutes which gave direction to all of us to proceed. But if Public Counsel today is permitted to relitigate a major need determination relied on by a utility to invest hundreds of millions of dollars, other intervenors may also be encouraged to challenge need determinations of FPL or other Florida utilities under the guise of prudence claims. Such actions would increase the risk of investing in utility projects in Florida and discourage utilities and investors from relying on Commission orders.

CHAIRMAN GRAHAM: Sir, just to let you know that there's a minute left.

MR. ANDERSON: And I was just, just completing.

CHAIRMAN GRAHAM: I don't know if you want to conclude or if you want to keep that for rebuttal.

MR. ANDERSON: I've, I've just concluded. Thank you.

CHAIRMAN GRAHAM: Okay. All right.

All right. Who's next? OPC?

MR. McGLOTHLIN: Joe McGlothlin, Commissioner.

Before I begin, I've asked that some handouts be distributed that I'll refer to, and, also, Patty Christensen of our, an attorney with our office, is going to put some enlargements of those same handouts on the easel as I, as I talk.

During the Prehearing Conference we were given, we were allotted five minutes per issue to address matters then. And I planned accordingly, so I will talk fast, but I hope you'll bear with me if my outline, you know, is at or above the ten minutes.

Let me begin, Commissioners, by some bottom line conclusions to which the rest of my argument will lead. They are as follows.

First, when the Legislature encouraged electric utilities to invest in nuclear facilities, the Legislature did not eliminate this Commission's role in protecting customers from the impact of imprudent decisions, conduct, or costs.

Next, when the Commission granted FPL's petition for a determination of need for the uprate projects, the Commission did not, nor could it, anticipate and prejudge future issues of prudence or imprudence.

Next, the Florida Supreme Court has acknowledged and upheld this Commission's ability to

modify its policy decisions where changed circumstances require that modification to protect the public interest.

And finally, before and after the passage of Section 366.93, which directed the Commission to make available alternative means of cost recovery, the Administrative Procedure Act continues to protect OPC's right to raise issues and present evidence on those issues.

I'll ask Patty to put up the first slide, which is an excerpt from 120.57(1)(b), which states, "All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, and to conduct cross-examination." OPC has intervened in this case, we are a party, and we're entitled to the rights guaranteed by the APA.

Now Staff has referred to Issue 10A, so I'll only talk about this very briefly. We have a, have another enlargement that juxtaposes Issue 10 with 10A. And, as the Prehearing Officer ruled, our issue of whether -- should the Commission accept the quantitative methodology that FPL employed to access the long-term feasibility of the EPU project be allowed, he ruled that it is encompassed within the broader Issue 10, to which FPL did not object.

The only thing remaining for you to rule on is whether, given this issue is in, can our witness address it? And in prefiled testimony our witnesses, Dr. Jacobs and Mr. Smith, make the point that while the method of preparing revenue requirements and excluding past spent amounts from that comparison may be an accepted approach in conventional projects, it is capable of causing distortions when applied to a situation in which the, the target price is not a fixed contract but instead a moving target, such that the, the amount of the estimated cost increases as rapidly as the spent amounts are excluded.

And so that is the source of the issue, and we contend that now that the issue is in our witnesses are free to address it.

We have a similar enlargement showing Issue 10B, which is, "Should the Commission require FPL to perform separate long-term feasibility analyses for the Turkey Point and St. Lucie uprate activities?" Our witness Dr. Jacobs makes this point: The Turkey Point units are geographically separate, they are distinct separate units, and those units have 14 fewer unit years of operation than do the St. Lucie projects.

And since the question to be answered in any uprate activity is whether the units are capable of

generating over time fuel savings in an amount sufficient to offset the initial capital costs and realize net savings, the shorter operational life becomes significant, particularly in light of the fact that in the last two years FPL has increased its estimate of capital cost for the uprates by $700 million.

That's the changed circumstance that, that justifies modification of the original approach to the feasibility analysis. And we contend that both the issue should be allowed and the testimony addressing that issue should be allowed.

Now let me wonder aloud a moment rhetorically whether anyone else has recognized that the choice of a feasibility analysis is a function of current circumstances. The answer is yes. The Commission did so in its 2009 order in response to a contention raised by SACE.

And with respect to SACE's objections to the approach FPL used, the Commission said in that order, "We recognize that the analysis is unique. However, we previously approached -- accepted this approach in the Turkey Point 6, 7 project need determination, and such an approach is reasonable today," recognizing that it's today's circumstances, prevailing circumstances that

govern.

And FPL is also on record as acknowledging that the choice of a feasibility analysis may change over time. In this docket their Dr. Sims says, "This same analytical approach was utilized in the 2007 determination of need filing and in the 2008, '9, and '10 NCRC filings. In later years, as more information becomes available regarding the costs and other aspects of the new nuclear units, another analytical approach may emerge as more appropriate." So FPL is also on record as saying changed circumstances may justify a different choice.

Now with respect to the contention that our issues are precluded by Section 366.93, we have an excerpt from that statute, and it says that "Costs shall not be subject to challenge, unless and only to the extent the Commission finds based on a preponderance of the evidence adduced at a hearing before the Commission under Section 120.57 that certain costs were imprudently incurred.

Well, that's exactly where we are. The Legislature did not preclude a challenge. It said it set the standard. And in setting the standard, it maintained the ability of parties to raise issues and address them through the very type of 120.57 hearing

that you're about to conduct.

We have another slide that juxtaposes Issues 11 and 16. And 16 is the question, "Was it prudent for FPL to undertake the EPU projects at Turkey Point and St. Lucie on a 'fast track' basis?" You'll see that this is essentially a subpart of the broader issue concerning FPL's project management, contracting, and cost oversight controls.

Now with respect to Issue 16, the, our witness will contend that fast tracking was imprudent given the massive complexity and uncertainty associated with the EPU undertakings. You'll notice when counsel for FPL was describing the petition to determine need, he said, "We told you we were going to expedite it." Well, fast tracking is a concept that's very different than mere expediting.

Here's an example of expediting. We usually give you 30 days to get your bids in, but this time we want 14, we want them here in 14. Fast tracking, you say we're going to dispense with the bids, we're not going to even design this because we're going to build it and design it as we go along. Now that's the type of abandonment of the typical procedures designed to control costs, which Dr. Jacobs says in the context of a 400-megawatt two-plus-billion-dollar project was

imprudent, given the fact that FPL had done no design engineering and had no adequate grasp on the cost of the project at the outset.

And that is not something that was presented to the Commission at the time of the determination of need, and the Commission did not anticipate, predict, prejudge the contention that once the determination of need was granted, FPL would proceed imprudently. If all the utility had to do was to proceed after the determination of need, there would be no reason to have this hearing. We proceeded, end of story.

But the fact is that the Legislature continued to mandate that the Commission conduct a 120.57 hearing and allow parties to air the issues with testimony addressing those issues.

I'll wrap up very quickly. With respect to the contention that ours is an effort to apply hindsight, Dr. Jacobs says explicitly in his testimony that the, the complexity of the project, which is described at length in FPL's testimony in this case, was known at the time of the decision to fast track.

We're asking the Commission to gauge the prudence of FPL based on what was the information that it had at the time it made the decision to fast track.

With respect to the contention that ours is an

attempt to relitigate the risk-sharing mechanism, that is wrong. The risk-sharing mechanism contemplates that a utility may have to accept a disallowance of a cost even though it was prudently incurred. That's not what is happening with our testimony. Dr. Jacobs says that the decision to fast track was imprudent, and the way to measure the imprudent costs is to compare the total with, with the breakeven, breakeven amount after all the -- after the project has been completed. That is far different than relitigation of the risk-sharing mechanism.

I don't know how I'm doing with time, but --

CHAIRMAN GRAHAM: You're about 20 seconds over.

MR. McGLOTHLIN: I'll conclude. Thank you.

CHAIRMAN GRAHAM: Thank you.

Please.

MS. KAUFMAN: Thank you. Mr. Chairman, Commissioners, you may wonder why, why FIPUG is inserting its nose into this controversy which seems to be between Public Counsel and Florida Power & Light. And the reason is very simple, and that is that we view the arguments that FPL is making to you to be dangerous arguments that would really narrow the scope of what you look at in this sort of proceeding.

And so we are concerned that if the premise that whatever happened in a determination of need -- and I'll talk about whether we agree with the contentions -- but whatever happened in a determination of need proceeding is essentially res judicata when you come to the nuclear cost recovery proceedings. I would agree with Mr. McGlothlin. This would be a very short hearing. You would have some calculators and, you know, we would be done in half a day.

The purpose of this hearing, especially with these large, expensive, complex projects, is for you to review the company's action, for you to determine whether it's been prudent, for you to look out for the ratepayers and say, well, is what the company -- what the company has done here the right decision for the ratepayers?

We can all read the statute regarding nuclear projects, and FIPUG is not in opposition to nuclear projects so long as they are properly managed and their costs are reasonable. That statute does not give Florida Power & Light or Progress or any other utility building a nuclear project a blank check. It doesn't say get your determination of need and go forward. You have the responsibility that you exercise every year: To look at the utilities' actions.

It doesn't mean that when you have granted a determination of need for a particular project -- and, of course, I can't imagine a nuclear project that would not require a determination of need -- that doesn't mean that's the end of your inquiry. That means that that is the beginning of your inquiry.

And I'm not going to repeat Mr. McGlothlin's remarks, which with -- with which we agree. But I would challenge you, and I would challenge FPL as well, to point you to any place in the determination of need order, or -- I haven't reviewed all of the testimony, but I believe nowhere is the term "fast track" mentioned. And I think that, as Mr. McGlothlin said, you are here to evaluate the circumstances of this project today.

Similarly, this idea that a particular methodology that was discussed in a determination of need proceeding is set in stone ties your hands when you look at the project today, I would suggest is ridiculous. Because the methodology that is chosen to evaluate a project is going to impact the cost-effectiveness, and you'll hear more testimony about that issue. But by choosing a methodology, you have the ability to affect the output of the methodology.

And I think that what you want, I would hope,

and what the consumers want is to have all the information before you today when you take a look at the projects. We think that the issues that have been raised by Public Counsel and which we support are critical when you look at these projects, EPU projects, and we would strongly urge you to permit Mr. Jacobs' testimony and to make a decision on the issues that are currently in the disputed category.

Thank you.

CHAIRMAN GRAHAM: Thank you.

Florida Power & Light, you guys have about a minute and a half to rebut or conclude.

MR. ANDERSON: Permit me about 20 seconds just to organize my notes.

CHAIRMAN GRAHAM: Sure.

(Pause.)

MR. ANDERSON: May I proceed?

CHAIRMAN GRAHAM: Sure.

MR. ANDERSON: Thank you.

The first thing you've not heard from Public Counsel or from FIPUG is any discussion of the clear law which we've laid out for you that requires the action we're taking. I will address briefly a couple of the points they raised.

First, it's very clear this project was

proposed and approved and has been reported to this Commission as one project to meet 400 megawatts of need in 2012 and 2013. Trying to break it apart at this late date, asserting differences in length of the projects' remaining licenses, all those things, those, each of those was examined by Staff in the need proceeding, each of those could have been raised. That just underscores the unfairness of permitting people to try to relitigate.

The other key point is we hear this distinction rather than difference. OPC argues that expedited and fast track are different things. That's pure semantics. The terms mean the same things. Our petition made it clear in 2007 that the generating capacity of all units would come into service with outages starting in 2011, and that's -- you know, we promised that we would proceed on an expedited basis to deliver those megawatts as promptly as we could. We made that commitment, we are doing that, and that's exactly what's being committed and sought to be relitigated here.

For all the reasons we've stated in our brief, we ask that you govern this proceeding by the law. Just because people point to a law that says you get to litigate the issues doesn't mean you get to make up the

issues. The Legislature and this Commission through its laws states what those issues are, and we request the relief granted in our motion. Thank you.

CHAIRMAN GRAHAM: Thank you, sir.

Staff?

MR. YOUNG: We've heard a lot from the parties today. Staff is in general agreement with OPC and FIPUG.

In the need determination, in the need determination matter, the Commission determined whether the proposed projects are needed and whether such projects are in the best -- the best way in which meets the ratepayers' needs, considering the options.

What the Commission -- what the need order did not do is determine whether the decision to fast track was the correct decision. It was just based on the need, whether, whether FPL had a need and whether the way they prefer to meet that need was in the best interest of the ratepayers. The issues before the Commission are not a relitigation of FPL's decision to fast track the EPU project. The Commission need order did not approve or, as stated by Ms. Kaufman, did not discuss the approach for the project.

What Mr. Anderson has presented and Staff believes are arguments on why the Commission should

not -- why the Commission should vote no on the issues, Staff believes there are genuine issues of disputed law and facts. Therefore, Staff believes that the testimony should not be stricken from the record.

CHAIRMAN GRAHAM: Commission board?

Commissioner Brisé.

COMMISSIONER BRISÉ: Thank you, Mr. Chairman.

When I looked at the motion to strike by FPL when it came before me as the Prehearing Officer, there's a few things that I thought about in looking at this in a broader perspective and not only dealing with the instant case that is before us, and so I arrived at the decision that 10A was subsumed in, in 10. But with respect to Issues 10B, 16, and 17, from my perspective if we keep the issues, then we have to keep the testimony. If we decide that we find that the issues should not be allowed at this point, then I think the testimony should follow the issues with respect to that.

Now there are some issues that, that I'm thinking about that concern me with respect to, to the conversation with, with these issues. One of them in 10B deals with whether the long-term feasibility should be considered as one combined plant or two separate plants. And that to me raises a question of regulatory certainty to a certain degree, and I think that that is

something that we have to think about as, as we make our decision. There should be a certain level of predictability with respect to what both consumers ought to be able to expect and the utility ought to be able to expect when coming before us.

Now with respect to Issues 16 and 17, I think that there were reviews that were filed by the company on a yearly basis, and, you know, justifiably the company relied on previous orders and determinations, and I think that it is something that we ought to consider, if, if this would be damaging to the, to the company if we proceeded in the manner that OPC is seeking for us to, to proceed.

However, I believe that on the moving-forward basis there are things that we ought to consider in terms of the methodology, that we might want to look at some of the methodology that is being proposed or, or looked at by OPC and FIPUG and others to see if there may be a need to take a second look at the methodology that we currently normally allow versus some of the methodology that is being looked at.

I am open to hear your thoughts and comments, for I believe this is not only an issue that affects this nuclear cost recovery hearing, but will affect how we deal with these moving forward and will set the

precedent for how we address these moving forward. So I am open to, to your thoughts and comments as we look at these issues.

CHAIRMAN GRAHAM: Commissioner Edgar?

COMMISSIONER EDGAR: Thank you, Mr. Chairman.

A question for Staff, and we discussed this in our briefing, but I was still looking at it and I think the Staff was still looking at it as well. So a question to Staff is do you have an opinion as to whether Issues 10B, 16, and 17 -- I'm going to look at 18 as kind of a fallout, so set that aside for the moment -- but 10B, and 16, and 17, if they as well as 10A are subsumed in other issues that are delineated in the Prehearing Order?

MR. YOUNG: Yes. If the Commission so desires, Staff is recommending that Issue 10B -- keep 10B. However, Staff notes that while 10B can be, can be, can be subsumed in Issue 10 and the parties can argue as relates to should the Commission require FPL to form a long-term feasibility analysis for the Turkey Point and St. Lucie uprate project activities.

As far as Issues 16, 17 -- as you mentioned, 18 is a fallout -- Staff would like OPC to clarify are they talking about 2009, 2010 costs only, or are they talking from the inception of the nuclear cost recovery

clause rules? So we seek some clarification from OPC on that.

COMMISSIONER EDGAR: Thank you. Thank you.

And, Mr. Chairman, if I may --

CHAIRMAN GRAHAM: Sure.

COMMISSIONER EDGAR: -- pose that question to OPC and FIPUG.

From your oral arguments, which were very helpful, but I was still and am still a little unclear on the time period that, that you are proposing that these specific issues then would address. And as our Staff counsel pointed out, are, are you -- are these issues, in the way you will approach them and believe them to be, going back to and through the need determination decision that has already been made or just going back to the costs from 2009 and 2010?

And I would like to hear, Mr. McGlothlin, from you, and also from Ms. Kaufman.

MR. McGLOTHLIN: Commissioners, the testimony and the issue do not relate back to the determination of need because the question of fast tracking was not presented to the Commission at that time nor ruled on. Our consultant focused on it in his analysis performed for this hearing cycle and also for the last one, because in the 2010 hearing cycle he did sponsor

testimony addressing the choice of feasibility methodology approaches and made many of the same points then that he's making here now. And so 2009 was encompassed at that time, even though that was brought forward.

Now in overall terms part of our presentation is that the statute does not prohibit the Commission from looking at the big picture, and that if the big picture means that in measuring the prudence or imprudence of costs it is necessary to compare the total project costs at the time it's completed with the corresponding breakeven costs of the alternative, then that would be the measure of imprudent costs, even though that measure does not attempt to allocate dollars to individual time periods.

So to the extent that the 2009 and 2010 costs are part and parcel of that overall picture, they are encompassed in the recommendation of our witness Dr. Jacobs.

CHAIRMAN GRAHAM: Ms. Kaufman? Thank you. Ms. Kaufman?

MS. KAUFMAN: Yes, I agree. And FIPUG also takes the position that part of your role is to look at, as Mr. McGlothlin said, the big picture in regards to what's happening with this project.

COMMISSIONER EDGAR: Are you saying that if Issues 16 and 17 were not to be included specifically as delineated, that that would not allow the Commission to look at the big picture?

MS. KAUFMAN: No. I hope not. But I think that --

COMMISSIONER EDGAR: Me too.

MS. KAUFMAN: I certainly didn't mean to say that. But I think that, that it's helpful to have the issues displayed the way they are and to make it specific in regard to what we're talking about, and certainly in regard to what Dr. Jacobs is telling you. But, no, I hope that you will always keep the big picture in mind. I know that you will.

MR. McGLOTHLIN: May I elaborate just a bit?

COMMISSIONER EDGAR: Please.

MR. McGLOTHLIN: I would distinguish between Issue 16 and Issue 18, which has been described as a fallout.

Issue 16 tees up for consideration by the Commission the question of fact, was the utility imprudent in its decision to fast track this project? And we have testimony addressing those factual issues and contentions.

Issue 18 asks this question: If the

Commission determines that utility was imprudent, what action should it take? And that is where FPL and OPC have competing interpretations of the latitude the Commission has under governing statutes. We contend that this comparison to the breakeven analysis is permitted by the statute. Because of the statute's reference to disallowance of certain costs, we contend those certain costs can be measured with the breakeven analysis. Whereas, FPL contends that the Commission is more or less confined to a year-by-year review of annual costs.

And so I think that is -- we have both disputed issues of fact, and the factual issue presented in 16 is, were they imprudent when they fast tracked and abandoned those processes that we contend would have controlled costs?

Issue 18 is a corresponding issue of law, which says what can the Commission do about it if you determine it's imprudent? And that's where I think the competing interpretations of law arrive.

COMMISSIONER EDGAR: Mr. Chairman, may I? Thank you.

Mr. Anderson, do you have anything to comment upon regarding this point as to the time period and how it would be addressed if these issues were to remain?

MR. ANDERSON: The only issues and costs which should be at -- for judgment in this case are those incurred in 2009 and '10 under the rule and the order. And the statute also clearly states that only certain costs may be attacked, so to speak, and that the burden of proof is on those who wish to disallow them by the preponderance of the evidence.

So our position would be that, you know, first and foremost we should not be litigating a liability issue from 2007. But if there were to be a dime of costs on the table, the obligation of Public Counsel and others is to identify specific 2009 and '10 costs and litigate those now. That's -- that, that has not been done.

And the last point is that, just remember, not only the need determination, we had a nuclear cost recovery case just like this one that looked at 2007 and approved EPU determinations. That was two different times this could have been litigated. And this is exactly the regime which is addressed by our Legislature in terms of encouraging nuclear generation and trying to provide some certainty and confidence so we can develop these resources.

COMMISSIONER EDGAR: Mr. Anderson, when you just said two specific prior instances where this could

have been litigated, what exactly do you mean by "this"?

MR. ANDERSON: The first one is the -- if people wanted to attack the method of project management, which has been mischaracterized, it's been called, so-called fast track. What that means is instead of doing things in series, they're done in parallel, and that's been described in our testimony since the outset of this project. For example, in your order 08 -- in Docket Number 080009-EI, Order PSC-08-0749-FOF-EI, that was the 2008 prudence review of 2007 EPU project decisions. That's exactly the type of claim that could have been raised in that prudence decision, and people could have attacked the decision and said, you know what, you're going about this wrong. And, too, there were some 2007 costs in that case they would argue that were at issue.

But what we're saying cannot be done is coming along in 2011 and saying, oh, we want to relitigate your choice back in the need determination approved by the Commission, relitigate that 2007 prudence determination in the 2008 case. That, that claim, in and of itself, should not be heard by this Commission because it violates the doctrine of administrative finality. And if it is heard, and we strongly discourage it, the only potential remedy could be specification of certain costs

incurred during 2009 and 2010, not, not this -- a very punitive, we call it a risk-sharing approach, which is, which is not provided for in the statute or rule.

COMMISSIONER EDGAR: Thank you.

And one other point and I'm done for the moment.

CHAIRMAN GRAHAM: Sure.

COMMISSIONER EDGAR: Mr. McGlothlin, on a separate but related point, in the context that we are in in this proceeding, do you consider the terms expedited or expedite and fast track to be synonymous and interchangeable?

MR. McGLOTHLIN: I do not, and that is a question of fact that we will get into during the hearing.

Fast, fast tracking is a term of art, and we will testify that fast tracking is a term of art that connotes far more than simple expediting. It connotes a decision to abandon the normal sequence of events, the normal processes. It means that instead of the usual sequence where you have first a completed design with full specifications that you then set out for bids, and then you translate those bids into fixed price contracts, all of which takes place before construction, you do it all at the same time.

And the only way to do that all at the same time is to depart from the idea that you're going to have any kind of cost control through fixed cost contracts. And that, that connotation of fast tracking was never teed up or ruled upon by the Commission until -- and it's being brought up by Dr. Jacobs in this case. It's a question of fact for you to hear and resolve.

COMMISSIONER EDGAR: Thank you.

CHAIRMAN GRAHAM: Commissioner Balbis.

COMMISSIONER BALBIS: Thank you, Mr. Chairman. I'd like to make a few comments for the board.

In looking at the motion and the responses from the parties and also what's been provided here, I just want to make a couple of points as to how I'm leaning at this point.

On Issue 16 and 17 specifically -- well, let me start off with this. I mean, one of the things we're charged with every year is to determine the prudency of the costs incurred for these nuclear projects. And I agree with some of the statements from the Intervenors that, you know, our job isn't to give a blank check, and I don't feel the Legislature intended to give a blank check. So one of the things that we do every year is to determine the costs, whether they were prudent or not.

And Issues 16 and 17 I feel at this point are subsumed within another issue, in that if we determine Issue 16 on whether it was prudent for fast track, well, that I feel maybe is not that important. It's the actions that occurred during the year in question and the specific costs incurred on what is prudent or imprudent.

So I don't think that having those two issues separated out is as important as what costs were incurred over the year in question and what we determine is prudent or imprudent, and those can be included in the other issue, I believe Issue 10. Because if we keep it separated out, I mean, I do agree with FPL in that it seems to question the decision that was made previously during the need determination process, and I don't feel comfortable with delving into that arena at this point.

CHAIRMAN GRAHAM: Commissioner Brown.

COMMISSIONER BROWN: Thank you, Mr. Chairman.

And I just did want to point out that those two issues, Issue 16 and Issue 17, would be subsumed under Issue 12 regarding prudency. And I also agree on those matters, and did want to point out that I believe the utility did provide convincing testimony here, and the case, the *Garcia* case also points to administrative finality.

So with regard to those issues, I think that we need to be limited to the 2009 -- 2009, 2010 costs. So I would support including Issue 16, Issue 17, and have them subsumed in Issue 12.

CHAIRMAN GRAHAM: Okay.

Commissioner Brisé.

COMMISSIONER BRISÉ: It sounds like we might be close to an area of decision here. I think we are -- from the comments I've heard I think we may be in agreement that, as was recognized by Staff in conversations that we had, that, you know, some of these issues could be subsumed in other issues. And I tend to agree that, as was discussed earlier, that 16 and 17 could be well covered in Issue 12. And if we are ready to entertain a motion on that and then further discuss what we're going to do with 10B, we'll deal with 16 and 17 and then come back to 10B, I think we could work it that way.

So at this time I'm ready to move that we -- that Issue 16 and 17 be handled through Issue 12 because they are subsumed in Issue 12.

COMMISSIONER BROWN: And just a point of clarification. So that would mean excluding Issues 16 and 17?

COMMISSIONER BRISÉ: 16 and 17.

COMMISSIONER BROWN: Okay. Second.

MR. McGLOTHLIN: May I ask for a clarification before you take that further? In our response to the motion to strike, we had, we had offered to view 16 as a subpart of 11. And respectfully, Commissioner, I suggest that you consider that as the more appropriate place where that could be subsumed than 12, which is -- 11 asks, "Should the Commission find that for the year 2010 FPL's project management, contracting, accounting, and cost oversight controls were reasonable and prudent?" And it appears to me that the issue proposed in 16, if it is going to be considered as part of a broader issue, would fit there as opposed to 12.

CHAIRMAN GRAHAM: Commissioner Brisé, it was your motion.

COMMISSIONER BRISÉ: Yes. Let me ask Staff this question, and I think they may be able to give us some direction here.

Under which issue would 16 and 17, I mean, the issues related to 16 and 17 be best covered, Issue 11 or 12? From my understanding, it would probably be 12.

MR. YOUNG: It was my understanding too, sir. But the technical experts also say that 11 can be fine also because it's a management decision, and a decision to fast track is a management decision also, so it can

be under both. So Staff is fine either way.

COMMISSIONER BRISÉ: Okay. So I think we will stick to the original motion that it will be under Issue 12.

CHAIRMAN GRAHAM: I have a question, Mr. McGlothlin. Is there a reason why you think -- I understand that you think it's better handled under 11. Is there a reason why it can't be handled under 12?

MR. McGLOTHLIN: It appeared to me that 12, if you view these things as one falling out from another, 12 asks for a quantification of costs that would depend on some determinations made in something like 11, and 11 sets up for consideration the quality of project management and cost oversight controls, which we believe are the umbrella under which the contention that fast tracking was a poor decision fits in terms of the subject matter. And then the costs would follow that in Issue 12.

CHAIRMAN GRAHAM: So 16 will fit better under 11, and 17 will fit better under 12, best under 12, or are you saying that both 16 and 17 should be under 11?

MR. McGLOTHLIN: I would say they would both fit under 11.

MR. ANDERSON: May I be heard?

CHAIRMAN GRAHAM: Give me just a second. I

understand where you're coming from.

All right. Commissioner Brisé -- all right. We are on the motion.

Commissioner Brown, your light was next.

COMMISSIONER BROWN: I did want to hear from FPL regarding the --

CHAIRMAN GRAHAM: There you go. You have the floor.

MR. ANDERSON: Thank you. I'm going to focus very precisely on how Staff has laid out issues.

Issue 11 frames the right issue for decision, which is, Should the Commission find for the years 2009 and 2010 FPL's project management, et cetera, controls are reasonable and prudent for the EPU project? Those are exactly in scope and subject to review. And if there's going to be testimony permitted by Public Counsel's witness, I think that's exactly where that should be. So I'd be in agreement with, with Mr. McGlothlin.

We think our testimony -- the testimony should be stricken, the issues should be stricken flat out. But at least that cabinets things in the 2009 and 2010 buckets, in which case it would be we'd ask for an instruction that the testimony of the witnesses should relate only to the '09 and '10 decisions, which would

fall under Issue 11.

And then Issue 12 is the dollars and cents issue, which is are there any dollars in the 2009 or 2010 buckets, so to speak, which are the subject of a claim? And that will put this in the right issue framework under the rule, at least in terms of framing things.

And, you know, if, again, if things are limited and focused on 2009 and 2010 decisions, that is exactly what we're here to review, and we're proud to present our witnesses. And then, under the law, if there are certain costs identified, and there have been none by Public Counsel or anyone, that are claimed to be imprudent, those would then be specified and litigated under that, that Issue 12.

CHAIRMAN GRAHAM: Commissioner Brown, you still have the floor.

COMMISSIONER BROWN: Thank you for your answers. So my understanding is that Issue 16, as it relates to 2009 and 2010 costs, would fall under Issue 11. And then Issue 17 -- so if I could ask Commissioner Brisé to make a friendly amendment to his original motion to separate Issue 16 and have that exclude Issue 16, and it will be subsumed under Issue 11, and Issue 17, exclude Issue 17, and it'll be subsumed under Issue

12.

CHAIRMAN GRAHAM: Is that what you had said?

MR. ANDERSON: I think you're saying that 16 and 17 would both fall under 11?

COMMISSIONER BROWN: I said 16 under 11, 17 under 12.

MR. ANDERSON: That, that's square with what I was saying. And please, please don't note -- I'm trying to help slot things in the correct slots. I'm not in any way backing off our position and fundamental objection, and I'll restate that at the end, Commissioner.

CHAIRMAN GRAHAM: All right. So Commissioner Brown is asking for a friendly amendment.

Staff, you said that you were fine with it going under 11 or 12. OPC said that they thought both should go under 11. I want to make sure I understand the dance.

MR. YOUNG: We're fine with both. But I think 16, everyone is fine with 16 going under 11. 17, Staff, Staff recommends keeping it under 12.

CHAIRMAN GRAHAM: Okay.

Commissioner Balbis's light was on. Let's hear from Commissioner Balbis before we go back to the friendly amendment from Commissioner Brisé.

COMMISSIONER BALBIS: Thank you, Mr. Chairman. I just want a clarification from Commissioner Brisé that the, the substance of Issue 16 and 17 can be argued as being subsumed in those 11 and 12, and they're not sub issues, not separate issues. They can make those arguments when we hear those issues; correct?

COMMISSIONER BRISÉ: Yes.

COMMISSIONER BALBIS: Okay. That's all I have.

CHAIRMAN GRAHAM: Commissioner Brisé, we are on your friendly amendment.

COMMISSIONER BRISÉ: Yes.

MR. ANDERSON: I'm sorry. I misspoke a moment in response to Commissioner Brown's question. 16 and 17 really should be both under 11, because they're both prudence claims that go under there. So pardon me for intruding, but --

CHAIRMAN GRAHAM: That's why I was asking you if that was what you had originally said, because it didn't sound like it was.

MR. ANDERSON: Yeah. I --

COMMISSIONER BROWN: It sounded to me that way, but --

MR. ANDERSON: I apologize for the confusion.

COMMISSIONER BRISÉ: So may I ask Commissioner

Brown if she will amend her amendment?

MS. BROWN: Well, in accordance with Staff's recommendation that it could go under either, I would suggest, I would specifically request that those issues fall under Issue 11.

COMMISSIONER BRISÉ: And we will accept the friendly amendment.

CHAIRMAN GRAHAM: Okay. Commissioner Edgar?

COMMISSIONER EDGAR: Thank you, Mr. Chairman. I think we are all trying to get to the same place and just wanting to be careful that we are clear.

From my reading of the issues, Issue 12 will, you know, kind of naturally flows from Issue 11, and so to have the testimony and discussion and then to have the decision laid out in 11 and then for the dollar amount to fall under 12 is, to me is a logical flow. So -- and I understand that to be the motion that is before us, and I'm pleased to be able to support it.

One question, just so I understand procedurally, if, if we are, as Commissioner Balbis said, and I think I heard from others, then allowing the discussion and testimony and question of the witnesses under Issue 11, then would that include the testimony being included and not being stricken? That is my understanding from the discussion that we've had. It

just seemed to be that that would be the next question, since there is a motion to strike that is included in what is before us.

So my suggestion would be that then the testimony be included under Issue 11 and the opportunity to question the witnesses appropriately on those issues in that manner.

CHAIRMAN GRAHAM: Let the record show both the motion giver -- the person that gave the motion and legal Staff are both nodding their heads that your assumption is correct.

COMMISSIONER EDGAR: Okay.

CHAIRMAN GRAHAM: All right. We have a motion on the floor to put Issues 16 and 17, let them be subsumed into Issue Number 11. And is there any further discussion on that piece of this?

Staff, is there any concerns you have on what I just said?

MR. YOUNG: I'm sorry, sir. Can you repeat that one more time? I'm sorry.

CHAIRMAN GRAHAM: Yeah. We are going to put Issues 16 and 17, let them be subsumed into Issue 11.

MR. YOUNG: Yes, sir.

CHAIRMAN GRAHAM: That's correct?

MR. YOUNG: Yes, sir. And the testimony is

in -- and the testimony is -- will -- is not stricken, and FPL's motion for the testimony is denied.

CHAIRMAN GRAHAM: That is correct.

FP&L, it looks like you're chomping at the bit.

MR. ANDERSON: Yes, sir. I want to be very, very clear for the, for the record here. FPL strongly objects to permitting Public Counsel to relitigate claims from a 2007 need determination and a 2008 nuclear cost recovery clause. This creates exactly the type of uncertainty which discourages investment in new nuclear generation. We feel that, honestly, being required to litigate what could have been litigated before in two prior cases, and it's just a matter of Public Counsel not having come, not having asked questions, deprives, you know, threatens to deprive us of our substantive due process rights, and that's not a good thing.

If the proceedings today, over the next couple of days focus on '09 and '10 decisions and costs, that's what the law very specifically provides for, but not one word of criticism of '09 or '10 decisions or costs should be rooted (phonetic), as Public Counsel has it, in criticism of the basic decision of how to start with the project, how to manage the project. That's relitigation, and we represent is, sends just the wrong

messages in terms of our efforts to continue to invest in nuclear and to continue to attract investment to do that.

CHAIRMAN GRAHAM: My understanding of the motion, specifically the second of the motion, was that it was going to only deal with '09 and '10, if that's correct from Commissioner Brisé and Brown. Let the record show they are nodding their head.

MR. ANDERSON: Okay. And for clarification though, what I heard Staff's counsel, with respect, say is that no testimony would be stricken. And the challenge presented is that it would remain in the proceeding the testimony which focuses on that 2007 decision, which would be -- if the Commission were to, honestly, at the third bite of the apple go down that path, that information would be in the record and that harms us.

So we're looking for the clarity of, of striking the testimony that relates to that 2007 decision.

MR. McGLOTHLIN: Commissioner, speaking of three bites of the apple, I think counsel is going back into oral argument.

CHAIRMAN GRAHAM: Hold on. Hold on. Hold on. I'll come back to you. We're not making a decision yet.

Hold on.

Staff?

MR. YOUNG: I think to preclude someone to raise -- to say that the 2009, 2010 costs were imprudent and just to bolster it, to me, his testimony is relevant to the 2009, 2010 costs. And if he wants to throw in there, attaboy, your decision was wrong at the beginning, to me that is not a violation of due process rights or a violation -- or violate any company's due process rights to raise an objection or to make arguments, as Mr. Anderson just made, in terms of the Commission should not consider 2000 -- any costs outside 2009 and 2010.

CHAIRMAN GRAHAM: Well, I --

MR. YOUNG: So to conclude, I think by accepting -- by denying FPL's motion to strike the testimony, you are not violating FPL's due process rights as testimony as filed.

CHAIRMAN GRAHAM: Then I guess my question is, and my board is lighting up here, but my question is if we're going to focus on 2009 and 2010, how do you allow for them to come back and say, you know, you're making an argument about '09 and '10, and then going back and saying this should have never happened even back in '07? I mean, we're not talking about '07. That decision is

made and we've moved forward from that.

MR. YOUNG: And, sir, you're absolutely -- that's correct, and that's the argument FPL could make. The Commission normally gives the testimony the weight that is due. So FPL can raise objections to it.

MR. CRAWFORD: Mr. Chairman, if I may. I hope this -- Jennifer Crawford for legal Staff.

I absolutely agree with what Mr. Young is saying. To the extent the testimony intrudes on what sounds like would be impermissibly in those earlier years or intrudes on the need determination itself, the remedy that FPL has available is to argue in its brief that this is a matter of administrative finality, and that burden has not been overcome based on the record evidence, if that's what it believes is appropriate.

I have to agree. I don't see that its, FPL's rights are somehow violated by having the testimony that's been prefiled entered into the record. If it believes the weight that should be given that testimony should be more or less than what OPC is arguing, then certainly that is again an argument that FPL is absolutely entitled to make in its briefs as it feels appropriate.

CHAIRMAN GRAHAM: All right. I am -- OPC.

MR. McGLOTHLIN: Yes. Thank you,

Commissioner.

There have been several additional references to the 2007 decision and the argument that we're asking to relitigate something that has been decided in 2007. I have here -- I have extrapolated from that determination of need order precisely what the Commission ruled, and I think you should hear it in context.

You stated -- well, the Commission in 2007 stated this. "We represented a series of stipulations which served to address each of the issues that had been identified for hearing, and those decisions were in these areas: Need for electric system reliability and integrity, need for fuel diversity, need for baseload generated capacity, need for adequate electricity at a reasonable cost, no mitigating renewable or conservation measures, most cost-effective source of power, exempt from the Bid Rule and the ruling that this cost recovery rule governing this proceeding would be applicable to the uprates."

That's what the Commission decided. It mentioned in passing, it acknowledged in passing that the utility intended to approach the EPU on an expedited basis. But whether -- the Commission did not and could not have issued a blank approval for anything that

followed that point.

So in terms of these arguments that we're asking the Commission to go back to its need decision, this is what -- this is that decision, and it does not encompass our testimony in this case.

CHAIRMAN GRAHAM: Commissioner Brown, I know the original motion was by Brisé and second by Brown. It is your -- Commissioner Brown, you have the floor, but it is your motion that's before us.

COMMISSIONER BROWN: Thank you. Some thoughts first.

I think that what the Office of Public Counsel and FIPUG said originally about the Commission looking at the overall picture is very important, and I agree with that fully. I do have some reservations with regard to talking about the imprudency of costs from the onset.

And when -- I understand what our Staff, our legal Staff has said, and I know that we have discretion to give it weight. But in the essence of fairness, there has been administrative finality, and to reargue it based on the witness testimony I think is problematic. There's a fundamental flaw when we're saying we're only going to be limited to the 2009 and 2010 costs, and then we're talking about the imprudency

from the onset. So I have some reservations about that.

CHAIRMAN GRAHAM: Commissioner Brisé.

COMMISSIONER BRISÉ: Thank you, Mr. Chairman.

And I agree with Commissioner Brown, and that's why I said at the outset that if we allow the issue, then we have to allow the testimony. If we won't allow the issue, then we won't allow the testimony at all.

And so if the only way to resolve this issue -- and this is to Staff -- is to, to remove the testimony and therefore removing the issues, if we can't constrain the issues to 2009, 2010, then I may be inclined to rescind my motion and go back to the drawing board. So I'm telling Staff that they may want to rethink their position and get to where -- to help us get to where we want to get to.

MR. YOUNG: With that, Mr. Chairman, if we could have a five-minute break so I can confer with Ms. Helton, the Advisor to the Commission, the Assistant General Counsel.

CHAIRMAN GRAHAM: I was going to say we are coming up to our two-hour break, so this is probably a perfect time, and our court reporter can relax her little fingers. We will take a break and get back here at five after 11:00.

(Recess taken.)

All right. I think we need to reconvene.

And, Commissioner Edgar, your light is on, so you have the floor.

COMMISSIONER EDGAR: Thank you, Mr. Chairman.

Right before the break I wanted to make a comment that in, in my desire to try to understand how the motion that is before us would address all of the aspects that are before us, I may have overcomplicated unintentionally. And I am comfortable, Commissioner Brisé, if I am understanding correctly the motion of how to deal with 16 and 17 as you have proposed, and take up the issue as to then what to do with the portion of the motion to strike, maybe as a separate, as a separate issue, and that may help us clarify where we are.

So with all of that said, my comment that the motion addresses that, I would like to scratch that. I'm not sure that it does, and I think that we can maybe parse that more carefully separately.

CHAIRMAN GRAHAM: Okay.

Commissioner Brown.

COMMISSIONER BROWN: Thank you, Mr. Chairman. And I appreciate Commissioner Edgar's comments on that.

I do have a question as it relates -- for OPC with regard to striking the testimony. Does that

foreclose OPC or its witness the opportunity to address its argument under Issue 11? Pardon me. Let me just clarify. As it relates to 2009 and 2010.

MR. McGLOTHLIN: It does foreclose our ability to fully exercise our rights to present evidence and argument on all issues. If the issue is there, it follows that we may present evidence addressing the issue. And so to, to strike the testimony would, would be to limit our ability to be heard on the issue that you have ruled is within the scope of the proceeding.

COMMISSIONER BROWN: Mr. Chairman, if I may? I would like to hear from Staff on this.

CHAIRMAN GRAHAM: Pardon me?

COMMISSIONER BROWN: I would like to hear from Staff on this.

CHAIRMAN GRAHAM: Sure.

COMMISSIONER BROWN: Thanks.

MR. YOUNG: One second.

MS. HELTON: Can I take a stab at it?

CHAIRMAN GRAHAM: Sure. Why not? We haven't heard from you.

MS. HELTON: I've been sitting over here very quietly.

I agree very much with Mr. Anderson that the costs at issue here today are 2009, 2010, and that's

because of the way the statute is laid out and the way that our rule implementing the statute is laid out. All that being said, it's my understanding that the prefiled testimony that's at issue here and the motion to strike is so intertwined that there's not a way to really easily split out what relates to 2009, 2010 and perhaps previous years.

So my recommendation to you would be to deny the motion to strike that testimony from the record. I do not believe that Florida Power & Light would be prejudiced from doing so because Florida Power & Light, if they believe inappropriate cross-examination questions are being asked, they obviously have the ability to object to that.

Florida Power & Light has the ability to argue in its briefs for this proceeding whether they think what's been presented to you in the record is relevant or irrelevant with respect to the issues that you ultimately will vote on.

So my recommendation would be to allow the testimony, and then I think due -- the due process rights that are available to Florida Power & Light throughout the proceeding will not prejudice it by doing so.

MR. YOUNG: I stand by that too.

COMMISSIONER BROWN: Okay.

CHAIRMAN GRAHAM: I guess I have a, I have a question because I'm trying to understand this. And this goes to Ms. Helton. You're saying that the testimony is so intertwined that it would be -- you'd lose the context of the testimony if you tried striking all of the references back to 2007.

MS. HELTON: Well, but that being said, you, you in your role as a fact finder and you in your role as determining the issues of law here, you can give that other kind of intertwined testimony that's not relevant the weight it's due. I think that you all have enough knowledge before you to rely on the information that's there with respect to 2009, 2010, and to put aside and not rely on information that is not about those, the time period at issue in this proceeding.

CHAIRMAN GRAHAM: So when you read the testimony, you're supposed to mentally act like you never read it.

MS. HELTON: That's not what I'm saying, and I'm sorry if that's how it's coming across. You -- I think that's something that you're faced with all the time. There's some evidence that is persuasive, more persuasive and stronger and more relevant, some witnesses that are more credible, and you give that

weight -- that evidence more weight than testimony that doesn't fall in that category.

CHAIRMAN GRAHAM: And you're saying that that's -- I'm just trying to get an understanding, because, once again, me playing lawyer is not a pretty thing. So what you're saying, that's cleaner than just striking it and just doing the testimony specifically on '09 and '010 -- on '09 and '10.

MS. HELTON: Recognizing that I am a lawyer, yes, sir, that's what I recommend.

(Laughter.)

CHAIRMAN GRAHAM: Okay.

MR. ANDERSON: Chairman Graham, just very -- we attached and gave to the Commission and all the parties some weeks ago the exact portions highlighted which should be stricken. We took exactly Staff's position or thought into account as how you segregate out the correct information for the motion to strike. We've highlighted that in green. It's been distributed to you. That's exactly what we ask to be stricken. You'll note there's lots of remaining testimony and lots of additional things for Public Counsel to talk about. But we took that into account, and we believe we've addressed that through the highlighting in green, which is, was an attachment to our motion you have before you.

CHAIRMAN GRAHAM: Commissioner Brisé.

COMMISSIONER BRISÉ: Thank you, Mr. Chairman.

If legal Staff would give us an idea of what would be the effect, if any, if we decided to strike the testimony. Would there be any injury to any of the parties? And if you could expound on that, that may help us in our decision.

MS. HELTON: As I understand it, I think that, while it may not harm Florida Power & Light, it could definitely harm OPC if they have -- if we have stricken testimony that is relevant to the issues that are before you and the issues that you will be voting on. And I think that that would give -- I hate to say this on the record, but I think that that would give OPC an appealable issue that a court would ultimately decide.

CHAIRMAN GRAHAM: Well, if I may, I don't think that -- this goes back to my question. You will still have the opportunity to, to put the witnesses' testimony on the record. You're just not going to put anything that's related back to '07 onto the record.

MS. HELTON: I'm going, I'm going to defer for a moment, if it's okay with you, to Ms. Norris, who has studied this testimony probably more carefully than most of us here.

MS. NORRIS: I think what the problem is is

the testimony that FP&L did identify and that they did highlight is applicable to going forward costs and current costs that are in dispute. The problem is you can't -- if you eliminate that testimony for past dollars, you're also eliminating it for present, and present is before us. So I think what Ms. Helton was saying was read it with the recognition that it's only applicable to 2009, 2010.

CHAIRMAN GRAHAM: Commissioner Brisé, I didn't mean to cut you off. Sorry.

COMMISSIONER BRISÉ: No problem.

And that's where I was sort of getting to. So in essence, as going back to what you said, what Staff has said with respect to giving the testimony the appropriate weight necessary, so then it would be our discretion to determine how much value to give to, to what has been said. And from your perspective of Staff, there is some value to the testimony with respect to, to things going on a forward basis?

MS. NORRIS: Absolutely. So when you read that, you will keep in light your ruling, if that is your ruling, that these are applicable only to Issue 11 and Issue 12, 2009, 2010 costs, because the prudence of that decision to continue making that decision regarding fast track or breakeven, that is, we think, relevant to

this proceeding. So if you take that out, we believe you are harming the parties by not allowing to, allowing them to argue the issues that are relevant here. So read it with the mind that you've made the ruling regarding previous years.

COMMISSIONER BRISÉ: So as we are going through this process, if they're -- within the testimony there are things that relate back to 2007, 2008, and one of the parties, say the utility, decides that they object to that, then the -- we have a decision to -- we have the ability to go ahead and strike that particular piece of the testimony as it's moving on a forward going basis so that we can create a record reflecting what our thought process and what our position is with respect to the issues.

MR. YOUNG: Yes, sir. Absolutely.

COMMISSIONER BRISÉ: Okay. Thank you.

Then I think I'm relatively comfortable with the motion as it stands.

CHAIRMAN GRAHAM: We'll get back to that.

Commissioner -- Commissioner Balbis.

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

And I personally believe that this Commission, as I believe it has done in the past, been able to

assign the appropriate weight to testimony and determine whether or not it's pertinent to the decision at hand. So I too think that with Staff's recommendation that we can accomplish it and not eliminate any parties' rights, given that Florida Power & Light can object to any portion of the testimony when it's into -- when we're at that portion of the testimony.

So with that, I agree with Staff's recommendation.

CHAIRMAN GRAHAM: Okay. So we still have the original motion on the floor, the Brisé motion seconded by Brown. We're still trying to clarify that motion, and I think we have clarified that motion. If I can get Staff to reiterate what the motion is, or Commissioner Brisé to restate the motion, or get Staff to reiterate the motion that's on the floor.

MR. YOUNG: The motion is to strike Issues 16 and 17 because they are subsumed in Issue 11, deny FPL's motion to strike the testimony of OPC's witnesses.

CHAIRMAN GRAHAM: Is that correct, Commissioner Brisé?

COMMISSIONER BRISÉ: Yes, that is correct.

CHAIRMAN GRAHAM: Is that correct, Commissioner Brown?

COMMISSIONER BROWN: That is correct.

CHAIRMAN GRAHAM: Okay.

Comments from OPC on the motion that's before us.

MR. McGLOTHLIN: Commissioners, you have been generous in allowing us to address you, and I don't want to impose any more time requirements on you. You've heard our arguments. If you rule that our witness may present his testimony and that will be considered under Issues 16 and 17 -- I'm sorry, under 11 instead of 16 and 17, we can live with that.

I would like to point out that there is Issue 18, the fallout issue, which says, If the Commission finds FPL was imprudent in what is now 11, what action can and should the Commission take? And we think that would be the appropriate vehicle for the debate between FPL and OPC with respect to the Commission's authority and latitude under governing statutes. And I don't want to get into an argument over buckets of dollars, but, you know, that is, that is a -- continues to be a point of contention, and 18 will tee that up for both parties just to have a fair chance at it.

CHAIRMAN GRAHAM: We'll come back to that.

FIPUG.

MS. KAUFMAN: Thank you, Mr. Chairman. I agree, so long as the testimony remains in and the

issues can be addressed in another issue, we, we can, we can live with that as well.

CHAIRMAN GRAHAM: Florida Power & Light.

MR. ANDERSON: We believe the testimony should be stricken. If the Commission is going to deny the motion and, and permit the testimony, we will clearly indicate our continuing objection. I think we really are doing harm to our process. We are -- it's kind of like a double jeopardy problem. It's been litigated, and here we go, we're going to litigate it again. And that's -- what are we going to do next year?

The last point is that, you know, focusing on 2009 and 2010 costs, that's what we're here for. There's not one dime of 2009 or 2010 costs identified in any testimony as claimed to be imprudent. So I just have a hard time seeing how we're going to climb this bridge from these past claims of imprudence to what's at issue here. So those are our comments.

CHAIRMAN GRAHAM: Okay. We have a motion before us. It's been seconded. Any further discussion?

Seeing none, all in favor, say aye.

(Ayes unanimous.)

Any opposed?

(No response.)

Okay. Now we've got to figure out what to do

with 10B and 18.

Commissioner Edgar.

COMMISSIONER EDGAR: Thank you, Mr. Chairman.

A question for Staff. It looks to me like perhaps Issue 18 would be subsumed, subsumed or addressed with the decisions ultimately to be made in Issue 12.

MR. YOUNG: 11.

COMMISSIONER EDGAR: And I think I'm hearing Issue 7?

MR. YOUNG: No. Issue 11.

COMMISSIONER EDGAR: Included in 11, realizing that then 12 would be the dollars that would flow from that.

With -- let me say this: With the decision that we have just made, which was -- sometimes it's painful getting there, but I do feel strongly was a good approach, then it seems to me that Issue 18 needs to be treated accordingly. And whether that is under 11 or under 12, I actually think I could make an argument either way. So -- and I do think that either way would allow us to make the decisions that we need to make with what is, what is before us. So I don't feel strongly whether it's 11 or 12.

But I would suggest, Commissioners, whichever

way on that ultimately seems to make the most sense, that we address Issue 18 in a similar manner that we did 16 and 17.

CHAIRMAN GRAHAM: Staff, Mr. Young, why don't you start us down this path on what to do with 18.

MR. YOUNG: Staff believes Commissioner Edgar's comments are right on point, but Staff would recommend that it be addressed in Issue 11. We feel the parties can argue what actions the Commission should take based on the management's decisions in terms of 2009, 2010 costs. If, if OPC believes and the other Intervenors believe that it was imprudent, they can argue that the Commission should take some form of action under that issue.

CHAIRMAN GRAHAM: So if you were to give me a motion, the motion would be that we would handle Issue 18 under Issue 11.

MR. YOUNG: The motion would -- if I could give you a motion, the motion would be that issue -- Staff recommends that Issue 18 be -- Issue 18 is subsumed under Issue 11, and Issue 18 should be stricken, stricken from inclusion in this year's NCRC proceedings.

CHAIRMAN GRAHAM: And would that be what your motion would be, Commissioner Edgar?

COMMISSIONER EDGAR: Mr. Chairman, again, I can see a logic to either 11 or 12. I am comfortable with either, Commissioners.

For purposes of moving us along, I will make the motion that 18 not be included as a separate issue, but that it be subsumed in and addressed under Issue 11.

CHAIRMAN GRAHAM: That's been moved and seconded.

Discussions on that issue? Let's go to Public Counsel.

MR. McGLOTHLIN: We can live with that.

CHAIRMAN GRAHAM: FIPUG?

MS. KAUFMAN: We can as well. It looks like though Issue 11 is going to be a very, very long issue.

CHAIRMAN GRAHAM: Florida Power & Light?

MR. ANDERSON: Noting our prior objection, I think one issue or the other is just fine.

CHAIRMAN GRAHAM: It's been moved and seconded. I don't see any lights coming on. All in favor, say aye.

(Ayes unanimous.)

Any opposed?

(No response.)

By your action, we've moved the Edgar amendment.

Now let's figure out what to do with 10B.

Staff?

MR. YOUNG: Staff recommends that Issue 10B be included in this year's NCRC proceeding. Staff believes that this is a legal and policy question issue that the Commission has yet to address directly. While the Issue 10B is arguably subsumed under Issue 10, Staff believes that it may be helpful to parties involved in future proceedings if the Commission votes on this direct -- on this as a direct issue.

CHAIRMAN GRAHAM: Prehearing Officer, I'm getting ready to throw you under the bus. (Laughter.) Suggestions, your thoughts.

COMMISSIONER BRISÉ: I do believe that 10B can be handled with 10. It can be subsumed in there. But it is a major policy issue, and I'm willing to hear thoughts from other Commissioners, and that's one of the reasons why it's here, because then it takes the concept of taking the -- a company's complete portfolio of nuclear plants, which provides some benefit in dealing with them as a combined unit versus taking each one, singling them out, and there may be some disadvantages to doing that. And, you know, there may be some advantages as well. So I think that that is something that we need to think about before we decide to separate

this issue out and make it a particular issue on its own.

CHAIRMAN GRAHAM: I'm not seeing any lights come on, so let me just go ahead and stir the pot.

OPC.

MR. McGLOTHLIN: Commissioners, we've recognized throughout the prehearing process that our Issue 10B is a subpart or part of the more general question of 10. We broke it out for two reasons, and it gets back into the perennial issue of how broad you want your issues to be, how narrowly defined you want them to be.

We thought there would be some value in expressing, articulating this one separately because it does two things. First of all, it informs and educates the Commissioners as to the precise nature of the point of contention. If you look only at 10, you'll not get any of the flavor of the contention that Turkey Point is different and should be treated differently. And so it has an educational value to it.

Secondly, it ensures that at the end of the day when the Commission is through with its deliberations and it comes for vote, we see 10B as a vehicle to ensure that you provide an explicit ruling up or down as to whether you agree or disagree with this.

This is something that may or may not be as, as transparent if you have just a broad issue.

But given that we have aired the content of 10B, if in your discretion you rule that you want to -- prefer a more general issue and treat it as part of 10, again, we, we had reasons to propose breaking it out, but as long as we have the opportunity to address it with testimony and argument, we would not resist that at this point.

CHAIRMAN GRAHAM: Florida Power & Light.

MR. ANDERSON: I'd reincorporate the arguments stated in our brief. Fundamentally, this project was proposed as one project to meet a particular need. All the points that Public Counsel have referred to in their position statement, they were actually probed by your Staff back in 2007, gets right back into our points. It's one project, we've been reporting on it all along, and it's incorrect here in 2011, or if we finish it in 2012 and '13, to start changing the bases for analysis.

CHAIRMAN GRAHAM: FIPUG, did you have anything to add?

MS. KAUFMAN: I just wanted to say, Mr. Chairman, that, as Mr. McGlothlin said, do we have one issue, do we have 20 issues is an ongoing debate. And I think that we've loaded up 11 now with a lot of

issues, and I personally think that the more discrete the issue is, the more helpful it is to the Commission, to the parties, and the public to understand exactly what matters are being decided. So I am in favor of leaving it as a separate issue. But if you want to subsume it in 10, as long as we have the opportunity to address it, we will obviously address it there.

CHAIRMAN GRAHAM: It sounds like the original thought of the Public Hearing Officer was to push 10B into 10 and handle it there. I haven't heard anything that pushes me the other direction, so if I can get a motion from somebody.

Commissioner Edgar.

COMMISSIONER EDGAR: So moved.

CHAIRMAN GRAHAM: Commissioner Brisé.

COMMISSIONER BRISÉ: Well, just before we, we move in that direction, and I don't know if now would be the appropriate time for us to address that issue, whether we as a Commission intend to deal with them separately, or do we need testimony to get there? I think that it might be worth a conversation with respect to whether we want to deal with them separately before we make the decision whether we're going to put 10B into 10, into 10 generically. Because if we do that, then we are in essence separating the two and going that route.

I don't know if I -- I think I just confused the issue a little bit. (Laughter.) But I think it's worth, it's worth a conversation, at least amongst us, and hearing from the parties, at least at this stage to decide whether we want to take 10B and go that route, that path.

CHAIRMAN GRAHAM: My understanding from what I heard from the parties is they'd rather keep it separate, but they're fine if you want to combine it, in simple summation.

We have a motion on the floor and I'll second it. So it's been moved and seconded to combine those two. So that's the motion that's before us. Let's make the argument on what we're going to do with that motion.

Commissioner Balbis.

COMMISSIONER BALBIS: Thank you, Mr. Chairman.

And I will support the motion, provided that we do have a specific discussion on whether or not we're going to separate those two. And if we can do that and including it into 10, which sounds like we can, then I'm in support of the motion. But I do feel that it warrants further discussion.

CHAIRMAN GRAHAM: Okay. We've got a motion and second. No more lights.

Staff?

MR. YOUNG: The, the only thing that gives Staff pause is the discussion. Just to clarify, you mean discussion during the time of the recommendation and throughout the course of the hearing, not a discussion before? Because that -- and the problem with that is if everyone agrees that 10B is subsumed in 10, then that's an argument the parties will be making, the Intervenors will be making, and we don't want to prejudice or cause some kind of confusion to the record and give a party an appealable issue. That's my, that's my, that's my concern about discussing it, whether we should require or have them break it out in terms of new nukes versus old nukes.

CHAIRMAN GRAHAM: Commissioner Brisé.

COMMISSIONER BRISÉ: Well, that makes it easier, I guess. It clarifies it a little bit, so therefore I will support the motion.

CHAIRMAN GRAHAM: Any other discussion? Seeing none, all in favor, say aye.

(Ayes unanimous.)

Any opposed?

(No response.)

By your action, you've approved the motion.

Okay. Mr. Young, help me. Where are we?

MR. YOUNG: We're on stipulations.

CHAIRMAN GRAHAM: Okay. What have we been doing the past hour and a half?

MR. BREW: Excuse me, Mr. Chairman.

CHAIRMAN GRAHAM: Yes, sir.

MR. BREW: If I might raise one more mundane preliminary matter before we get to the stipulations. We had a lively discussion during the prehearing on trying to establish a definite date for establishing the Progress Energy Florida portion of the hearings, and those are scheduled to start on the completion of the FPL portion rather than on a date certain.

I'd ask for a little clarification from the Commission for the benefit of out-of-town parties and witnesses that we would at least start fresh on the next day as opposed to immediately after the conclusion of the last FPL witness, so that parties can economically plan their travel to Tallahassee.

I would note along the lines that with the Commission's granting of the motion to defer the CR3 uprate issues that I think every part of the CR3 portion except for Staff's LAR management issue has been addressed, and it's my expectation that probably a substantial portion of the existing witnesses for Progress will be stipulated by the time we finally get there and that the scheduled hearings for Progress

Energy Florida at this point probably won't last two days.

CHAIRMAN GRAHAM: Well, the decision I made -- I believe Staff was able to give you a best guess on when we thought we were going to start the Progress piece of this. And what was that best guess?

MR. YOUNG: Monday, August the 15th, 2011.

CHAIRMAN GRAHAM: That's going to be our best guess. What I don't want to put ourself in the position of being is for us ending the Florida Power & Light piece of this at 11:00 one morning and for us to have to sit around and twiddle our thumbs until the next day. We want to be as efficient as possible and move through this as efficiently as possible. So we are going to start Progress as soon as we're done with Florida Power & Light. And if we can take a lunch break and whatever we need to do, but I'm not going to tell you a date certain that we're going to start Progress.

MR. BREW: Thank you.

CHAIRMAN GRAHAM: Thank you.

Mr. Young.

MR. YOUNG: We have stip -- the -- two things. I just was handed a note that OPC and PEF are trying to work through some proposed, possibly some proposed stipulations, and they need to get with the rest of the

parties to work through those issues. And those are possibly with witnesses, in terms of stipulating witnesses also, along with the issues, and I think Mr. Rehwinkel would like to be heard on that. And then we can move through the stipulations.

CHAIRMAN GRAHAM: Mr. Rehwinkel.

MR. REHWINKEL: Yes, Mr. Chairman. And I think your remarks with respect to Mr. Brew's request somewhat mooted my need to have this addressed at this time. But I would like to say that all the parties, including OPC, are trying to work to, to have a very narrow focus of the Progress phase of the case with a very limited number of witnesses. I think we're making progress on that, but we, we still have a little bit more work to do. So it's just informational to you at this time.

CHAIRMAN GRAHAM: Okay.

MR. REHWINKEL: Thank you.

CHAIRMAN GRAHAM: Thank you, sir.

MR. YOUNG: Stipulations.

CHAIRMAN GRAHAM: Yes.

MR. YOUNG: The Prehearing Officer has ruled that each company petition will be addressed in turn. The first petition, first FPL's petition, then PEF's petition. To that end, Staff recommends that all of --

if there's any proposed stipulations that Staff is not aware of be addressed during FPL's portion of the hearing, and that all PEF's proposed stipulations be addressed during PEF's portion of the hearing.

CHAIRMAN GRAHAM: Okay.

MR. YOUNG: All right. Staff notes that there's a proposed stipulation for FPL's witness Winnie Powers and William Derrickson to present direct and rebuttal together. And I think if we can get on the record a confirmation from all the parties on that, those two witnesses, will be helpful.

CHAIRMAN GRAHAM: OPC?

MR. McGLOTHLIN: Yes, we'd agree to that.

CHAIRMAN GRAHAM: FIPUG?

MS. KAUFMAN: We have no objection.

CHAIRMAN GRAHAM: Florida Power & Light?

Let the record show Florida Power & Light says yes as well. Okay.

MR. YOUNG: Mr. Chairman, we have SACE and FEA.

CHAIRMAN GRAHAM: Oh, sorry.

MR. WHITLOCK: Mr. Chairman, SACE has previously agreed to that and would reaffirm that now. Thank you.

CHAIRMAN GRAHAM: Yes. Thumbs up in the back.

Okay. Mr. Young, so we are done with stipulations. Are we now to opening statements?

MR. YOUNG: Yes, sir. We are at opening, the part of the hearing as to opening statements. Staff -- just for the record, Staff is not aware of any other stipulations that is out there or any other preliminary matters.

CHAIRMAN GRAHAM: Before we move on then, is there any other stipulations that we have not addressed yet that are still pending?

Okay. Mr. Young.

MR. YOUNG: Opening statements. Opening statements, the Prehearing Officer ruled that opening statements shall not exceed ten minutes per party per petition.

CHAIRMAN GRAHAM: All right. We will start with -- who do we start with opening statements?

MR. YOUNG: Florida Power & Light.

CHAIRMAN GRAHAM: Okay. FP&L.

MR. ANDERSON: Thank you. May we proceed?

CHAIRMAN GRAHAM: Yes, sir.

MR. ANDERSON: Thank you for all your time here today, Chairman Graham and Commissioners. FPL is here today to request approval of the company's 2011 nuclear cost recovery request for collection during

2012.

FPL's investment in nuclear energy for customers is a major reason why our typical residential customer bill is the lowest of Florida's 55 electric utilities. Nuclear power produces clean, reliable electricity around the clock, all year long, with low fuel costs that save our customers money.

Additional nuclear generation is a vital part of FPL's plans for continuing to provide our customers with low cost reliable service. This investment is made possible by the Commission's continued application of the Florida nuclear cost recovery framework established by the Legislature and the Commission.

In response to the state's policy of encouraging additional nuclear generation, FPL applied for determinations of need from the Commission in 2007 for the two projects that are the subject of these annual reviews, the Turkey Point 6 and 7 new nuclear project and the extended power uprate project. Both projects were approved in need determination orders issued in early 2008.

Under those statutes and rules, FPL is requesting to recover preconstruction costs necessary to obtain licenses and approvals for the Turkey Point 6 and 7 project. These licenses and approvals are needed to

enable the future construction of two nuclear units with 2,200 megawatts of generating capacity at FPL's Turkey Point site. For the extended power uprates, FPL is requesting to recover financing costs on the amounts incurred for construction.

The uprate project will increase the nuclear generation from FPL's existing units by about 450 megawatts, equal to installing half of a new nuclear generating unit, beginning in the 2012 and 2013 time period. In fact, this project has already begun producing additional nuclear power for customers.

As to our cost recovery request for 2012, it totals about $196 million, or $2.09 on a typical 1,000-kilowatt-hour monthly residential bill. A small fraction of this is for the Turkey Point 6 and 7 project. Most of the costs are for the uprate project, which has begun producing benefits for customers and is scheduled for completion in 2012 and early 2013. Over the operating life of the uprates, they're projected to save FPL customers well over $4 billion in fossil fuel costs.

FPL's decisions and costs in 2009 are subject to prudence review in this proceeding. With respect to Turkey Point 6 and 7, in those years FPL filed and pursued its combined operating license application from

the Nuclear Regulatory Commission. Based upon nuclear regulatory and market conditions in those years, FPL decided to extend the project schedule and deferred incurring many costs while maintaining progress in permitting and licensing.

FPL remains committed to developing the option for new nuclear generation. The company manages the project to maintain progress and manage risk. The company is cognizant of the recent events in Fukushima, Japan, and former NRC Chairman Nils Diaz will appear before you and explain how FPL's approach to new nuclear licensing is prudent.

The Turkey Point 6 and 7 project costs have been audited and reviewed by external auditors for FPL and by the Commission's audit Staff, providing the Commission and customers with additional assurance of the correctness of FPL's charges. No Intervenor has submitted testimony claiming that any 2009 or 2010 new nuclear decisions or costs were imprudent.

Turning to the uprate project, during 2009 and 2010 FPL made decisions and incurred costs with respect to NRC licensing, design engineering, procuring major equipment, and both preparing for and implementing many modifications at the plants needed to increase nuclear generation. In 2010, FPL successfully completed two

uprate project implementation outages at St. Lucie and Turkey Point. Thus far during 2011, FPL has successfully completed two more uprate project implementation outages.

FPL has received NRC approval of one of its license amendment requests, with three others accepted for review. This spring, FPL customers began benefiting from fuel savings when 29 megawatts of nuclear-generated electrical output was added. The uprate project has also been audited by FPL's external auditors and by the audit Staff of the Commission with good results.

Years after the Commission's need determination approving the uprate project, OPC now seeks to second-guess and relitigate that decision. The record will show that Public Counsel's are not factually sustainable and should be rejected.

The Commission's decision to approve construction of the EPU project on an expedited basis was a good one, and a decision upon which FPL properly relied in moving forward with significant investment.

Had FPL constructed the uprate project without using expedited or fast track construction methods -- those terms mean the same thing -- the project capital costs would have been higher, not lower. The project would have taken six years longer. That alone would

lose about $800 million in fuel cost savings for customers.

Public Counsel's position would have left our customers with lower reliability, lower fuel diversity, higher fuel costs, more dependence on natural gas and fuel oil, and higher environmental impacts. So for these reasons as well Public Counsel's claim should be rejected.

Turning to project feasibility, FPL filed a detailed feasibility analysis using the same rigorous processes well known and accepted by the Commission in past proceedings. A feasibility analysis is a snapshot of how a project's long-term economics may play out over a number of future scenarios, reflecting a range of fuel costs, environmental costs, and other factors. This year's feasibility analysis shows that the uprate project and Turkey Point 6 and 7 are both solidly cost-effective for FPL's customers.

The analysis is appropriate, should be accepted by the Commission for several reasons. The analysis for the uprate looks at the uprate project as a whole as it was originally proposed, as it was approved by the Commission. These are the same methods as the analysis accepted in the need determination proceeding that was tested and probed by the Commission Staff at

that time.

The analysis considered a wide range of fuel and environmental costs. It also appropriately accounts for sunk costs, consistent with the Commission's nuclear cost recovery rule, consistent with prior Commission orders, and consistent with commonly accepted economic practices.

The extended power uprates were approved by the Commission as one project to meet more than 400 megawatts of need beginning in 2012 and 2013. It's been undertaken, it's been managed as one project from the outset, obtaining economies of scale from using shared corporate management, corporate support and vendors.

FPL did not propose and would not have undertaken the uprate of just one of FPL's plants. Therefore, Public Counsel's claim four years into the game that the uprate project should be broken apart for analysis or that our analysis should take a different form or include different information should be rejected.

Public Counsel also claims that FPL should be penalized for not providing preliminary unapproved vendor forecasts to the Commission during 2009 hearings. This claim is baseless. The information that FPL

provided at the 2009 hearings was true, correct, and accurate. That is FPL's practice in all cases before the Commission.

At the time of the 2009 hearings, FPL's review of the preliminary vendor information was not complete. FPL's actions reflected care and deliberation and management of the project for the benefit of its customers as opposed to unquestioning acceptance of preliminary vendor information. Reasonable minds may differ as to whether FPL should have advised the Commission of the preliminary information. What is clear, however, is that there is no basis to conclude that FPL's decision violated the nuclear cost recovery rule.

In part to convey how seriously FPL takes this unfounded accusation, our president and chief executive officer Armando Olivera personally filed testimony in this case. He's prepared to appear before the Commission to address this.

To conclude, there is no doubt that FPL's customers receive lower electricity costs, better reliability, greater environmental benefits every day because of nuclear generation investment decisions made 40 years ago. Those customer benefits include substantial fuel diversity, cleaner air due to tens of

millions of tons of avoided emissions, and many billions of dollars of fossil fuel cost savings.

The Florida nuclear cost recovery framework is essential to FPL's continued investment in additional nuclear generation to provide more of these benefits to FPL's customers.

FPL asks that the Commission enter 2009 and 2010 prudence findings, 2011 and 2012 reasonableness findings, and accept the company's feasibility analysis consistent with the FPL positions stated in the Prehearing Order. Thank you.

CHAIRMAN GRAHAM: Thank you, sir.

Who wants to go first?

MR. WHITLOCK: Thank you, Mr. Chairman. Jamie Whitlock on behalf of SACE.

As the Commission has already heard this morning, there's a -- and for good reason a lot of focus on FPL's acts and omissions surrounding its uprate projects this year. But on behalf of SACE, as well as the ratepayers of the State of Florida, I would respectfully ask that the Commission, as I know it will, also take a hard look at FPL's proposed new nuclear reactors, the Turkey Point 6 and 7 project.

And the reason for this is simple, and that's FPL simply has not, through its testimony and filings

this year, demonstrated that it intends to build Turkey Point 6 and 7.

Let me take a step back. In, in the Commission's order last year at the end of the 2010 nuclear cost recovery docket, the Commission found that in order to be compliant, in compliance with the cost recovery statute, Section 366.93 of the *Florida Statutes*, and thus to be eligible for advanced cost recovery, that a utility must continue to demonstrate its intent to build the nuclear power plant for which it seeks advance recovery of costs. It's very logical, it makes sense. I think it was a good decision by the Commission.

Now in regards to Turkey Point 6 and 7, I would ask that the Commission carefully consider the testimony of the FPL witnesses in this docket this year and the other evidence in this matter because what it shows is that the only intent that FPL has demonstrated is the intent to create an option -- you're going to hear a lot about creating an option -- to build Turkey Point 6 and 7, and that that would be through the possible receipt of a combined operating license from the Nuclear Regulatory Commission.

Now the intent to create an option is not the intent to actually follow through with that option, or

the intent to actually build Turkey Point 6 and 7. And this is a crucial distinction, and I would ask that the Commission consider this carefully.

And you don't really -- you really don't have to look any further in the dictionary to understand this distinction. An option is defined as the power or freedom to choose, and that's exactly what FPL is asking for in this docket, is for million of dollars. Mr. Anderson just referred to it as a small fraction. Well, I have a feeling FPL's ratepayers might, might have something to say about whether it's a small fraction or some miniscule amount that's not worthy of a hard look from the Commission.

So, so FPL is asking for millions of dollars so that, so it can do nothing more than continue to try and obtain a combined operating license and thus have the power or freedom to choose at some undefined point in the future whether or not to actually build Turkey Point 6 and 7, and their testimony will tell you as much.

So I think the logical next question is when is this point in the future? I just referred to it as an undefined point in the future. Well, ostensibly it's when all the uncertainty and risk currently surrounding the development of new nuclear generation, which SACE

and the other Intervenors have sat before you and the other Commissioners for the last four years and talked about, and which FPL now acknowledges, they didn't, they didn't when this all started back in, I believe, 2008, but they do now, you know, when all this uncertainty just magically disappears and building a new nuclear project like Turkey Point 6 and 7 becomes feasible, because it's not feasible today. And in fact, the uncertainty and the risks have only be exacerbated as a result of the recent Fukushima nuclear disaster in Japan. And this is certainly going to have -- the Fukushima disaster is going to have an adverse effect on the feasibility of new reactors for years to come, as well as on other key feasibility drivers, such as lack of cost of carbon and low cost of natural gas. All these things, when taken in -- taken together, only just lead to more increased uncertainty and risk surrounding new nuclear generation.

I would note that FPL witnesses might pay lip service regarding their intent to ultimately, to ultimately build Turkey Point 6 and 7, but the totality of the circumstances or preponderance of the evidence, if you will, demonstrate that FPL's true intent is to merely acquire a combined operating license and use the approximate 20-year window that is allowed by that

license to determine if actual construction is feasible and makes economic, makes economic sense for the utility.

But this approach of merely creating an option does not make economic sense for FPL ratepayers, who have absolutely no guarantee that their investment in these proposed reactors will ever benefit them in the form of any actual rate savings.

FPL continuously, you've heard them this morning, tout all the benefits of new nuclear generation. Well, if the plant is never built and never comes online, there won't be any benefits. And under their current approach, which is to create an option, they are not within the -- they do not come within the intent of the statute, as this Commission ruled last year. Earlier this year I believe the order was actually issued, but last year's docket.

And I think, you know, this is exactly what the Commission was getting at in its order last year. You know, the Commission was faced with the question of balancing the interests of the utility, the goals of the Legislature, that the Legislature laid out, and also ratepayer interests, and basically had to reconcile the goals of the cost recovery statute with the statutory mandate of the Commission to fix fair, just, and

reasonable rates. And what the Commission found was that in order to reconcile those things, a utility has to come in every year and demonstrate that it is committed, that it intends to build the new nuclear project, or in this case Turkey Point 6 and 7, to be eligible for advanced cost recovery. Merely saying that we're continuing to, to do everything we can to create an option to build it, it's not enough. It's not enough. You do not qualify -- a utility does not qualify under the statute under these circumstances.

There's countless references in the, in the FPL testimony and other filings, as I noted earlier, in the docket this year to creating an option, preserving an option, maintaining an option. In fact, the Commission need look no further than FPL's position statement in regards to this issue as it's set out in its prehearing statement. It's Issue Number 2. The question is, "Do FPL's activities through 2010 related to Turkey Point Unit 6 and 7 qualify as the," quoting the statute, "'siting, design, licensing, and construction' of a nuclear power plant as contemplated by Section 366.93, *Florida Statutes*?"

FPL's response: "Yes. FPL is conducting activities and incurring necessary expenses in the course of actively pursuing the license, permits and

approvals necessary to create the option for new nuclear generation consistent with the intent of Section 366.93."

That's not what the -- that's not what this Commission said the intent of the statute was last year. That is completely, wholly inconsistent. It's the antithesis of the intent of what, of what the Commission said the intent of the statute was.

I'd also note even audit Staff concluded that, "Audit Staff believes that FPL is committed to pursuing the option to build two new AP1000 nuclear reactors." Not that they're committed to build them, committed to building, actually building them. They're committing to pursuing the option.

So, you know, and again, you know, a position statement, while that's important, I think even more important is the evidence. And the evidence demonstrates again that their only intent is to try and get a combined operating license and then make a decision from there, and they're doing this under the guise of minimizing ratepayer impacts. And I want the Commission to see through that.

They're focused solely on licensing. As Mr. Anderson said earlier, they've scaled back. All preparation, construction, site design, preconstruction

activities have been pushed out and continue to be pushed out significantly into the future. They continue to negotiate extensions and then renegotiate them further, do it again, do it again, do it again. That's what the evidence is going to show.

And all this evidence is a lack of intent to actually build Turkey Point 6 and 7. And, again, the reason for that is because FPL knows, as I believe the Intervenors know, it's not feasible to build it today. It's simply not. And, you know, you can project anything out into the future and say, well, it might be feasible then. You know, we think this is going to look like this in 20 years.

The cost recovery rule requires the Commission to look at the long-term feasibility in addition to the intent issue I've been talking about each year, and you have to make a determination that completion of the project remains feasible in the long term. And based on what we know this year, when the Commission is charged with approving FPL's analysis, they've not met their burden to demonstrate that it's feasible. And, again, there's any number of factors relating to the ever-increasing uncertainty and risk which would show this.

Again, the Fukushima disaster, its effects on

schedules and total project costs --

CHAIRMAN GRAHAM: Sir, you've got about 30 seconds to conclude.

MR. WHITLOCK: Thank you, sir.

Regulatory uncertainty, economic and energy policy, there's no cost to carbon, there's -- natural gas, the cost of natural gas is extremely low. These are the two main drivers that make nuclear energy cost-effective and attractive.

So in conclusion, I don't believe it's fair, just, or reasonable for the Commission to allow FPL to continue to incur significant costs, millions of dollars, no matter how they want to characterize them, and pass those costs on to their ratepayers to merely create an option to construct a project that's not feasible based on what we know today.

Thank you.

CHAIRMAN GRAHAM: Thank you, sir.

Mr. McGlothlin?

MR. McGLOTHLIN: Thank you. And you're all showing admirable stamina this morning.

In my opening comments I'm going to revert back to a discussion of the uprate activities because that's where our office is going to focus on the FPL portion of the case.

Our office will sponsor the testimony of two witnesses, Brian Smith and Dr. William Jacobs. I'm going to use my time to preview their testimony as it relates to three subjects, again, all of which relate to uprate activities.

The first is FPL's flawed methodology for gauging the long-term feasibility of the uprates. The next is the imprudence of the fast tracking of the uprate project. The third is FPL's failure to update its estimate of capital costs for the uprate during the 2009 hearing cycle.

First, with respect to the feasibility study. FPL excludes past expenditures, called sunk costs, and examines only to-go costs, or costs remaining for completion, when comparing the revenue requirements of the uprate scenario with the alternative generation portfolio. Excluding past expenditures, our witness will say, is an accepted practice when the overall cost is known. But when you apply that same methodology to a situation in which the price tag of the project under consideration is rapidly increasing, this exclusion of past expenditures can have a distorting effect.

In the space of two hearing cycles, FPL has increased its estimate of the capital costs necessary to complete the uprates by $700 million. Coincidentally,

FPL has spent to date about $700 million on the uprates, and in its feasibility study it excludes that $700 million when it compares the costs of the uprate scenario and the alternative generation portfolio.

In fact, the evidence will show that after spending $700 million, FPL says that the to-go costs presently are as high or higher than they were at the outset. This is an indication that the feasibility study is something of a self-fulfilling prophecy. If the utility simply spends money fast enough, its feasibility study will show a positive outcome regardless of what price you have set to it.

What may appear to be a rational decision to proceed when the analysis is limited to annual go costs, to-go costs could turn out to be uneconomic when you reach the end of the line and tally up all the costs and when FPL asks the Commission to set rates based upon the total.

This is the type of dilemma presented when a traditional, routine feasibility methodology is applied to an unusual, far from routine volatile circumstance of the uprate case. Dr. Jacobs and Mr. Smith will testify that a breakeven analysis offers a better tool. The breakeven analysis will quantify a value that represents the maximum amount the utility can spend on capital

costs expressed in dollars for installed KW and still be at or under the corresponding costs of, of the alternative. That value can serve as an early warning system in the event the trend is toward additional increased costs, and will detect and report a situation in which the project is approaching or exceeding that point at which it is no longer cost-effective.

In fact, FPL uses a breakeven analysis as its basis for studying the proposed new units. It shows that, it says, because of the high uncertainty associated with the construction of new units. As it turns out, experience has shown that these EPU projects are equally uncertain and warrant this type of an approach.

Now Dr. Jacobs will also recommend that you direct FPL to separate the St. Lucie and Turkey Point uprate activities and regard them in separate standalone feasibility analyses. Currently FPL rolls all four units, two at St. Lucie and two at Turkey Point, into a single composite feasibility study. And perhaps that was noncontroversial at the time it presented its first cost estimate, but, again, the estimate has increased $700 million, and those represent -- those increases represent changed circumstances which warrant this breakout.

The question is whether -- the question with an uprate is always whether the units after the uprate will generate fuel costs, fuel savings sufficient in amount to overcome this hurdle of capital costs and realize net savings for the customer.

Dr. Jacobs points out that the two Turkey Point units have together 14 fewer unit years of operation than do the St. Lucie units. Their permits are going to expire that much sooner, so they have a shorter time frame within which to accomplish those required fuel savings. Therefore, they are the most vulnerable to the impact on feasibility of an increase in the price. It simply makes sense to view them on a standalone basis so that in the event this change in circumstances is impacting the feasibility, the composite will no longer require St. Lucie to more or less carry the, the feasibility of the, of the Turkey Point questions.

The uprates differ as to the megawatts to be added, they differ with respect to the capital costs and remaining operating life, all of which we think support the recommendation to separate these out.

Now with respect to fast tracking, again, Dr. Jacobs will testify that fast tracking is a term of art, it is not co-expensive -- coextensive with the idea

of expediting. I covered that earlier, so I won't spend any more time on it. But it means that the project when fast tracked takes place outside the normal processes that are designed to control costs.

Dr. Jacobs will testify that because the EPU or uprate project is so huge and hugely complex, and because FPL had done no design engineering that would have given it an adequate grasp on the cost of completion, the decision to fast track and proceed outside those cost control measures was imprudent and exposes customers to the possibility of high costs. He will recommend that to measure the impact of the imprudence it would be necessary to perform an ultimate breakeven cost.

With respect to the failure to testimony, update testimony, you'll recall, some of you will recall that this arose in the 2010 hearing cycle and stemmed primarily from a dispute between FPL and FPL's consultant when FPL disputed the finding of its consultant. During the period in which this had been deferred, OPC has engaged in considerable discovery on the matter, and we've reached two conclusions.

First of all, the decision not to, not to update was not a case of lack of communication between management and witness. Instead, it was a jointly made,

conscious decision not to update the May 2009 testimony, for which FPL's management is accountable.

The second conclusion is that, by the time of the September 2009 hearing, the May estimate was no longer the project manager's current view. The estimate had increased by $444 million compared to the May testimony.

Your rule requires the utilities to submit both an annual estimate of capital costs and an annual study of the long-term feasibility. The capital costs are principal input into that feasibility analysis. We contend that if the rule means anything, it means that the utility is called upon to present the best, most current information with respect to both those requirements. The willful withholding of all that significantly changed information is a violation of the nuclear cost recovery rule.

Now, among other things, you may hear FPL say that we looked at the revised feasibility and it was still okay, although I would note it was, their revised analysis was materially less cost-effective. But in a bigger sense, that argument misses an important point. The feasibility analysis is for FPL to present and for the Commission to evaluate.

FPL may also refer to its effort to push back

against unvetted numbers, but the testimony will show that the longer FPL pushed back, the higher its estimate became. This is because the contract, which was the subject of the pushback, was only a portion of the overall cost of the project. Other increases incurred in areas such as engineering, materials, and design work. As the design work proceeded, the scope of the project increased, and that led to the increased estimate.

Expect FPL to downplay this episode and to try to explain away the significance of it. We think after you hear the evidence, you'll agree that in this case actions -- or in this case, more precisely, deliberate inactions speak louder than FPL's words. Thank you.

CHAIRMAN GRAHAM: Thank you, sir.

Ms. Kaufman.

MS. KAUFMAN: Thank you. Now I get to say good afternoon, Mr. Chairman and Commissioners.

I'm Vicki Kaufman, as you know, and I'm appearing today on behalf of the Florida Industrial Power Users Group. And since we have appeared before you many times, I'm not going to tell you a lot about the group, but I just want to reiterate that, that we are actual businesses and what these businesses do greatly -- varies greatly: From grocery stores,

hospitals, phosphate companies, NASA. So we have a lot of different business interests, but they have one thing in common, and the goal of the group is to promote and to be sure that their electric rates and how those rates impact their operations are taken into consideration by the Commission, because that affects their operations in this state, it affects jobs, people they employ now, people they may employ in the future, and it affects their ability to remain competitive in the state, in the United States, and, for many of these businesses, in a worldwide market.

You have a difficult job in this case. I don't envy you at all. You have to wade through mountains of paper, spreadsheets, days of hearing, cross-examination. And as you do that, FIPUG would ask that you keep the goal of reasonable, low cost electric rates in mind. That is, I think we've referenced this before, that you look at the big picture, that you look at the forest as well as all of the trees.

Nuclear power can be a very important part of the energy portfolio used to serve Florida's consumers, and the Legislature, as you've heard, has encouraged the development of nuclear energy. But having said that, they didn't give FPL a blank check, they didn't give FPL an unlimited time period, they didn't say bring on

nuclear power regardless of the cost or when it's going to be available to serve the ratepayers. And so we ask you to look carefully at some of the claims that are being made.

We're very concerned about not only the delay, for example, in the Turkey Point 6 and 7 project, but the costs, the ultimate costs that the ratepayers are going to bear if and when this project ever comes online. And it's already been mentioned there is tremendous uncertainty in the nuclear industry at this time.

There are several subcategories of issues that you're going to hear about, and Mr. McGlothlin has described several of them. I'm not going to repeat what he said, but I am going to talk about them actually in the reverse order that he did.

The first issue that I want to address is the testimony that FPL provided to you in the 2009 hearing, and the veracity of that testimony concerning their uprate project.

As a preliminary matter, I think everybody in this room would agree that you have to have current and reliable information before you when you make any decision, but particularly decisions of the magnitude that are being made in this case where we're talking

about not millions, but billions of dollars.

You have to rely, as do Intervenors and the public, on the information that the utility gives to you when you make your judgments, which at the end of the day the ratepayers pay the price for.

In 2009, you did not have the most current information from Florida Power & Light regarding the uprate projects, and the reason that you didn't have it is because when FPL's witness in this regard took the stand in September 2009, a willful and conscious decision was made by the company that they were not going to update that information for you.

Their witness took the stand and was asked the traditional question, "Is your testimony true and correct," and he responded that it was. However, I think the evidence will show that is not the case.

And in fact, FPL, to its credit, conducted or commissioned, I guess, an independent outside expert to take a look at what occurred in regard to this incident, if you will, after there was a complaint by an employee. They commissioned Mr. Reed and his company, Concentric. Mr. Reed is a witness in this case that you will hear from. And a report was ultimately produced by Concentric, and I just want to quote a couple things that FPL's independent expert had to say about the

information that, that you were provided in 2009.

For example, the Concentric report says, quote, information provided by FPL in the 2009 NCRC was out of date and did not represent the best information available at that time, close quote. Later on in the report Concentric said, quote, we believe that a $300 million or 27 percent increase in the projected cost of the EPU project should have been discussed in the live testimony on September 8th, 2009, close quote.

We certainly agree with you, and I would emphasize to you that these are FPL's independent expert's opinion about what occurred in 2009. And as Mr. McGlothlin referenced, his expert, Dr. Jacobs, has now gone back and reviewed the information and I think concurs with Concentric's opinion.

You'll hear FPL tell you that the EPU project remains cost-effective. I want to emphasize to you that that's a different issue and it's an issue that's going to be discussed, but that has nothing to do with the veracity of the information that's provided to you.

The core concern I think for FIPUG and for consumers is that FPL and all utilities and all parties that appear before you provide you with accurate information. And if this doesn't happen, your process is undermined, and we would suggest to you that in 2009

that you were not provided with appropriate information.

I think you have the authority under 366.095 to fine regulated companies for a rule violation such as this, and we would urge you to do so in this case and send a strong signal that this type of behavior is not going to be tolerated by this Commission.

As to the issues Mr. McGlothlin discussed regarding the EPU project, we agree with him that the fast tracking of that project is not equivalent to expedited, and we further agree that it resulted in costs being incurred that were unnecessary and thus imprudent.

If FPL had taken a measured approach, a lot of those costs, we believe, would have been avoided. And we certainly agree with his comments regarding the requirement for a breakeven analysis. You want to be able to critically evaluate what this project is costing everyone at the end of the day, and discounting or, I guess, removing sunk costs is an analysis that totally understates what the project costs.

I want to just finish up and go back to my premise of the forest versus the trees and urging you to look at the big picture. And as to the Turkey Point 6 and 7, that is what is the cost of this project, these projects? When will they come online? The Turkey Point

6 and 7 projects, according to Florida Power & Light's own computations, are estimated to cost between $13 billion and $19 billion. I mean, that's just a staggering amount.

The projects are behind schedule and projected, as we sit here today, not to come online for another 11 years. There is much potential for the costs to increase and for the dates to slip, and the ratepayers -- and for the ratepayers to hold the bag for this, these projects.

I agree with some of the comments that were made by my colleague from SACE, which is what you have before you is a pursuit of an option. It's, it's a let's, let's keep this possibility open, let the ratepayers pay for it without a commitment from the company to move forward. The sums are staggering, and as far as I can recall from the testimony, there has been no information or no testimony presented that there are going to be any joint owners in this project to take a little bit of the burden off of the ratepayers.

So we urge the Commission, number one, to send a very strong signal about the events in 2009. We urge them to take a critical look at the analysis that has been done for the EPU project, and we finally urge you to take a look at the big picture and, and figure out is

$19 billion an amount that ratepayers should be saddled with with a project that we don't know is ever going to come to fruition? Thank you.

CHAIRMAN GRAHAM: Thank you.

MS. WHITE: Good afternoon, Commissioners. I'm Karen White and I'm here on behalf of the Federal Executive Agencies.

And you might ask yourself why is the Federal Executive Agencies involved in this case? And in fact many people that I meet, including my own children, sometimes say, "Why are you doing that?" And so I just wanted to take a minute to sort of lay it out for you.

Why are Federal Executive Agencies involved at all in ratemaking? It's because utility bills are a significant part of constrained and getting more constrained federal and military operating budgets. Those same dollars that are used to pay for utilities are the ones that are used for operations. They come out of the same pot. So we care very deeply about how much utilities cost for military agencies and other federal executive agencies that I represent.

Our goal in this proceeding is to ensure that those dollars are well spent, that only prudent and reasonable costs are recovered. I know that you share that goal with us, with the Intervenor -- other

Intervenors.

I'm not going to cover the same issues that my Intervenor colleagues have done, because I think they've done so in a much more eloquent way than I would be able to do. But one thing that I note as I look through this case was that this is, this is an enormous or, as my seven-year-old says, ginormous project with a long-time planning history, preconstruction, and things that will happen.

And so we all know that things change over time, and Federal Executive Agencies recognizes that things can change. And so we urge you, as you look at the case, to ensure that things haven't changed to the point that this case is no longer -- that these costs that are being asked to recover this, this year are no longer prudent or reasonable. And so we ask you to take a hard look at those, those numbers and ensure that the promises that have been made for the benefits to ratepayers will in fact accrue to ratepayers over time. Thank you.

CHAIRMAN GRAHAM: All right. Thank you. Is that all the Intervenors that we have? I think so.

MR. YOUNG: Yes, sir.

CHAIRMAN GRAHAM: All right. So I guess next we swear in the witnesses for Florida Power & Light.

MR. YOUNG: Yes, sir. But before we swear in the witnesses, Staff would like to move, as I stated earlier, move Exhibit Number 1, which is the Comprehensive Exhibit List, into the record.

CHAIRMAN GRAHAM: We'll move that into the record. Okay.

(Exhibit 1 admitted into evidence.)

MR. YOUNG: Also, Staff would like to move the Staff's stipulated exhibits, which are labeled 21 through 29 -- I mean, excuse me, 121 through 129.

CHAIRMAN GRAHAM: Let the record show that we're going to move the stipulated exhibits into the record, which are -- one more time.

MR. YOUNG: 121 through 129, Staff's stipulated exhibits.

CHAIRMAN GRAHAM: Okay. That is done.

(Exhibits 121 through 129 admitted into evidence.)

MR. YOUNG: And just to note that Powers and Derrickson will present direct and rebuttal at the same time throughout this hearing.

(Transcript continues in sequence with Volume 2.)

STATE OF FLORIDA)
: CERTIFICATE OF REPORTER
COUNTY OF LEON)

I, LINDA BOLES, RPR, CRR, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 15th day of August, 2011.

Linda Boles

LINDA BOLES, RPR, CRR
FPSC Official Commission Reporter
(850) 413-6734

✓ FPL

Parties/Staff ✓ Handout

Hearing event date 08/10/2011

Docket No. 110009

A

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Florida Power & Light Company's Petition to Determine Need for Expansion of Electrical Power Plants and for Exemption from Rule 25-22.082, F.A.C.	Docket No. 070602-EI Dated: September 17, 2007

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PETITION

Pursuant to Sections 366.04 and 403.519, Florida Statutes, and Rules 25-22.080, 25-22.081, and 28-106.201, Florida Administrative Code, Florida Power & Light Company ("FPL" or the "Company") petitions this Commission for an affirmative determination of need to expand the electric generating capacity of FPL's existing Turkey Point nuclear power plant ("PTN") and St. Lucie nuclear power plant ("PSL"). FPL also requests that the Commission confirm or grant on an expedited basis an exemption from Rule 25-22.082, F.A.C. (the "Bid Rule") and confirm that the costs of the uprates will be recovered as provided in Section 366.93, Florida Statutes, and Rule 25-6.0423, F.A.C.

I. Introduction and Overview

1. FPL owns and operates four nuclear units at two nuclear generating plant sites in Florida: Turkey Point Units 3 and 4, and St. Lucie Units 1 and 2. These units together have operated cleanly, safely, and reliably for more than a combined 125 years. Their operation has saved customers billions of dollars in fuel costs, enhanced fuel diversity, and supported electric system reliability. In doing so, the nuclear units also have prevented the emission of hundreds of millions of tons of carbon dioxide ("CO2") and other greenhouse gasses ("GHG") into the atmosphere.

2. FPL is working to expand its nuclear production. FPL's efforts consist of two parts. First, FPL is proposing to expand the electric generating capacity of its existing nuclear

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Determination of Need for Expansion of Crystal River 3 Nuclear Power Plant, Order No. PSC-07-0119-FOF-EI, Docket No. 060642-EI, 2007 Fla. PUC Lexis 77, *9 (Feb. 8, 2007).

X. Request for Finding of Prudence and Confirmation Of Cost Recovery Treatment

54. FPL believes that the decision to implement the PTN and PSL uprates is in the long-term interest of its customers. But the investment necessary to realize the benefits of the PTN and PSL uprates is significant. Prior to undertaking the PTN and PSL uprates and in conjunction with this request for a determination of need, FPL requests that the Commission determine that FPL's decision to undertake the proposed uprates is reasonable and prudent.

55. FPL also requests that, in connection with granting a need determination, the Commission confirm that it: (a) will provide for annual reviews and determination of the prudence of the nuclear uprate costs, and recovery of costs, as provided for in the Commission's nuclear power plant cost recovery rule, Rule 25-6.0423; and (b) will affirm that after the uprates are placed in commercial service, FPL will be allowed to increase its base rate charges by the projected annual revenue requirements associated with the uprates in the manner provided for in Section 366.93, Florida Statutes and Rule 25-6.0423.

56. The Commission's confirmation of the application of Section 366.93 and Rule 25-6.0423 plays an essential role in FPL's decision to pursue development of more than 400 MW of cost-effective, non-GHG-emitting nuclear generation in a time frame where it would not otherwise occur. The Commission's timely ongoing review and determination of the prudence of FPL's nuclear uprate expenditures, as well as the interim cost recovery and base rate

adjustment provisions contained in Section 366.93, Florida Statutes and Rule 25-6.0423, provide an appropriate regulatory framework within which FPL is encouraged to undertake this significant and beneficial investment at the earliest feasible point in time. Absent the enhanced regulatory certainty and more predictable cost recovery provided for nuclear plant investment by the Florida Legislature and the Commission, FPL would not be encouraged to undertake this capital-intensive nuclear investment on an expedited basis.

57. Under Section 366.93 and Rule 25-6.0423, FPL will file a petition for Commission approval of a base rate increase as each nuclear uprate is placed into service, pursuant to Section 366.93(4) equal to the annualized revenue requirements for the nuclear uprate for the first 12 months of operations, in accordance with Rule 25-6.0423(7). The timing of the base rate increase for each uprate would be implemented in concert with the fuel cost decreases that will begin as each uprate is placed into service.

58. The full benefit of lower fuel costs achieved because of the uprates would flow to customers through lower monthly fuel charges, the savings of which in the aggregate, are expected to more than offset the cost of the uprates and result in many millions of dollars of net economic benefits for customers. The economic benefits to customers are in addition to improved fuel diversity, reductions in the use of natural gas and oil as fuel for electric generation, and the expected prevention of about 27 million tons of CO2 emissions due to the uprates.

59. The annual review and determination of prudence contemplated in Rule 25-6.0423, as well as both the cost recovery and adjustments to base rates when the uprates are

placed in service, will facilitate the significant additional investment by the Company in clean nuclear generation consistent with the objectives of Section 366.93 and Rule 25-6.0423. In addition, these actions will at least partially mitigate the increased business risk associated with such a large capital expenditure involving the expansion of existing nuclear capacity.

XI. Disputed Issues of Material Fact and Ultimate Facts Alleged

60. FPL is presently unaware of any disputed issues of material fact affecting this proceeding. In any event, consistent with the requirements of Section 403.519, FPL's filing demonstrates that: (a) the PTN and PSL uprates are needed to provide adequate electricity at reasonable cost, taking into account the need for fuel diversity and supply reliability; (b) the PTN and PSL uprates are the most cost-effective option for providing fuel diverse generation capacity needed by FPL's customers starting in 2011 and 2012; (c) there is no reasonably available conservation or other non-generation alternative that would mitigate the need for the PTN and PSL uprates; (d) the circumstances of this matter support a specific determination of the prudence of FPL's decision to proceed with the PTN and PSL uprates, (e) FPL's proposal is appropriately exempt from the requirements of the Bid Rule; and (f) application of Section 366.93 and Rule 25-6.0423 for purposes of recovering the significant costs associated with this investment is appropriate.

B

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for determination of need for expansion of Turkey Point and St. Lucie nuclear power plants, for exemption from Bid Rule 25-22.082, F.A.C., and for cost recovery through the Commission's Nuclear Power Plant Cost Recovery Rule, Rule 25-6.0423, F.A.C.	DOCKET NO. 070602-EI ORDER NO. PSC-08-0021-FOF-EI ISSUED: January 7, 2008

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
MATTHEW M. CARTER II
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

APPEARANCES:

BRYAN S. ANDERSON, ESQUIRE, R. WADE LITCHFIELD, ESQUIRE, MITCH ROSS, ESQUIRE, and JESSICA A. CANO, ESQUIRE, 700 Universe Boulevard, Juno Beach, Florida 33408-0420
On behalf of Florida Power & Light Company.

JENNIFER S. BRUBAKER, ESQUIRE, and KATHERINE E. FLEMING, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Florida Public Service Commission.

FINAL ORDER GRANTING PETITION FOR DETERMINATION OF NEED FOR PROPOSED EXPANSION OF NUCLEAR POWER PLANTS

BY THE COMMISSION:

Background

On September 17, 2007, Florida Power & Light Company (FPL) filed a petition for a determination of need for the proposed expansion of nuclear power plants in Dade and St. Lucie Counties. FPL filed its petition pursuant to Section 403.519, Florida Statutes (F.S.). FPL's proposal consists of the expansion ("uprate") of the electric generating capacity of its existing Turkey Point and St. Lucie nuclear power plants, in Dade and St. Lucie Counties, respectively. FPL's proposed uprate would increase the power output at Turkey Point, units 3 and 4, from approximately 700 megawatts (MW) to 804 MW per unit, for a two-unit total of about 208 MW. At St. Lucie, units 1 and 2, net electrical generation per unit is expected to increase from

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approximately 840 MW to 943 MW, for a two-unit total of 206 MW. FPL proposes to complete the uprate to all four nuclear units during separate outages beginning in 2011 and ending in 2012.

This matter was scheduled for a formal administrative hearing on December 10-13, 2007. No persons intervened in this docket, and no public testimony was presented at the hearing on December 10. At the hearing, after taking all evidence, we considered the proposed stipulations regarding the appropriate resolution of all issues identified for this proceeding. We approved the stipulated positions by a bench decision, thereby resolving all issues in this docket and granting FPL's petition for determination of need. This Order reflects our decision and serves as our report under the Power Plant Siting Act, as required by Section 403.507(4)(a), F.S.

Standard of Review

Section 403.519(4), Florida Statutes, sets forth those matters that we must consider in a proceeding to determine the need for the expansion of an existing electrical power plant, or the construction of a new nuclear power plant:

> In making its determination on a proposed electrical power plant using nuclear materials or synthesis gas produced by integrated gasification combined cycle power plant as fuel, the commission shall hold a hearing within 90 days after the filing of the petition to determine need and shall issue an order granting or denying the petition within 135 days after the date of the filing of the petition. The commission shall be the sole forum for the determination of this matter and the issues addressed in the petition, which accordingly shall not be reviewed in any other forum, or in the review of proceedings in such other forum. In making its determination to either grant or deny the petition, the commission shall consider the need for electric system reliability and integrity, including fuel diversity, the need for base-load generating capacity, the need for adequate electricity at a reasonable cost, and whether renewable energy sources and technologies, as well as conservation measures, are utilized to the extent reasonably available.

Findings

As discussed above, we were presented a series of stipulations which serve to address each of the issues that had been identified for hearing. We have reviewed the proposed stipulations, and find that they are appropriate based on the record development of this docket, and that they provide a reasonable resolution of the outstanding issues regarding FPL's petition. We, therefore, approve the stipulations set forth below.

Need for Electric System Reliability and Integrity

There is a need for the Turkey Point nuclear power plant ("PTN") and St. Lucie nuclear power plant ("PSL") uprates, taking into account the need for electric system reliability and integrity, as this criterion is used in Section 403.519(4), Florida Statutes. Without the uprates,

FPL's electric system reliability and integrity will be significantly reduced, and FPL will fail to meet its 20% reserve margin beginning in 2012, as shown in the table below.

Estimated Impact on FPL's Summer Reserve Margin		
Year	Reserve Margin w/o Uprates	Reserve Margin with Uprates
2010	22.6%	22.6%
2011	20.1%	20.1%
2012	17.8%	19.2%
2013	16.1%	17.9%
2014	14.2%	16.0%
2015	11.7%	13.4%

FPL has future resource needs of 490 MW of incremental capacity in 2012. All demand side management ("DSM") that is known to be cost-effective through 2013 is already reflected in FPL's 2006/2007 resource planning work, which identified this capacity need. Consequently, to meet FPL's summer reserve margin criterion of 20% through 2013, FPL needs new capacity in the form of power plant construction and/or purchases.

The data in the table above actually reflects an optimistic view by also including 287 MW of renewable energy purchases that are not yet certain. Three contracts for 143 MW from municipal solid waste facilities will expire in 2009-2010, but are assumed to be extendable. FPL is also analyzing three new proposals for a total of 144 MW of capacity beginning in 2011-2012. Even combined, the 287 MW of renewable generation does not significantly defer the need for additional capacity beyond the 2012 time frame.

As the table above shows, considering load projections today, the proposed uprates do not satisfy all reliability needs. Without the uprates, the gap between capacity and need becomes even larger.

Need for Fuel Diversity

There is a need for the PTN and PSL uprates, taking into account the need for fuel diversity, as this criterion is used in Section 403.519(4), Florida Statutes. Increasing nuclear generation through the nuclear uprates will enhance fuel diversity.

During 2006, about 21% of the energy produced by FPL was generated using nuclear fuel. Without the nuclear uprates, due to system growth, the percentage of nuclear-fueled production will decrease to about 17% by 2013 and decline thereafter. In contrast, FPL's analysis shows that the nuclear uprates would contribute to FPL's system supplying approximately 19% of its energy with nuclear-fueled energy by 2013. Likewise, with the uprates, natural gas-fueled production will decrease from 67% to 65%. Thus, the nuclear uprates contribute to improving and maintaining FPL's fuel diversity as well as decreasing reliance on natural gas as a fuel for electric generation. The diversification of fuel type, technology type and

transportation method provided by the uprates will enhance system reliability for FPL's customers.

Need for Baseload Generating Capacity

There is a need for the PTN and PSL uprates, taking into account the need for baseload generating capacity, as this criterion is used in Section 403.519(4), Florida Statutes. The uprates will add approximately 414 MW of nuclear-fueled baseload generating capacity, which is needed to keep pace with the increasing demand for reliable power and the steady growth that the state of Florida continues to experience.

Need for Adequate Electricity at a Reasonable Cost

There is a need for the PTN and PSL uprates, taking into account the need for adequate electricity at a reasonable cost, as this criterion is used in Section 403.519(4), Florida Statutes. The uprates will increase the amount of highly efficient nuclear-fueled generation on FPL's system, and will displace large amounts of higher-cost fossil fuel and purchase power generation, resulting in fuel savings that provide a net benefit (i.e., lower system cost) to customers. In addition, customers will benefit from reduced capacity costs due to the deferral effect of the nuclear uprates upon the timing of subsequent additional units in the 2014-2017 time period.

Furthermore, adding incremental capacity by uprating plants maximizes use of existing sites, as compared to constructing a generating plant of equivalent capacity at a new site. FPL already owns the necessary land at Turkey Point and St. Lucie, it is permitted for electric generation plants, and most of the necessary infrastructure is already in place. The proposed project precludes these costs at a new site.

No Mitigating Renewable Energy Sources and Technologies or Conservation Measures

There are no renewable energy sources and technologies or conservation measures taken by or reasonably available to FPL which might mitigate the need for the proposed expansion of the Turkey Point and St. Lucie nuclear power plants. FPL's forecasted need already accounts for all of the cost-effective DSM identified through the year 2014, plus a projection of continued DSM for the years 2015-2020. This DSM includes FPL's current Commission-approved DSM goals and a significant amount of additional DSM that FPL has identified as cost-effective, and we have since approved, since the current DSM goals were approved. Additional conservation measures cannot be implemented to eliminate the need for the PTN and PSL uprates.

For purposes of analysis, FPL's forecast assumed successful contracting for and delivery of 144 MW of renewable firm capacity bid in response to its 2007 request for proposals for renewable energy, and successful extension of 143 MW of renewable firm capacity from three expiring municipal waste-to-energy contracts. There are not sufficient additional renewable energy options to mitigate the need for the 414 MW of nuclear baseload capacity that will be provided by the uprates. The table previously shown in this Order shows the need for additional capacity even after including DSM and purchased power from renewable energy sources.

Most Cost-Effective Source of Power

The proposed uprates will provide the most cost-effective source of power, as this criterion is used in Section 403.519(4), Florida Statutes. The estimated nominal costs for the PTN and PSL uprates, not including construction carrying costs, are approximately $750 million and $651 million, respectively. The costs of changes to the transmission system that are needed to support the uprates are estimated at $45 million.

To fully evaluate the system impacts of the nuclear uprates, FPL developed a long-term resource plan that included the uprates ("the Plan with Nuclear Uprates") and an alternate resource plan not including the nuclear uprates ("the Plan without Nuclear Uprates"). The Plan without Nuclear Uprates represents the addition of combined-cycle (CC) units that could be sited and receive permitting approval in the relative near term. FPL also utilized three different fuel cost forecasts and four different environmental compliance cost forecasts in its economic analysis to address the impacts of uncertainty in future fuel and environmental compliance costs. Because 3 of these 12 scenarios represent a highly unlikely combination of low natural gas costs and high CO_2 environmental compliance cost, FPL used 9 scenarios in its economic analysis. FPL's analysis shows that in eight of the nine economic scenarios comparing the generating technology choices represented in the two plans, the Plan with Nuclear Uprates is the most cost effective option. The estimate is that total net savings realized by customers are expected to range from $222 million to $963 million on a cumulative present value revenue requirement basis.

Proposed Expansion is Exempt from Rule 25-22.082, F.A.C.

The PTN and PSL uprates are within the definition of electrical power plants utilizing nuclear materials as fuel (see Sections 403.513(13), 403.506(1), and 366.93, Florida Statutes). Accordingly, pursuant to Section 403.519.(4)(c), the proposed uprates are exempt from Rule 25-22.082, Florida Administrative Code.

Rule 25-6.0423, F.A.C., Applicable to the costs of the Proposed Expansion

Rule 25-6.0423, F.A.C., is applicable to the costs of the proposed expansion of the Turkey Point and St. Lucie Nuclear Power Plants after the issuance of our order granting this determination of need. For example, if FPL were to file for recovery by May 1, 2008, as called for in Rule 25-6.0423(5)(c)(1)(b), F.A.C., carrying costs on construction that we determine to be reasonable and prudent pursuant to the Rule would be included for cost recovery purposes as a component of the 2009 Capacity Cost Recovery Factor in the annual Fuel and Purchased Power Cost Recovery proceeding, pursuant to Rule 25-6.0423(5)(c)(4), F.A.C.

Conclusion

Based on the resolution of the foregoing issues, and as more fully developed in FPL's prefiled testimony and its petition, we hereby find it appropriate and in the public interest to approve the proposed stipulations set forth above, and grant FPL's petition to determine the need for the proposed expansion of the Turkey Point and St. Lucie Nuclear Power Plants.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's petition for determination of need for expansion of Turkey Point and St. Lucie nuclear power plants is hereby approved. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 7th day of January, 2008.

ANN COLE
Commission Clerk

(SEAL)

JSB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within five (5) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

with them. As Justice England stated in *Ingram v. Pettit*, 340 So.2d 922, 924–25 (Fla.1976) (footnote omitted):

> Florida courts have recognized that an automobile on the highway is a dangerous instrumentality. Its dangerous propensities are heightened when operated by a person who is, by definition, incapable of exercising vigilance and caution.

To allow fourth-time offenders to escape felony charges only because an appeal from a predicate conviction has not yet been exhausted would be inconsistent with the Legislature's expressed intent. Moreover, in the event that a predicate conviction *is* reversed on appeal, the defendant may seek relief through a motion to vacate judgment filed pursuant to Florida Rules of Criminal Procedure 3.850.

Finally, relying on *Snyder* and *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), Finelli argues that the Court's ruling today would constitute an unforeseeable judicial enlargement of the felony DUI statute which cannot be applied to her case. Such reliance is unfounded. While the meaning of "conviction" varies depending upon the context in which it is used, this Court's interpretation of that term in *Snyder* provided Finelli with fair warning that, where predicate convictions are elements of later charges, those convictions need not be final on appeal. Moreover, in *Snyder*, the defendant's due process challenge was upheld only because this Court's decision constituted an unforeseeable judicial enlargement of a criminal statute where the defendant might have relied on an antecedent and contrary opinion by a lower court. No such circumstances obtain here. Accordingly, for the reasons expressed above, we quash the decision of the lower appellate court with directions to remand this case to the trial court for further proceedings consistent with this opinion.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, ANSTEAD and QUINCE, JJ., concur.

PARIENTE, J., recused.

FLORIDA POWER CORPORATION,
Appellant,

v.

Joe GARCIA, etc., et al., Appellees.

No. SC94665.

Supreme Court of Florida.

March 1, 2001.

Power company sought review of decision of Public Service Commission (PSC), 1998 WL 995264, denying company's petition for declaratory statement that its negotiated cogeneration contract was consistent with Florida Administrative Code. The Supreme Court, Lewis, J., held that prior determination of PSC had preclusive effect as applied to its later determination of jurisdiction to entertain petition.

Affirmed.

1. Public Utilities ⇐194

Court presumes orders of the Public Service Commission (PSC) to be correct, and only determines whether the Commission's action comports with the essential requirements of law and is supported by competent, substantial evidence.

2. Electricity ⇐1

Under doctrine of administrative finality, Public Service Commission's (PSC) prior, unappealed ruling regarding its jurisdiction to entertain controversy addressed in power company's petition for declaratory statement, even if erroneous, operated as a bar to a subsequent determi-

nation of that jurisdiction over the same claim, despite subsequent change in case law potentially affecting scope of PSC's jurisdiction over controversy.

3. Administrative Law and Procedure ⇐489.1

Judgment ⇐217

The doctrine of decisional finality provides that there must be a terminal point in every proceeding both administrative and judicial, at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein.

4. Public Utilities ⇐169.1

A decision of the Public Service Commission (PSC), once final, may only be modified if there is a significant change in circumstances or if modification is required in the public interest.

Rodney Gaddy and James A. McGee, Florida Power Corporation, St. Petersburg, FL; Jodi L. Corrigan and Marylin E. Culp of Annis, Mitchell, Cockey, Edwards & Roehn, P.A., Tampa, FL; and Sylvia H. Walbolt, Chris S. Coutroulis, Robert L. Ciotti, and Joseph H. Lang, Jr. of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., for Appellant.

Robert D. Vandiver, General Counsel, and Richard C. Bellak, Associate General Counsel, Florida Public Service Commission, Tallahassee, FL, for Appellee.

John Beranek and Lee L. Willis of Ausley & McMullen, Tallahassee, FL, for Lake Cogen, Ltd., Intervenor/Appellee.

Robert Scheffel Wright and John T. Lavia, III, Tallahassee, Florida; and Gail P. Fels, Office of the County Attorney, Miami, FL, for Miami–Dade County, Florida, and Montenay–Dade, Ltd., Intervenors/Appellees.

LEWIS, J.

This case involves an appeal from a decision of the Public Service Commission (the "Commission," or the "PSC") denying Florida Power Corporation's petition for declaratory statement on the basis of res judicata. *In re Petition of Florida Power Corp.*, 98 F.P.S.C. 12:65 (1998) (Docket No. 980509–EQ, Order No. PSC–98–1621–FOF–EQ, Dec. 4, 1998). We have jurisdiction. *See* art. V, § 3(b)(2), Fla. Const. The narrow question presented is whether the 1995 determination by the Florida Public Service Commission regarding its jurisdiction to entertain a certain petition for declaratory statement filed in 1994 by appellant, Florida Power Corporation (FPC), had a preclusive effect as applied to its later determination of jurisdiction to entertain a substantially similar petition for declaratory statement filed by FPC in 1998. Based upon the unique circumstances of this case, we affirm the PSC's determination that it did because the concept of administrative finality applies.

I. MATERIAL FACTS AND PROCEEDINGS BELOW

In March, 1991, FPC and certain qualifying facilities [1] ("QF"s) entered into negotiated contracts for the purchase of electrical power. One of these contracts involved the cogenerator who is the appellee here, Lake Cogen, Limited ("Lake Cogen"). All of the contracts contain the following provision, set forth as section 9.1.2:

> Except as otherwise provided in Section 9.1.1 hereof, for each billing month beginning with the Contract In–Service Date, the QF will receive electric energy payments based on the Firm Energy Cost calculated on an hour-by-hour basis as follows: (i) the product of the average monthly inventory chargeout price of fuel burned at the Avoided Unit Fuel

1. "Qualifying Facilities" are those small power generators and cogenerators who meet the qualifying criteria set forth in Rule 25–17.080 ("Definitions and Qualifying Criteria"), Florida Administrative Code, enabling them to contract with power companies for the purchase and sale of electrical power which they generate.

> Reference Plant, the Fuel Multiplier, and the Avoided Unit Heat Rate, plus the Avoided Unit Variable Q & M, if applicable, for each hour that the Company would have had a unit with these characteristics operating; and (ii) during all other hours, the energy cost shall be equal to the As Available Energy Cost.

This provision makes apparent allowance for the fact that electric utilities such as FPC typically have a number of electricity-generating facilities, not all of which may be "on line" at the same time, but which may be cycled into operation as appropriate to meet the customers' fluctuating energy demands. *See generally* Leonard S. Hyman, *America's Electric Utilities: Past, Present and Future* 22–30 (4th ed.1992). Thus, the contract provision establishes the method to determine, on a monthly basis, when the cogenerator will be entitled to receive higher "firm" energy payments for electricity pursuant to subsection (i) (when FPC would have operated the "avoided unit"—the facility which a utility such as FPC, by purchasing electrical power from a QF, avoids having to build to meet customer demand for electricity) or lower "as-available" payments pursuant to subsection (ii) (when such unit would not have been operated).

On July 1, 1991, in *In re Petition for Approval of Contracts*, 91 F.P.S.C. 7:60 (1991) (Docket No. 910401–EQ, Order No. 24734, July 1, 1991), the PSC reviewed the negotiated contracts and found them to be cost-effective for FPC's ratepayers (that is, not requiring payment to the cogenerators in excess of FPC's "avoided cost") under the criteria established in Rules 25–17.082 and 25–17.0832(2), Florida Administrative Code (providing that "[n]egotiated contracts will be considered prudent for cost recovery purposes if it is demonstrated by the utility that the purchase of firm capacity and energy from the qualifying facility pursuant to the rates, terms, and other conditions of the contract can reasonably be expected to contribute towards the deferral or avoidance of additional capacity construction or other capacity-related costs by the purchasing utility at a cost to the utility's ratepayers which does not exceed full avoided costs, giving consideration to the characteristics of the capacity and energy to be delivered by the qualifying facility under the contract"). As stated by this Court in *Panda–Kathleen, L.P. v. Clark*, 701 So.2d 322, 324 (Fla.1997), " '[a]voided cost' is the cost that a utility avoids by purchasing electrical power from a QF rather than generating the electrical power itself or purchasing the power from another source." In arriving at the estimated energy payment structure which the Commission approved, the contract used simplified assumptions regarding the "avoided unit."

During the first three years of the contract, FPC paid cogenerators firm energy prices at all hours of the day (thus, at the very least, implying that FPC would have operated the "avoided unit" at all times). However, thereafter (according to representations made to the Commission by FPC), FPC reviewed the operational status of the "avoided unit" described in section 9.1.2 of the contracts during minimum load conditions (that is, times of minimum customer demand for energy), and determined that the "avoided unit" would be scheduled off during certain minimum load hours of the day.

Based upon this review, on July 18, 1994, FPC unilaterally notified the parties to the contracts that, effective August 1, 1994, FPC would begin implementing section 9.1.2 as a basis for making certain "as available" energy payments for electricity (*i.e.*, assuming that the "avoided unit" would *not* be operating during those hours) instead of the "firm" energy payments which it had previously been making (*i.e.*, assuming, at least by implication, that the "avoided unit" *would* be operating during those hours). Three days later, on July 21, 1994, in an apparent attempt to justify its planned change in payments, FPC filed a petition with the Commission seeking a declaratory statement that sec-

tion 9.1.2 of its negotiated cogeneration contracts (including the contract with appellee here) was consistent with Rule 25–17.0832(4)(b), Florida Administrative Code.[2]

The appellee cogenerator, Lake Cogen, petitioned for leave to intervene and questioned whether the declaratory statement procedure was appropriate. In addition, Lake Cogen filed a motion to dismiss on the ground that the PSC did not have jurisdiction to consider FPC's petition. Lake Cogen also initiated a lawsuit in state court at this time, alleging breach of contract based upon FPC's planned change in payments, and seeking declaratory judgment.

On November 1, 1994, FPC amended its petition, asking the PSC to determine whether its manner of implementing the pricing mechanism set forth in section 9.1.2 of the negotiated contracts for the purchase of firm capacity and energy from certain QFs (to determine the period when as-available energy payments were to be substituted for firm energy payments), which would result in a planned change in payments, was lawful under section 366.051, Florida Statutes (1993), and complied with Rule 25–17.0832(4)(b), Florida Administrative Code, and the orders of the Commission approving the negotiated contracts. Thereafter, Lake Cogen filed an additional motion to dismiss the amended petition.

In *In re Petition by Florida Power Corp.*, 95 F.P.S.C. 2:263 (1995) (Docket no. 940771–EQ, Order No. PSC–95–0210–FOF–EQ, Feb. 15, 1995), the Commission granted the motion to dismiss. In so ruling, the Commission found that, although FPC had phrased its petition in terms of seeking a rule interpretation, it was really asking the Commission to adjudicate a contractual dispute,[3] a matter over which the Commission did not have jurisdiction. The order provided, in pertinent part:

> FPC has asked us to determine if its implementation of the pricing provision is lawful and consistent with Commission Rule 25–17.0832(4), Florida Administrative Code. *We believe that FPC's request is really a request to interpret the meaning of the contract term. FPC is not asking us to interpret the rule. It is asking us to decide that its interpretation of the contract's pricing provision is correct.* We believe that endeavor would be inconsistent with the intent of PURPA to limit our involvement in negotiated contracts once they have been established. *Furthermore, we agree with the cogenerators that the pricing methodology outlined in Rule 25–17.0832(4), Florida Administrative Code, is intended to apply to standard offer contracts, not negotiated contracts.* We have clearly said that we would not require any standard provisions, pricing or otherwise, for negotiated contracts. Therefore, whether FPC's implementation of the pricing provision is consistent

2. Subsections (a) and (b) of Rule 25–17.0832(4) provide:

> (4) Avoided energy payments.
>
> (a) For the purpose of this rule, avoided energy costs associated with firm energy sold to a utility by a qualifying facility pursuant to a utility's standard offer contract shall commence with the in-service date of the avoided unit specified in the contract. Prior to the in-service date of the avoided unit, the qualifying facility may sell as-available energy to the utility pursuant to Rule 25–17.0825(2)(a).
>
> (b) To the extent that the avoided unit would have been operated, had that unit been installed, avoided energy costs associated with firm energy shall be the energy cost of this unit. To the extent that the avoided unit would not have been operated, firm energy purchased from qualifying facilities shall be treated as as-available energy for the purposes of determining the megawatt block size in Rule 25–17.0825(2)(a).

3. The Commission, in later summarizing its decision, stated: "The Commission found that FPC was asking the Commission to adjudicate a contract dispute. The Commission held that it had no jurisdiction to adjudicate contract disputes involving negotiated cogeneration contracts." *In re Petition of Florida Power Corp.*, 98 F.P.S.C. at 12:66.

with the rule is really irrelevant to the parties' dispute over the meaning of the negotiated provision. In this case, we will defer to the courts to resolve that dispute. We note however, that courts have the discretion to refer matters to us for consideration to maintain uniformity and to bring the Commission's specialized expertise to bear upon the issues at hand.

We disagree with FPC's proposition that when the Commission issues an order approving negotiated cogeneration contracts for cost recovery, the contracts themselves become an order of the Commission that we have continuing jurisdiction to interpret....

Under certain circumstances we will exercise continuing regulatory supervision over power purchases made pursuant to negotiated contracts. We have made it clear that we will not revisit our cost recovery determinations absent a showing of fraud, misrepresentation or mistake; but if it is determined that any of those facts existed when we approved a contract for cost recovery, we will review our initial decision. That power has been clearly recognized by the parties through the "regulatory out" provisions of those contracts. We do not think, however, that the regulatory out provisions of negotiated contracts somehow confer continuing responsibility or authority to resolve contract interpretation disputes. Our authority derives from the statutes. *United Telephone Company v. Public Service Commission*, 496 So.2d 116 (Fla.1986). It cannot be conferred or inferred from the provisions of a contract.

For these reasons we find that the motions to dismiss should be granted. FPC's petition fails to set forth any claim that the Commission should resolve. We defer to the courts to answer the question of contract interpretation raised in this case. Thus, FPC's petition is dismissed.

In re Petition by Florida Power Corp., 95 F.P.S.C. at 2:269–70 (footnote omitted) (emphasis supplied).

With the PSC having refused to intervene in the dispute, the parties involved in the Lake Cogen litigation pending in state court then proceeded to enter into a proposed settlement agreement attempting to resolve all issues between them. Because this agreement included modifications to the power purchase contract, it required Commission approval pursuant to Rule 25–17.082, Florida Administrative Code. Accordingly, FPC filed with the Commission a "Petition for Approval of a Settlement Agreement." Upon considering the petition, the Commission, in a proposed agency action order, determined that the PSC had jurisdiction (in the context of reviewing the modifications to the original contract proposed in the settlement agreement before it) to construe the meaning of the contract as originally approved,[4] citing *In re Orange & Rockland Utilities, Inc.*, No. 96–E–0728, 1996 WL 707459 (N.Y.P.S.C. Nov.29, 1996). It further found that the exercise of such jurisdiction was not barred by the doctrine of administrative finality. Based upon its review of the petition, the PSC concluded that the proposed modifications, when compared with the original contract which the Commission had approved, would result in payments to the cogenerators in excess of current avoided energy costs:

> If as FPC contends, the contract contemplates that the "avoided unit" would

4. Commissioner Clark dissented, observing that "[t]he Order originally approving the contract had no specific amplification as to how the payments due under section 9.1.2 would be calculated, and when asked for clarification with respect to the calculation in the Petition for Declaratory Statement, *it was acknowledged that the dispute involved a contract interpretation, not a clarification of the basis on which the contract was approved for cost recovery.*" *In re Petition for Expedited Approval of Settlement Agreement*, 97 F.P.S.C. 11:202, 11:216 (1997) (Docket No. 961477–EQ; Order No. PSC–97–1437–FOF–EQ, Nov. 14, 1997) (emphasis supplied).

cycle in FPC's system economic dispatch and if as we believe and FPC contends, the contract provides for the use of actual fuel prices and not projected fuel prices, then Lake's assertion in the circuit that it is entitled to firm energy payments 100% of the time is suspect. If this assertion is suspect, then the "savings" associated with the buy out are overstated. If the Commission does in fact have the jurisdiction to resolve the question of what was contemplated at the time of approval, the uncertainty of the outcome of the circuit court litigation would not be a factor in the decision to approve the buy out.

. . . .

. . . Florida Power Corporation argues that, given the Commission's previous determination that it would defer to the circuit court, the Commission cannot revisit that question in the guise of a cost recovery approval/disallowance.

However, we are not, at this juncture, "revisiting" anything. What is before the Commission is a contract modification that we believe is based on an erroneous assumption. That is, that the cost effectiveness of the modification is based on the "litigation risk" associated with a circuit court determination of the operating characteristics of the "avoided unit" in a manner not contemplated or intended when the contract was approved. If, as FPC suggests (and Crossroads [*Orange & Rockland Utilities*] supports), this Commission has the jurisdiction to interpret and clarify its approval, there is no "risk" associated with an erroneous circuit court interpretation. The modification/buy-out then is clearly not cost-effective when measured by the standard of Rule 25–17.0836, Florida Administrative Code.

. . . .

When the Commission initially approves a negotiated contract, the determination of avoided costs is based on the utility's next identified capacity addition. At that point in time, the contract is evaluated for cost recovery purposes in accordance with the above referenced rules. *However, in evaluating contract modifications, continued cost recovery is based on savings compared to the existing contract.*

Rule 25–17.036(6) requires that:

> The modifications and concessions of the utility and developer shall be evaluated against both the *existing contract and the current value of the purchasing utility's avoided cost.* (Emphasis added)

Absent a modification, the utility's ratepayers remain obligated to pay costs as specified within the current contract. Therefore, modifications which result in costs above the existing contract are not appropriate for approval.

. . . .

The Settlement Agreement achieves benefits in the form of curtailment savings and reduced capacity and variable O & M payments. *However, compared to the more appropriate method of determining energy payments under the existing contract,* the Settlement Agreement increases costs to FPC's ratepayers by approximately $17.1 million NPV. Furthermore, contrary to Section 366.051, Florida Statutes, Section 210 of PURPA, and this Commission's rules, approval of the Settlement Agreement commits FPC's ratepayers to costs in excess of current avoided energy costs. For these reasons, we find that the Settlement Agreement should be denied.

In re Petition for Expedited Approval, 97 F.P.S.C. at 11:209–12 (emphasis added).[5]

5. The cogenerator, Lake Cogen, timely protested this order, and subsequently moved to dismiss the proceeding on grounds of mootness. On March 30, 1998, the Commission, pursuant to a unanimous vote, issued an order holding that the Lake Cogen Order was a nullity (because the settlement agreement which the order had disapproved had, by its own terms, expired for lack of such approval), and dismissing FPC's petition in the Lake Cogen–FPC Settlement Docket. *See In re Petition for Expedited Approval of Settlement*

On April 10, 1998, FPC filed with the PSC the petition for declaratory statement which is at issue here. Pursuant to "Rule 25–22.020, et. seq., F.A.C.," FPC petitioned the Commission as follows:

> FOR A DECLARATORY STATEMENT that, under Order no. PSC–97–1437–FOF–EQ entered in Dkt. 961477–EQ, Nov. 14, 1997 (the "Lake Docket"), [PURPA], Fla. Stat. § 366.051, and Rule 25–17.0832, F.A.C., the Commission interprets its Order No. 24734 entered in Dkt. 910401–EQ, July 1, 1991 [originally approving the negotiated contracts between FPC and respondents] to require that FPC:
>
> (A) Pay for energy based upon avoided energy costs, strictly as reflected in the Contract;
>
> (B) Use only the avoided unit's contractually-specified characteristics in § 9.1.2, and not other or additional unspecified characteristics that might have been applicable had the avoided unit actually been built, to assess its operational status for the purpose of determining when [respondents are] entitled to receive firm or as-available energy payments;
>
> (C) Use the actual chargeout price of coal to FPC's Crystal River ("CR") plants 1 and 2, resulting from FPC's prevailing mix of transportation, rather than the mix of transportation in effect at the time the Contract was executed or some other mix, to compute the level of firm energy payments to Dade.

The Commission denied this petition on the basis of administrative res judicata:

> Subsequent to the filing of FPC's petition in Docket No. 940771–EQ, Lake and other QFs, filed lawsuits in the state courts for breach of contract. On January 23, 1996, the Fifth Judicial Circuit Court issued a Partial Summary Judgement for Lake in Case No. 94–2354–CA–01.
>
> On April 9, 1998, FPC filed a Petition for a Declaratory Statement arguing that Order No. 24734, issued July 1, 1991, in Docket No. 901401–EQ, together with Orders Nos. PSC–97–1437–FOF–EQ and 24989, PURPA, Section 366.051, Florida Statutes, and Rule 25–17.082, F.A.C., establish that its contractual energy payments to Lake, including when firm or as-available payment is due, are limited to the analysis of avoided costs based upon the avoided unit's contractually-specified characteristics.
>
> On April 30, 1998, Lake filed a motion to dismiss FPC's request for a Declaratory Statement, a petition to intervene and a request for Oral Argument on the topics of res judicata, collateral estoppel and administrative finality....
>
> ....
>
> In its current petition, FPC asks us to consider certain authorities which postdate Order 0210 in determining whether the Commission can nonetheless exercise jurisdiction to issue the declaratory statement that FPC now petitions for. Those cases include the New York Public Service Commission's opinion in *Orange and Rockland Utilities, Inc. (Crossroads)*, Case 96–E–0728 [, 1996 WL 707459]; the Florida Supreme Court's decision in *Panda Kathleen, L.P. v. Clark, et al. (Panda)*, 701 So.2d 322 (Fla.1997) and our own *Order Denying Approval of Proposed Settlement (Lake)*, Order No. PSC–97–1437–FOF–EQ in Docket No. 961477–EQ.
>
> In *Crossroads*, which concerned a negotiated power purchase agreement between a utility and a cogenerator, the NYPSC held that it is within our authority to interpret our power purchase contract approvals[6].... The precedents in-

Agreement, 98 F.P.S.C. 3:392 (1998) (Docket No. 961477–EQ, Order No. PSC–98–0450, FOF–EQ, Mar. 30, 1998).

6. *See Orange & Rockland Utilities*, No. 96–E–0728, 1996 WL 707459 (stating, specifically, that, "[a]s was recently reaffirmed, it is within our authority to interpret our power purchase

volving interpretation of past policies and approvals, and *not the contract non-interference policy* that *Crossroads* cites, control here. [e.s.] *Crossroads*, p. 5 [, 1996 WL 707459]

While *Panda* involved a standard offer contract, FPC interprets the Florida Supreme Court's opinion to provide that

> the Commission has jurisdiction to clarify its orders and to construe its rules in order to ensure that contracts and payments thereunder do not exceed avoided cost.

Petition, at p. 14.

Finally, FPC points out that, consistent with *Crossroads* and other like holdings of the NYPSC, our *Lake* order reasoned that the cited New York cases

> involve a question that turns on what was meant when the contract was approved, and not on the determination of disputed facts and the application of those facts to an unambiguous provision.

Petition, p. 13–14.

In the adjudication of the instant petition, however, we find that we are *unable to apply these more recent cases* as directly to the case at hand as FPC argues we should. First, *this case is distinguishable* from both *Crossroads* and *Panda* in that *neither of those cases involved a prior determination which could be claimed to be, in effect res judicata as to the current controversy concerning pricing* between FPC and parties (including Lake) to the negotiated cogeneration contracts containing these identical pricing provisions. The cogenerators, during oral argument, asserted that, however we may decide to reflect such holdings as *Crossroads* or *Panda* in our future dispositions as to negotiated cogeneration contract issues, this controversy has already been determined in our dismissal of FPC's prior petitions in Order 0210 and may not be re-adjudicated now. We agree with that point and find that the doctrine of administrative finality *precludes* such re-adjudication as a matter of fairness to those who prevailed in the litigation of this issue previously. *Peoples Gas System v. Mason*, 187 So.2d 335 (Fla.1966). Moreover, *our Lake order* was only proposed agency action (PAA), which then became a legal nullity when the settlement proposal considered therein lapsed. Therefore, it *never matured into a final order so as to constitute this Commission's precedent.*

> In thus denying FPC's petition, *we need not reach today the issue of whether such cases as Crossroads, the reasoning in our Lake order or FPC's interpretation of Panda will or will not play a role in our consideration of future cases concerning negotiated cogeneration contracts post-approval.* We only decide that, *having resolved this pricing controversy previously* in Order 0210, *the prior resolution must stand*, consistent with the principles of administrative finality.

In re: Petition of Florida Power Corp., 98 F.P.S.C. at 12:66–68 (footnote added) (emphasis supplied).

On appeal, FPC argues that the PSC erred in giving preclusive effect to its 1995 dismissal of FPC's prior petitions, by Order 0210, in the present controversy. FPC also argues that the PSC's dismissal of the current petition on the ground that the same matter is pending in state court is not proper.

II. ANALYSIS

Despite the fact that all of the parties present arguments directed to whether (absent the unique procedural history involved in this case) the Commission does or does not have jurisdiction over some aspect of a contractual controversy such as theirs, that issue is not before the Court at

contract approvals, and that jurisdiction has been upheld by the courts") (citing *Matter of Indeck–Yerkes Energy Servs. v. Public Serv. Comm'n. of State of N.Y.*, 164 A.D.2d 618, 564 N.Y.S.2d 841 (1991)).

this time. What *is* before the Court is the question of whether the Commission's 1995 determination *of its own subject matter jurisdiction* over the present controversy is a bar to the Commission's subsequent determination *of jurisdiction* over the same claim. To resolve that issue, the Court must decide whether the jurisdictional issue posed by the 1998 petitions was either actually raised and determined, or could have been raised and determined, in the 1994–95 proceedings.

[1] In reviewing the PSC's determination of its own subject matter jurisdiction, this Court has applied the standard established in *Pan American World Airways, Inc. v. Florida Public Service Commission*, 427 So.2d 716 (Fla.1983). *See Panda*, 701 So.2d at 325 (applying *Pan American* standard of review to, *inter alia*, PSC's determination of its jurisdiction to construe terms of standard offer contract). Pursuant to that review standard, the Court presumes "orders of the Commission to be correct, and ... only determine[s] whether the Commission's action comports with the essential requirements of law and is supported by competent, substantial evidence." *Id.* at 325–26 (citing *Pan American*, 427 So.2d at 717).

[2] Applying this standard, under the circumstances of this case, the PSC's prior, unappealed ruling regarding its jurisdiction to entertain the controversy addressed in FPC's petitions-even if erroneous [7]—operates as a bar to a subsequent determination *of that jurisdiction* over the same claim. *Cf. State Dep't of Transp. v. Bailey*, 603 So.2d 1384, 1387 (Fla. 1st DCA 1992) (acknowledging that "even an erroneous determination on the question of subject matter jurisdiction may become res judicata on that issue if the jurisdictional question was actually litigated and decided, or if a party had an opportunity to contest subject matter jurisdiction and failed to do so," although finding it inapplicable under the facts of the case) (citing 11 Charles Alan Wright & Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure*, § 2862, (Supp.1992) (reflecting cases in which an erroneous exercise of jurisdiction was not challenged by appeal)); *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1411–13 (8th Cir.1983) (holding that dismissal of a suit for lack of federal subject-matter jurisdiction precludes relitigation of the same issue of subject-matter jurisdiction in a second federal suit on the same claim). This result is unchanged even if there has been a subsequent change in case law potentially affecting the scope of the Commission's jurisdiction over the controversy-particularly where (as here) such subsequent case law is not directly on point [8] and irrefutably controlling. *Cf. Plymouth Citrus Products Co-op. v. Williamson*, 71 So.2d 162 (Fla.1954) (involving workers' compensation claim barred by prior determination that claimant had not suffered an accident based upon case law prevailing at the time of the first determination, even though statute of limitations period had not expired, and controlling case law developed in interim would have provided a basis for the claim); *Sugarmill Woods Civic Ass'n, Inc. v. Southern States Utilities*, 687 So.2d 1346, 1349 (Fla. 1st DCA 1997) (holding that intervening PSC order reflecting that PSC had jurisdiction over certain facilities should not be retroactively applied because "[a] subsequent order by the body which rendered the order under review is not the

7. The narrow issue addressed here is the preclusive effect of the PSC's prior determination in this case as applied to FPC's 1998 petitions for declaratory relief. We do not address the substantive issue of whether, absent the unique circumstances presented here, the Commission would have jurisdiction to entertain such a petition.

8. This Court's intervening *Panda* decision involved a "standard offer" contract. The issue of whether the *Panda* reasoning could (or could not) be applied broadly to suggest that the exercise of jurisdiction would also be appropriate where Commission rules have been incorporated into a negotiated contract is not properly before us, and therefore we do not address it here.

kind of 'change in the law' which the appellate court is bound to apply to pending cases"); *Hillhaven Corp. v. Department of Health and Rehab. Servs.*, 625 So.2d 1299 (Fla. 1st DCA 1993) (holding that a Supreme Court decision which invalidated a statute related to certain rules, and which was rendered after adoption of the rules but before commencement of the proceeding challenging them, applied to invalidate the rules at issue), *review denied*, 634 So.2d 623 (Fla.1994).

In *Plymouth Citrus Products*, this Court considered whether res judicata applied to bar a workers' compensation claim where the Deputy Commissioner had previously made a determination (on the merits) based upon the then-prevailing case law, the claimant had not sought appellate review, and, thereafter, the controlling precedent changed, so that the claimant would have been entitled to recover from the employer under the changed case law. The statute of limitations had not expired when the case law changed, and the claimant again filed his claim, in the form of a petition for modification. The full Commission accepted this petition "as the filing of a new claim by the claimant," determining, based upon the current case law, that "the claimant suffered a compensable accident for which claim had been filed within the proper time limit" and that "the previous adjudication between the parties is not res judicata to this present claim." 71 So.2d at 163.

In reversing this order, this Court disagreed with the Commission's analysis:

> There must be an end to litigation sometime. As to the facts in this particular case, the doctrine of res adjudicata applies.
>
> The case of *Wagner v. Baron*, Fla., 64 So.2d 267, was strongly relied upon by petitioner in this case but it is not applicable. In that case we were dealing with a statute which imposed certain additional liabilities upon the father of a bastard child in the nature of support for the said child during a certain period of time and for the determination of the question of fatherhood. There was no question involved in that case of an intervening decision which changed the rule of law or the responsibilities, duties and liabilities of the father of the bastard child. The change in that case was effected by a statute.
>
> After a judgment, order or decree has become final and the time for appeal has expired, an intervening decision which may change the liability or *the rule of law applicable to a case is not sufficient* ground to open the case up *for the filing of a new claim under the same facts.*
>
> It appears that the Full Commission did not proceed in accordance with the essential requirements of the law in this matter. The writ of certiorari should be granted and the order of the Full Commission, affirming the Deputy Commissioner, should be quashed and set aside and a proper order entered by the Full Commission, reversing and setting aside the order of the Deputy Commissioner.

Plymouth Citrus Products, 71 So.2d at 163 (emphasis supplied) (citations omitted). Applying these principles to the present case, the Commission's determination of its jurisdiction to entertain the 1998 petition for declaratory statement regarding the parties' negotiated contract was governed by the doctrine of administrative finality.

Further, even if the jurisdictional issue raised by appellant in its 1998 petition was not *actually* determined by the PSC's prior decision regarding jurisdiction over the 1994 petition, it appears that it *could have been* resolved by the PSC at that time. In reviewing the two petitions, there is no question that they are substantively the same, despite the semantical difference.[9]

9. Focusing on the same technical distinction which is urged by FPC here, the New York Public Service Commission in *Orange & Rockland Utilities* suggested that, while a commission may *not* (as the Florida PSC determined) resolve a contractual dispute between parties to a negotiated contract, it *may* properly entertain a petition for declaratory statement

That semantical difference is "*what the contract terms mean*" (1994) (*i.e.*, an interpretation of the contract itself) versus "what the contract terms *meant to the PSC when it approved the contract*") (1998) (*i.e.*, an interpretation of the Commission's contract approval order). Although the wording of the 1994 and 1998 jurisdictional issues is not identical, because FPC could have challenged the Commission's jurisdictional analysis in an appeal from the denial of its 1994 petition (but did not), the doctrine of decisional finality still applies. *Cf. Albrecht v. State*, 444 So.2d 8, 11–12 (Fla.1984) (reflecting that, for the counterpart of administrative finality—res judicata—to apply, several conditions must occur simultaneously, one of which is an identity of the cause of action, and that the "determining factor in deciding whether the cause of action is the same is whether the facts or evidence necessary to maintain the suit are the same in both actions") (citations omitted); *accord, Youngblood v. Taylor*, 89 So.2d 503, 505 (Fla.1956) (observing that "the test of the identity of the causes of action, for the purpose of determining the question of res adjudicata, is the identity of the facts essential to the maintenance of the actions") (citing *Gordon v. Gordon*, 160 Fla. 838, 36 So.2d 774, 777 (1948) (quoting *Bagwell v. Bagwell*, 153 Fla. 471, 14 So.2d 841, 843 (1943)).

[3, 4] The doctrine of decisional finality provides that there must be a "terminal point in every proceeding both administrative and judicial, at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein." *Austin Tupler Trucking, Inc. v. Hawkins*, 377 So.2d 679, 681 (Fla.1979). Here, because there is an identity of essential facts common to FPC's 1994 and 1998 petitions, along with an identity of the substance of the issue presented, the same issue of subject matter jurisdiction implicated by the 1998 petition, even if not actually raised in 1994, could have been raised at that time. A decision, once final, may only be modified if there is a significant change in circumstances or if modification is required in the public interest. *See Austin Tupler Trucking*, 377 So.2d at 681. Although the Court will avoid "too doctrinaire" an application of the rule, *see Peoples Gas System, Inc. v. Mason*, 187 So.2d 335, 339 (Fla.1966), the circumstances here do not compel a different result.

Even assuming *arguendo* (as appellant urges) that a change in law could qualify as "changed circumstances" for purposes of this analysis, the theory does not apply. At the time FPC filed its first petition, there was *already* an out-of-state ruling reflecting that it was properly within the ambit of a public service commission's authority to interpret the scope of its contract approval. *See Indeck–Yerkes Energy Servs. v. Public Serv. Comm'n*, 164 A.D.2d 618, 564 N.Y.S.2d 841 (1991). Indeed, this was the opinion cited by the New York Public Service Commission in *Orange & Rockland Utilities* when it stated that its jurisdiction to interpret the scope of its original contract approvals "has been upheld by the courts."

In *Indeck–Yerkes*, the New York Supreme Court, Appellate Division, in approving the public service commission's declaratory statement interpreting the scope of its original approval of a cogeneration contract, carefully framed the issue which had been addressed by the commission:

> The issue in this proceeding is not one of pure interpretation of the language of the agreement between petitioner and NiMo by application of common-law

seeking clarification of how the commission first interpreted that contract at the time it was approved. *See Orange & Rockland Utilities*, No. 96–E–0728, 1996 WL 707459 (providing that it "is within [the commission's] authority to interpret our power purchase contract approvals, and that jurisdiction has been upheld by the courts[; therefore,] the approval of the original contract for the Crossroads site may be explained and interpreted, and O & R's petition may be construed as requesting that relief").

principles of contract. Rather, it is whether there was a rational basis to the PSC's determination of the scope of its prior approval of the parties' agreement, particularly the price structure contained therein, as not covering other than insignificant deviations from the contract's stated initial output of approximately 49 MW.

564 N.Y.S.2d at 843.[10] The distinction stated by the *Indeck–Yerkes* court in framing the issue before it (involving an interpretation of the scope of the commission's order approving the subject agreement, rather than a "pure interpretation" of the agreement itself) is the same basis upon which FPC relies to differentiate its 1998 petition from its 1994 petition.

Thus, it is clear that FPC could have pursued this theory of jurisdiction throughout the proceedings involving its 1994 petition. Given its failure to do so, including its failure to appeal from dismissal of the 1994 petition, under the unique circumstances presented here, decisional finality applies.[11] The PSC's decision is affirmed.

It is so ordered.

WELLS, C.J., and SHAW, HARDING, ANSTEAD, PARIENTE and QUINCE, JJ., concur.

10. Although the *Indeck–Yerkes* opinion does not reflect whether the subject contract was "standard" or negotiated, from the discussion of the contract terms, it appears to have been negotiated. *Id.* at 842.

BEAL BANK, SSB, Petitioner,

v.

ALMAND AND ASSOCIATES, etc., et al., Respondents.

No. SC93384.

Supreme Court of Florida.

March 1, 2001.

Creditor sought to garnish bank accounts that debtors held with their wives. The Circuit Court, St. Johns County, Robert K. Mathis, J., dissolved the writs. Creditor appealed. The District Court of Appeal affirmed in part and reversed in part and certified questions of great public importance. Review was granted. The Supreme Court, Pariente, J., held that: (1) a presumption arose in favor of a tenancy by the entireties; (2) the presumption shifts the burden of proof to the creditor to prove by a preponderance of evidence that a tenancy by the entireties was not created, disapproving *Terrace Bank v. Brady*, 598 So.2d 225; (3) the signature cards did not disclaim the tenancy by the entireties or indicate another form of ownership, disapproving *In re Guardianship of Medley*, 573 So.2d 892; and (4) the debtors could prove a tenancy by the entireties by extrinsic evidence if the bank did not allow that form of ownership.

Approved in part, quashed in part, and remanded.

Harding, J., dissented.

Wells, C.J., dissented and filed opinion.

1. Husband and Wife ⇐14.2(1)

Property held as a tenancy by the entireties possesses six characteristics: (1)

11. Based upon this conclusion, we need not reach the alternative issue raised on this appeal (that it was proper for the Commission to deny FPC's petition for declaratory statement where, as here, the matter in controversy was pending in state court).

D

Section 403.519, Florida Statutes - Exclusive Forum for Determination of Need

(4)(e) After a petition for determination of need for a nuclear...power plant has been granted, the right of a utility to recover any costs incurred prior to commercial operation...shall not be subject to challenge unless and only to the extent the commission finds, based on a preponderance of the evidence adduced at a hearing before the commission under s. 120.57, that certain costs were imprudently incurred. Proceeding with the construction of the nuclear...power plant following an order by the commission approving the need for the nuclear...power plant under this act shall not constitute or be evidence of imprudence.

E

Rule 25-6.0423(5)(c)(2) F.A.C.

Florida Admin. Code 25-6.0423

2. The Commission shall, prior to October 1 of each year, conduct a hearing and determine the reasonableness of projected pre-construction expenditures and the prudence of actual pre-construction expenditures expended by the utility; or, once construction begins, to determine the reasonableness of projected construction expenditures and the prudence of actual construction expenditures expended by the utility, and the associated carrying costs. Within 15 days of the Commission's vote, the Commission shall enter its order. Annually, the Commission shall make a prudence determination of the prior year's actual construction costs and associated carrying costs. To facilitate this determination, the Commission shall conduct an on-going auditing and monitoring program of construction costs and related contracts pursuant to Section 366.08, F.S. In making its determination of reasonableness and prudence the Commission shall apply the standard provided pursuant to Section 403.519(4)(e), F.A.

F

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Nuclear cost recovery clause.	DOCKET NO. 100009-EI ORDER NO. PSC-11-0095-FOF-EI ISSUED: February 2, 2011

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR
RONALD A. BRISÉ
EDUARDO BALBIS
JULIE I. BROWN

APPEARANCES:

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DOCUMENT NUMBER-DATE
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FINAL ORDER DEFERRING FLORIDA POWER & LIGHT COMPANY SPECIFIC ISSUES TO THE 2011 NCRC HEARING, AND ALLOWING RECOVERY SUBJECT TO REFUND, DECLINING TO IMPLEMENT A RISK SHARING MECHANISM, AND APPROVING NUCLEAR COST RECOVERY AMOUNTS FOR PROGRESS ENERGY FLORIDA, INC.

BY THE COMMISSION:

BACKGROUND

On March 1, 2010, Progress Energy Florida, Inc. (PEF) and Florida Power & Light Company (FPL) filed petitions seeking prudence review and final true-up of the 2009 costs for certain nuclear power plant projects pursuant to Rule 25-6.0423, Florida Administrative Code, (F.A.C.) and Section 366.93, Florida Statutes (F.S.). On April 30, 2010, PEF filed a petition seeking approval to recover estimated 2010 costs and projected 2011 costs. On May 3, 2010, FPL filed its petition seeking approval to recover estimated 2010 costs and projected 2011 costs.

Both companies requested recovery of these costs through the Capacity Cost Recovery Clause (CCRC).

PEF's petitions addressed two nuclear projects. The first PEF project is a multi-phased uprate of the existing nuclear generating plant, Crystal River Unit 3 (CR3 Uprate). PEF obtained an affirmative need determination for the CR3 Uprate by Order No. PSC-07-0119-FOF-EI.[1] The second PEF project is the construction of two new nuclear generating plants, Levy Units 1 & 2 (LNP). PEF obtained an affirmative need determination for the LNP by Order No. PSC-08-0518-FOF-EI.[2]

FPL's petition also addressed two nuclear projects. The first FPL project is composed of extended power uprate activities at its existing nuclear generating plants, Turkey Point Units 3 & 4 and St. Lucie Units 1 & 2. FPL obtained an affirmative need determination for its extended power uprate project by Order No. PSC-08-0021-FOF-EI.[3] The second FPL project is the construction of two new nuclear generating plants, Turkey Point Units 6 & 7. FPL obtained an affirmative need determination for the two new nuclear generating plants by Order No. PSC-08-0237-FOF-EI.[4]

Traditionally, all eligible power plant construction projects have been afforded the same regulatory accounting and ratemaking treatment. That is, once the need for a project has been determined, the utility books all expenditures associated with the project into account 107 Construction Work in Progress (CWIP) for that particular project. A monthly allowance-for-funds-used-during-construction (AFUDC) rate is applied to the average balance of this account and the resulting dollar amount is then added to the account balance. This process continues until the completion of the project.

Once the plant is placed in commercial service, the CWIP account balance is transferred to the appropriate plant-in-service account and becomes part of the utility's rate base. The impacts of including the total project costs in a utility's rate base, as well as the impacts of additional plant operational expenses, are addressed during a subsequent proceeding wherein it is determined whether customer base rate charges should be changed in order to provide the opportunity to recover these costs.

In 2006, the Florida Legislature enacted Section 366.93, F.S., creating an alternative cost recovery mechanism in order to encourage utility investment in nuclear electric generation in

[1]Order No. PSC-07-0119-FOF-EI, issued February 8, 2007, in Docket No. 060642-EI, In re: Petition for determination of need for expansion of Crystal River 3 nuclear power plant, for exemption from Bid Rule 25-22.082, F.A.C., and for cost recovery through fuel clause, by Progress Energy Florida, Inc.

[2]Order No. PSC-08-0518-FOF-EI, issued August 12, 2008, in Docket No. 080148-EI, In re: Petition for determination of need for Levy Units 1 and 2 nuclear power plants, by Progress Energy Florida, Inc.

[3]Order No. PSC-08-0021-FOF-EI, issued January 7, 2008, in Docket No. 070602-EI, In re: Petition for determination of need for expansion of Turkey Point and St. Lucie nuclear power plants, for exemption from Bid Rule 25-22.082, F.A.C. and for cost recovery through the Commission's Nuclear Power Plant Cost Recovery Rule, Rule 25-6.0423, F.A.C.

[4]Order No. PSC-08-0237-FOF-EI, issued April 11, 2008, in Docket No. 070650-EI, In re: Petition to determine need for Turkey Point Nuclear Units 6 and 7 electrical power plant, by Florida Power & Light Company.

Florida. Section 366.93, F.S., authorized us to allow investor-owned electric utilities to recover certain construction costs in a manner that reduces the overall financial risk associated with building a nuclear power plant. In 2007, Section 366.93, F.S., was amended to include integrated gasification combined cycle plants, and in 2008, the statute was amended to include new, expanded, or relocated transmission lines and facilities necessary for the new power plant. The statute required the adoption of rules that provide for, among other things, annual reviews and cost recovery for nuclear plant construction through the existing capacity cost recovery clause. Rule 25-6.0423, F.A.C., was adopted to implement Section 366.93, F.S.

Pursuant to Rule 25-6.0423(4) and (5), F.A.C., once a utility obtains an affirmative need determination for a power plant covered by Section 366.93, F.S., the affected utility may petition for cost recovery using the alternative mechanism. Three types of prudently incurred costs are described in the rule for such consideration.

- Site selection costs are costs incurred prior to the selection of a site. A site is deemed selected upon the filing for a determination of need. (Rule 25-6.0423(2)(e) and (f), F.A.C.)

- Preconstruction costs are those costs incurred after a site is selected through the date site clearing work is completed. (Rule 25-6.0423(2)(g), F.A.C.)

- Construction costs are costs that are expended to construct the power plant including, but not limited to, the costs of constructing power plant buildings and all associated permanent structures, equipment and systems. (Rule 25-6.0423(2)(i), F.A.C.)

In Order No. PSC-08-0749-FOF-EI, issued October 12, 2008, we approved stipulations among the parties to Docket No. 080009-EI, recommending that site selection costs be treated in the same manner as pre-construction costs. Pursuant to Section 366.93(2)(a), F.S., and Rule 25-6.0423(5), F.A.C., all prudently incurred preconstruction costs, as well as the carrying charges on prudently incurred construction costs are to be recovered directly through the CCRC.

Rule 25-6.0423(5), F.A.C., sets forth the process by which we conducts an annual hearing to determine the recoverable amount that will be included in the CCRC pursuant to Section 366.93, F.S. This is the third year of the nuclear cost recovery roll-over docket (NCRC).

Intervention in the 2010 NCRC proceeding was granted to the following parties: the Office of Public Counsel (OPC), Florida Industrial Power Users Group (FIPUG), White Springs Agricultural Chemicals Inc. d/b/a PCS Phosphate – White Springs (PCS Phosphate), Southern Alliance for Clean Energy (SACE), and the Federal Executive Agencies (FEA). Testimony and associated exhibits were filed by PEF, FPL, OPC, SACE, and our staff.

The evidentiary hearing for the PEF portion of the 2010 NCRC was held on August 24-25, 2010. The FPL portion of the evidentiary hearing was held on August 26-27, 2010 and September 7, 2010. During the FPL portion of the hearing FPL, OPC, and FIPUG filed a joint

motion to defer the resolution of all FPL-specific issues until the 2011 NCRC, except the issue concerning the risk sharing mechanism. On September 7, 2010, we approved the motion.

Subsequently, on October 26, 2010, we approved the one legal issue and all the factual issues pertaining exclusively to PEF. However, we deferred the other legal issue (does the Commission have the authority to require a "risk sharing" mechanism) because the resolution of this issue would impact both FPL and PEF, and the Florida First District Court of Appeal stayed this proceeding as well as all other matters pertaining to FPL. On October 26, 2010, we deferred the resolution of the other legal issue to the 2011 NCRC proceeding due to the pending court case. However, since the court case has been resolved and the stay lifted, we moved forward with a resolution of that issue at our January 11, 2011, Agenda Conference.

All parties, excluding FEA, filed post-hearing briefs on September 10, 2010. We have jurisdiction over these matters pursuant to Section 366.93, F.S., and other provisions of Chapter 366, F.S.

List of Acronyms and Abbreviations	
AFUDC	Allowance for funds used during construction
CCRC	Capacity Cost Recovery Clause
CFR	Code of Federal Regulations
COL	Combined operating license
COLA	Combined operating license application (NRC filings)
Commission	Florida Public Service Commission
CPVRR	Cumulative present value revenue requirement
CR3 Uprate	Multi-phased uprate project at PEF's Crystal River Unit 3
CWIP	Construction work in progress
CO_2	Carbon dioxide
DEP	Department of Environmental Protection
EPC	Engineering, procurement and construction
F.A.C.	Florida Administrative Code
FEA	Federal Executive Agencies
FIPUG	Florida Industrial Power Users Group
FPL	Florida Power & Light Company
F.S.	Florida Statutes
kWh	Kilowatt-hour (1000 watt-hours)
LAR	License amendment request (NRC filings)
LNP	Levy Units 1 & 2 project
LWA	Limited work authorization (NRC filings)
MW	Megawatt (1,000,000 watts)
NCRC	Nuclear Cost Recovery Clause
NRC	Nuclear Regulatory Commission
O&M	operation and maintenance
OPC	Office of Public Counsel
PEF	Progress Energy Florida, Inc.
PCS Phosphate	White Springs Agricultural Chemicals Inc. d/b/a PCS Phosphate – White Springs
RAI	Request for additional information (NRC filings)
ROE	Return on equity
SACE	Southern Alliance for Clean Energy
SMC	Senior Management Committee
Shaw/Westinghouse	A consortium of Shaw-Stone & Webster and Westinghouse that owns and controls the design of the AP1000 nuclear power plant
USACE	United States Army Corps of Engineers

DECISION

I. Deferral of Florida Power & Light Issues[5]

As stated in the above, during the FPL portion of the hearing FPL, OPC, and FIPUG filed a joint motion to defer the resolution of all FPL-specific issues until the 2011 NCRC, except the issue concerning the risk sharing mechanism. (Attachment A) On September 7, 2010, we approved the motion. By approving the motion, FPL is authorized to include $31,288,445 as its total 2011 jurisdictional amount in the calculation of its 2011 Capacity Cost Recovery Factor.

II. Risk Sharing Mechanism[6]

To examine whether we have the authority to require a "risk sharing" mechanism, we believe that it is critical to analyze Section 366.93(2), F.S., and our past decisions. Section 366.93(2), F.S., states in pertinent part:

> Within 6 months after the enactment of this act, the commission shall establish, by rule, alternative cost recovery mechanisms for the recovery of costs incurred in the siting, design, licensing, and construction of a nuclear power plant.... Such mechanisms shall be designed to promote utility investment in nuclear power plants and allow for recovery in rates of all prudently incurred costs.

(Emphasis added)

The statute expressly provides that a utility shall be allowed to recover all prudently incurred costs. The statute is silent regarding a risk sharing mechanism. As discussed below, we find that the only statutory requirement is that the utility prove that its costs in new nuclear power plant capacity were prudently incurred.

Following the directive from the Florida Legislature, we adopted Rule 25-6.0423, F.A.C., which expressly provides for recovery of all prudently incurred costs resulting from the siting, design, licensing, and construction of a nuclear power plant. Rule 25-6.0423, F.A.C., implements the statute by using the exact or similar language from Section 366.93, F.S., and does not provide for a risk sharing mechanism that would preclude a utility from recovering all prudently incurred costs. However, the rule does provide for an annual prudence review of the prior year's costs. Although costs are initially recovered on a projected basis, ultimately, a utility must prove that those costs were prudently incurred to avoid a disallowance of recovery (i.e., refund costs determined to be imprudently incurred). Thus, we find that the only requirement is that the utility must prove its costs were prudently incurred to recover said costs.

The intervenors argue that we have the authority to implement a risk sharing mechanism pursuant to our authority to prescribe fair, just, and reasonable rates. They contend that the statute and the rule allow us to keep costs from escalating to unfair dimensions that would require customers to bear all of the risk when the existing projects face significant uncertainty.

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[5] Commissioner Argenziano, Edgar, Skop, Graham, and Brisé participated in this portion of the decision.
[6] Commissioner Graham, Edgar, Brisé, Balbis, and Brown participated in this portion of the decision.

Also, the intervenors assert that we have broad authority and discretion to ensure that the purpose and intent of the rule and statute are met in order to protect customers from imprudence. Moreover, they believe that without an implementation of a risk sharing mechanism, the utilities do not have "skin in the game." The intervenors cite several Florida cases as examples to support their position that we have broad authority and discretion to implement a risk sharing mechanism.[7]

We agree with the intervenors that we have broad authority and discretion to set fair, just, and reasonable rates and charges. The cases citied by the intervenors have merit for said proposition. For example, we find that Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), and Richter v. Florida Power Corporation, 366 So. 2d 798 (Fla. 2d DCA 1979), are persuasive of the broad principle it espouse. In Storey v. Mayo, the Court held that "the power of the Commission over privately-owned utilities is omnipotent within the confines of the statutes and the limits of organic law." Id. at 307; In Richter v. Florida Power Corporation, the Court held that

> Chapter 366, Chapter 366, Fla.Stat. (1977) embraces the statutory regulation of public utilities. In § 366.01 the legislature has mandated that the regulation of public utilities "is declared to be in the public interest and this chapter . . . shall be liberally construed for the accomplishment of that purpose."

Id. at 799; OPC Br. 6.

Section 366.93, F.S., however, is unambiguous in its language as it relates to recovery of costs, and it restricts our authority by statute from implementing a risk sharing mechanism that would preclude a utility from recovery of all prudently incurred costs, despite our broad authority to set fair, just, and reasonable rates per Storey v. Mayo. The statute specifically states that the recovery mechanism adopted by the Commission shall be designed to allow a utility to recover all prudently incurred costs. Moreover, it is settled law in Florida that when a general statute and a specific statute cover the same subject area, the specific statute controls. School Board of Palm Beach County v. Survivors Charter Schools, Inc., 3 So. 3d 1220, 1233 (Fla. 2009).[8] Here, our authority pursuant to Section 366.06, F.S., to set fair, just, and reasonable rates does not control cost recovery, because the Florida Legislature enacted Section 366.93, F.S., to specifically govern nuclear cost recovery in Florida. Thus, we find that our authority is limited as it relates to implementing a risk sharing mechanism for recovery of the costs associated with nuclear power plants.

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[7] Storey v. Mayo, 217 So. 2d 304 (Fla. 1968); Richter v. Florida Power Corporation, 366 So. 2d 798 (Fla. 2d DCA 1979); City Gas Co. v. People Gas System, Inc., 182 So. 2d (Fla. 1965); Southern Bell v. Bevis, 279 So. 2d 285 (Fla. 1973); and Gulf Power Company v. Bevis, 296 So. 2d 482 (Fla. 1974). OPC also cited Order No. PSC-05-0187-PCO-EI, issued February 17, 2005, in Docket No. 041291-EI, In re: Petition for authority to recover prudently incurred storm restoration costs related to 2004 storm season that exceed storm reserve balance, by Florida Power & Light Company.

[8] School Board of Palm Beach County v. Survivors Charter Schools, Inc., were cited in both PEF's and FPL's briefs for the proposition that when a general statute and a specific statute covers the same subject area, the specific statute controls.

However, we find that we do have the authority to address options relating to the timing of recovery and matters associated with rate impacts over the term of the projects, prior to and subsequent to the commercial in service dates of the nuclear power plants. For example, in Order No. PSC-09-0783-FOF-EI, issued November 19, 2009, in Docket No. 090009-EI, In re: Nuclear cost recovery clause, we approved PEF's request to establish a rate management plan whereby costs approved for recovery could be deferred to a later date in order to manage the rate impact for PEF's customers in a given year.[9] This authority is derived from our broad ratemaking powers to set fair, just, and reasonable rates and charges pursuant to Section 366.04, F.S., and does not conflict with the ultimate directive of Section 366.93, F.S., to allow recovery of all prudently incurred costs.

In conclusion, based upon the analysis above, we find that we do not have the authority under the existing statutory framework to require a utility to implement a risk sharing mechanism that would preclude a utility from recovering all prudently incurred costs resulting from the siting, design, licensing, and construction of a nuclear power plant. To do so would limit the scope and effect of a specific statute, and an agency may not modify, limit, or enlarge the authority it derives from the statute. Rinella v. Abifaraj, 908 So. 2d 1126, 1129 (Fla. 1st DCA 2005).

III. Progress Energy Florida, Inc. Specific Issues[10]

PEF - Levy Units 1 & 2

Section 366.93, F.S., provides for advanced cost recovery for utilities engaged in the siting, design, licensing, and construction of nuclear power plants. We have interpreted this statute to include building of new nuclear power plant capacity. Order No. PSC-08-0749-FOF-EI, issued on November 12, 2008, in Docket No. 080009-EI, In re: Nuclear Cost Recovery Clause; and Order No. PSC-09-0783FOF-EI, issued on November 11,2009, in Docket No. 090009-EI, In re: Nuclear Cost Recovery Clause. In analyzing this issue, the main question for us to consider is whether a utility must engage in the siting, design, licensing, and construction of nuclear power plant activities simultaneously in order to meet the statutory requirements under Section 366.93, F.S.

Based upon our analysis of the applicable statute, our prior decisions, and prior Florida case law, we do not find that a utility must engage in the siting, design, licensing, and construction of nuclear power plant activities simultaneously in order to meet the statutory requirements under Section 366.93, F.S. We find that a utility must continue to demonstrate its intent to build the nuclear power plant for which it seeks advance recovery of costs to be in compliance with Section 366.93, F.S. To interpret Section 366.93, F.S., to require a utility to engage in all activities simultaneously in order to qualify for advance cost recovery is an incorrect interpretation of the statute for the reasons discussed below.

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[9] In 2009, PEF requested a midcourse correction to defer $198 million of nuclear cost included in the Capacity Cost Recovery Clause in order to mitigate rate impact to its customers. The midcourse correction was approved by Order No. PSC-09-0208-PAA, issued April 6, 2009, in Docket No. 090001-EI, In re: Fuel Adjustment Clause.

[10] Commissioner Graham, Edgar, Skop and Brise' participated in this portion of the decision.

SECTION 120.57(1)(b), FLORIDA STATUTES:

ALL PARTIES SHALL HAVE AN OPPORTUNITY TO RESPOND, TO PRESENT EVIDENCE AND ARGUMENT ON ALL ISSUES INVOLVED, TO CONDUCT CROSS-EXAMINATION. . .

✓OPC ✓
Parties/Staff Handout
Hearing event date 8/10/2011
Docket No. 110009

ISSUE 10

SHOULD THE COMMISSION APPROVE WHAT FPL HAS SUBMITTED AS ITS 2010 AND 2011 ANNUAL DETAILED ANALYSES OF THE LONG-TERM FEASIBILITY OF COMPLETING THE EPU PROJECT, AS PROVIDED FOR INRULE 25-6.0423, F.A.C.? IF NOT, WHAT ACTION, IF ANY, SHOULD THE COMMISSION TAKE?

ISSUE 10A

SHOULD THE COMMISSION ACCEPT THE QUANTITATIVE METHODOLOGY THAT FPL EMPLOYED TO ASSESS THE LONG-TERM FEASIBILITY OF THE EPU PROJECT?

ISSUE 10 (NOT IN DISPUTE)

SHOULD THE COMMISSION APPROVE WHAT FPL HAS SUBMITTED AS ITS 2010 AND 2011 ANNUAL DETAILED ANALYSES OF THE LONG-TERM FEASIBILITY OF COMPLETING THE EPU PROJECT, AS PROVIDED FOR INRULE 25-6.0423, F.A.C.? IF NOT, WHAT ACTION, IF ANY, SHOULD THE COMMISSION TAKE?

OPC'S ISSUE 10B

SHOULD THE COMMISSION REQUIRE FPL TO PERFORM SEPARATE LONG-TERM FEASIBILITY ANALYSES FOR THE TURKEY POINT AND ST. LUCIE UPRATE ACTIVITIES?

FPSC ORDER NO. PSC-09-0783-FOF-EI

"SACE CONTENDED THAT FPL'S BREAK-EVEN ANALYSIS WAS NOT A COMMON APPROACH TO MAKING THE COMPARISON BETWEEN ALTERNATIVES. WE RECOGNIZE THAT THE ANALYSIS IS UNIQUE; HOWEVER, WE PREVIOUSLY ACCEPTED THIS APPROACH IN THE TP67 PROJECT NEED DETERMINATION *AND SUCH AN APPROACH IS REASONABLE TODAY*."

(EMPHASIS PROVIDED)

"IN REGARD TO THE TURKEY POINT 6&7 PROJECT, THE ANALYTICAL APPROACH USED IS THE CALCULATION OF BREAKEVEN OVERNIGHT CAPITAL COSTS. . .FOR THE NEW NUCLEAR UNITS. THIS SAME ANALYTICAL APPROACH WAS UTILIZED IN THE 2007 DETERMINATION OF NEED FILING, AND IN THE 2008,2009, AND 2010 NCRC FILINGS. . .*IN LATER YEARS, AS MORE INFORMATION BECOMES AVAILABLE REGARDING THE COST AND OTHER ASPECTS OF THE NEW NUCLEAR UNITS, ANOTHER ANALYTICAL APPROACH MAY EMERGE AS MORE APPROPRIATE.*" (emphasis provided)

FPL WITNESS DR. SIM, AT 10-11

ISSUE 11 (NOT IN DISPUTE)

SHOULD THE COMMISSION FIND THAT FOR THE YEARS 2009 AND 2010 FPL'S PROJECT MANAGEMENT, CONTRACTING, ACCOUNTING AND COST OVERSIGHT CONTROLS WERE REASONABLE AND PRUDENT FOR THE EPU PROJECT?

OPC'S ISSUE 16

WAS IT PRUDENT FOR FPL TO UNDERTAKE THE EPU PROJECTS AT TURKEY POINT AND ST. LUCIE ON A "FAST TRACK" BASIS?

SECTION 366.93, FLORIDA STATUTES:

"AFTER A PETITION FOR DETERMINATION OF NEED FOR A NUCLEAR. . .PLANT HAS BEEN GRANTED, THE RIGHT OF A UTILITY TO RECOVER ANY COSTS INCURRED PRIOR TO COMMERCIAL OPERATION. . . SHALL NOT BE SUBJECT TO CHALLENGE *UNLESS AND ONLY TO THE EXTENT THE COMMISSION FINDS, BASED ON A PREPONDERANCE OF THE EVIDENCE ADDUCED AT A HEARING BEFORE THE COMMISSION UNDER S. 120.57, THAT CERTAIN COSTS WERE IMPRUDENTLY INCURRED.*"

(emphasis provided)

ISSUE 18

IF THE COMMISSION FINDS FPL WAS IMPRUDENT IN ISSUES 16 OR 17, WHAT ACTION CAN AND SHOULD THE COMMISSION TAKE?