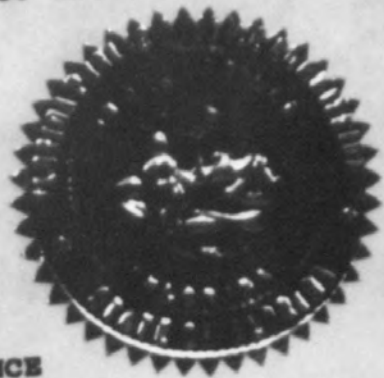


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

In the Matter of : DOCKET NO. 960235-WB
: Application for transfer of :
: Certificates Nos. 404-W and :
: 341-S in Orange County by :
: Wedgefield Utilities, Inc. :

In the Matter of : DOCKET NO. 960283-WB
: Application for amendment of :
: Certificates Nos. 404-W and :
: 341-S in Orange County by :
: Wedgefield Utilities, Inc. :



PROCEEDINGS: PREHEARING CONFERENCE

BEFORE: COMMISSIONER JOE GARCIA
Prehearing Officer

DATE: Monday, August 4, 1997

TIME: Commenced at 1:30 p.m.
Concluded at 2:45 p.m.

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JOY KELLY, CSR, RPR
Chief, Bureau of Reporting

DOCUMENT NUMBER-DATE
07937 AUG-65
FPSC-RECORDS/REPORTING

1 APPEARANCES:

2 BEN E. GIRTMAN, 1020 East Lafayette Street,
3 Suite 207, Tallahassee, Florida 32301-4552, appearing
4 on behalf of Wedgefield Utilities, Inc.

5 JACK SHREVE, Public Counsel, and CHARLES J.
6 BECK, Deputy Public Counsel, Office of Public Counsel,
7 111 West Madison Street, Room 812, Tallahassee,
8 Florida 32399-1400, appearing on behalf of the
9 Citizens of the State of Florida.

10 LILA JABER, JENNIFER S. BRUBAKER and
11 BOBBIE REYES, Florida Public Service Commission,
12 Division of Legal Services, 2540 Shumard Oak
13 Boulevard, Tallahassee, Florida 32399-0870, appearing
14 on behalf of the Commission Staff.

15

16

17

18

19

20

21

22

23

24

25

P R O C E E D I N G S

(Hearing convened at 1:40 p.m.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COMMISSIONER GARCIA: All right. I'll call the hearing to order. Counsel, will you read the notice, please?

MS. BRUBAKER: Pursuant to notice this time and place has been set aside for a prehearing conference in Docket No. 960235-WS, application for transfer of Certificate Numbers 404-W and 341-S in Orange County from Econ Utilities Corporation to Wedgefield Utilities, Inc., and Docket No. 960283-WS, application for amendment of Certificates Numbers 404-W and 341-S in Orange County by Wedgefield Utilities, Inc.

COMMISSIONER GARCIA: We'll take appearances.

MR. GIRTMAN: Ben Girtman, representing Utilities, Inc. and its subsidiary, Wedgefield Utilities, the transferee in this docket. My address is 1020 East Lafayette Street, Suite 207, Tallahassee, Florida 32301.

MR. BECK: Jack Shreve and Charlie Beck, Office of the Public Counsel, 111 West Madison Street room 812, Tallahassee, Florida 32399-1400, appearing on behalf of the Citizens of Florida.

1 MS. BRUBAKER: Jennifer Brubaker and Bobbie
2 Reyes on behalf of Commission Staff.

3 COMMISSIONER GARCIA: Staff attorney, are
4 there any preliminary matters?

5 MS. BRUBAKER: Yes, Commissioner, there are
6 two pending matters at this time. On August 1st,
7 1997, Wedgefield Utilities filed a verified petition
8 and suggestion of disqualification with regard to
9 Commissioner Deason and also filed a motion for
10 continuance of hearing. It's our recommendation that
11 both of these matters merely be acknowledged as
12 pending matters and be dealt with by separate order.

13 COMMISSIONER GARCIA: Okay. There's no
14 problem with that?

15 MR. GIRTMAN: No, Commissioner.

16 Commissioner, our understanding is that
17 under this kind of matter it's not within the purview
18 of the hearing officer to address, and so it is more
19 appropriate as Staff attorney has mentioned, but we
20 would like to call to the attention of the hearing
21 officer, though, the potential impact on this
22 proceeding.

23 It's our understanding of the procedure that
24 if an order is issued by the Commissioner
25 acknowledging disqualification, then that's the end of

1 it and the hearing would go forward on August the
2 19th. If there's a denial of disqualification, then
3 the matter has to go to the full Commission.

4 And it does not appear there would be
5 sufficient time, understanding the lead times that are
6 necessary for a Commission agenda item, so that may
7 require a rescheduling of hearing, depending on the
8 circumstances of the ruling.

9 COMMISSIONER GARCIA: Okay. I think we're
10 all aware of that.

11 All right. So we're going to go through.
12 Everyone is holding the same copy, the same draft.
13 All right. What I'll do --

14 MR. SHREVE: I'm sorry, were you going to
15 address -- we just wanted to know where we were going
16 to be on this. I don't know where the notice stands
17 as far as the hearing goes, and with this motion they
18 have, as a practical matter, where are we on the
19 hearing?

20 COMMISSIONER GARCIA: I'm sorry.

21 MR. SHREVE: When is the notice going out?

22 COMMISSIONER GARCIA: As of right now we're
23 still on the same schedule, until Commissioner Deason
24 makes his decision. If he does not -- if he chooses
25 to recuse himself, then we go forward. If he does

1 not, it has to go to the full Commission, correct?

2 MS. BRUBAKER: Commissioner Garcia, yes,
3 that's correct. But it's also true, I believe, that
4 the Utility has already sent out its notice. If it
5 becomes necessary, we will file a notice of
6 cancellation of hearing to all the affected customers
7 if a continuation is necessary.

8 I also think it's fair to say that we'll
9 know by Wednesday afternoon the outcome of the
10 verified petition, whether Commissioner Deason would
11 chose to recuse himself or not.

12 MR. BECK: Would it be at that time that the
13 ruling will be made on the motion for a continuance?

14 MS. BRUBAKER: I'm sorry. Beg your pardon?

15 MR. BECK: We're trying to figure out if
16 we're going to have a hearing two weeks from tomorrow,
17 would you wait until -- if Commissioner Deason does
18 not disqualify himself, what will happen then?

19 MS. BRUBAKER: It will need to go to the
20 full Commission for a majority vote which will
21 necessitate taking it to the next agenda. I believe
22 the next agenda is the 28th and that will require a
23 continuance of the hearing.

24 MR. BECK: So you're saying that if
25 Commissioner Deason does not disqualify himself, the

1 hearing is going to be continued? Is that what you're
2 saying?

3 MS. BRUBAKER: That's correct.

4 MR. BECK: And we'll know by Wednesday
5 afternoon whether that's going to happen.

6 MS. BRUBAKER: Yes.

7 MR. BECK: And in Commissioner Deason does
8 disqualify himself, then we're going forward.

9 MS. BRUBAKER: That's correct.

10 COMMISSIONER GARCIA: Jack, go ahead.

11 MR. SHREVE: I guess we don't have much of a
12 say in this one way or the other.

13 COMMISSIONER GARCIA: I don't think any of
14 us do. I think Commissioner Deason has the say in it.

15 MR. SHREVE: Well, the Company has had their
16 say.

17 COMMISSIONER GARCIA: Right, to Commissioner
18 Deason who will make a determination on that.

19 MR. SHREVE: Has the notice gone out? I'd
20 just like to know because we're going to have to deal
21 with the customers. Has the notice gone out?

22 MR. GIRTMAN: Yes, the notice has gone out.

23 MR. SHREVE: When did the notice go out?

24 MS. BRUBAKER: Last Friday, wasn't it, this
25 past Thursday?

1 MR. GIRTMAN: It was sometime last week. It
2 was earlier in the week.

3 MR. SHREVE: Was it before you decided to
4 file this motion?

5 MR. GIRTMAN: Yes.

6 COMMISSIONER GARCIA: All right. I
7 understand the position it puts us in, but I don't
8 think we've got much of a choice at this point.

9 I'm going to go through the sections, if you
10 have any problems -- Jack, go ahead.

11 MR. SHREVE: I don't know, I guess -- if
12 Commissioner Deason is challenged on these grounds,
13 and it's successful, we may want to make some
14 challenges ourselves. I don't know. Maybe things are
15 different than I thought they were as far as relying
16 on past votes and things. It came up on us pretty
17 late. As I understand it, it was about 4:55 on
18 Friday.

19 COMMISSIONER GARCIA: Right.

20 MR. SHREVE: Which kind of leaves everybody
21 in the lurch, particularly since the -- I guess no
22 thought was given to the filing of the motion prior to
23 that or they might have even decided to file it
24 earlier so they could have decided what to do as far
25 as the notice is concerned, which is going to be a

1 little cumbersome on everyone.

2 **COMMISSIONER GARCIA:** I understand. But,
3 again, if Commissioner Deason does not recuse himself,
4 then, obviously, we'll make the determination on a
5 continuance. But I don't think we have any choice at
6 this point. All right. I'm going to go through the
7 sections. If you have a problem with them, just bring
8 it up and then I'll go from there.

9 Corrections or changes to the case
10 background?

11 **MR. GIRTMAN:** Commissioner, I have one
12 question for clarification. The style of the
13 proceeding includes the application for the amendment
14 of certificate to extend service area.

15 When the order initially came out of the
16 Commission, it read that that was a final agency
17 action. In fact, the top of the second page, the
18 fourth line down it cites the order and says "By final
19 agency action, approved the transfer and granted the
20 amendment of the certificates." We challenged the
21 bifurcation of the order as being part PAA and part
22 final order. And the Commission ruled against us and
23 said that the transfer itself was final; that the
24 extension of the service territory approval was final.
25 And so what we're required to do is go to hearing on

1 the extension of the service territory. The notice
2 was also required to include extension of the service
3 territory and my question is do we have any
4 requirement of proof in regard to extension of the
5 service territory?

6 **COMMISSIONER GARCIA:** I don't think we do.

7 **MR. GIRTMAN:** I don't think so either, but
8 the problem I'm dealing with is that the style of the
9 Prehearing Order and the style of the Notice were
10 required to include that.

11 Now, I was told that these dockets were
12 consolidated and, therefore, they both had to be
13 included in the notice. But I think it's misleading
14 at best to the public to require the notice of an
15 application that's now final. I don't know why it's
16 required to be in there.

17 **COMMISSIONER GARCIA:** Ms. Brubaker.

18 **MS. BRUBAKER:** Commissioner Garcia, the
19 style of the notice reflects two active cases that
20 were consolidated. That is merely the caption. Then
21 the purpose of the hearing is set forth in the body of
22 the notice, which states specifically it only has to
23 do with the acquisition adjustment of the -- rate base
24 inclusion of an acquisition adjustment.

25 The amendment case is still open; it has not

1 been closed. I think it would be misleading, if
2 anything, to not have that appear in the notice when
3 it is still an open docket. Those reflect only the
4 titles of the docket. They do not reflect what is
5 going to be a subject at the hearing.

6 MR. GIRTMAN: Okay. Then it's my
7 understanding that we have no burden of proof on the
8 question of extension of the service territory and
9 that will not be considered at the hearing; is that
10 correct?

11 MS. BRUBAKER: That simply hasn't been
12 raised as an issue in the context of this hearing;
13 that's correct.

14 MR. GIRTMAN: Well, I'm raising it now
15 because we sent the notice out last week and had
16 raised the question and were told that we were
17 required to have a notice of the certificate amendment
18 included in the notice, and I just want to make sure
19 what the hearing is going to be on.

20 MS. BRUBAKER: Commissioner Garcia, if I
21 may? The inclusion of the docket caption in the
22 notice is strictly procedural. It has nothing to do
23 with the substantive portion of the hearing. It is
24 procedural only in nature.

25 COMMISSIONER GARCIA: The issues are laid

1 out before us already in this Prehearing Order. It's
2 limited to those issues.

3 **MR. GIRTMAN:** Okay. But I just wanted to
4 make sure that nothing is going to come up at a later
5 time. For example, if I was a customer and I saw this
6 and I objected to the extension of the service area,
7 I'd go attend the hearing expecting to speak on it.
8 That's a question -- as long as we have no burden of
9 proof in regard to the extension of territory.

10 **COMMISSIONER GARCIA:** That burden of proof
11 is on the issues that we're going to be considering
12 right here.

13 **MS. BRUBAKER:** Commissioner Garcia, also our
14 rules provide that issues can be included at hearing
15 only up to the point today. No new issues can be
16 introduced at hearing. So I don't believe there's any
17 room for adding issues past this point.

18 **COMMISSIONER GARCIA:** Okay. We'll go to the
19 witness list. Any changes or amendments here?

20 **MR. GIRTMAN:** Excuse me. On the order of
21 witness, we would like to add, as far as the issue
22 numbers that Mr. Wenz and Mr. Seidman will be speaking
23 to, each of them should be listed on all issues, and
24 that would include changing the end of Wedgefield's
25 position on each issue. Some of them, both are

1 listed; some, one is listed; some others are listed.
2 So we want to have them both listed on all issues,
3 please.

4 **MS. BRUBAKER:** Commissioner Garcia -- And,
5 please, Mr. Girtman, correct me if I'm
6 mischaracterizing this, but Issue 10, I believe it is,
7 which speaks to whether the matter needs to be
8 referred to a generic rulemaking proceeding. I don't
9 recall either witness speaking to that matter and it
10 seems to be a legal issue.

11 **MR. GIRTMAN:** I think there are two of them
12 that are legal issues, the last two, as a matter of
13 fact, so no one would be listed as witnesses.

14 **MS. BRUBAKER:** I just wanted it for
15 clarification.

16 **MR. GIRTMAN:** Right.

17 **MS. BRUBAKER:** Thank you.

18 **MR. BECK:** On Mr. Larkin, we would like to
19 add Issue 6 and delete 9 and 10.

20 **COMMISSIONER GARCIA:** Okay.

21 **MS. BRUBAKER:** No changes for Staff.

22 **COMMISSIONER GARCIA:** All right. Basic
23 positions. All right. We're going to go
24 issue-by-issue, and then we'll deal with it as we come
25 up. Issue 1?

1 Issue 2?

2 Issue 3?

3 MS. BRUBAKER: Commissioner, with regard to
4 Issue 3, Staff is proposing the consolidation of
5 Issues 3, 6 and 9. Prior to the commencement of the
6 prehearing we have provided parties with copies of our
7 proposed issue language as well as proposed
8 consolidation of their positions on each respective
9 Issue 3, 6 and 9. The parties, I think, have had a
10 brief chance to go over that language, but they may
11 wish a moment to comment on them or they might require
12 additional time to review those. I expect they would
13 request it at this time.

14 MR. GIRTMAN: Perhaps I could have -- I've
15 not had a chance to review them thoroughly. I've
16 scanned over them.

17 I'm curious as to why these would be
18 consolidated. It seems like they are both, as far as
19 the statement of the issue and the positions, that
20 they are merely additive rather than merged, just took
21 three sets and put them into one long issue. I'm not
22 sure what we're seeking to accomplish by doing this.

23 MS. BRUBAKER: In essence, we're seeking
24 economy. There are three issues which all are
25 interrelated and interlocked. The analysis is

1 initially or essentially the same for all three
2 issues. It all flows together. It's simply an
3 attempt to keep the issues as narrowly tailored and
4 focused as possible.

5 **MR. BECK:** Commissioner, I disagree with
6 Staff. I think what they propose does just the
7 opposite of what they're saying the intent is. It's
8 taking three distinct issues and made them compound
9 questions. If these were questions on cross
10 examination they would be objectionable as compound
11 questions. I think particularly, since Staff is our
12 adversary on these issues, I think it confuses matters
13 to just raise them and jumble them all together into
14 one big issue, and we would prefer to keep it the way
15 it is.

16 **COMMISSIONER GARCIA:** Mr. Girtman?

17 **MR. GIRTMAN:** I'm easy to please,
18 Commissioner. Whatever is best and easiest for the
19 Commission.

20 **COMMISSIONER GARCIA:** I have a tendency to
21 agree with Public Counsel on this. It does strike me
22 as a compound question. While I understand what Staff
23 was trying to do with them, I think we'll go with
24 Public Counsel on this. We'll keep them as separate
25 issues.

1 All right. That takes care of 3, 6 and 9.
2 Are there any changes on any of those so we don't have
3 to go back and forth?

4 Let me just keep going. That takes care of
5 3. We go to 4, 5.

6 MS. BRUBAKER: Commissioner, with respect to
7 Issue 5, I would also refer you to Stipulation No. 4.
8 The stipulation and the issue both deal with the net
9 book value of the water and wastewater system in the
10 Staff audit. It is my understanding that all parties
11 agree -- or, rather, willing to stipulate to the
12 values of the Staff audit with respect to net book
13 value. If that is the case we would like to look into
14 having the Staff witnesses, Kathy Welch's direct
15 testimony, entered into the record and, without
16 objection, have her not need to be -- necessarily
17 appear at the hearing in order to testify. However,
18 it's my understanding that Public Counsel has some
19 objection to that, and I would just like clarification
20 whether this is something we can stipulate to or
21 whether it is going to remain an issue.

22 MR. GIRTMAN: Commissioner. I'm sorry.

23 MR. BECK: Yes, we do object. I'm not
24 willing to stipulate to Ms. Welch's testimony being
25 entered into the record.

1 **MR. GIRTMAN:** We also would like to have her
2 there if possible. As long as we're talking about the
3 Stipulation No. 4, we have a change to that if you'd
4 like to deal with that now or wait until we go through
5 the rest of it.

6 **COMMISSIONER GARCIA:** Let's wait until we go
7 through the rest of it so we can put it all away. All
8 right. So we go on. I'm going to leave 5 in then.
9 We go to 6, which we already agreed to. 7. 8. 9.

10 **MR. GIRTMAN:** Commissioner, if I could for a
11 moment, on Issue 8, who bears the burden of proving
12 whether an acquisition adjustment should be included
13 in the rate base?

14 Heretofore the orders of the Commission have
15 read that the burden is on the proponent of the
16 acquisition adjustment. If you're seeking a positive
17 acquisition adjustment, you bear the burden; if you're
18 seeking a negative acquisition adjustment, you bear
19 the burden, regardless of who it is that is seeking
20 it.

21 The concern that I have in the statement of
22 the issue is that it forces us to prove a negative.
23 It forces us to prove there is nothing which warrants
24 a negative acquisition adjustment. And when we get on
25 down into the legal issues you'll find that it's

1 somewhat unclear, at least in the challenger's point
2 of view, as to whether or not you have a binding
3 policy on acquisition adjustments in any case.

4 And my concern -- I understand that somebody
5 wants the issue there and the positions have been
6 stated there. But I just wanted to make a point here
7 at the prehearing that if the burden as stated by the
8 Staff were to exist, then that requires the applicant
9 to prove a negative and I don't know that we can do
10 that, and I don't know how it is I'm supposed to prove
11 something I'm not supposed to know how to do anyway.
12 It's a real problem. And we want to be prepared to go
13 through a hearing expeditiously, address the issues,
14 have everybody that has something to say come and say
15 it, but I'm having a real problem of preparing the
16 question of how do I prove a negative? So that said,
17 I think we can go on to the next issue.

18 **COMMISSIONER GARCIA:** Ms. Brubaker, do you
19 want to make that comment?

20 **MS. BRUBAKER:** Commissioner, only that I
21 believe it is a valid issue. I believe the comments
22 Mr. Girtman has made really go to the merits of the
23 issue and is an argument he might make, say, in a
24 brief.

25 **MR. BECK:** I agree. The issue is simple. I

1 think Mr. Girtman's comments are commenting on the
2 Staff's position, and I don't see what purpose is
3 served by that.

4 **COMMISSIONER GARCIA:** Move on. Issue 9.
5 Issue 10.

6 **MR. BECK:** Commissioner, on Issue 9 our
7 position is just a wording change, but I've talked to
8 Ms. Brubaker about it before. It says "No, the
9 citizens need not show extraordinary circumstances,"
10 that should be changed to "No extraordinary
11 circumstances need not be shown, although such
12 circumstances exist in this case."

13 **COMMISSIONER GARCIA:** You've got the
14 wording, Ms. Brubaker?

15 **MS. BRUBAKER:** Yes, I do.

16 **COMMISSIONER GARCIA:** Because I didn't get
17 it. Do it again for me Charles.

18 **MR. BECK:** It's just the first part of the
19 first sentence where it says "No, the citizens need
20 not show extraordinary circumstances." It's changed
21 to "No, extraordinary circumstances need not be
22 shown."

23 **COMMISSIONER GARCIA:** Okay. 10.

24 **MR. GIRTMAN:** Commissioners, I have a
25 suggestion on 10 and 11. The phrasing in the answer

1 to the preceding issue, when it was first proposed, it
2 was following what is now Issue 11. Issue 11 deals
3 with does the Commission currently have a policy on
4 acquisition adjustments that's binding on the
5 Commission? And then the 10 in front of us -- was
6 intended to say "If there is no binding policy, may
7 the Commission decide this case on case-by-case basis
8 or do you have to go to a generic proceeding?" So I
9 would like to change, if I may, the order of 10 and
10 11. 11 becomes 10, 10 becomes 11, and the wording
11 would change in the first part of it. We would take
12 out this phrase that if the answer to the preceding
13 issue is no, and make it read "If the -- if the
14 Commission does not currently have a binding policy on
15 acquisition adjustments" and then pick up "can," read
16 "If the Commission does not currently have a binding
17 policy on acquisition adjustments, can the Commission
18 make an acquisition adjustment?"

19 **COMMISSIONER GARCIA:** Did you want to leave
20 it in this order?

21 **MR. GIRTMAN:** No, sir, we'd like to change
22 the order.

23 **COMMISSIONER GARCIA:** Okay. All right.

24 **MS. BRUBAKER:** I don't think we'd have any
25 objection to that.

1
2 MR. BECK: Nor do we. I think that makes
3 sense.

4 COMMISSIONER GARCIA: Ms. Brubaker, I was
5 under the impression that you were going to move this.

6 MS. BRUBAKER: Yes, I was just waiting for
7 the -- perhaps I should have gone first. I'm sorry,
8 Commissioner.

9 COMMISSIONER GARCIA: Change the order.

10 MS. BRUBAKER: Right. Actually, Staff would
11 like to move to strike what I suppose is old Issues 10
12 and 11, which is also new Issues 10 and 11, just
13 reversed order. We feel that they are in the nature
14 of a rule challenge, and the rules are clear that the
15 Commission cannot hear rule challenges. We do not
16 have the jurisdiction. It's a matter that is properly
17 raised in the context of a challenge brought to DOAH
18 and not before this Commission or in the context of
19 this hearing.

20 COMMISSIONER GARCIA: Mr. Girtman?

21 MR. GIRTMAN: I think counsel's legal
22 analysis is right on point. Although I'd love to have
23 the Commission express its views on both issues, it
24 seems to be a purely legal issue under the
25 jurisdiction of DOAH.

MR. BECK: I completely disagree. The

1 issue -- take 11, which would now precede what is
2 currently 10. It says "Are these acquisition
3 adjustment policies that are not in rules but are
4 simply in orders that are not rules binding on this
5 case?" It's absolutely critical to this case. In
6 other words, do we have to show all the things those
7 orders do or not? Can the issue -- Staff is arguing
8 what they see as their position and saying if their
9 position is correct, then these issues need not be
10 there. I don't agree with them. I think it's -- to
11 me the law is very clear that the orders that are
12 issued are not rules. The Commission declined
13 rulemaking and issued these orders, and as so, they
14 are not binding. But I can see where people might
15 disagree with that. But, nonetheless, the issue is
16 clear. You know, we want the issues in there because
17 they are legal issues. Do these bind us or do they
18 not? That is very important to our case that we know
19 whether these orders that are issued that are not
20 rules bind us in this case. I think that would
21 violate the APA. If it's so, I want to know so we can
22 take it to a court and have them decide it.

23 COMMISSIONER GARCIA: Ms. Brubaker?

24 MS. BRUBAKER: Once again, I think the
25 appropriate forum in which to raise those questions

1 and have them answered is a rule challenge proceeding
2 at DOAH. To the extent that OPC might wish to raise
3 the subject matter, I suppose they could do so in a
4 brief. I just simply do not see that these are
5 appropriate issues raised in the context of this
6 hearing. There are no witnesses. They are obviously
7 legal issues. And the only way they can be
8 appropriately decided is in a rule challenge
9 proceeding at DOAH, not at this Commission.

10 **MR. BECK:** Commissioner, again, Staff is
11 taking their analysis with which we disagree, ask you
12 to assume it is the only answer and then strike the
13 issues. These are legal issues. I agree completely.
14 I'm not willing to drop them. I want them answered by
15 this Commission. And if the Commission rules that it
16 can issue an order that is not a rule and then apply
17 it to us in another case, we will very likely take
18 that court to on an appeal. We're not willing to
19 strike these issues.

20 **MR. GIRTMAN:** Could I add just a brief point
21 on this?

22 You know, when these things first came up it
23 was -- it's an interesting mental legal exercise.
24 Those of us who have practiced administrative law and
25 been involved with the legislative and administrative

1 process, you know, enjoy debating questions like this,
2 but the point is who has jurisdiction? And upon
3 consideration of the position set forth by Staff that
4 these are matters not within the jurisdiction of the
5 Public Service Commission, and looking at the
6 Administrative Procedure Act for challenges, I have to
7 agree with Staff. The Commission doesn't have the
8 jurisdiction to do what OPC is asking it to do. It
9 does what it does, and DOAH does what it does. And
10 DOAH has the jurisdiction.

11 MR. BECK: Well, Commissioner, to the
12 contrary, I think the Commission doesn't have the
13 authority to apply a nonrule order to us and make it
14 binding to us on this case. It's clear we have
15 different positions on a legal issue. And, again,
16 Staff -- because Staff has a position doesn't make it
17 not an issue. We have a contrary view. Therefore,
18 it's an issue, it's a legal issue; we want it
19 addressed so we can deal with it appropriately at the
20 end of the case.

21 MR. GIRTMAN: If I could briefly respond, I
22 think Mr. Beck's comment points it out very clearly as
23 to whether or not you can apply your policy in this
24 case to the parties here. That's what DOAH does.
25 That's the petition to DOAH. That's not the petition

1 to the Public Service Commission.

2 **COMMISSIONER GARCIA:** I would tend to agree
3 with Staff on this, Mr. Beck. I'm going to strike
4 Issues 10 and 11. We had reversed their order, but,
5 regardless, both of them are going to be stricken.

6 **MR. BECK:** Commissioner, how can you strike
7 an issue when there's a disputed legal issue? I just
8 don't know understand that.

9 **COMMISSIONER GARCIA:** You're asking us to
10 make policy determination in the issues on this case.
11 And the issues that you want to address here are --
12 while you may believe are relevant, they don't strike
13 at the basic position in this case and what both sides
14 are trying to address. A policy statement is not
15 necessary in making this determination in this case.

16 **MR. BECK:** It determines how we go about
17 proving the case. It determines what we have to show
18 for our position. It's the legal -- I'm almost at a
19 loss, I so don't understand this. Staff thinks it has
20 to go to DOAH. I think we can take it to the First
21 District Court of Appeal if the Commission rules
22 against us on this. And you're going to say that
23 because Staff has one position and we have another,
24 theirs is correct and there's no issue? I don't
25 understand that.

1 **COMMISSIONER GARCIA:** That's not what I'm
2 saying. What I'm saying is that I agree with Staff on
3 this position, and it's not a question of Staff's
4 position being. I just think that you're asking this
5 Commission to make a determination on a policy issue
6 that the proper forum would be DOAH. And if you want
7 to take us on, that's fine. But I just don't see this
8 as being essential to this case in this form.

9 **MR. BECK:** I'd like to request if you could
10 issue a separate order on that issue so we can take it
11 up. We disagree with that.

12 **COMMISSIONER GARCIA:** Absolutely.

13 **MR. GIRTMAN:** Clarification, please,
14 Commissioner.

15 **COMMISSIONER GARCIA:** Sure.

16 **MR. GIRTMAN:** I have been hit with separate
17 orders in this case before and I'm a little gun-shy.
18 If there's going to be a separate order on just the
19 question of striking 10 and 11, where does that leave
20 the hearing?

21 **MS. BRUBAKER:** Commissioner Garcia, if I
22 may? I don't believe that a separate order would be
23 necessary in this case. What OPC may do, if it so
24 chooses, is to file a motion for reconsideration of
25 the prehearing order.

1 **COMMISSIONER GARCIA:** Is that fine,
2 Mr. Beck?

3 **MR. SHREVE:** Yes, we can. So it's your
4 position that even though in general in a prehearing
5 conference it's to see what agreements there are and
6 what issues still remain, we have an issue that we
7 want to have listed and you're ruling we can't have
8 it.

9 **COMMISSIONER GARCIA:** What I'm ruling --

10 **MR. SHREVE:** As I understand it.

11 **COMMISSIONER GARCIA:** Excuse me?

12 **MR. SHREVE:** I thought you were eliminating
13 the issue. Maybe I misunderstood.

14 **COMMISSIONER GARCIA:** Mr. Shreve, what I'm
15 doing is that this issue I do not think goes to the
16 merits of this case, and you're asking us to make a
17 decision in terms of policy of this Commission, which
18 I think is better taken before DOAH. You're asking us
19 to determine on something that is not within our
20 purview at this time.

21 **MR. BECK:** You see, Commissioners, you're
22 making a legal determination by making that
23 conclusion. And we're asking you to have an issue on
24 that issue. Whether that legal determination is
25 correct. We don't agree. Yet you're saying because

1 you agree with Staff that we can't make the issue.
2 That's where I get confused. It seems to me that if
3 Staff has one legal position we have another, you
4 can't just say they are correct and we don't have an
5 issue. You have to have the issue and then decide the
6 issue. You may rule in Staff's favor. So be it.
7 But at least there's an issue.

8 MS. BRUBAKER: Commissioner Garcia, if I may
9 make just a point of clarification.

10 COMMISSIONER GARCIA: Sure.

11 MS. BRUBAKER: I believe what Commissioner
12 Garcia is saying is not necessarily that he agrees
13 with our position as taken in the prehearing order,
14 but he agrees with our analysis that these are not
15 issues which we have the jurisdiction to entertain.

16 MR. BECK: You can't decide whether your
17 orders are binding in this case? How do not have
18 jurisdiction to decide whether your orders bind this
19 case?

20 MS. BRUBAKER: I would merely point out that
21 that's not -- what is being pointed out in these two
22 issues is whether there's a policy and is it a rule.
23 These are issues, once again, preferably raised at
24 DOAH. I would once again point out that the
25 Prehearing Order itself has language at the very end

1 that says, you know, any affected party, which is
2 preliminary procedure in nature, can move to
3 reconsider that. And, you know, you could even bring
4 it as a preliminary matter at the hearing if you so
5 chose.

6 MR. BECK: Well, we will, but I think you're
7 denying us a very fundamental due process and that is
8 to have an issue decided by the Commission. And
9 despite everything you've said, I think what exactly
10 has been done is that the Commissioner is adopting
11 your position and then ruling against us.

12 COMMISSIONER GARCIA: That's not what is
13 being done, Mr. Beck. What I'm doing is that Staff
14 has a Motion to Strike, and I'm granting that Motion
15 to Strike.

16 MR. SHREVE: That --

17 COMMISSIONER GARCIA: I'm not ruling for
18 Staff in terms of the position that they have in the
19 issue. You're asking us to make a determination on
20 rules that is not before -- is not in the purview of
21 this Commission.

22 MR. BECK: No, no. Issue 11, and that one.

23 COMMISSIONER GARCIA: Let's make sure we're
24 looking at the same 11.

25 MR. BECK: As stated in the Prehearing Order

1 says "Is the Commission's policy as set forth in these
2 orders binding in this case?" and there's a
3 disagreement.

4 Staff and the Company say yes. We say no.
5 How can that be a DOAH matter? This is a matter of
6 whether these orders that have been issued that are
7 not rules -- you know, they're talking about rule
8 challenges. These orders are not rules; they are just
9 orders. And the question is do they bind in this
10 case. And there's a disagreement amongst the parties
11 as whether they bind in this case. Yet you're telling
12 us that we can't allow the Commission to decide that
13 issue. That's not a rule challenge; that's an issue
14 as to whether these orders bind this case or not, and
15 it makes a big difference in our case on whether they
16 do or don't.

17 **COMMISSIONER GARCIA:** Mr. Girtman.

18 **MR. GIRTMAN:** Thank you, Commissioner.

19 You know, those of us who represent
20 utilities before the Commission are sometimes faced
21 with a question: Do we bring an issue to the
22 Commission? Do we take an issue to DOAH? And the
23 statutes are pretty clear as to which ones come to the
24 Commission and which ones go to DOAH. And although we
25 might like to have it all in one proceeding sometimes,

1 we don't get it because the Commission does not have
2 the power to do that. It is granted certain specific
3 authority under the statutes, and the Division of
4 Administrative Hearings is granted certain different
5 powers, specifically under Chapter 120 and the
6 challenges to proceedings exactly like this. And I'll
7 have to tell you, Commissioner, my client and I have
8 been discussing the question of whether we take this
9 case to DOAH on some of these issues. And DOAH is the
10 place where the issues like that ought to be decided.
11 And I have a grave concern to what I heard from Staff
12 just a moment ago that you can bring issues at the
13 hearing.

14 Now, if this is going to be decided, it must
15 be decided once and for all before we get to a
16 hearing. If the OPC wants to appeal your Prehearing
17 Order, then they should have whatever right to appeal
18 a Prehearing Order that they can get. That's fine.
19 If they want to take the case to DOAH, they can do
20 that. But I respectfully and strongly ask not to be
21 broadsided with these two issues if they are stricken
22 and we show up in a hearing, because I'm not going to
23 be prepared for them, sir.

24 **COMMISSIONER GARCIA:** Mr. Beck.

25 **MR. BECK:** One last time, Commissioner. And

1 I'm arguing Issue 11 as stated in the Prehearing Order
2 because I don't really care about 10. That was
3 Wedgefield's issue.

4 Issue 11 is not a question of a rule
5 challenge. The issue is whether your policies --
6 orders apply to this case or not. That's all it is.
7 There's nothing in there that says this a DOAH rule
8 challenge or is there a rule that should be challenged
9 or what. We don't even mention it. Ours is whether
10 these orders apply to us in this case. It's a
11 fundamental issue. We say no, they don't. Staff and
12 the Utility says yes, they do. The Commission has
13 authority to tell us whether orders and issues apply
14 to this case or not.

15 And I'll say it once again, you're taking
16 Staff's position, granting it and saying there's no
17 issue because you agree with their position. That's
18 different than whether there's an Issue. The issue is
19 in dispute. Staff has one position; we have an
20 opposite one. And I think it's highly inappropriate
21 to strike an issue when there's a disagreement on it.
22 It's not a rule issue. There's nothing in that issue
23 that talks about a rule.

24 MR. GIRTMAN: Commissioner, if I may finally
25 make a very brief -- you know, I don't like to argue

1 Staff's motion --

2 MS. BRUBAKER: Commissioner, may I have just
3 a moment? I'm sorry.

4 COMMISSIONER GARCIA: Absolutely. One
5 second. (Pause)

6 MS. BRUBAKER: Thank you, Commissioner. I
7 appreciate your indulgence.

8 COMMISSIONER GARCIA: Let's give them one
9 second.

10 MS. BRUBAKER: Thank you. (Pause)

11 COMMISSIONER GARCIA: Ms. Brubaker.

12 MS. BRUBAKER: If I may, Mr. Beck faxed me
13 his position on the issue. It's old Issue 11/new
14 Issue 10. If I could just confirm with him that that
15 is the position he would intend to take with respect
16 to that issue?

17 MR. BECK: Yes. I'd like to give a copy to
18 Commissioner Garcia, if I might.

19 MS. BRUBAKER: Thank you. Commissioner
20 Garcia, with that understanding, we would request to
21 withdraw our Motion to Strike that issue, old Issue
22 11/new Issue 10.

23 MR. GIRTMAN: I'll make the motion for them,
24 please, if I may.

25 MS. BRUBAKER: With a note, however, that

1 upon review of Wedgefield's position on that issue, we
2 believe it to be error, that it is a matter that can
3 be dealt with in the recommendation.

4 **COMMISSIONER GARCIA:** Sorry. With regard to
5 Wedgefield's position on Issue 11 you believe it is in
6 error? Let's get it right before we speak into the
7 mikes again. Take a second -- let me read this.

8 **MR. GIRTMAN:** Could I -- I'm sorry.

9 **COMMISSIONER GARCIA:** Take a second and let
10 me read this, Mr. Girtman.

11 (Discussion off the record.)

12 **MS. BRUBAKER:** Commissioner, I believe I
13 must have misspoken myself.

14 Upon consideration, hearing the other
15 parties speak, and a review of their responses, I
16 don't believe that Staff will have a problem with the
17 issue as worded. I think a problem came from
18 Wedgefield's position which I think couches things in
19 the terms of a rule challenge. I believe I said I
20 thought it was in error. I meant to say the response
21 seems to be in error in the respect that it seems to
22 be in the nature of a rule challenge versus directly
23 responsive to the issue. I don't think Staff has any
24 objection to the issue as worded.

25 **COMMISSIONER GARCIA:** Let's make sure we're

1 speaking on the same thing. Because if you're
2 withdrawing your Motion to Strike, I want to
3 understand that.

4 Are you then withdrawing your Motion to
5 Strike 10 and 11?

6 **MS. BRUBAKER:** We are only withdrawing with
7 respect to that issue. We'd like to keep live the
8 motion to strike old Issue 10/new Issue 11.

9 **COMMISSIONER GARCIA:** Now you've got me
10 confused. New Issue 10, in other words, which used to
11 be old Issue 11, you are fine with. And this is
12 Mr. Beck's, Public Counsel's, response to those,
13 correct? These are their positions?

14 **MS. BRUBAKER:** Yes, that's correct.

15 **COMMISSIONER GARCIA:** What we're doing is
16 we're following Mr. Beck's suggestion, or I guess it
17 was his suggestion, that we drop old 10 altogether or
18 new 11 altogether, correct?

19 **MS. BRUBAKER:** Correct.

20 **COMMISSIONER GARCIA:** And now it's your
21 turn, Mr. Girtman. Now we know where we are.

22 **MR. GIRTMAN:** First of all, I find it quite
23 curious that after extensive analysis the Staff has
24 made a motion and now withdrawn it.

25 **COMMISSIONER GARCIA:** Not as curious as I

1 find it.

2
3 **MR. GIRTMAN:** I'm amazed. I need to file
4 another motion is what I need to do, but I'm not sure
5 what I'd call it.

6 These two issues came up in the preliminary
7 prehearings. We had two of them. Mr. Beck initially
8 began discussing whether or not the Commission had a
9 binding policy or rule on the question of acquisition
10 adjustments.

11 **COMMISSIONER GARCIA:** Right. And he
12 verbally proposed a rule -- or an issue, does the
13 Commission have a binding policy, a rule on the issue,
14 and I said fine. Well, our position is that if the
15 finding on that is that it does not have a binding
16 rule on acquisition adjustments, then the question is
17 can the Commission proceed in this case on
18 case-by-case basis contrary to the APA in incipient
19 rulemaking?

20 **COMMISSIONER GARCIA:** Right.

21 **MR. GIRTMAN:** So if one issue stays in, both
22 issues stay in. But I think both of them belong at
23 DOAH. The question is clearly a question of whether
24 or not OPC is trying to raise the issue of whether the
25 Commission is trying to apply nonrule policy. That is
clearly, specifically stated to be within the

1 jurisdiction of DOAH. It is not within the purview of
2 an agency itself to make a challenge to an agency's
3 action on whether or not they are applying nonrule
4 policy.

5 **COMMISSIONER GARCIA:** Where do you find that
6 in the new Issue 10 or old Issue 11?

7 **MR. GIRTMAN:** Find what, sir?

8 **COMMISSIONER GARCIA:** The rule issue that
9 you believe we cannot address that we need to take to
10 DOAH?

11 **MR. GIRTMAN:** Well, no one has to take it to
12 DOAH. We can let the Commission proceed and do its
13 job. If somebody wants to take it to DOAH, they are
14 free to do so. And if they want to appeal the
15 decision of the Prehearing Officer that an issue is
16 within the jurisdiction of DOAH and not the PSC, then
17 I'm not -- I haven't looked at whether or not that's
18 clearly an appealable order, but I assume it would be.
19 But I think the Commission Staff was right
20 in the first analysis. It's not within the purview of
21 a agency to determine whether it's applying nonrule
22 policy. That's DOAH's job. The responsibility of
23 this Commission is to do what it is charged under the
24 statutes that it has responsibility for in 367, 350,
25 what have you.

1 And so to bring these issues to -- either of
2 these issues, I have to agree with the Staff's
3 original analysis, they spent some time going over and
4 expressed rather eloquently, I thought. I'm amazed at
5 why they are backing off the question just because --

6 **COMMISSIONER GARCIA:** That makes two of us.
7 I have to agree with Staff's original position on
8 this, unless Staff has something to add.

9 **MS. REYES:** Can I just try to clarify just
10 for a moment?

11 I think where we were initially we did not
12 have OPC's position on this issue.

13 **COMMISSIONER GARCIA:** See, OPC's position on
14 the issue shouldn't determine whether this is an issue
15 or not. It should be determined based on whether this
16 is an issue that is relevant in this case to be
17 addressed and whether we're required to address it in
18 this case. And whether -- OPC's position is to our
19 liking or not doesn't necessarily make it an issue. I
20 find that OPC's position is pretty near to Staff's
21 position, but that shouldn't have a determination
22 here.

23 **MS. JABER:** Commissioner, may I make an
24 appearance on the record and see if I can explain some
25 of the confusion?

1 **COMMISSIONER GARCIA:** Absolutely.

2 First of all, on the record I would like to
3 apologize for the confusion and changing on the oral
4 motion to strike.

5 I would agree with you that a review of the
6 position doesn't in and of itself tell us if the issue
7 is relevant or not. What it has done for us is
8 explain, further explain where OPC was coming from
9 with the identification of the issue. What was
10 misleading to Staff is Wedgefield's position.
11 Wedgefield's position answers OPC's --

12 **COMMISSIONER GARCIA:** The rule challenge,
13 that I understand.

14 **MS. JABER:** It answers OPC's question in the
15 form of a rule challenge. And because the two issues
16 were done back to back --

17 **COMMISSIONER GARCIA:** That is the only thing
18 we're looking at here. In other words, the only thing
19 that -- Staff obviously had this, but I did not -- was
20 Mr. Girtman's position, Wedgefield's position on
21 issues --

22 **MS. JABER:** Right.

23 **COMMISSIONER GARCIA:** -- specifically 10.

24 **MS. JABER:** Right. OPC's issue, though, if
25 you just look at it from a pure legal standpoint,

1 their question is are those two orders binding? And
2 if so, what do you do? And if not, what do you do? I
3 think just from a pure legal standpoint the Commission
4 could answer that question based on the evidence in
5 the record without getting into the rule challenge,
6 which would be inappropriate pursuant to 120.

7 The other issue is not that -- you can't do
8 that with the other issue. The way it's worded it
9 says must you initiate a generic rulemaking
10 proceeding? And what Staff has attempted to make
11 clear to all the parties is pursuant to 120 the
12 Commission can't decide that.

13 **COMMISSIONER GARCIA:** Correct. Now you are
14 addressing the new Issue 11 or old Issue 10?

15 **MS. JABER:** Yes, sir.

16 **MR. GIRTMAN:** Commissioner, if I could
17 respond. Again, the issue raised by OPC in the new
18 Issue 10 about whether or not those rules are binding,
19 is directed at whether or not this Commission would be
20 exercising or applying a nonrule policy. That's
21 exactly what the issue is and whether you cite orders
22 in it or not --

23 **COMMISSIONER GARCIA:** That's not the
24 response we're getting from them. I understand what
25 you're saying, Mr. Girtman, but that's not necessarily

1 what it seems to be directed at.

2 MR. BECK: Commissioner, can I make a few
3 comments? First of all, old 11/new 10 is our --

4 COMMISSIONER GARCIA: Wait a second,
5 Mr. Girtman.

6 MR. BECK: The old 11/new 10 is our issue.
7 You've got our response there.

8 COMMISSIONER GARCIA: Correct.

9 MR. BECK: I think Mr. Girtman's position
10 goes into rulemaking that we don't agree with. That's
11 their position, though, and they are entitled to take
12 whatever position they want to take.

13 The old 10/new 11 that Mr. Girtman wants to
14 strike is Mr. Girtman's issue. And, again, I don't
15 care about that issue, if you strike it or not. It's
16 not my issue and it's up to him. But I think it's odd
17 that Wedgefield wants to strike its own issue. So we
18 would be very happy if you kept the old 11/new 10; you
19 have our position.

20 MR. GIRTMAN: Commissioner, the new 11 was
21 put in only in response to the OPC's position 10.
22 Again, both of these issues raise the question of
23 whether or not the Commission is applying a nonrule
24 policy. If it is, what is the consequence? If it's
25 not, what is the consequence?

1 COMMISSIONER GARCIA: I see that in 10. I
2 don't necessarily see that in 11. Because while 10
3 addresses that issue directly, I don't think 11 does,
4 or -- I'm sorry, let me not mix them up. I don't
5 think new 10 has the same point or makes the same case
6 as old 10 or new 11.

7 MR. GIRTMAN: Well, they are opposite sides
8 of the same coin, Commissioner. One is -- and that's
9 the new 10 is whether or not the Commission has
10 binding policy on acquisition adjustments. That's
11 what the issue is.

12 Is the Commission bound by its prior
13 statements of policy on the acquisition adjustments?
14 Okay. That is, it has a policy or it doesn't. It has
15 a rule or it doesn't. Is it applying nonrule policy
16 or is it not? Clearly a DOAH issue, okay?

17 If the response to new Issue 10 on whether
18 or not it has a binding policy or not, if the answer
19 is, "Yes, we have binding policy; we're going to
20 follow it," that's one thing. If the answer is "We
21 know we don't have a binding policy," the next
22 question has to be, "What do we do?" Do we dismiss
23 this case because we don't have any binding policy and
24 we can't go forward on a case-by-case basis?
25 Incipient rulemaking has been thrown out by the new

1 APA. McDonald versus Department of Banking and
2 Finance was overruled, if you will, by the statute.
3 The legislature said no more of that. No more
4 incipient rulemaking. No more case-by-case
5 development of policy.

6 So if one stays, they both have to stay,
7 because you can't get from Point A to Point B without
8 going through two of them while at the same time --
9 they are both DOAH issues. They're both questions of
10 application of nonrule policy. That's the issue that
11 OPC wants to bring and it's afraid to take it to DOAH.

12 **COMMISSIONER GARCIA:** Mr. Brubaker, do you
13 have anything to add?

14 **MS. BRUBAKER:** Well, I would say,
15 Commissioner, that if the only reason Mr. Girtman
16 included his issues in response to OPC's old Issue 11/
17 new Issue 10, then he might take the content of his
18 issue and make that his response to OPC's issue.

19 **MR. GIRTMAN:** No, ma'am. That's not our
20 position.

21 As I understand -- correct me if I'm wrong,
22 but what I believe you're saying is that you think
23 that the new Issue 10, if it stayed, would be
24 adequately addressed merely by taking a position,
25 which we can't squeeze into 50 words one of those much

1 less two of them. That's the first point.

2 The second point is they are two totally
3 separate issues. One is do you have a binding policy,
4 yes or no? And the second issue is if you don't have
5 a binding policy, what do you do next?

6 And our position is that if you don't have a
7 binding policy in effect currently, then you can't
8 proceed on this case and you must initiate generic
9 proceedings to address the overall policy of
10 acquisition adjustments. You cannot do incipient
11 rulemaking. We think you've got a binding policy. We
12 think what you have, in fact, is a rule. Even though
13 it's not in the Florida Administrative Code, we
14 believe it's a rule. It looks like a rule. It talks
15 like a rule. It does what a rule does. It's a
16 statement of general application. You went through
17 hearings, noticed everybody in the world, fully
18 participated in by anybody that wanted to participate.
19 So we feel you've got a rule. But the point is first
20 our position is the whole thing ought to be decided by
21 DOAH. If somebody wants to challenge you on the
22 application of your policy, they ought to be in DOAH
23 on both issues, okay? But if you're going to keep
24 one, you have to keep both.

25 COMMISSIONER GARCIA: Mr. Beck, are you

1 going to add anything?

2 MR. BECK: No.

3 COMMISSIONER GARCIA: I'm going to strike 11
4 and -- I mean, 10 and 11, new 10 and new 11 or the old
5 10.

6 We go on. Exhibit list. Any corrections or
7 changes?

8 MR. GIRTMAN: Commissioner, we have one
9 thing -- a couple things actually. The PSC witness,
10 Ms. Welch, has an audit report that in the information
11 that's been developed says part of that relies on
12 previous audit reports. There have been three of
13 them. And I provided to everyone a copy of the list
14 -- it's titled "Econ Utilities' Audits." And we
15 would request that those three also be added as
16 exhibits, and we'll need to get copies of those and
17 provide to everyone.

18 COMMISSIONER GARCIA: Did you give us a
19 copy?

20 MR. GIRTMAN: No, we have not gotten them
21 yet. We know what they are. We just need to get
22 them. We will provide them.

23 COMMISSIONER GARCIA: Staff.

24 MS. BRUBAKER: I would simply note that
25 those, if they were to be filed as direct exhibits,

1 would have been more appropriately filed in the course
2 of filing direct testimony. If they are going to be
3 admitted for the purposes as a cross examination
4 exhibit, I think that would be perfectly appropriate.

5 MR. GIRTMAN: Commissioner, I have been
6 challenged in this case by trying to understand what
7 our burden of proof is. And if we're going to have to
8 prove a negative on acquisition adjustment, my
9 question is what in the world else is there that we
10 may get nailed with for failing to quote, "prove it."

11 I remember a PPW case that hinged on the
12 question of a PSC audit, same Company. And the rate
13 base was set at zero based on questions about whether
14 or not there was sufficient evidence. OPC was
15 involved in that case. And I think because the change
16 has occurred in the two prehearing conferences,
17 preliminary prehearing conferences we have had and
18 particularly the question of burden of proof, I would
19 respectfully request some latitude in a couple of
20 these things, because this has been new to us in this
21 proceeding. If we had known it was happening a long
22 time ago we could have put the kitchen sink in this
23 case, but we didn't know it. And so I respectfully
24 ask for the opportunity to put them in. I can cross
25 examine, but I want them listed, please. I don't want

1 any surprises for anybody. I want everybody to know
2 that we're going to rely on this stuff. And, you
3 know, you can say, "Well, you can introduce these on
4 cross examination." Well, we can spend a lot of time
5 down there at that hearing shuffling paper around and
6 authenticating and doing things like that, but I don't
7 think there's any question about the authenticity of
8 these documents.

9 COMMISSIONER GARCIA: Mr. Beck.

10 MR. BECK: This was just given to me as we
11 came into the hearing. It seems to me that these may
12 be appropriate cross examination exhibits for
13 Ms. Welch, which Ms. Welch chose not to attach to her
14 testimony. I have no way of knowing whether she
15 relied on these or not until she testifies. She may
16 say she didn't; she may she did. But it just seems to
17 me that would be more appropriate for Mr. Girtman to
18 offer at the hearing. If he hands an exhibit to
19 Ms. Welch and she says, "I've never seen this before,"
20 I'm certainly not agreeing to it. On the other hand,
21 if she did rely on it, it would seem to me to be an
22 appropriate cross examination exhibit.

23 MR. GIRTMAN: We served request for
24 admissions on Ms. Welch and she answered and she said
25 she relied on these, you know, took this information

1 from these prior exhibits and went from there.

2 MR. BECK: I don't recall, Ben, her saying
3 exactly what she relied on or not. She said she
4 relied on previous audits or some generic statement,
5 didn't she? I don't remember this --

6 MR. GIRTMAN: That's what these are. These
7 are previous audits.

8 MR. BECK: She didn't have the kind of
9 specificity you have here.

10 MR. GIRTMAN: No, she didn't.

11 MR. BECK: I would want her to answer that
12 at the hearing. If she said that she reviewed these
13 and relied on them --

14 MR. GIRTMAN: I intend to.

15 MR. BECK: I would not have a objection.

16 COMMISSIONER GARCIA: Mr. Girtman, bring it
17 up in cross. Okay?

18 MR. GIRTMAN: Okay. We also have a request,
19 Commissioner, for official notice. I know the
20 Commission can taken notice of its prior rulings, but
21 I have supplied a list of specific orders of the
22 Commission that I would request that be taken official
23 notice of, put everybody on notice as to what they
24 are.

25 COMMISSIONER GARCIA: Okay.

1 **MR. GIRTMAN:** Also, just so there's no
2 doubt, we're going to be relying pretty heavily on
3 Chapter 120 and Chapter 367 as one might imagine.

4 And one of the other things that's given us
5 some concern, Commissioner, as I mentioned before, the
6 change in what we understood originally as our burden
7 in this proceeding. It may have been -- my next
8 question may have become moot by the striking of the
9 two issues and very likely has. I'll think more about
10 this.

11 **COMMISSIONER GARCIA:** Before you launch into
12 it think about it, because I don't want to go rehash
13 something.

14 **MR. GIRTMAN:** All right. May I take about
15 two minutes?

16 **COMMISSIONER GARCIA:** That would be fine.

17 (Pause)

18 Mr. Girtman, you handed me a series of cases
19 here. Are these --

20 **MR. GIRTMAN:** That's what I was going to
21 address. It may be moot, and we may just be able to
22 totally forgot them. Just a minute. (Pause)

23 Commissioner, after consultation with
24 Mr. Seidman, we believe that the striking of Issues 10
25 and 11 eliminates the need for consideration of these

1 other four documents.

2 COMMISSIONER GARCIA: Very good.

3 MR. GIRTMAN: Thank you.

4 COMMISSIONER GARCIA: Is there anything
5 else?

6 MR. GIRTMAN: Yes, Commissioner. On Page 15
7 of the Prehearing Order, Stipulations, No. 2, we've
8 agreed to stipulate with the Office of Public Counsel
9 as to the authenticity of a copy of a document. But I
10 would --

11 COMMISSIONER GARCIA: Page 14, you said?

12 MR. GIRTMAN: 15.

13 COMMISSIONER GARCIA: I don't think we're
14 holding the same document.

15 MR. GIRTMAN: It was on the -- I'm through
16 with exhibits.

17 MS. BRUBAKER: Page 14?

18 COMMISSIONER GARCIA: 14.

19 MR. GIRTMAN: I'm sorry.

20 COMMISSIONER GARCIA: Okay. You're fine
21 with that as well as Stipulation 1? I didn't address
22 them because I thought we had already agreed to these
23 but nonetheless. And 3 is also stipulated, too? What
24 did we do with 4?

25 MS. BRUBAKER: Issue 4 should be stricken.

1 **COMMISSIONER GARCIA:** Very good.

2 **MS. BRUBAKER:** I'm sorry. Beg your pardon,
3 Commissioner. Don't let me misspeak myself again.
4 Stipulation No. 4 should be stricken. Beg your
5 pardon.

6 **COMMISSIONER GARCIA:** You're right.
7 Stipulation 4. Issue 4 remains.

8 Mr. Shreve made a very important point. We
9 need to move with as much diligence as possible to
10 find out how Commissioner Deason is going to rule on
11 this. I don't want to put any added pressure on him,
12 but certainly it puts both of the parties in an
13 uncomfortable position, in particular Public Counsel's
14 office, as well as the citizens. So we want to make
15 sure that we try to get this out from under us as
16 quickly as possible and we give as much notice as
17 possible.

18 **MR. GIRTMAN:** Commissioner, on the
19 stipulations, as I was about to address, we've
20 stipulated with the Office of Public Counsel for the
21 introduction of a particular document from Orlando.
22 But I would like to please add one sentence at the
23 end.
24

25 **COMMISSIONER GARCIA:** Which one are you

1 talking about?

2 MR. GIRTMAN: Stipulation No. 2.

3 COMMISSIONER GARCIA: Uh-huh. Director,
4 Orange County Utilities into the record as stipulated,
5 right?

6 MR. GIRTMAN: Right. And I would like to
7 add the sentence, please, "Parties disagree as to the
8 meaning of the document." We're not stipulating to
9 the contents, the meaning, the substance of it. All
10 we're doing is saying this document was prepared by
11 those folks in Orlando.

12 COMMISSIONER GARCIA: It does have an
13 effect.

14 Mr. Beck.

15 MR. BECK: Well, this is new to me, also.
16 Of course, the documents entered into the record, the
17 people are going to read it the way they are going to
18 read it. I don't really quite understand what
19 Mr. Girtman is driving at here.

20 MR. GIRTMAN: We're not stipulating to the
21 fact that their conclusions are correct. If they put
22 a number in, the number is there and whatever it
23 means, it's up to the Commission to decide what it
24 means. But we're not stipulating that the meaning of
25 the document is -- or the conclusions of the

1 document --

2 **COMMISSIONER GARCIA:** I don't think we're
3 stipulating that in this stipulation. I don't think
4 that was ever included, that's why I think your words
5 are superfluous.

6 **MR. GIRTMAN:** It may be. I just wanted to
7 raise it to make sure that we're stipulating that that
8 document is what that document purports to be, but we
9 don't stipulate to the contents of it.

10 **MR. BECK:** I accept that. To me, I
11 understood it that way, that he's not agreeing that
12 these are in fact --

13 **COMMISSIONER GARCIA:** So we're not going to
14 add the wording in. I think we all understand what we
15 meant here.

16 **MR. GIRTMAN:** That's fine.

17 **COMMISSIONER GARCIA:** Ms. Brubaker, do you
18 have anything else?

19 **MS. BRUBAKER:** Nothing, except to add to the
20 pending motions we will make a note of Wedgefield's
21 pending petition and motion for continuance.

22 **COMMISSIONER GARCIA:** Very good.

23 Mr. Shreve, you were going to say something?

24 **MR. SHREVE:** Commissioner, I do have one
25 question to help us make our decision on what action

1 we're going to take on your ruling. This was a verbal
2 motion made by Staff. When was the first time that
3 motion was brought up?

4 MS. BRUBAKER: Today.

5 MR. SHREVE: At this hearing was the first
6 time it's been discussed?

7 MS. BRUBAKER: That's correct.

8 COMMISSIONER GARCIA: Let's be correct about
9 this. We did have a pre-premeeting with Staff, which
10 they said that they would be bringing up this motion.

11 MR. SHREVE: This motion and this was a
12 motion by the Staff, I guess, acting as a party.

13 COMMISSIONER GARCIA: Are you speaking about
14 the Motion to Strike Issues 10 and 11 or new Issues 10
15 and 11?

16 MR. SHREVE: Yes, sir, I am.

17 COMMISSIONER GARCIA: Yes. Staff pointed
18 out that they would be bringing it up at the
19 prehearing that they were going to move to strike
20 Issues 10 and 11. Am I correct in stating it that
21 way?

22 MS. BRUBAKER: It was not raised at the
23 pre-prehearing simply because --

24 COMMISSIONER GARCIA: No, it was raised in
25 my office when you were --

1 MS. BRUBAKER: That's correct.

2 COMMISSIONER GARCIA: -- briefing me on the
3 Prehearing Order precisely one hour and 30-minutes
4 ago.

5 MS. BRUBAKER: And it's clarification. It's
6 not that we're entering a motion as a party. We're
7 simply recommending to the Commission that for
8 jurisdictional reasons these issues are inappropriate.

9 MR. GIRTMAN: Commissioner, if I could add a
10 comment just to make sure for Mr. Shreve's
11 understanding. The first time I heard about this
12 motion was when it was made here by Staff counsel. We
13 have been looking at that question ourselves in our
14 research and independently came to the conclusion that
15 it was a DOAH jurisdictional matter.

16 COMMISSIONER GARCIA: I think by what was
17 stated, I think it was your motion that passed, not
18 Staff's.

19 MR. SHREVE: It may have been, but
20 Mr. Girtman was not the first one to raise it. And
21 this was raised before the hearing in your explanation
22 to the Chairman?

23 MS. BRUBAKER: That's correct.

24 COMMISSIONER GARCIA: If that's it then this
25 prehearing is adjourned.

1 (Thereupon, the hearing concluded at
2 2:45 p.m.)

3 - - - - -
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 STATE OF FLORIDA)

2 COUNTY OF LEON)

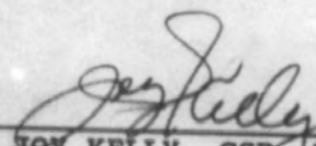
CERTIFICATE OF REPORTER

3 I, JOY KELLY, CSR, RPR, Chief, Bureau of
4 Reporting, Official Commission Reporter,

5 DO HEREBY CERTIFY that the Prehearing
6 Conference in Docket No. 960235-WS and 960283-WS was
7 heard by the Prehearing Officer at the time and place
8 herein stated; it is further

9 CERTIFIED that I stenographically reported
10 the said proceedings; that the same has been
11 transcribed under my direct supervision; and that this
12 transcript, consisting of 56 pages, constitutes a true
13 transcription of my notes of said proceedings.

14 DATED this 6th day of August, 1997.

15
16
17
18
19
20
21
22
23
24
25

JOY KELLY, CSR, RPR
Chief, Bureau of Reporting
Official Commission Reporter
(904) 413-6732