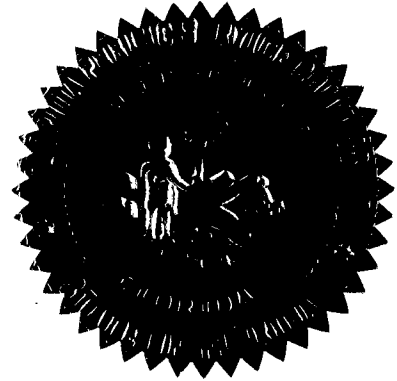


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 010827-EI

In the Matter of

PETITION BY GULF POWER COMPANY FOR
APPROVAL OF PURCHASED POWER
ARRANGEMENT REGARDING SMITH
UNIT 3 FOR COST RECOVERY THROUGH
RECOVERY CLAUSES DEALING WITH
PURCHASED CAPACITY AND PURCHASED
ENERGY.



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PROCEEDINGS: PREHEARING CONFERENCE

BEFORE: COMMISSIONER BRAULIO L. BAEZ
Prehearing Officer

DATE: Friday, August 24, 2001

TIME: Commenced at 9:30 a.m.
Concluded at 11:08 a.m.

PLACE: Betty Easley Conference Center
Room 152
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR
Chief, Office of Hearing Reporter Services
FPSC Division of Commission Clerk and
Administrative Services
(850) 413-6732

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FPSC-COMMISSION CLERK

1 APPEARANCES:

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4 12950, Pensacola, Florida 32576-2950, appearing on behalf of
5 Gulf Power Company.

6 VICKI GORDON KAUFMAN and JOHN McWHIRTER, McWhirter,
7 Reeves, McGlothlin, Davidson, Dekker, Kaufman, Arnold & Steen,
8 117 South Gadsden Street, Tallahassee, Florida 32301, appearing
9 on behalf of Florida Industrial Power Users Group.

10 ROGER HOWE and ROB VANDIVER, Office of Public
11 Counsel, 111 West Madison Street, Room 812, Tallahassee,
12 Florida 32399-1400, appearing on behalf of the Citizens of the
13 State of Florida.

14 ROBERT ELIAS and MARLENE STERN, FPSC Division of
15 Legal Services, 2540 Shumard Oak Boulevard, Tallahassee,
16 Florida 32399-0870, appearing on behalf of the Commission
17 Staff.

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P R O C E E D I N G S

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2 COMMISSIONER BAEZ: Let's call the prehearing to
3 order.

4 Counsel, will you read the notice.

5 MS. STERN: By notice dated August 7th, 2001, this
6 time and place were set for a prehearing conference in Docket
7 010827-EI.

8 COMMISSIONER BAEZ: We will take appearances.

9 Mr. Stone.

10 MR. STONE: Jeffrey A. Stone and Russell A. Badders
11 of the law firm Beggs and Lane from Pensacola representing Gulf
12 Power Company.

13 MS. KAUFMAN: Vicki Gordon Kaufman of the McWhirter
14 Reeves law firm. And I would also like to enter an appearance
15 for John McWhirter on behalf of the Florida Industrial Power
16 Users Group.

17 MR. HOWE: I'm Roger Howe with the Public Counsel's
18 Office.

19 MR. VANDIVER: Rob Vandiver with the Public Counsel's
20 Office.

21 MS. STERN: Marlene Stern on behalf of Commission
22 staff.

23 COMMISSIONER BAEZ: Okay. We will move along. Do we
24 have any preliminary matters that we have to take care of?

25 MS. STERN: Yes, we do. Right now the deadline for

1 discovery is set for August 29th. FIPUG will be having --
2 sponsoring a witness and he will not be available for
3 depositions until August 30th. Likewise, staff is sponsoring a
4 witness. Staff's testimony won't be filed until August 29th.
5 So if anybody wants to depose staff's witness, it will have to
6 be after August 29th. And I think -- well, we suggest the
7 discovery deadline be extended until August 31st.

8 COMMISSIONER BAEZ: And that will give -- we will
9 have two days for deposition of the staff witness, if
10 necessary?

11 MS. STERN: Right.

12 COMMISSIONER BAEZ: Mr. Stone, any objection?

13 MR. STONE: I have no objection to extending the
14 deadline for the purposes of those two depositions, but I would
15 hope that it would not mean extending the deadline for all
16 other purposes.

17 COMMISSIONER BAEZ: My understanding is that that is
18 the only basis.

19 Ms. Kaufman.

20 MS. KAUFMAN: Commissioners, we have some other
21 matters that we are going to bring up that may effect that
22 ruling. As we sit now we don't have any objection to the
23 extension, however.

24 COMMISSIONER BAEZ: All right. Mr. Howe.

25 MR. HOWE: No objection.

1 COMMISSIONER BAEZ: Thank you. You say you have
2 other matters that are going to effect the ruling, I mean,
3 would it be better to take it up before we rule on that? I
4 will reserve ruling on the extension.

5 Staff, you don't have any other preliminary matters?

6 MS. STERN: No. No, I don't.

7 COMMISSIONER BAEZ: Ms. Kaufman, why don't you weigh
8 in now, if you would like.

9 MS. KAUFMAN: Well, my concerns have to do with the
10 discovery in this case and how the receipt or lack thereof is
11 affecting my witness' ability to prepare his testimony, which
12 currently is supposed to be due on Monday, this upcoming
13 Monday, August 27th. And there are two discovery matters that
14 are affecting his ability to prepare.

15 The first has to do with some discovery requests we
16 made to Gulf Power asking them to provide us electronic copies
17 of all the backup and formulas and information underlying the
18 spreadsheets, the confidential spreadsheets that you are going
19 to consider. We made the requests to them, Production Request
20 Number 4 on August 16th. I talked to Mr. Stone about it and he
21 graciously turned it around very quickly and had the disk
22 FedEx'd to my expert who received it last Monday.

23 However, after he reviewed it, my expert told me that
24 basically the disk only contains the same information that is
25 on the hard copies input into a workbook spreadsheet. And for

1 the most part contains no backup, no links, no formulas, no way
2 for him to ascertain how any of the values were derived.

3 As soon as he let me know that, I called Mr. Stone,
4 explained it to him. This was at the beginning of this week.
5 He told me he was going to check on it. I haven't heard
6 anything back. I sent another discovery request, there has
7 been no response. The bottom line is Mr. Pollock does not have
8 the --

9 MR. STONE: Perhaps I can cut to the chase. The
10 diskette, a second CD was sent to Mr. Pollock.

11 MS. KAUFMAN: Excuse me, Commissioner --

12 COMMISSIONER BAEZ: Hang on. Finish your statement
13 and we will get the --

14 MS. KAUFMAN: I would appreciate that. At any rate,
15 what I was going to say, here we are on Friday with my witness'
16 testimony due Monday and he doesn't have the information that
17 he needs to prepare his analysis to counter the analysis that
18 Gulf provided. That is one aspect of the discovery problem
19 that we are having.

20 COMMISSIONER BAEZ: If you are going to move on to
21 another point, can we just have Mr. Stone --

22 MS. KAUFMAN: Sure, absolutely.

23 MR. STONE: The discovery request that I received
24 from Ms. Kaufman, I believe it was on Tuesday, I believe the CD
25 was sent out by Federal Express to Mr. Pollock on Wednesday.

1 He should have had it yesterday morning.

2 It may be that the hard copy of the response to Ms.
3 Kaufman hasn't made it to her and she was not aware of that,
4 and that was the only thing I was trying to bring to both Ms.
5 Kaufman's attention and to the Prehearing Officer's attention.

6 COMMISSIONER BAEZ: So what you are suggesting is
7 that we may have no -- may not have an issue? I mean, have you
8 been able to confirm with your witness that it has been
9 received?

10 MS. KAUFMAN: I have not.

11 COMMISSIONER BAEZ: It hasn't been received or --

12 MS. KAUFMAN: This is the first I have heard that
13 anything has been sent. And even if he has received it, again,
14 I mean, here we are Friday talking about him trying to file
15 testimony on Monday. To do analysis underlying that
16 spreadsheet I think is unreasonable, and we are going to
17 request an extension of time for his testimony. But I have
18 another discovery matter, as well.

19 COMMISSIONER BAEZ: Moving on.

20 MS. KAUFMAN: Okay. Moving on. You know that Public
21 Counsel sent discovery and filed a motion to compel which you
22 granted yesterday in regard to a lot of documents that relate
23 primarily to Southern Power and their motivation and
24 involvement in this case.

25 And if I understand your order, and assuming Gulf is

1 going to comply with it, you directed them to provide those
2 documents by August 28th, I'm assuming the close of business,
3 and also you have some provisions in there for in camera
4 inspection on the same day.

5 Again, assuming that the documents are provided on
6 August 28th, that's the day after my witness' testimony is due,
7 he will have no opportunity to review the documents or
8 incorporate anything in there that might be of importance in
9 his testimony. And, again -- I'm sorry.

10 COMMISSIONER BAEZ: Go ahead.

11 MS. KAUFMAN: In terms of his preparation, it puts
12 him in an impossible situation. He won't be able to do
13 anything with those documents, even assuming that I have
14 received them close of business on Tuesday, since he will have
15 already filed his testimony Monday.

16 COMMISSIONER BAEZ: Is there any way -- and
17 understand that, you know, I will say it again, we are moving
18 on very short time lines and we are down to giving hours to
19 spare, okay? We are not even talking about days at this point.
20 There is -- you do have an opportunity to try and address that
21 information through direct, and I know that that is not your
22 preferred way of addressing it, but it seems to me that that is
23 at least not unduly burdensome, not an undue burden to you
24 given the time lines that we have got. We are fast approaching
25 hearing.

1 MS. KAUFMAN: Did you mean on cross?

2 COMMISSIONER BAEZ: On cross, I'm sorry. I misspoke.
3 To elicit or to try and address that information on cross. It
4 seems to me that that is the last alternative that we have got
5 left, and I would urge you to make the best of it. I don't
6 think that we can take any more extensions. I'm pretty certain
7 that we are like down to nothing on this.

8 MS. KAUFMAN: Well, Commissioner, obviously whatever
9 you rule is what is going to occur. I would suggest to you
10 that Gulf objected -- they didn't produce the documents, you
11 found that their objections were invalid, you have ordered them
12 to produce the documents. They are the ones that are asking
13 for this rush to judgment on the one hand and we are all, you
14 know, killing ourselves to try to accommodate it. And on the
15 other hand they are the ones that are throwing obstacles in the
16 road path of the process. So I suggest to you that it is sort
17 of an ironic situation we find ourselves in.

18 COMMISSIONER BAEZ: It is an ironic situation and
19 please understand that I'm -- you said it right, we all are
20 trying to kill ourselves. And I think that it is this -- it is
21 the prehearing officer's responsibility to try and weigh
22 everything. And one of the goals is to keep this thing moving
23 on time after all the decisions that have been made consistent
24 with that.

25 And what I'm trying to tell you is that I think you

1 are not entirely foreclosed from addressing whatever
2 information comes out of that in camera inspection through
3 cross. And it seems to me that that is the most reasonable way
4 to approach it without muddying things up any further. There
5 is a number of issues and a number of timing issues that are
6 going to get thrown up here today, and we are going to try and
7 deal with them as best we can. And that's one of them and
8 that's how I'm going to rule.

9 MS. KAUFMAN: I understand. And I appreciate it,
10 Commissioner, I just want my objection to be on the record.

11 COMMISSIONER BAEZ: I hear you. You have ample
12 opportunity. Anything else or is that --

13 MS. KAUFMAN: That's all I had in terms of the
14 discovery dispute.

15 COMMISSIONER BAEZ: Thank you. Mr. Howe.

16 MR. HOWE: I do not have any preliminary matters.

17 COMMISSIONER BAEZ: Okay. Mr. Stone, I didn't get to
18 you.

19 MR. STONE: I don't know if this is the appropriate
20 place. I would not have considered it a preliminary matter,
21 but with regard to the order that was issued yesterday, we
22 obviously are still trying to assess the order. I understand
23 there was one point of clarification, at one place at least and
24 perhaps others there is the term business days, but in most
25 passages it refers to five days. And I am assuming that the

1 intention of the prehearing officer was that the response be
2 within five actual days, not five business days.

3 COMMISSIONER BAEZ: Yes. We are shooting -- as it is
4 my understanding we are shooting for a 28th or 29th -- I think
5 that is the date that -- it's the 28th, so if we can make the
6 clarifications accordingly.

7 MR. STONE: That is the clarification I was seeking.

8 COMMISSIONER BAEZ: Calendar days.

9 MR. STONE: There may be a need for further motions
10 addressed to the order. And if we had that opportunity, or if
11 we had to file those other motions, I would assume that they
12 would be by that same deadline. And what we would hope is that
13 if the need to file those further motions is that there be an
14 expedited schedule for any responses that would be appropriate
15 to those motions. And, if necessary, a staff recommendation in
16 an effort to get the matter before the Commission on the 4th.

17 COMMISSIONER BAEZ: Staff.

18 MS. STERN: Yes, we would.

19 COMMISSIONER BAEZ: It sounds like it can probably be
20 accommodated.

21 MS. STERN: Yes. It sounds like if we are talking
22 about a motion for reconsideration --

23 COMMISSIONER BAEZ: That's what it sounds like.

24 MS. STERN: -- we would bring it before the full
25 Commission on the 4th.

1 COMMISSIONER BAEZ: And in terms of response times,
2 we have been working on two days, is that --

3 MS. STERN: I'm sorry, response time.

4 COMMISSIONER BAEZ: Two days to respond, or can you
5 enlighten us what kind of response time for the other parties.

6 MS. STERN: Oh, response time if the other parties
7 want to respond to Gulf's motion?

8 COMMISSIONER BAEZ: Yes.

9 MS. STERN: I believe that was three days. I guess
10 it depends on when Gulf is going to file. And I think we might
11 need to just think now, set a schedule now for responding to
12 the motion for reconsideration regardless of what is in the
13 orders on procedure.

14 COMMISSIONER BAEZ: Our starting point is by when
15 Gulf is planning on filing, or I have heard the suggestion that
16 at least by the 28th, along with whatever filing -- I'm sorry,
17 Mr. Elias, do you want to jump in here?

18 MR. VANDIVER: I would like to be heard, too.

19 COMMISSIONER BAEZ: You are next in line, Mr.
20 Vandiver.

21 MR. VANDIVER: Great.

22 MR. ELIAS: If it was filed by the 28th and the
23 parties were given two days to respond, that would basically
24 mean that staff would have to have one business day to prepare
25 a recommendation. Which we can do, we have done before. But

1 beyond that, I assume it would be -- presume it would be
2 considered by the Commission at the September 4th agenda
3 conference. In the event that the motion for reconsideration
4 is denied, my concern is that the parties have been effectively
5 denied access to documents that they first requested almost a
6 month ago on the day before the hearing. And I think that
7 raises substantial concerns in terms of the sufficiency of the
8 opportunity to present evidence on those documents.

9 And I don't pretend to speak for the parties, but I
10 am very concerned with the impact on the ability to meet Gulf's
11 request for an expedited decision on the case and a hearing on
12 the 5th if it chooses to exercise the full panoply of its
13 rights to seek review of the interim orders. I mean, it is
14 Gulf's request to expedite this matter, it is Gulf's desire to
15 go forward on the 5th, and it really does place us in a very
16 uncomfortable position in terms of being able to assure that
17 all parties to the process have the opportunity to litigate the
18 issue fully on the merits.

19 COMMISSIONER BAEZ: And I would agree. I am
20 concerned that there isn't going to be an opportunity. I mean,
21 filing the motion which you have every right to do, and given
22 the time that is remaining leading up to the hearing is not
23 going to afford the other parties a meaningful -- so, I guess
24 my interpretation of that is that, you know, there is going to
25 be some hard decision have to be made whether we are going to

1 go on the 19th instead of the 5th.

2 And I understand the position that it puts you in in
3 terms of expediting the docket, but somehow these are the hard
4 choices that the company is going to have to make on whether
5 they put this into motion or keep it on an expedited schedule.

6 MR. STONE: And those are part of our assessment
7 which is why I can't -- I won't say there will be a motion to
8 reconsider, but there may be. I would point out that Mr.
9 Elias' analysis assumes that we were not successful on any such
10 motion.

11 MR. ELIAS: That is true.

12 MR. STONE: And I would urge that we at least leave
13 open the possibility of a hearing on the 5th if there was a
14 possibility that we were successful in any such motion.

15 COMMISSIONER BAEZ: And I think that possibility is
16 implicit in all of our discussions. But I think for our
17 purposes here, we are trying to deal with worst-case scenarios,
18 you understand.

19 MR. STONE: Yes. I just didn't want -- I didn't want
20 the mere fact that there was a possibility we would file such a
21 motion to cause us to lose the hearing on the 5th.

22 COMMISSIONER BAEZ: Any discussion on a motion that
23 you may file for reconsideration is not being prejudged here in
24 any way, shape, or form. I think it's fair to raise that
25 point, but we are -- let's just clarify that we are talking on

1 worst-case scenarios and if the reconsideration isn't granted.

2 MR. STONE: Right.

3 COMMISSIONER BAEZ: Where does that -- and I guess
4 having said that, I'm wondering, Counsel, where does that leave
5 us? We need to somehow address the other parties opportunity
6 to --

7 MR. ELIAS: My suggestion would be that the motion,
8 if any, be filed by the close of business on Monday. That the
9 responses, if any, be filed by the close of business on
10 Wednesday. And then with the expectation that staff, assuming
11 that we obtain the appropriate approvals, would file a
12 recommendation on Friday.

13 COMMISSIONER BAEZ: Now, that takes care of the
14 recommendation, but there is a bigger issue as to one way or
15 the other, however a motion would go or fare. I think we have,
16 you know, the issue that you have correctly pointed out, is
17 that we are talking less than 24 hours to make, possibly have
18 to make materials available to the other parties, and I'm
19 wondering how we can address that.

20 MR. ELIAS: You know, I would like to hear from the
21 utility and the other parties.

22 COMMISSIONER BAEZ: Mr. Vandiver was waiting
23 patiently.

24 MR. VANDIVER: I just wanted to raise some
25 fundamental fairness issues.

1 COMMISSIONER BAEZ: I think they are out there.

2 MR. VANDIVER: I think they are, too. Gulf Power --
3 I think I filed this -- I don't have a calendar in front of me,
4 I don't have these motions in front of me, so I'm doing a lot
5 of this from memory. I think I filed this original thing
6 August 8th. I filed a motion to compel two days later. I
7 think Gulf Power was given a weekend and then an additional day
8 to file.

9 Now Gulf Power is talking about a five-day period to
10 file possibly a motion for reconsideration, and then a two-day
11 window for us to file. That is fundamentally unfair. Our time
12 lines are much stricter to respond to Gulf Power than Gulf
13 Power is getting. That's not right. The time line should be
14 parallel. And I don't think it has been proportional in the
15 past, and I think it should be for the future.

16 As you point out, we are getting so close to this
17 hearing we need a meaningful opportunity to review these
18 documents should the Commission -- should this order ultimately
19 be upheld. We have been saying since we originally requested
20 these documents, we need these documents to prepare for
21 hearing. This is our theory of the case. It is fundamental to
22 our theory of the case that we look and see these documents.
23 We still don't have these documents. We need to look at these
24 documents. We need time to review them when we finally get
25 these documents.

1 Also I would point out, as you well know because you
2 wrote the order, this is a very lengthy order. There is many,
3 many rulings in here, there is not just one ruling in here.
4 There are rulings concerning work product, there are rulings
5 concerning relevance, there are rulings concerning privilege.
6 There are many, many discreet rulings contained within that
7 document. It is not going to be a walk in the park for the
8 full Commission to review it, for the prehearing officer to
9 review that document on reconsideration. There is a lot of
10 stuff in that document to be reviewed.

11 That is quite an undertaking to respond to in a
12 pleading legally. It was quite an undertaking to do in two
13 days to write a motion to compel. And I know it was quite an
14 undertaking to write the order for you to do. And this is a
15 very involved legal undertaking, and our resources are
16 stretched to the limit preparing for this hearing.

17 And we are running into fundamental due process
18 concerns here in getting ready for hearing and trying to get
19 these documents. And I am very, very concerned about the
20 proportionality of the time to prepare. And Gulf Power's
21 suggestion that they might file some kind of motion in five
22 days and then the suggestion that this office would be given
23 two days to respond to that is fundamentally unfair and I
24 object. And it's not fair. And I want to be on the record as
25 objecting to that, and I'm going to object to that until the

1 cows come home.

2 COMMISSIONER BAEZ: Understood, Mr. Vandiver.

3 MR. VANDIVER: All right. And I don't have the
4 calendar in front of me, and I wish I could lay it out chapter
5 and verse for you, but I think some of these answer and
6 responses back and forth have gone on in the past. And I just
7 want to try to get on a going-forward basis that we could get
8 these answer and responses on a going-forward basis in a
9 proportional sense. And to the extent they are not, I'm going
10 to continue to object, sir. Thank you.

11 COMMISSIONER BAEZ: Thank you.

12 MR. STONE: Just for clarification, the motion to
13 compel filed by Mr. Vandiver, the deadline of two days is one
14 that was self-imposed. The deadline I had to respond to his
15 motion to compel was in the prehearing order. If he had taken
16 more time to prepare his motion to compel, I still would have
17 had the same deadline imposed on me. So the alleged lack of
18 proportionality in that instance was one of his own volition.

19 With regard to the comment about five days, yes, I
20 had suggested five days for filing any motions because that was
21 the deadline specified in the order for compliance, but I
22 understood Mr. Elias to shorten that deadline. I agree that at
23 least on the surface it does not appear proportional, but as
24 Mr. Vandiver has outlined, this is a very lengthy order and it
25 takes a lot to consider the options with regard to further

1 motions. And I suspect, and you will see evidence throughout
2 the rules, that the initial pleading is generally given more
3 time than the responsive pleading. And so that argument about
4 proportionality, I think, is a little disingenuous.

5 The scheduled proposed by Mr. Elias seems to be
6 workable in leaving open the possibility that ultimate
7 compliance with this order may not be necessary if further
8 motions are filed and ruled upon, and that would allow us to
9 keep the hearing date on September 5th. And if for some reason
10 such motions, if filed, are not successful, then we would be
11 dealing with the issue of what to do with a hearing date at
12 that point, and I think that may be the appropriate time to
13 deal with that question.

14 MS. KAUFMAN: Commissioner, could I be heard?

15 COMMISSIONER BAEZ: Yes.

16 MS. KAUFMAN: Thank you.

17 Hopefully I won't sound like a broken record here,
18 but, of course, I want to join with Mr. Vandiver's objections.
19 You have already ruled, but I think that throughout this
20 process FIPUG's due process rights have basically been trampled
21 upon; us not getting our discovery, our witness' inability to
22 prepare his testimony, not having these documents, if we get
23 them at all, until August 28th. The schedule for the motion
24 and the response and the Commission's decision the day before
25 we are supposed to have the hearing, and we all have hearing

1 preparation to do, as well, I think it is just totally
2 unreasonable. And so I see that you are getting weary of this,
3 and I apologize for that --

4 COMMISSIONER BAEZ: It's part of the game.

5 MS. KAUFMAN: I understand. -- but I want to join
6 with Mr. Vandiver and let you know that from FIPUG's position
7 that this sort of a schedule is totally unworkable. Now, Mr.
8 Stone, perhaps he will prevail and your order will be
9 overturned and he won't have to produce the documents, but we
10 are not going to know that.

11 And, again, we are all going to be rushing to get
12 ready for a hearing that may not happen. And I remind you,
13 Commissioner, that we are in this situation because of Gulf's
14 request. So I think it is fundamentally unfair to expect the
15 parties to deal with these unreasonable deadlines in order to
16 satisfy Gulf's request. And basically we are in a situation of
17 Gulf's own doing, that is FIPUG's position.

18 COMMISSIONER BAEZ: Mr. Elias, can you remind me
19 again what the date for response you had suggested?

20 MR. ELIAS: My suggestion was that if a motion for
21 reconsideration was going to be filed, it be filed no later
22 than the close of business Monday, August 27th, and provided
23 either via facsimile or electronically to the other parties at
24 the same time. And that any responses to the motion be filed
25 no later than the close of business Wednesday, August 29th, and

1 provided to the parties electronically at the same time. And
2 that staff would endeavor to obtain permission to file a
3 recommendation by Friday so that it could be considered on the
4 next business day, which is Tuesday, September 4th.

5 COMMISSIONER BAEZ: Okay. One question. This
6 concept of close of business, that is discretionary so that we
7 can say noon just as well?

8 MR. ELIAS: Yes, I'm just -- yes.

9 COMMISSIONER BAEZ: Okay. Here is what my preference
10 would be. Let's not make it close of business Monday. We are
11 going to make it noon on Monday for the filing of the -- if
12 there is to be a filing for a motion for reconsideration.
13 Close of business Wednesday for responses. Mr. Vandiver, I
14 know that that doesn't give you total parity on the time, but I
15 think given the circumstances it seems fair. You have got a
16 little bit extra time.

17 Secondly, in terms of the hearing date, because that
18 is the one thing that we are not able to address with the time
19 that we have remaining. Whatever recommendation you file for
20 the Commission, assuming there is a motion for reconsideration
21 filed, should include a recommendation on the filing dates that
22 is consistent with your recommendation on the motion for
23 reconsideration, such that if it is that the staff is
24 recommending -- let's say no more. It should be consistent and
25 you should take into consideration to also have a

1 recommendation on whether the hearing should be held on the 5th
2 or not. I would like to have that issue put up to the
3 Commission, as well.

4 Mr. Vandiver, you are leaning over.

5 MR. VANDIVER: Yes, sir, and it was only to inquire.

6 COMMISSIONER BAEZ: Yes.

7 MR. VANDIVER: Am I to understand that we are getting
8 no documents and no discovery during the pendency of all of
9 these motions, and that we will be going into Tuesday and,
10 again, we are -- and I'm asking because I'm preparing for a
11 hearing September 5th. And, of course, you understand we have
12 a fueling adjustment filing on the agenda, we have other
13 matters, other things to do.

14 COMMISSIONER BAEZ: Please don't complicate things,
15 Mr. Vandiver.

16 MR. VANDIVER: But this hearing we are preparing for
17 and we are either going to be looking at documents or we are
18 not, but am I to understand that if this motion is filed we are
19 not going to be looking at any documents and we are going to be
20 going down one preparation path.

21 COMMISSIONER BAEZ: Well, here is this idiot's
22 opinion as the dumbest person in the room. I don't know how
23 you reconcile the situation that you have just -- I mean, I
24 don't see any way -- and, Counsel, feel free to jump in -- how
25 you get materials before there is a vote of reconsideration

1 that would free those materials to be provided to the parties.
2 I just don't know. If anybody wants to make any suggestions,
3 now is the time to do it. I'm not expecting -- I know where
4 you're coming from, so no need. But, you know, Mr. Elias, I
5 have reached the limit of my knowledge on this. I don't know
6 how to reconcile that.

7 MR. ELIAS: And I guess, to use a sports analogy, the
8 ball is in Gulf's court. And to the extent it chooses to
9 exercise its rights to seek reconsideration and withhold
10 documents pending the ultimate ruling on those motions, it sort
11 of puts into play the question of the fairness of going forward
12 on the date that is scheduled for the hearing.

13 COMMISSIONER BAEZ: Which is ultimately, Mr.
14 Vandiver, going to be addressed by the full Commission, as
15 well. That's why I have asked staff to make it part of a
16 recommendation.

17 MR. VANDIVER: Yes, sir.

18 COMMISSIONER BAEZ: And understanding, you know, what
19 the difficulties are and the timing issues that are involved.

20 MR. VANDIVER: Yes, sir. And I simply wanted to
21 inquire because I need to prepare and zealously represent my
22 clients and prepare for hearing.

23 COMMISSIONER BAEZ: I understand. It's a valid
24 question, and my answer is I don't know any other way to do it
25 but to have it decided on the day it is decided finally and

1 depending on what five Commissioners are going to decide about
2 this issue of fundamental fairness that you have raised. Does
3 that -- I'm hoping that takes care of these matters, unless
4 anyone has another question, then we can get into the
5 prehearing order.

6 MR. STONE: The only question I would have is would
7 we have the leeway to file our motion, if we choose to file a
8 motion, electronically or by fax.

9 MR. ELIAS: The Commission does not accept electronic
10 or fax filings.

11 COMMISSIONER BAEZ: And I don't know that we have
12 made exceptions, Mr. Stone. Moving along.

13 MS. STERN: Excuse me, we have one more preliminary
14 issue.

15 COMMISSIONER BAEZ: Oh, sorry.

16 MS. STERN: I'm sorry we didn't bring it up earlier.
17 We are going to have to send out a couple more interrogatories
18 today, and there might be some exhibits associated with those
19 interrogatories that we might want to enter into the hearing
20 record. Since we filed our prehearing statements and we have
21 already listing our exhibits, we would ask permission to file
22 an exhibit late, to request to file an exhibit late.

23 COMMISSIONER BAEZ: Granted. I am assuming there is
24 no objections. I guess not.

25 MR. STONE: Not knowing the interrogatory, I would --

1 COMMISSIONER BAEZ: I understand. I mean, I think
2 you can reserve the right to the object at the time that it is
3 filed.

4 Anything else, Ms. Stern?

5 MS. STERN: No.

6 COMMISSIONER BAEZ: All right. Let's move through
7 the draft prehearing order. Any changes necessary on Sections
8 1 through 4?

9 MS. KAUFMAN: Commissioner, I have one, and after our
10 weighty discussion this is just an easy one, and that is just
11 that my name --

12 COMMISSIONER BAEZ: That's what we're looking for.

13 MS. KAUFMAN: I thought you would like this one.
14 -- Ms. Stern, should just reflect that my middle name is
15 Gordon.

16 MS. STERN: I'm sorry.

17 MS. KAUFMAN: No problem. I just wanted to get -- do
18 I get credit for that?

19 COMMISSIONER BAEZ: We all know that. We knew that
20 one.

21 Sections I through IV.

22 MS. KAUFMAN: I do have a comment or maybe a question
23 about Section III, which deals with the confidential
24 information. And, first of all, I am supposed to notify
25 everyone that we, FIPUG will be utilizing confidential

1 information in Mr. Pollock's testimony, and I imagine in cross
2 examination, as well. And I suppose at some point we are going
3 to have to talk about how we are going to conduct the hearing
4 if we do go forward. Because I personally have some concerns
5 about how exactly this is going to work. And I notice that
6 Gulf has some suggestions that they included in their other
7 category that we would like to discuss at the appropriate time.

8 COMMISSIONER BAEZ: Okay.

9 MR. HOWE: Commissioner Baez, I would like to address
10 your Section IV, the post-hearing procedures.

11 COMMISSIONER BAEZ: All right.

12 MR. HOWE: In this section it states that apparently
13 if the Commission decides that it cannot issue a bench
14 decision, that the parties will be required to file a summary
15 within two days. As I understand the schedule right now, on
16 August 31st we are going to file our position on whether the
17 Commission can render a bench decision.

18 Commissioner Baez, in that you are going to see us
19 stating that the APA, the uniform rules, virtually all the
20 cases that we can find that construe the matter, give parties
21 explicit authority or the right to file memoranda of proposed
22 findings and so forth. I don't believe two days would be a
23 reasonable response time. Moreover, I don't think we are even
24 going to have a transcript within two days.

25 So I think our position as you are going to see in

1 our pleading filed on the 31st is going to be that you can't
2 render a bench decision and you have to afford a reasonable
3 opportunity to address the facts, and particularly to address
4 the facts as they apply to the law. And I don't think that is
5 possible within two days.

6 MS. KAUFMAN: Commissioner Baez, I'm not going to
7 comment on the bench decision question at this time, but if the
8 Commission does not make a bench decision we would agree that
9 two days is certainly insufficient to provide you with briefs
10 on the important issues in this case.

11 COMMISSIONER BAEZ: Mr. Stone.

12 MR. STONE: I am reminded that when an individual is
13 on trial for his life in a capital case that the closing
14 arguments are usually performed at the end of the case. They
15 are not performed in writing, they are not generally given with
16 the benefit of a transcript, and it would seem to me that two
17 days, given the fact that we take procedural steps in the
18 administrative proceedings to have prefiled testimony, we have
19 had extensive discovery in this case, I still believe that a
20 bench decision not only is possible, but is desirable in this
21 case. And that I think two days, if we do not have a bench
22 decision, is reasonable under the circumstances given the
23 posture of this case.

24 COMMISSIONER BAEZ: Ms. Stern.

25 MS. STERN: We would like to take the matter under

1 advisement and look at the schedule more closely at this point.

2 We need to work with the court reporter on that. We also --

3 COMMISSIONER BAEZ: I was going to say we seem to
4 have dropped an unintended bomb on the court reporter.

5 MS. STERN: Yes. What we were thinking on the --
6 that being said, I would just like to note that there is -- the
7 majority of information that has been sought in the testimony,
8 that type of thing will have been provided, and actually a lot
9 of it already has been provided. The parties have had a chance
10 to look at it. There is still more information that parties
11 will have to look at that they haven't seen, but the parties
12 will be able to walk into the hearing knowing a lot of what
13 will be introduced into the record at that time.

14 COMMISSIONER BAEZ: Let's hold that matter off until
15 staff can take a better look at the timing issues. And I'm
16 assuming we can discuss that further at hearing, if necessary.
17 Anything else on Section IV? Section V. Section VI, order of
18 witnesses. Ms. Kaufman, you are going to be providing the
19 issues to staff?

20 MS. KAUFMAN: Yes, sir, as soon as --

21 COMMISSIONER BAEZ: As soon as you know, right.

22 MS. KAUFMAN: As soon as the testimony is complete.

23 COMMISSIONER BAEZ: The staff will be doing the same,
24 I see.

25 Mr. Stone, I interrupted you.

1 MR. STONE: I just pointed out that by Ms. Burke and
2 Mr. Labrato it is not indicated that they are proffered by
3 Gulf, I'm sure that is apparent to everyone, but --

4 COMMISSIONER BAEZ: If we don't know that by now then
5 -- can you make the proper notations?

6 MS. STERN: Yes, that will be corrected.

7 COMMISSIONER BAEZ: Thank you. Section VII, basic
8 positions. Mr. Stone, any changes?

9 MR. STONE: None.

10 COMMISSIONER BAEZ: Ms. Kaufman.

11 MS. KAUFMAN: I was just going inquire, since staff
12 is going to have a witness, are they going to be telling us
13 what their position is going to be?

14 COMMISSIONER BAEZ: Well, I'm not going to answer for
15 staff. My inkling is that --

16 MS. STERN: The scope of staff's testimony will
17 depend on what is in the intervenor testimony. This prehearing
18 order will be going -- will become final and will be going out
19 before staff's testimony is filed.

20 COMMISSIONER BAEZ: I think the answer to that is no.

21 MS. KAUFMAN: Commissioner, I would just suggest to
22 the extent staff is going to have a witness, it's going to have
23 to take positions. Again, I think the other parties ought out
24 to be informed of what those positions are. And if that would
25 mean delaying the prehearing order, so be it.

1 MS. STERN: We can delay the prehearing order. You
2 will be getting the actual testimony, though, shortly.

3 COMMISSIONER BAEZ: So, Ms. Stern, will you be able
4 to provide -- I mean, is there an opportunity to provide as
5 part of the prehearing order, even if it means --

6 MS. STERN: No, I don't think there is.

7 COMMISSIONER BAEZ: All right. We are going to stick
8 with that, Ms. Kaufman. I don't think that the timing is
9 available for staff to do that. And you will be receiving
10 testimony after the prehearing order is -- I don't suspect it
11 is going to be much testimony.

12 MS. STERN: No.

13 COMMISSIONER BAEZ: Okay. Section VIII, Issue 1.
14 Mr. Stone, any changes?

15 MR. STONE: No changes.

16 COMMISSIONER BAEZ: Ms. Kaufman?

17 MS. KAUFMAN: No, sir.

18 MR. HOWE: No changes.

19 COMMISSIONER BAEZ: Mr. Howe, no changes.

20 Why don't would do it this way, Mr. Stone, do you
21 have any proposed changes to any of the issues?

22 MR. STONE: I have some when we get to Issue 13 and
23 14.

24 COMMISSIONER BAEZ: Issue 2. We can go
25 issue-by-issue, then. Ms. Kaufman.

1 MS. KAUFMAN: I have no changes.

2 COMMISSIONER BAEZ: Mr. Howe.

3 MR. HOWE: No. Commissioner Baez, might I suggest
4 that you announce the issue and if we have an objection we will
5 raise it.

6 COMMISSIONER BAEZ: Great, thank you. Issue 3, 4, 5,
7 6, 7, 8, 9, 10, 11, 12, 13.

8 MR. STONE: I have one on 13.

9 COMMISSIONER BAEZ: We've got a winner.

10 MR. STONE: When we had our last issue ID conference,
11 which was on the 31st of July, we had -- I thought had settled
12 on the wording for Issue 13. On the 1st of August, Mr.
13 Ballinger had proposed Issue 13A as an alternative wording to
14 13. I discussed my reasons for opposing that wording with him
15 and I thought we had reached an understanding of why the
16 suggested rewording by staff was not suitable, but I addressed
17 that in my prehearing statement.

18 And we have stated our position on Issue 13, not to
19 Issue 13A, for that reason. As noted in our prehearing
20 statement at Page 11 in a footnote, we include the original
21 wording of Issue 13 as it was stated on July 31st, rather than
22 the alternative wording suggested by staff in a memorandum
23 dated August 1st. We indicated that staff's proposed rewording
24 would require Gulf's position to be no, since certain price
25 changes are contemplated by the agreement.

1 We believe that it was the intent of the parties to
2 identify an issue to structure a mechanism to bring those
3 changes when they occur to the Commission, and that is what
4 Gulf was trying to state in its position. And we believe that
5 the rewording of the issue puts us in a posture where this
6 Commission, if they approve the issue, if they answer the issue
7 in the affirmative would, in essence, be killing the contract
8 since it does contemplate changes. It would either be killing
9 the contract in its entirety or would be -- the only other
10 alternative would be to interpret such an approval to mean they
11 blessed those price changes without any further review, and I
12 don't think that was the intent of the parties.

13 And so that is why we propose that our wording on
14 Issue 13 captures better the intent of the parties with regard
15 to the issue to present to the Commission, and our position on
16 that is that we intend to bring such price changes that occur
17 as a function of the operation of the contract to the
18 Commission for review. And that we would hope we will be able
19 to reach a stipulation on that issue as it is worded. So I
20 would suggest we drop Issue 13A in favor of Issue 13.

21 MS. STERN: That's fine with staff.

22 COMMISSIONER BAEZ: Any other parties?

23 MR. HOWE: No objection.

24 COMMISSIONER BAEZ: No objection. Ms. Kaufman?

25 MS. KAUFMAN: No problem.

1 COMMISSIONER BAEZ: I'm sorry?

2 MS. KAUFMAN: We have no objection.

3 COMMISSIONER BAEZ: Thank you. Issue 13A is
4 stricken.

5 MR. HOWE: Commissioner Baez, when you say it is
6 stricken, do you mean to be substituted by Issue 13?

7 COMMISSIONER BAEZ: To be substituted by Issue 13,
8 sorry.

9 MR. STONE: If we are ready to move on to Issue 14,
10 Commissioner --

11 COMMISSIONER BAEZ: I haven't heard from Ms. Kaufman.
12 Anyone else on Issue 13?

13 MS. KAUFMAN: No, sir.

14 COMMISSIONER BAEZ: Issue 14.

15 MR. STONE: 14 and 14A are alternative wording of the
16 same issue. We had proposed Issue 14A's wording. I do not
17 recall who was the advocate for Issue 14. I believe it was
18 FIPUG. I don't believe both issues need to be in the document,
19 it is just a determination for the prehearing officer as to
20 which wording should belong in the document. They are, in
21 essence, duplications of each other in terms of the effect,
22 it's just a choice of wording.

23 MS. STERN: That is correct. And staff has no
24 preference for which wording is used. If the other parties do,
25 this is the appropriate time to object.

1 COMMISSIONER BAEZ: Ms. Kaufman.

2 MS. KAUFMAN: Well, we prefer the worrying of Issue
3 14, but I do agree that the issues are duplicative and you
4 don't need both of them.

5 COMMISSIONER BAEZ: Mr. Vandiver, you don't have any
6 preference that you want to state?

7 MR. VANDIVER: I was just going to say that voltage
8 regulation should be changed to voltage support, but that is a
9 minor wording issue that we can fix later. I think it's
10 voltage support in the testimony.

11 MS. KAUFMAN: I think that's right.

12 COMMISSIONER BAEZ: Mr. Stone.

13 MR. STONE: I agree.

14 COMMISSIONER BAEZ: Make that change, voltage
15 support.

16 MR. VANDIVER: But I agree they are duplicative.

17 COMMISSIONER BAEZ: I think we will take 14A. 14A
18 will substitute for Issue 14. Any changes to the response or
19 to the positions?

20 MR. HOWE: Commissioner Baez, I don't think so, but I
21 would like the opportunity to see if we need to blend what we
22 said in response to 14 into 14A.

23 COMMISSIONER BAEZ: Very well. You can make them
24 available to staff if you do have any changes. Issue 15. 16.
25 17.

1 MR. STONE: We noted in our position that we objected
2 to this issue on the basis that it is not relevant to the
3 determination pending before the Commission. We then explained
4 our position on the issue. We do believe that this is an
5 extraneous issue and should not be part of this proceeding.

6 COMMISSIONER BAEZ: Ms. Kaufman.

7 MS. KAUFMAN: Yes, Commissioner.

8 COMMISSIONER BAEZ: Who supported this issue, by the
9 way?

10 MS. KAUFMAN: This is FIPUG's issue. To the
11 contrary, this issue is not extraneous at all, but goes to the
12 heart of this transaction. And I think that when the
13 Commission looks at what is being requested in this case they
14 are not only looking at a single transaction between a utility
15 and its affiliate, but they are also making a policy decision
16 here in regard to these types of transactions.

17 And it is our view that we don't have an open and
18 competitive and level playing field, and that is something that
19 the Commission should consider when it is deciding whether or
20 not it wants to approve a transaction between a regulated
21 monopoly and its affiliate when there may have been other more
22 cost-effective alternatives out there that the company did not
23 even bother to pursue. So we think it is very relevant for
24 your consideration.

25 COMMISSIONER BAEZ: Mr. Howe.

1 MR. HOWE: I agree with Ms. Kaufman. In our
2 statement of basic position we addressed this, the fact that we
3 think the company should have certainly sought the highest
4 transfer price and the lowest cost PPA that might be available
5 out there. And so this addresses the whole overview of what is
6 actually happening in this transaction.

7 MR. STONE: If I may be heard briefly in response.

8 COMMISSIONER BAEZ: Please.

9 MR. STONE: What both FIPUG and OPC have essentially
10 articulated to the Commission is that their objection to the
11 project is on the grounds of bidding and other issues, and
12 those are captured in the other issues in this docket. And all
13 I am suggesting is that this question of public policy is
14 something that goes beyond the scope of the facts of this case
15 and is not necessary to determination on the facts of this
16 case.

17 Everything that you heard both Ms. Kaufman and Mr.
18 Howe say they can argue and have argued in response to many of
19 the other issues in this docket, and this issue is not
20 necessary for them to make those arguments. My concern is that
21 this raises some questions that, one, don't touch on the
22 decision before the Commission; and, two, the way the issue
23 itself is phrased is although there was a great effort to try
24 and phrase it in a fashion that was accurate and neutral, you
25 just simply cannot do so because it is not an issue that

1 applies to the transaction before the Commission.

2 I am assuming that the phrasing of the issue was
3 intended to capture the Duke/New Smyrna Beach Supreme Court
4 decision when it is talking about the limited circumstances.
5 And as we have indicated in our position, this transaction
6 falls within the guidelines of that decision. And so, in
7 essence, what it appears as though FIPUG is trying to do
8 through this issue is to get the Commission to come up with a
9 new public policy that is beyond that that has been announced
10 as the policy of the state by the Florida Supreme Court.

11 MR. HOWE: Commissioner Baez, if I might. One
12 additional thing in the back of my mind when I was thinking
13 about this issue was it is my understanding that there is a
14 current appeal before the Supreme Court dealing with Florida
15 Power Corporation's construction of Hines Unit 2, and it is
16 being challenged by basically a merchant plant developer. And
17 it is not unlikely that that opinion will have some bearing on
18 this case. And the fact that it is on appeal suggests that the
19 issue itself is not fully resolved here at the Commission
20 level.

21 COMMISSIONER BAEZ: And you are looking for this
22 issue to resolve it?

23 MR. HOWE: I'm just thinking there is something out
24 there, that this is not a completely resolved issue right now
25 where a utility decides to build and where concerns of an

1 independent power producer or a merchant plant operator are
2 introduced. It's an open question at the time, and as such it
3 deserves to be kept open here at the Commission.

4 MS. STERN: Staff has a comment. As far as staff is
5 concerned the issue is not really directly relevant to the
6 case. If it is included, staff will be prepared to address it,
7 but we do think that the real substance of the issue is
8 addressed -- is included in other issues, as Gulf was saying,
9 the question of bidding and that type of thing. Also, this
10 question is under consideration in the 2020 Commission and it
11 does seem to be open and maybe not necessarily, you know,
12 adjudicating this issue in this proceeding might not be a good
13 idea.

14 COMMISSIONER BAEZ: Mr. Howe, I was just going to
15 mention, I agree with you that this is an open question and
16 given the fact that it is being litigated as well would confirm
17 as much. I'm not sure that I am comfortable having this issue
18 included in this docket in part because of what staff counsel
19 has reminded us all of, that it is a question that is somehow
20 before the study commission, and I think at this point we need
21 to keep our lines less blurred and as little blurred as
22 possible.

23 But it also seems to me that there are -- that this
24 argument and that this policy is present in every one of the
25 issues. And I think you have an opportunity to make that case

1 throughout the other issues. I'm not sure that we actually
2 need to take this question head-on in this, so I am going to
3 grant Gulf's proposed striking of this issue.

4 MR. HOWE: I understand your ruling, Commissioner
5 Baez. Might I suggest, though, that it would remain a viable
6 issue if we were to put a question mark after the word
7 affiliate, and I think you will then find you have an issue
8 clearly relevant in this proceeding. As a matter of policy,
9 should a Florida regulated utility be allowed to construct a
10 power plant for the benefit of a nonregulated affiliate, and
11 that is clearly an issue in this proceeding.

12 COMMISSIONER BAEZ: Mr. Stone, do you have a
13 response? I'm not sure that it gives me enough comfort either,
14 but --

15 MR. STONE: I, again, point out all of the concerns
16 are dealt with in other issues. The affiliate concerns are
17 dealt with in other issues. I don't think it is necessary to
18 have this issue and all the other issues.

19 COMMISSIONER BAEZ: I mean, Mr. Howe, is there
20 anything about the Commission reaching a decision on the
21 balance of the issues that is not going to provide an answer to
22 this question in particular?

23 MR. HOWE: Commissioner Baez, it would be my feeling
24 that none of them address the policy. I mean, Gulf has been
25 very careful to try to frame things in terms of the facts that

1 it wants addressed, I believe. But here I think you need to
2 consider do you have an overarching policy concern, that being
3 can a regulated utility basically build a unit for an
4 affiliate.

5 COMMISSIONER BAEZ: And I think that the question,
6 again, is present in all the other issues. And it seems to me
7 that whatever the decision is on this proposal is going to
8 render some kind of decision based on that policy consideration
9 by the Commission. I don't believe that we are avoiding that
10 or negating any opportunity to have a decision by this
11 Commission answer that issue. I'm not certain that I am
12 comfortable throwing it out there.

13 MR. HOWE: Let me just say I would like to see it
14 stay, but I can understand your interpretation.

15 COMMISSIONER BAEZ: Okay, thank you.

16 MS. KAUFMAN: Commissioner, if I could just be heard.

17 COMMISSIONER BAEZ: Last words.

18 MS. KAUFMAN: Thank you very much. The reason that
19 we proposed this issue and, of course, we want it to stay in
20 its entirety, but we could accept Mr. Howe's suggestion, is
21 that this is a matter, I believe, of first impression for the
22 Commission and it is a policy decision that you are going to be
23 making, and that we want it to be recognized as such and
24 separately stated. Now, you do have other issues that address
25 cost that address some of the issues that Gulf has raised,

1 risks, benefits, and that sort of thing. But make no mistake
2 that the Commission, we think, is going to be making a policy
3 statement here and we want that to be explicit and we want it
4 to be recognized in the context of the case. And we will be
5 addressing that.

6 COMMISSIONER BAEZ: I'm not sure I think mechanically
7 the more relevant issue is whether there is a reopener on the
8 bidding rules. And I think the question that we have, and I
9 forget what number it was, but it may have been 13 or somewhere
10 in the teens, you know, that more properly catches the
11 limited -- the function that this is taking on, or at least how
12 the company is proposing that this work.

13 And I think the question is very relevant as to
14 whether should they have put it up to bid again. I mean, does
15 a change in the plan that has once been approved start the
16 process all over again. Now, I'm not sure that we can go at it
17 from the angle of is this a regulated utility building a plant
18 for an unregulated, because those are specific facts. I think
19 there is a more general issue here as to whether the bidding
20 rules reapply or reattach or not.

21 MS. KAUFMAN: And I guess you said I had the last
22 word, but I don't think this is -- the bidding rule is one
23 question, whether or not they had to comply with that and there
24 is obviously a difference of opinion among the parties.

25 COMMISSIONER BAEZ: Of course.

1 MS. KAUFMAN: Regardless of what the decision is on
2 that, I think the Commission needs to consider the policy
3 aspects even if you were to conclude that they didn't need to
4 bid it, of allowing this sort of a transaction under these
5 circumstances. And as I said, I think it is one of first
6 impression and it is an important public policy decision.

7 COMMISSIONER BAEZ: Thank you. We are going to go
8 without it this time around. Issue 18. Issues 19.

9 MR. HOWE: Commissioner Baez, I do not have any
10 comments on Issue 19, but in our prehearing statement we raised
11 two new issues which I see are not listed on this document. We
12 identified two new issues and we did so pursuant to the order
13 establishing procedure which states that any issue not raised
14 by a party prior to the issuance of the prehearing order shall
15 be waived by that party. In our prehearing statement we
16 included two issues which we highlighted in all caps and bold
17 as new issues.

18 COMMISSIONER BAEZ: I don't have those issues before
19 me. I mean, is there --

20 MS. STERN: I'm sorry, they were overlooked. We
21 should discuss them now obviously. Would you like to read
22 them? Would you like for me to read them?

23 COMMISSIONER BAEZ: Mr. Stone, do you have them?

24 MR. STONE: I have a copy of them.

25 COMMISSIONER BAEZ: I guess I'm the only one that

1 doesn't have a copy.

2 MR. HOWE: They're good.

3 COMMISSIONER BAEZ: I have no doubt, Mr. Howe.

4 MS. KAUFMAN: Commissioner Baez, I can give you my
5 copy if you want to look at it.

6 MR. VANDIVER: We can make copies.

7 COMMISSIONER BAEZ: Go off the record for two
8 minutes.

9 (Off the record.)

10 COMMISSIONER BAEZ: We will go back on the record.
11 All right. On the issue of additional issues proposed by OPC,
12 Mr. Stone, I guess I should start with you.

13 MR. STONE: As to his first of two issues, I don't --
14 first, it is my position that the answer is yes. Obviously his
15 answer is no, but what I'm trying to get to is whether the
16 issue has to be decided in order to --

17 COMMISSIONER BAEZ: Okay, that's what we are
18 discussing.

19 MR. STONE: And I don't think you have to decide this
20 issue. If you approve the contract, then obviously it will be
21 a binding contract. If you don't approve it, then the
22 condition precedent has failed and it won't be a binding
23 contract. So I don't see the addition of the issue being
24 necessary to the ultimate question before the Commission. If
25 Public Counsel is contending that after you approve it we would

1 change the contract, we have assured the Commission in other
2 issues, in our position on other issues that we will not. So I
3 don't see any point to having the first of their two new
4 issues.

5 With regard to the second of the two issues --
6 COMMISSIONER BAEZ: Let's just stay on the first
7 issue.

8 MR. STONE: Okay.

9 COMMISSIONER BAEZ: Thank you. Mr. Howe.

10 MR. HOWE: The reason for the -- Commission Baez, the
11 reason for the issue is not whether it will become a contract
12 once the Commission acts, the issue is whether it is a contract
13 going into this proceeding. We understand that it is subject
14 to a condition subsequent in the sense that it turns on whether
15 or not the company receives Commission approval here at this
16 Commission and before the Federal Energy Regulatory Commission.
17 But we think in the first instance when you are dealing with a
18 proposed purchased power agreement, the first issue is do you
19 have an agreement.

20 And in this particular instance it is our view that
21 since either -- certainly Gulf currently owns Smith Unit 3. It
22 is entering into a contract to purchase the output of a unit it
23 currently owns from another entity. It appears to us that
24 either party -- where either can avoid its obligation under the
25 contract as it is now framed, by that I mean the PPA.

1 COMMISSIONER BAEZ: And you are talking about the
2 transfer?

3 MR. HOWE: Yes. By either refusing to negotiate the
4 transfer or negotiating the transfer and failing to reach an
5 agreement, that essentially neither party is currently bound to
6 any action. And I think the Commission as --

7 COMMISSIONER BAEZ: Beyond the regulatory approval
8 condition.

9 MR. HOWE: Yes. And so the issue is whether or not
10 you even have a contract before you at this time is a question
11 of law which we believe is to be determined in the first
12 instance by the Commission itself.

13 COMMISSIONER BAEZ: Okay.

14 MR. STONE: Commissioner, if I may.

15 COMMISSIONER BAEZ: You may.

16 MR. STONE: Our -- and I believe it is even reflected
17 in the -- well, it's not reflected in the title, but I know it
18 was reflected in our petition. We talked about it as a
19 proposed purchased power agreement. We did, in fact, sign the
20 agreement, and that agreement, the signed agreement executed by
21 the parties with the condition, condition precedent, condition
22 subsequent --

23 COMMISSIONER BAEZ: It's hard to tell, isn't it.

24 MR. STONE: It's hard to tell. But at this point
25 there is a condition that basically is a regulatory-out clause.

1 And that the contract will be rendered null and void if it does
2 not get ultimate approval by the regulatory bodies. The fact
3 that it may not be binding at this instant I don't think is
4 relevant to the determination whether this Commission wants to
5 approve it.

6 And the reason why I say that is his argument would
7 basically say you could never approve a contract with a
8 regulatory-out clause in it, and no party would ever enter into
9 an agreement such as this without a regulatory-out clause. So
10 that is part of my response to his argument.

11 The other part is we own construction work in
12 progress. That construction work in progress is not capable of
13 generating a single kilowatt hour today. There are all sorts
14 of things that can happen on any construction project that
15 could mean it could not fulfill its intended purpose at some
16 point. A hurricane could come through, anything could happen.

17 And so to raise that parade of possibilities and
18 saying that you don't have a binding contract and say that is a
19 fundamental interference with this Commission's ability to
20 approve the transaction before it, I think really puts form
21 over substance.

22 The question before the Commission is is this
23 agreement with its terms and conditions which are not
24 speculative, they are laid out, they are fixed, is this
25 agreement such that the Commission is willing to approve it and

1 allow the company to go forward with its ultimate plan, which
2 is to complete the project, transfer the unit to another
3 entity, take back the capacity through the purchased power
4 agreement, and protect its customers in that fashion. And this
5 new issue has no bearing on that ultimate question.

6 COMMISSIONER BAEZ: Mr. Howe.

7 MR. HOWE: Well, Commissioner Baez, I mean, at its
8 most basic you are being asked to consider whether a contract
9 should be approved. Obviously an initial question is is there
10 a contract before you. Certainly there are many contracts that
11 contain conditions precedent, conditions subsequent that are
12 valid on their face. For example, I'm not trying to state the
13 law, but, for example, a contract condition upon a transfer
14 that will happen, for example, they are obligated to do it in a
15 certain time. They will do it, for example, at a price, at an
16 appraised price that is set by an appraiser. All matters of
17 definiteness. You can get a contract that way.

18 I'm not trying to be facetious, but, for example, you
19 can sign a document that looks like a contract to buy and sell
20 the Brooklyn Bridge. You will have a buyer, you will have a
21 seller, but you don't have a contract because something is
22 missing. The seller doesn't own the bridge. The buyer can't
23 buy the bridge. So sometimes things that look a lot like
24 contracts aren't contracts.

25 And at its most fundamental, we think the Commission

1 needs to ask -- to look at this document that has been
2 presented and say, are we looking at a contract? Because if
3 you think about it, what is going to come out of the back end
4 of this proceeding if the company gets what it is asking for is
5 the Commission is saying we are going to approve an agreement
6 that may eventuate if the two parties to this agreement get
7 around to actually transferring the assets. But we don't know
8 that at this time.

9 So you are going to be making a speculative decision
10 the way this case is currently framed. And we think whether or
11 not you have got a contract before you is a very fundamental
12 issue that was created by the manner in which the company filed
13 its case.

14 COMMISSIONER BAEZ: Well, Mr. Howe, I'm not sure at
15 this point how this proposed agreement differs from other PPAs
16 that we have had, but -- you know, I think your argument is
17 fair, as is Mr. Stone's. Mr. Stone, I see this as a fairly
18 harmless issue. And to the extent that there are some
19 disagreement as to whether it is or isn't a contract, I think
20 that is something that is fair for the Commission to hear and
21 ultimately decide. So I'm going to -- we are going to rule
22 that the new issue be included. I don't know what the number
23 is because we are going to have to renumber these issues, but
24 it will be a legal issue.

25 Next, the Commission's prior approval to transfer.

1 MR. HOWE: If I might address the reason for these.

2 COMMISSIONER BAEZ: Okay.

3 MR. HOWE: I think if we proceed down the track that
4 Gulf has framed, the Commission is basically going to issue an
5 order, and in that order it is essentially going to announce
6 that it's the Commission's understanding that a transfer will
7 take place. But I think, again, a very fundamental issue is
8 you have been presented with an announcement by the company
9 that they intend to transfer an asset that you granted a need
10 determination on. The Governor and Cabinet have passed on that
11 need determination. In fact, an order was issued to Gulf
12 Power. The expectation of the state was that Gulf Power was
13 going to own and operate and rate base a power plant.

14 We don't think that Gulf can just transfer that plant
15 outside the Commission's jurisdiction, convert it from a retail
16 asset to a wholesale asset without this Commission approving
17 such transfer, and that is the reason for the issue.

18 COMMISSIONER BAEZ: Mr. Stone.

19 MR. STONE: Our petition asks for approval and
20 contemplation of -- I mean, the approval of the PPA clearly
21 contemplates the transfer. We are putting both issues before
22 the Commission. I don't think you need to answer this question
23 since we have asked you to approve the transfer. I don't think
24 you need to answer this question because we have brought the
25 approval before you. It is not the situation that Mr. Howe

1 presented in his hypothetical back on June 25th, which was
2 answered, do we even have to come to you for approval. If we
3 had transferred it without having a PPA, if we had never come
4 before you then that question might be relevant. But because
5 we have come before you, we have asked for blessing of the PPA
6 which contemplates the transfer, we are asking for blessing of
7 the transfer, too, since you can't have one without the other.

8 And so the need to add this issue is really
9 superseded by the fact of the very relief the company has asked
10 for in this case, and I would suggest it needs to be dropped to
11 avoid confusion in the ultimate determination to be made by
12 this Commission.

13 MR. HOWE: Commissioner Baez, may I suggest that what
14 Mr. Stone just said suggests that the issue should be rephrased
15 to say should the Commission approve Gulf Power's transfer of
16 Smith Unit 3 to Southern Power. You will get to exactly the
17 issue that he was describing.

18 COMMISSIONER BAEZ: Mr. Stone.

19 MR. STONE: My concern is you could approve the
20 transfer and not approve the PPA and the transfer won't take
21 place. Or you could approve the transfer -- or you could
22 approve the PPA and not approve the transfer, in which case the
23 PPA won't take place. It's all caught up in the same decision,
24 you don't need to have two different decision points.

25 COMMISSIONER BAEZ: I would like to hear from staff

1 on this.

2 MS. STERN: It is staff's position that the issue
3 should be in. It is relevant to the decision being made to
4 approval of the purchased power agreement. There are other
5 issues that address, you know, the transfer. It's a legal
6 issue. It has been a real -- the subtext of this issue has
7 been here in this docket for a long time and it should be
8 addressed head-on.

9 COMMISSIONER BAEZ: Very well. The issue is
10 accepted. Okay.

11 MR. STONE: Commissioner Baez, clearly we have not
12 had an opportunity to take a position on the issues.

13 COMMISSIONER BAEZ: And you can provide those to
14 staff. I'm not sure -- we need to have them before you are
15 issuing the order, so I'm not sure what the timing is on that,
16 Ms. Stern, but you all can get together as to when to provide
17 the positions.

18 MR. STONE: Thank you.

19 COMMISSIONER BAEZ: I guess that goes for FIPUG, as
20 well.

21 MS. KAUFMAN: Yes. We will provide our positions on
22 that.

23 COMMISSIONER BAEZ: Section IX. I know Ms. Kaufman
24 had some questions. Ms. Kaufman.

25 MS. KAUFMAN: Well, my questions aren't so much

1 directed to Section IX, but more generally I have some concerns
2 as to how we are actually going to conduct the hearing. And,
3 for example, my witness I am assuming will have information in
4 his testimony that relates not only to the lack of
5 cost-effectiveness of this proposal in which he will have done
6 calculations that will, in our view, demonstrate that Gulf's
7 spreadsheets are in error. But in addition I imagine, or I am
8 contemplating that he will be discussing certain terms and
9 conditions in the contract that Gulf has suggested are
10 confidential.

11 And I have to admit to you that I have never been in
12 a hearing here under these sort of circumstances. And I was
13 just trying to visualize how the hearing will be conducted.
14 First of all, my witness' summary and whatnot from the stand as
15 well as how we will cross-examine Gulf's witnesses. And I
16 recognize and have been in proceedings where witnesses have
17 been directed to look at this line and this number and not to
18 verbalize the number. But I don't think that is the only sort
19 of confidential information we are going to be dealing with
20 here. We are going to be asking and discussing clauses in the
21 contract and what rights and responsibilities they may or may
22 not convey. So, you know, I don't have a solution, I am just
23 raising that because I was trying to figure out how we would do
24 it.

25 COMMISSIONER BAEZ: And as I recall we had discussed

1 this issue early on, I think, at the first of these several
2 meetings that we have had since. And Mr. Elias I think had
3 mentioned that there is -- unfortunately, I think Mr. Elias has
4 been involved in a hearing. If you want to put your two cents
5 worth in here and maybe we can --

6 MR. ELIAS: It's worth about that much. I would
7 suggest three approaches. The first is to the extent that
8 there are numbers that are derived from or provide a comparison
9 to confidential information, that those be worked up ahead of
10 time and identified as a confidential exhibit. Then to the
11 extent that a question or a response would elicit confidential
12 information, that that also either be handwritten at the
13 hearing or to the extent possible prepared in advance, marked
14 as an exhibit and shared with all the parties and the
15 Commissioners.

16 MS. KAUFMAN: I just want to ask; so, for example,
17 Mr. Howe will be on the stand. We would want to ask him about
18 a particular clause in the contract that Gulf has designated as
19 confidential. What you are suggesting is we would write that
20 question out, show it to him and he would write his answer out,
21 as well?

22 MR. ELIAS: If the question or the answer would
23 elicit, of necessity, confidential information, if there is no
24 way to phrase the question or the response where confidential
25 information would not be disclosed, then that is my suggestion

1 for addressing it. I have seen the procedure used in the past.

2 COMMISSIONER BAEZ: Mr. Vandiver.

3 MR. VANDIVER: Just talking and trying to understand,
4 would then copies be provided to each Commissioner, all
5 counsel, and all involved staff simultaneously?

6 MR. ELIAS: Yes.

7 MS. KAUFMAN: Well, that takes a long time, doesn't
8 it?

9 MR. VANDIVER: That seems like a very cumbersome
10 process for a one-day hearing. And in the give and take of
11 cross examination -- I'm just trying to work through the
12 practicalities of it.

13 COMMISSIONER BAEZ: I don't think we are going to
14 reach any answers as to practicalities here and now. I think
15 this is something that should be the subject of conversation --

16 MR. VANDIVER: Maybe counsel could meet at some
17 point.

18 COMMISSIONER BAEZ: -- at some point and try to work
19 out some workable way of doing this. And I do realize that it
20 is going to take a lot of effort.

21 MR. VANDIVER: And I'm concerned about revealing
22 trial strategy in advance.

23 COMMISSIONER BAEZ: I can't protect you from that,
24 sir. You're on your own on that one.

25 MR. VANDIVER: But there is a process concern, but we

1 will try to work through that, I guess. Mr. Howe might have
2 some thoughts on that.

3 COMMISSIONER BAEZ: I guess, you know, if you are
4 going to give up trial strategy, I can't jump over the bench
5 and put my hand over your mouth. You have got to figure out
6 some way not to do it. Mr. Howe, I'm sorry.

7 MR. HOWE: Commissioner Baez, I am reminded that
8 there is a provision, I'm sure most of us are well aware of in
9 the Rules of Civil Procedure that under discovery you can take
10 depositions upon oral examination or you can take depositions
11 upon submitted written questions. I have never done it under
12 written submitted questions, and I don't think I ever will.
13 Because to be honest with you, I don't work with a script. I
14 don't think anybody has ever seen me work from a list of
15 questions.

16 And I try to tailor my -- my view has always been you
17 can only put the first question in writing, because after that
18 your second question is going to depend upon the answer you get
19 to the first, and so forth down the line. We cannot be put in
20 a position where, for example, if we were to draft any
21 questions in advance it would preclude us from asking any
22 others that would be indicated by answers we got from the
23 witness.

24 COMMISSIONER BAEZ: I think that is something -- I'm
25 being honest with you, I think that is something you all are

1 going to have to think about and discuss and figure out some
2 workable ground rules for it. I mean, otherwise we are going
3 to lapse back into a cumbersome situation. And if that is the
4 only way that you have available to you to get questions and
5 answers, you know, if it is the only alternative left, then I
6 suggest, you know, you have got to decide whether you are going
7 to use it or not.

8 MR. HOWE: I should make you aware that the view of
9 the members of the office I work for that -- and I have used
10 this phrase before -- we consider ourselves public employees
11 doing a public job in a public place. As such, if I draft
12 questions, all right, if a reporter wanted to see those
13 questions I drafted, I might have to give them to him. Those
14 might be public records immediately upon my creation of them.
15 I'm not going to here state that anything that I generate might
16 be outside the public eye at this time, I just can't do that.

17 COMMISSIONER BAEZ: Again, I urge counsel to get
18 together on this. I mean, you have raised an interesting
19 question. I will be curious to see how everyone can deal with
20 it. Ms. Kaufman.

21 MS. KAUFMAN: I don't have any further suggestions at
22 this point. I just think that if we go through this
23 writing-out process, as Mr. Howe described, you know, again,
24 you don't write your questions out in advance, I think we are
25 going to need -- I don't think a day is going to be sufficient

1 because the majority of the information and the documents in
2 this case Gulf claims are confidential, and I think many of us
3 in this room sat through the depositions of the three Gulf
4 witnesses that took, I don't know, longer than an entire day.
5 That does not take into consideration my witness. So, at this
6 point I don't have the answers for you, I'm just raising that
7 as a grave concern on our part.

8 COMMISSIONER BAEZ: Thank you. Mr. Stone.

9 MR. STONE: Commissioner Baez, I feel compelled to
10 respond to something Mr. Howe just said. Mr. Howe has been
11 given access to confidential documents only under the rules of
12 this Commission that allow him access to confidential
13 information. If the position that he just stated, if I
14 interpret it literally, that means that any notes he has taken
15 from those confidential documents are not protected.

16 I do not believe that was the intention of the
17 Commission, I do not believe that was the intention of the
18 statute. He raised the same concern at the outset of our
19 depositions, and that was what led to a delay in the
20 commencement of those depositions while an ore tenus motion for
21 protective order was presented to you and you ruled upon it.

22 I guess at the very minimum I need to renew that
23 motion for protective order and ask that it be expanded to
24 include any notes or questions that he might prepare based on
25 the confidential information he has had access to only by

1 virtue of the rules of this Commission. And that such notes,
2 thoughts, and impressions would also not constitute public
3 records during the pendency of this proceeding.

4 COMMISSIONER BAEZ: We will take that motion under
5 advisement. And I would like to meet with counsel after the
6 prehearing is closed.

7 MR. HOWE: Commissioner Baez, I'm afraid I must -- I
8 said nothing about any notes or anything. I said if I am put
9 in a position, those would then be my own work product at that
10 time. I am just announcing that for obvious reasons. I have
11 never suggested that anything that this Commission has issued
12 in the way of a confidentiality order has in any way been
13 compromised by anybody in our office.

14 COMMISSIONER BAEZ: Understood, Mr. Howe.

15 MR. STONE: But he did say that any questions he
16 prepared from confidential information that may have
17 confidential information, he may be compelled to give them to
18 the press.

19 COMMISSIONER BAEZ: Mr. Stone, you have made your
20 motion. We are not going to entertain discussion on it. I
21 would like to meet with counsel after.

22 We were on section -- we were on the request for
23 confidentiality, Section IX.

24 MR. STONE: Commissioner, I just note that we have --
25 the last document listed in Section IX, there is a document

1 number now for that document at the Clerk's Office, and also a
2 document number for the document that the request pertains to,
3 if you wanted to include those two numbers.

4 COMMISSIONER BAEZ: We don't have them available now,
5 do we?

6 MS. STERN: Not that I am aware of. We will
7 incorporate the document numbers.

8 COMMISSIONER BAEZ: We will incorporate it. Exhibit
9 list, Section X. I note that you have a -- you have got a
10 late-filed in addition to these.

11 MS. STERN: Yes. It will be part of Composite
12 Exhibit 1 for staff.

13 COMMISSIONER BAEZ: Very well. Section XI. You have
14 got a proposed stipulation.

15 MR. STONE: I don't think it is pertinent to this
16 proceeding. You can remove that language unless somebody is
17 prepared to waive cross.

18 COMMISSIONER BAEZ: Judging from the --

19 MR. STONE: I can't waive cross on witnesses I
20 haven't seen yet, but --

21 COMMISSIONER BAEZ: We will leave that.

22 MS. STERN: Under proposed stipulations, we can
23 delete the one that is there now, but there had been some
24 discussion about stipulating to Issues 12 and 13, I believe,
25 that Gulf would bring any modifications in the PPA before the

1 Commission for approval and any changes in price. Issues 12
2 and 13.

3 MS. KAUFMAN: Ms. Stern, we are not prepared to
4 stipulate to those issues.

5 MS. STERN: Okay. Is the possibility that Gulf is
6 willing to stipulate to those issues still on the table?

7 MR. STONE: Again, we are trying to make it clear to
8 the Commission that we will not make changes that you don't get
9 a chance to see. And that price changes that result from the
10 operation of the contract itself, you will also get to see
11 those. We are trying to make that clear. I don't think -- I
12 mean, I don't know why it is that we can't reach a stipulation,
13 but we have tried to make that clear. We are not playing games
14 with you. And so whatever it is that is preventing us from
15 stipulating, it's not on our part.

16 MS. KAUFMAN: Well, I guess that is directed to me.
17 There you go. The reason that we cannot stipulate to those
18 provisions is that we don't think that that is what the
19 contract provides. We think the contract provides otherwise.
20 And we think that that is something the Commission is going to
21 need to look at in this case.

22 MS. STERN: Okay. Thank you.

23 COMMISSIONER BAEZ: Very well. No agreement. We
24 have got Gulf's motion pending. Section XIII.

25 MR. STONE: That was our notice of intent to use

1 confidential information and our proposed procedure for dealing
2 with it in accordance with the order on procedure.

3 COMMISSIONER BAEZ: I just realized we took it out of
4 order, but counsel for parties will discuss it outside the
5 hearing. Any changes to Section XIV? All right.

6 Anything further, Staff?

7 MS. STERN: No.

8 COMMISSIONER BAEZ: Hearing nothing else, we are
9 adjourned. Thank you all.

10 (The prehearing conference concluded at 11:08 a.m.)

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

I, JANE FAUROT, RPR, Chief, Office of Hearing Reporter Services, FPSC Division of Commission Clerk and Administrative Services, 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' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 27th day of August, 2001.



JANE FAUROT, RPR
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