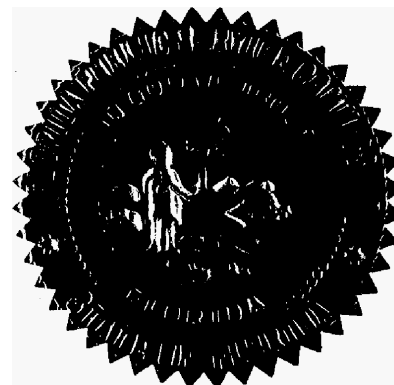


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 041272-EI

In the Matter of:

PETITION FOR APPROVAL OF STORM
COST RECOVERY CLAUSE FOR RECOVERY
OF EXTRAORDINARY EXPENDITURES
RELATED TO HURRICANES CHARLEY,
FRANCES, JEANNE, AND IVAN, BY
PROGRESS ENERGY FLORIDA, INC.



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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 7

BEFORE: CHAIRMAN BRAULIO L. BAEZ
COMMISSIONER J. TERRY DEASON
COMMISSIONER RUDOLPH "RUDY" BRADLEY
COMMISSIONER CHARLES M. DAVIDSON
COMMISSIONER LISA POLAK EDGAR

DATE: Tuesday, January 4, 2005

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

REPORTED BY: TRICIA DeMARTE, RPR
Official FPSC Reporter
(850) 413-6736

1 PARTICIPATING:

2 VICKI KAUFMAN, ESQUIRE, representing the Florida
3 Industrial Power Users Group.

4 PATRICIA CHRISTENSEN, ESQUIRE, representing the
5 Office of Public Counsel.

6 BONNIE E. DAVIS, ESQUIRE, and MIKE WALLS, ESQUIRE,
7 representing Progress Energy Florida, Inc.

8 MICHAEL B. TWOMEY, ESQUIRE, representing Buddy L.
9 Hansen and the Sugarmill Woods Civic Association, Inc.

10 JENNIFER BRUBAKER, ESQUIRE, and RICK MELSON, ESQUIRE,
11 representing the Florida Public Service Commission.

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P R O C E E D I N G S

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CHAIRMAN BAEZ: We'll reconvene agenda.

Commissioners, we are on Item 7.

MS. BRUBAKER: In Item 7, this Commission is being asked to decide upon OPC's and FIPUG's joint motion to dismiss Progress Energy Florida's petition for approval of storm cost recovery clause. And in order to do that, the Commission should determine whether the petition, with all allegations taken as true and construed in the light most favorably to Progress, states a cause of action which the Commission can take action upon.

Oral argument has not been requested but may be heard at the Commission's discretion, and there are representatives present for Progress, OPC, FIPUG. Also present is a representative for Buddy Hansen and Sugarmill Woods, who have filed for intervention in this matter.

CHAIRMAN BAEZ: Thank you. And, Commissioners, though oral argument wasn't requested, I'm wondering if any of you have a problem with hearing oral argument?

COMMISSIONER DAVIDSON: Yes, I'd be interested in hearing it.

CHAIRMAN BAEZ: Okay. Ms. Christensen, it is your motion. Go ahead.

MS. CHRISTENSEN: Good afternoon, Commissioners. I would like to address Citizens' and FIPUG's joint motion to

1 dismiss Progress's petition. We disagree with staff's
2 recommendation. We believe that Progress's petition for storm
3 recovery should be dismissed because the petition fails to
4 state a claim upon which relief may be granted.

5 First, Progress's petition fails to state that its
6 earnings fell below 10 percent return on equity, ROE, as
7 required under the stipulation they entered into in their last
8 rate proceeding. And the stipulation does not allow for the
9 company to circumvent this requirement through a clause.

10 Second, Progress's petition passes on 100 percent of
11 the risk of the hurricanes to the customers by its proposed 100
12 percent pass-through mechanism, the storm recovery clause.
13 This is in direct conflict with Commission's clear policy. The
14 customers should not bear 100 percent of the risk, and nothing
15 in the stipulation and in the order approving the stipulation
16 necessitates a change in this policy.

17 As I just said, Progress's petition seeks the
18 establishment of a storm cost recovery clause which is contrary
19 to the stipulation in Docket Number 000824-EI approved by this
20 Commission and to which Citizens, FIPUG, and other parties are
21 signatories. The stipulation is due to expire at the end of
22 2005. Under the stipulation, Progress agreed not to seek an
23 increase in its base rates and charges, including interim rate
24 increases, that would take effect prior to December 31, 2005.
25 Progress's petition fails to address this obligation under the

1 stipulation, an agreement it freely entered into. Its proposal
2 to establish a clause as an alternative to increasing base
3 rates is merely a way to evade its obligation not to seek an
4 increase to base rates under the stipulation.

5 In addition, its petition fails to even allege
6 whether its current clause proposal is permitted under this
7 stipulation. We believe that its clause proposal is prohibited
8 by the stipulation for the following reasons: First, the
9 orders which establish the storm reserve funds for FPL and
10 Progress make it clear that the storm reserve fund is part of
11 base rates. Rule 25-6.0143 demonstrates that the storm reserve
12 funds are part of base rates in that the balance of these
13 accounts are to be evaluated at the time of a rate proceeding
14 and adjusted as necessary while permitting a utility to
15 petition the Commission for a change in the provision level and
16 accrual rate outside a rate proceeding. Nevertheless, under
17 the rule, the storm reserve fund is reviewed in the context of
18 base rates. **It is clear under the orders and the rule that the**
19 storm reserve fund is part of base rates, and Progress is
20 attempting to have a clause created because under its
21 stipulation it cannot seek a base rate increase, which includes
22 seeking an increase in the storm reserve fund or implementation
23 of a surcharge, without first showing that its ROE is below
24 10 percent. And this is codified in Provision 7 of the
25 stipulation.

1 As we noted in our motion, Progress could petition
2 the Commission to increase its base rates under the stipulation
3 if its retail base rates earnings fall below 10 percent ROE as
4 reported on an FPSC adjusted or pro forma basis on its monthly
5 earning surveillance reports during the term of the
6 stipulation. However, Progress failed to plead that its base
7 rates fell below 10 percent ROE. The failure to address
8 earnings in its petition is a fatal flaw since it is contrary
9 to its stipulation that it would not seek such an increase.

10 Second, the manner in which Progress seeks recovery
11 is inconsistent with the stipulation and past Commission
12 precedent. Through the establishment of a storm cost recovery
13 clause, Progress seeks to recover storm costs that would shift
14 100 percent of the burden of storm-related expenses to the
15 customers. When this Commission established a storm reserve
16 fund for FPL in Order Number PSC-03-0918-FOF-EI, this
17 Commission refused to create a 100 percent pass-through
18 mechanism. When the Commission established the storm reserve
19 fund for Progress, the Commission did not create a 100 percent
20 pass-through mechanism, nor did the Commission establish a
21 clause for storm recovery. At that time Progress did not ask
22 for a clause.

23 Progress argues in its response that it is not
24 seeking a 100 percent pass-through because it has limited the
25 scope of recovery under its proposed clause to O&M expenses

1 hat are a direct consequence of the hurricanes. We disagree
2 with their argument for the following reason: Except for
3 excluding some 50 million in capital expenditures, the clause
4 mechanism is designed to pass along dollar for dollar all the
5 remaining \$250 million in costs which Progress deems are a
6 direct consequence of the hurricanes to customers.

7 Progress's petition does not exclude those expenses
8 that are a direct consequence of the hurricanes which have
9 already been paid for by the customers through base rates such
10 as the cost of removal collected through depreciation rates and
11 labor costs already included in the normal O&M for the affected
12 months. We believe that due to the magnitude of the
13 storm-related costs, these costs need to be thoroughly
14 analyzed, and the best way to review these costs would be to
15 address them in conjunction with the company's next rate
16 proceeding.

17 In conclusion, Progress is bound by its stipulation
18 not to seek an increase to its base rates unless its base rates
19 earning fall below 10 percent ROE. Progress's failure to
20 address this obligation under the stipulation is fatal to its
21 petition. Second, through the clause proposal in its petition,
22 Progress seeks to recover every cost associated with these
23 hurricanes instead of only those costs which are extraordinary
24 incremental costs above normal monthly budgeted costs.
25 Progress's petition violates past Commission policy. **The**

1 customers should not bear 100 percent of the risk from
2 hurricanes, nor should the company be indemnified against such
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17 I'm not going to repeat what Ms. Christensen said.
18 We approve of, adopt, and incorporate her arguments. I would
19 like to just touch on a couple of points for emphasis and a
20 little bit more explanation.

21 Ms. Christensen referred to the stipulation that the
22 parties, including OPC, FIPUG, and others, entered into and
23 that you approved, and it's attached, I believe, to your
24 staff's recommendation as Attachment A. If you look at the
25 clause -- let me refer you to the right -- that Ms. Christensen

1 was referring to you that says Progress will not come in --
2 will not petition for an increase in its base rates and charges
3 that would take effect prior to December 31, 2005, and that's
4 found at Paragraph 4, which is on Page 10 of the Attachment A.
5 Essentially, what we think is happening here since Progress
6 obviously recognizes that language and, as Ms. Christensen
7 said, agreed to it as did the other parties, this is, if you
8 will, sort of a back doorway to levy an increase and try and
9 evade the language in the stipulation. We think that that is
10 inappropriate and that you should not permit it.

11 We think it's also clear that their request for a
12 storm recovery clause to recover O&M expenses is simply going
13 to levy a charge on customers that ought to be recovered
14 through base rates unless and until Progress can plead and
15 prove to you they're below the 10 percent ROE threshold that
16 Ms. Christensen mentioned. They haven't done that here. They
17 haven't even tried to do it here.

18 Now, Progress claims in part in their response to our
19 motion to dismiss that because Paragraph 12 of the settlement
20 says that clauses won't be used to recover, quote, new capital
21 items, that must mean therefore all other kinds of clauses are
22 fair game. We disagree with that. We think it just ignores
23 the prohibition on a rate increase until the end of 2005. And
24 despite Progress's protest to the contrary, we think that, as
25 Ms. Christensen said, these kind of expenses would be the

1 subject of a base rate increase request if one were appropriate
2 and if the stipulation did not preclude it.

3 Commissioners, as signatories to this settlement
4 agreement, we believe that it should be strictly construed and
5 upheld, and the parties should each receive what they bargained
6 for. And I think it's interesting that when I read your
7 staff's recommendation, my reading of it was not that they
8 disagreed with FIPUG's and OPC's interpretation of the
9 stipulation, but rather I read them to say that those parties
10 may be correct, but you, Commissioners, might want to revisit
11 the stipulation or revise the stipulation because that might be
12 in the public interest for you to do so. I would suggest to
13 you, number one, it would not be in the public interest for you
14 to do so and that the public interest requires that you
15 interpret the stipulation in a reasonable manner and uphold the
16 integrity of the stipulation by dismissing Progress's petition
17 for failure to comply with the stipulation and order.

18 Ms. Christensen talked to you a little bit about the
19 fact that in your order establishing the FPL storm fund, and
20 you're probably going to hear quite a bit about that order, you
21 declined to guarantee 100 percent recovery of storm loss. And
22 you said that that would, and this is a quote, this would
23 effectively transfer all risk associated with storm damage
24 directly to ratepayers and would completely insulate the
25 utility from risk. And then you went on to say, We believe it

1 would be inappropriate to transfer all risk of storm loss
2 directly to ratepayers. The Commission has never required
3 ratepayers to indemnify utilities from storm damage. This type
4 of damage is a normal business risk in Florida. We think that
5 in addition to the contravention of the stipulation that we've
6 discussed, Progress is asking you to do exactly that, to give
7 them dollar for dollar flow-through of all of these storm
8 damage expenses. We think that would be inappropriate and in
9 contravention of your prior policy. So for these reasons as
10 well as those that Ms. Christensen has articulated, we think
11 that the petition fails to state a cause of action, and
12 therefore, you should dismiss it. Thank you.

13 CHAIRMAN BAEZ: Mr. Twomey.

14 MR. TWOMEY: Mr. Chairman, Commissioners, Mike Twomey
15 appearing on behalf of Buddy Hansen and the Sugarmill Woods
16 Civic Association, Inc., both of whom I've filed petitions to
17 intervene on the beginning of last week. I don't believe they
18 have been ruled upon, but as many of you will recall, they were
19 parties to Progress Energy's last rate case and were
20 signatories as well to the settlement agreement.

21 I'll be brief by saying that my clients would beg
22 leave to adopt the positions taken by Office of Public Counsel
23 as well as the FIPUG and urge your adoption of those positions
24 for the reasons stated by them. Thank you.

25 CHAIRMAN BAEZ: Thank you, Mr. Twomey.

1 Ms. Davis.

2 MS. DAVIS: Thank you, Commissioners. Commissioners,
3 I'm Bonnie Davis appearing on behalf of Progress Energy Florida
4 today. With me is Mike Walls from the law firm of Carlton
5 Fields. The company supports the staff recommendation in this
6 proceeding. We urge you to deny the motion to dismiss. We
7 believe that our petition states a well pleaded cause of action
8 that seeks to recover in a fair and equitable way the O&M
9 portion of the extraordinary storm expenses that our company
10 and our customers experienced this year.

11 To be absolutely clear on one point, we think that
12 the Office of Public Counsel and FIPUG are dead wrong on the
13 proposition that the stipulation that we entered in our last
14 rate case is in any way a bar to the relief that we seek today.
15 However, I would respectfully suggest that the only issue that
16 you have to decide today is whether as a matter of law our
17 petition states a cause of action on which you could grant
18 relief, not on which you would grant relief but on which you
19 could grant relief. And I think judged on that standard the
20 law is fairly clear. Motions to dismiss are disfavored
21 remedies. Every allegation in a petition has to be taken as
22 true. And the sole question before you is, is there a point of
23 law that would preclude you from granting us the relief that we
24 seek? With all due respect, I think all other arguments are
25 somewhat irrelevant to the issue that you have to decide today.

1 In this sense, you may wish to hear more testimony on
2 he distinction between base rates and a clause type recovery
3 mechanism. We are anxious to talk to you about why we think
4 hese types of expenses are particularly well suited for
5 recovery through a clause mechanism as opposed to base rates.
6 We totally disagree with the assertion that any of the expenses
7 for which we seek recovery are already included or provided for
8 in base rates, but these are all matters that are the subject
9 of sworn testimony and factual investigations by the
10 Commission, and they are not matters that are suitable for
11 disposition in a pleading. So what we are asking for today is
12 an opportunity to get to the hearing on the merits that you
13 have already scheduled for March. We believe when you get to
14 that hearing and you hear what we have to say on these
15 subjects, that you will find that not only did we plead it well
16 but that we have proved it well and that ultimately you will
17 see the wisdom in the relief that we seek.

18 The storm reserve which you've heard so much about
19 was the subject of a prior Commission hearing in which we
20 submitted a study that laid out our assumptions and what we
21 believed the storm reserve was designed to provide for. You
22 received that study. All parties before you today had an
23 opportunity to look at it and comment on it. We all went
24 forward on the notion that the storm reserve was designed to
25 provide for relief that was consistent with what you expected

1 the loss to be and what you expected the amount of damage to
2 be. That is what is in base rates in accrual for this storm
3 damage reserve fund. What is not in base rates, what was never
4 contemplated to be in base rates is the regulatory relief or
5 the regulatory response to a situation in which the storm fund
6 was inadequate because the catastrophic nature of the damages
7 sustained.

8 All of your prior orders discuss what possibly you
9 would consider doing. I will cheerfully concede that you can
10 read those prior orders, and there's something for everyone in
11 them. There's a passage that favors our position, a passage
12 that favors Public Counsel's position, but I think ultimately
13 the fairest reading of those orders is that you decided not to
14 decide. And you said when and if you find yourself in a
15 position where you need additional relief, come to the
16 Commission, lay your petition on the table, and we will
17 expeditiously review it. That is the position we are all in
18 today, but it should come as no surprise to anyone that this is
19 an issue that's right for decision now. And what we are asking
20 you to do is to preserve the opportunity for everybody to have
21 a debate on the regulatory wisdom of what we propose, to look
22 over every expense that we propose for recovery, to fully audit
23 it and subject it to a full hearing on the merits, but we do
24 not think that it would be either fair or wise to dismiss this
25 petition without giving yourselves the opportunity to do that.

1 I would like to make one further point and that is
2 you've heard from Public Counsel many times that the company
3 seeks to shift 100 percent of the risk of loss to customers
4 through our petition. Once again, I would respectfully suggest
5 that that position is just dead wrong. When the hurricanes
6 struck, the company without tempering its response went forward
7 and expended money to promptly, efficiently, safely restore
8 service knowing that their opportunity to recover those costs
9 would be limited to some future proceeding in which after the
10 money has been spent, there would be a thorough and searching
11 examination of whether those expenses were prudent and
12 reasonable under the circumstances in which they were incurred.
13 And I respectfully suggest that that is a fairly unusual and
14 significant risk that the company undertook.

15 The signal that I think is appropriately sent in
16 response is that, yes, if there is a storm, go forth and repair
17 as quickly and safely as you can, and after the fact, we will
18 review your expenses and allow you to recover those that are
19 prudent and reasonable and not otherwise provided for under our
20 regulatory policies. And I think that all we are asking for is
21 an opportunity to get to that hearing on the merits. We'd be
22 happy to respond to any questions that you have.

23 CHAIRMAN BAEZ: Thank you, Ms. Davis. Commissioners,
24 questions? Commissioner Deason.

25 COMMISSIONER DEASON: I have a question for our legal

1 staff. I understand that we're dealing with a motion to
2 dismiss and that there is a certain standard that has to be
3 met. We have to consider whether the Commission can take
4 action on the motion, legally can take action if there's a --
5 that is pending before us. My question has to do with the
6 stipulation. And as I read your recommendation, it's your
7 position that there is a question as to the correct
8 interpretation of that stipulation as to whether it would or
9 would not allow a particular remedy which Progress seeks and
10 that in addition to that, the Commission would have the
11 latitude possibly to even revisit the stipulation. Am I
12 understanding your recommendation correctly?

13 MS. BRUBAKER: That's correct. There are additional
14 facts that would need to be adduced to determine whether the
15 settlement agreement would prohibit the kind of relief that
16 Progress is requesting. And if it does not prohibit the
17 relief, there is the further additional evidence that would
18 need to be adduced to determine whether it would be appropriate
19 to revisit the settlement agreement or not.

20 COMMISSIONER DEASON: Okay. Here's my question. If
21 the Commission is not inclined to revisit the stipulation, does
22 that still mean we have to afford the company an opportunity at
23 hearing to convince us that we should revisit it?

24 MS. BRUBAKER: I believe that would be the -- the
25 appropriate result is to afford the due process to allow the

company to go forward with its request, and if it can prove up
2 its case at hearing, I think that would be appropriate.

3 COMMISSIONER DEASON: And then the second part of my
4 question is this. If the Commission is inclined to interpret
5 the stipulation such that it forbids the relief requested, are
6 we still obligated to give the petitioner a hearing to convince
7 us that that reading of the stipulation would allow the relief
8 requested?

9 MS. BRUBAKER: It's my opinion that in order to make
10 that interpretation of the settlement agreement that we would
11 need additional facts before us that we simply do not have
12 before us at this time. In other words, I think it would be
13 more appropriate to move forward in an evidentiary posture to
14 make that determination about whether the stipulation would bar
15 the kind of relief that's being requested.

16 CHAIRMAN BAEZ: Can I throw one just real quick? And
17 I'll get out of your way.

18 My understanding has always been that these
19 stipulations are between the parties sitting on the other side
20 and that this Commission isn't a party to the stipulation. My
21 question to you is, other than the manner in which this has
22 come before us, would this Commission still have authority to
23 grant some relief even if it was on its own motion? I mean,
24 we're not bound by the terms of the stipulation, are we?

25 MS. BRUBAKER: I think you're bound to the terms of

1 the stipulation at the extent that you'll be bound by any other
2 order of the Commission. Essentially, the stipulation was
3 approved by the Commission. That stipulation became the force
4 of law, the same as any Commission order would be. If
5 circumstances are presented where you would want to revisit
6 that or if you would --

7 CHAIRMAN BAEZ: Well, by your own suggestion, if we
8 are capable of acting in the public interest, then we by
9 implication have to have reserved our right not to be bound by
10 that stipulation when we issued an order accepting it.

11 MS. BRUBAKER: Yes.

12 CHAIRMAN BAEZ: I mean, functionally or mechanically
13 speaking, the only thing that we do when we approve a
14 stipulation is to say, you know what? It is okay with us if
15 you guys bind each other, if you all as parties bind each
16 other, but it's not -- the term "acceptance" doesn't imply
17 any -- and correct me if I'm wrong. I don't know. Mr. Melson
18 is looking at me cockeyed.

19 MS. BRUBAKER: No, the Commission wouldn't give away
20 any of its jurisdiction through that process.

21 CHAIRMAN BAEZ: So then the mere suggestion that we
22 could ever revisit the stipulation to me says that we wouldn't
23 have to because we would have somehow the authority to do
24 something on our motion. Now, I know that that's not what
25 we're talking about. But I want to understand, you know, when

1 somebody comes and says, you can't do that, or you can do that,
2 I want to understand exactly what we can do.

3 MS. BRUBAKER: Well, I suppose it would bear
4 repeating that, you know, the Commission does favor settlement
5 through stipulation, and there are policy reasons we want to
6 encourage those and in a sense protect them. It's not to say
7 that we cannot explore other avenues as well.

8 CHAIRMAN BAEZ: And I would absolutely agree with
9 that which has been said and with what you just said, that we
10 do encourage settlements. And I do appreciate whatever the
11 chilling effect might have been if the Commission were to step
12 out of that, but, you know, I mean, there's different policy --
13 I hate putting public policy up against public policy. You
14 know what I'm saying? Otherwise, we can't -- we have to choose
15 between two evils, and I don't think that that should be the
16 case here. Anyway, Mr. Twomey, you had raised your hand.

17 MR. TWOMEY: Mr. Chairman, thank you. My suggestion
18 would be to you that you can't, not that you're suggesting
19 this, but you can't willy-nilly change your view --

20 CHAIRMAN BAEZ: I don't do anything willy-nilly and
21 not anymore anyway.

22 MR. TWOMEY: You can't change your view of what
23 happened in an order, even in a stipulation. It would be my
24 view -- let's take -- forget the stipulation a minute. Let's
25 take a rate order, the last rate order that was involved in

1 Progress Energy. You can't come back five years, six years,
2 ten years later and change the outcome of that order absent a
3 showing of substantially changed circumstance. Okay? And of
4 course, the best way to have that is if they came in and
5 someone filed a petition to change the rates. I would suggest
6 to you that the same is generally true for your orders adopting
7 stipulations, aside from the public policy interest and
8 encouraging all the parties to your jurisdiction to engage in
9 negotiations and adopt settlement agreements, which, of course,
10 would be put off. If you hurt one party or the other by
11 abandoning a settlement, I would suggest to you that you would
12 have to show legally that there were the same type of changed
13 circumstances in effect for that stipulation order as you would
14 to change a rate case order or any other order. You just can't
15 decide that we don't believe that's in the public interest any
16 longer without showing substantially changed circumstances.

17 CHAIRMAN BAEZ: And I'm not suggesting -- I guess I'm
18 trying to say what is the magic of -- I guess I'm trying to
19 understand what the magic is of a company petitioning the
20 Commission for relief as opposed to this Commission saying, you
21 know what? We have catastrophic events. I hope that's not an
22 issue for litigation. But we have whatever, in our view. We
23 have X, Y, and Z; come on in because we've got to look at this.
24 And if I can do that, then I don't understand the magic of, you
25 know, it hanging on the balance whether it was a petition or

1 whether it was on the Commission's own motion. I guess that's
2 really what I'm trying to figure out, not willy-nilly, not
3 willy-nilly.

4 MR. TWOMEY: That was a poor choice of words.

5 CHAIRMAN BAEZ: But I'm not concluding anything. I'm
6 just saying, let's look at this.

7 MR. TWOMEY: Yes, sir. I'm not trying to quibble on
8 this.

9 CHAIRMAN BAEZ: That's all right.

10 MR. TWOMEY: I'm just saying I think that if --
11 you've got a stipulation, and one side may take a slightly
12 different view of what it says versus the other. The best way
13 to resolve that is during the course of a hearing. All I'm
14 trying to say is I don't think that this Commission or any
15 state agency enjoys the same latitude. You always hear the
16 Legislature saying, you know, we're not bound by what came
17 before. We can change it and so forth. I don't think you have
18 that same -- not that you're suggesting it, the same degree
19 of latitude --

20 CHAIRMAN BAEZ: That's not what I'm suggesting.

21 MR. TWOMEY: I know. I'm just saying -- I think I'm
22 trying to say to you, I think you have to have substantially
23 changed circumstances to justify the change of any order,
24 including one approving a stipulation.

25 CHAIRMAN BAEZ: But I want to go back to something

1 you just said a few seconds ago. You alluded to the argument
2 as to what the stipulation means and so on and so forth, and
3 that the best way to figure out what that said was through a
4 hearing. So then this motion shouldn't be here. We shouldn't
5 be short-circuiting a discussion which I would agree with you
6 has to take place; am I right?

7 MR. TWOMEY: Well, unless you can conclude now.

8 CHAIRMAN BAEZ: But you said that the best place to
9 do it is at a trial, a hearing.

10 MR. TWOMEY: Yes. If you have doubts -- if you have
11 no doubts that Public Counsel, FIPUG are correct in their view,
12 then you should dismiss it. If you have doubts, then
13 necessarily, you go on.

14 CHAIRMAN BAEZ: Thank you. Ms. Christensen.

15 MS. CHRISTENSEN: May I address just hopefully
16 briefly --

17 CHAIRMAN BAEZ: You want to try and save Mr. Twomey?

18 MS. CHRISTENSEN: Well, since it was Office of Public
19 Counsel's and FIPUG's motion, we believe that the stipulation
20 is clear on its face. We don't believe that there really is
21 any different interpretation that can be put to the
22 stipulation. We think that it's clear, and we think that
23 that's a decision that you can make here today in agenda.

24 To answer your previous question which was, I
25 believe, could we bring the companies in here to address

1 catastrophic hurricane events and the appropriate recovery on
2 our own motion; if that would be appropriate, why could we not
3 do it here, I want to make it clear that certainly the
4 Commission on its own motion could bring in the companies and
5 say we want to address this. But we would also, I think, in
6 that circumstance say that the stipulation has an impact on
7 that proceeding as well, and you must consider the stipulation
8 even if the matter was brought up on your own motion that to
9 seek recovery they would have to meet that requirement, and
10 that's what we're saying here.

11 This is a condition precedent such as any contract or
12 agreement between the parties that would have, let's say, a
13 mediation provision before you could take a matter to court.
14 We believe that that's similar here with the stipulation that
15 says, you know, we agree not to bring it to the forum until and
16 unless we can show our earnings are below 10 percent ROE. And
17 we believe that that's a condition precedent, that the
18 stipulation -- the parties and the Commission by its approval
19 agree that that should be a condition precedent before bringing
20 a case to you to increase base rates. We believe that a
21 surcharge would be encompassed in the base rates premise, and
22 that's basically what we are suggesting here today, that this
23 is a condition precedent. Not to say that if they can plead
24 that in a petition that would state that fact that they
25 couldn't bring that petition to you. What we're saying is the

1 petition that they have brought to you fails at least on that
2 point.

3 MS. DAVIS: If I could respond, Mr. Chairman.

4 CHAIRMAN BAEZ: Ms. Davis, hold on because
5 Ms. Kaufman was pulling her trigger, and I don't know if you
6 want to wait and that way you can respond to both.

7 MS. DAVIS: I will do that, yes.

8 CHAIRMAN BAEZ: Okay. Go ahead, Ms. Kaufman.

9 MS. KAUFMAN: I agree with what Ms. Christensen said.
10 I think that your questions about the impact of your order
11 approving this stipulation are important ones. And I think
12 that, as you recall, that stipulation was entered into after a
13 tremendous amount of discovery and basically on the eve of
14 going to hearing in regard to a full-blown rate case. And with
15 all due respect, I think I would agree somewhat with
16 Ms. Brubaker that when you approved that stipulation, I recall
17 the agenda, I recall that we went over it in some detail, your
18 staff looked at the substantive aspects of the stipulation, and
19 I think that you -- I guess I might put it that you gave it
20 your blessing, you approved it. It was more than just, well,
21 if you all agree, you know, that's all right with us.

22 CHAIRMAN BAEZ: No. That's not what I was
23 suggesting.

24 MS. DAVIS: It wasn't willy-nilly either.

25 CHAIRMAN BAEZ: It wasn't willy-nilly. No

1 willy-nilly. But my point is this, and I guess I'm just trying
2 to get it straight in my head. And, Commissioner Deason, I
3 know that I have monopolized what was originally your time.

4 COMMISSIONER DEASON: That's all right.

5 CHAIRMAN BAEZ: And I know you don't agree with this
6 part, but if the staff is recognizing that legally we have some
7 overriding authority because we have to act in the public
8 interest, that to me says that we have some authority -- it can
9 only come about from the fact that the Commission is not a
10 signatory and therefore not bound by the terms of that contract
11 or by the terms of that stipulation no matter that we accepted
12 it. And if we can do that, then in my mind all we're doing
13 is -- again, and I am presuming or I'm assuming many things,
14 (A), that my colleagues and I would even deem the hurricanes to
15 be events that we would want to look into on our own, I guess,
16 that they would rise to that level, but having said that, we've
17 got to be able to do that if we can go ahead and revisit a
18 stipulation.

19 MS. KAUFMAN: Chairman Baez, I am not intending to
20 imply that you do not have the obligation and the authority to
21 act in the public interest.

22 CHAIRMAN BAEZ: You haven't said that.

23 MS. KAUFMAN: Certainly if you wanted to open an
24 investigation to look at the hurricane issues, I think
25 certainly you would be able to do that, but I would like to

1 remind you, and I want to harken back to something Ms. Davis
2 said, that's not what the company asked you to do. The company
3 came in here and asked you to establish a clause. We have
4 objected because we think it contravenes the stipulation. I
5 heard Ms. Davis say, I believe, no, it doesn't. They're not
6 arguing to you that there's an overriding public interest.
7 There is an issue that I think, as Ms. Christensen said, is a
8 matter of law. You can look at the stipulation that you
9 approved and interpret it. And I think when you do that, the
10 company has not stated a cause of action. And in that regard,
11 I agree with Ms. Davis's articulation of what the standard is
12 for a motion to dismiss. It's failure to state claim. And in
13 this instance when you look at the stipulation, Progress has
14 failed to state a cause of action here. And I think, as
15 Ms. Christensen put it, maybe they could. They haven't done
16 it. They filed testimony, they filed a petition, and nowhere
17 have they attempted to meet what, in our view, would be the
18 initial hurdle to get these issues in front of you. That's
19 different than the Commission on their own motion saying we
20 need to investigate this matter.

21 CHAIRMAN BAEZ: Ms. Davis, I cut you off. I'm sorry.

22 MS. DAVIS: That's okay. I think there are about
23 three separate issues here. One is, we are not seeking a
24 change in base rates by this petition. So it does not appear
25 to us that you will ever have to revisit the stipulation as a

1 matter of public interest because the stipulation was a
2 settlement of a base rate proceeding. It is very clear that it
3 precludes us from seeking to change base rates unless our
4 return on equity falls below a certain threshold level. It's
5 also very clear that we agreed not to recover through or
6 attempt to recover through a recovery clause capital items that
7 have traditionally and historically been recovered through base
8 rates. We are not asking for that relief either.

9 What we are asking for is for those expenses that are
10 not included in base rates, that are extraordinary, and that
11 are catastrophic be the subject of a separate recovery clause.
12 To get to the point that Public Counsel and others are trying
13 to make, that these expenses are somehow covered by the storm
14 reserve accrual that is in base rates, requires precisely the
15 type of factual investigation that a hearing is designed to
16 provide. And for that reason, I think that while this
17 conversation about the public interest is interesting, it's not
18 dispositive of what's before you today, which is just the
19 simple question of, could you grant us the relief that we
20 asked?

21 And I think your question, Mr. Chairman, about could
22 I pose that question on my own motion, or is it dependent on
23 the company asking, illustrates the nature of what we're
24 seeking because the answer to it is obviously, yes. If we had
25 not asked for a clause recovery, could you have said, this is

1 the type of expense that's not included in base rates, it's not
2 covered by the stipulation, it needs to be provided for, let's
3 have a clause? The answer to that is I think, yes.

4 CHAIRMAN BAEZ: Commissioner Deason, I apologize.

5 COMMISSIONER DEASON: Well, I think Ms. Davis kind of
6 anticipated my next question, and I'll go ahead and address it
7 just for clarity. Under Paragraph 4 of the stipulation, it
8 forbids an increase in base rates before December 31, 2005, and
9 it's clearly your position that the relief you've requested is
10 not an increase in base rates; correct?

11 MS. DAVIS: Yes, sir.

12 COMMISSIONER DEASON: And why is that? Because it's
13 just structured such that you label it a clause as opposed to a
14 base rate increase?

15 MS. DAVIS: No. To my way of thinking, a change in
16 base rates implicates earnings; that is, you would set a new
17 base rate based on your investigation either of the historic
18 test period or a forward-looking test period.

19 COMMISSIONER DEASON: Speak a little more into the
20 microphone.

21 CHAIRMAN BAEZ: Can you speak into the microphone?

22 MS. DAVIS: I'm sorry. The idea is that you would
23 set rates on a going-forward basis that would remain in effect
24 unless facts suggested that they'd be changed. To me, that is
25 very different than a clause type recovery, which is a

1 backward-looking, dollar-for-dollar, trued-up recovery of
2 expenses with no earnings implication one way or the other.
3 And I think that when we have base rate proceedings great
4 effort is made to separate out the impact of expenses and
5 revenues that are recovered through a clause versus projected
6 expenses, projected revenues that go into the ratemaking
7 calculation for base rates.

8 COMMISSIONER DEASON: Is it your position that the
9 O&M expenses incurred to restore service as a result of the
10 hurricanes does not affect the company's earnings?

11 MS. DAVIS: No, that is not our position. But I
12 think our position is that the cost of restoration were not
13 included in base rates and that we should fairly be able to
14 recover those costs on a dollar-for-dollar basis should you
15 find them prudent and reasonable through a clause.

16 COMMISSIONER DEASON: Well, hasn't the Commission
17 historically allowed the recovery of storm reserves -- accruals
18 to the storm reserve in base rates?

19 MS. DAVIS: Yes, sir. But what you have to remember
20 is that the -- what is it the accrual is -- what type of
21 expense is the accrual designed to allow you to recover. And
22 at least for our company, and I believe this to be the case for
23 FPL, there is a study done that says, this is the predicted
24 type of occurrence, this is the predicted level of damage,
25 we'll set the dollar amount that's included in base rates to

1 return that to the company should you experience an actual
2 loss. But when you approved that accrual, you did it with the
3 full knowledge and expectation that in the event of a
4 catastrophic loss, there would have to be an opportunity for
5 further recovery above and beyond the accrual that's in base
6 rates, because otherwise to be fair, you would have had to pick
7 a number for the accrual and built up the storm fund to a level
8 that not only would provide recovery for the most expected hit
9 but you would have had to set it at a level that provided
10 recovery for the most expensive hit or someplace in between.

11 COMMISSIONER DEASON: Well, at the time that the
12 storm damage reserve accrual was set and we made the --
13 incurred in that study in 1993, did we not look at historical
14 incidents of hurricanes, the strength of those hurricanes, the
15 amount of expense in restoring service? And wasn't that
16 accrual set to anticipate a normal level of storm activity?

17 MS. DAVIS: Yes, but a normal level of storm activity
18 based on that study would be one Category 3 or less storm every
19 five years.

20 COMMISSIONER DEASON: Let me ask you this question.
21 Let's put it in the reverse. What if we had been incorrect and
22 when we set the accrual in base rates and we had set the amount
23 way too high and that we were very fortunate and we didn't have
24 any hurricane hit the state for a period of ten years and the
25 reserve was at \$500 million? Would you be in here requesting a

1 recovery -- I mean, a refund to customers because we
2 misallocated or misappropriated the amount of -- or
3 misanticipated the amount of storms that were going to occur in
4 the future?

5 MS. DAVIS: Well, in essence, that is what you have
6 done. We are required to report on an annual basis what the
7 level in the storm reserve is. And in the last base rate
8 proceeding, I believe FPL has specific target cap level to
9 their funds set, and the direction in your orders is if you hit
10 the level, if you hit the target, then come back and we will
11 make an adjustment to your storm accrual. **So, yes, your order**
12 **contemplated going both ways.**

13 COMMISSIONER DEASON: Right. And have we ever done
14 it outside the context of a rate proceeding? Has there been
15 any type of a one-year or two-year or one-month refund to
16 customers for an overage in the storm damage reserve?

17 MS. DAVIS: No, sir, because I believe on the basis
18 of factual evidence you've concluded every time that it would
19 be wiser to allow the storm fund to continue to increase in
20 value. But you have examined that question and reached that
21 conclusion, and I think the possibility of an up or down
22 adjustment was on the table every time you considered it.

23 COMMISSIONER DEASON: I have another question for
24 staff and maybe it's my last question. Staff, it's your
25 position that there is enough question as to the wording of the

1 stipulation that we cannot as a -- in the context of a motion
2 to dismiss, dismiss the petition; is that correct?

3 MS. BRUBAKER: That is my opinion.

4 COMMISSIONER DEASON: Do you anticipate we will be
5 taking testimony or argument as to the correct interpretation
6 of the stipulation and how it affects whatever relief this
7 Commission can or cannot grant?

8 MS. BRUBAKER: I would certainly anticipate that
9 would be a factor of the testimony.

10 CHAIRMAN BAEZ: Commissioner Davidson.

11 COMMISSIONER DAVIDSON: Really, a comment and then
12 with a question to legal. Personally, I would like an
13 opportunity to sort of consider the issues that are before us.
14 I think it would be improper to say as we sit here as a matter
15 of right Progress wins or as a matter of right OPC wins and
16 FIPUG wins. I mean, I think there are a lot of sort of
17 complicated issues here. I mean, for me, as I read through
18 this, it's not as simple as, okay, Side A wins or Side B wins.
19 I do think Ms. Davis pointed out what was key fact for me in
20 that there are passages throughout sort of this whole record
21 that favor different sides. It's not clear-cut. I think it's
22 important that we address the issues. It's important to sort
23 of set some precedent for the 2004 -- to recover from the 2004
24 hurricane season and to set some clear guidance for the
25 2005 hurricane season, which will be upon us before we know it.

1 I think ultimately resolution is going to depend upon
2 some key factual findings, also application of some core legal
3 principles and interpretation of past Commission orders in the
4 context of this case. As the last time we revisited the
5 Progress settlement made clear, I mean, there are a number of
6 meritorious arguments on all sides about what's allowed, what's
7 not allowed. Aside from sort of any factual evidence we take
8 and factual rulings we might make as we proceed, we may
9 determine that Progress as sort of a matter of law and
10 applicable precedents is not entitled to recover or they are
11 entitled to recover.

12 My thought, and this is the question for legal, is
13 that -- and I don't know where the rest of Commission is on
14 here, I personally am sort of not inclined because of these
15 issues to grant the motion to dismiss, but what about the
16 propriety of just sort of holding that motion in abeyance and
17 proceeding with the case, taking evidence and testimony? I
18 don't know if that's a viable option, a good option, but if we
19 ultimately determine as a matter of law Side A wins or Side B
20 wins, then we could address the motion at that time.

21 MR. MELSON: Commissioner, you could do that. I'm
22 going to -- pleading in administrative cases doesn't correspond
23 100 percent to pleading in court, and we try to sometimes bring
24 those court concepts over. My understanding of sort of the
25 civil practice is even if you believed at this stage that this

settlement precluded Progress from recovery, that wouldn't be a motion to dismiss issue so long as they had pled that their factual situation was outside. It might be a matter for a summary judgment or what in administrative practice we would call a summary final order. From my personal point of view, I don't think a motion to dismiss is appropriate even if you read this to absolutely preclude. Obviously, if you go forward with a hearing, take testimony, hear the legal arguments, you very well could decide at the end that as a matter of law applying the settlement agreement, that they are precluded from recovery, but to me, that's a decision that comes at a later stage in the process rather than the motion to dismiss.

COMMISSIONER DAVIDSON: Thank you.

CHAIRMAN BAEZ: Mr. Melson, then in a practical sense, what is it that you would suggest? I guess if a motion to dismiss is stylistically not proper even though the argument still remains, when is the proper -- I guess you've given an opinion as to when the proper moment or when the proper time to entertain that kind of argument is.

MR. MELSON: It seems to me the staff recommendation is legally correct. In staff's view, General Counsel's view, that the motion to dismiss ought to be denied, that Progress has stated a cause of action. The question of what the stipulation means theoretically could be raised prior to hearing on a legal argument about summary judgment. It could

1 be reserved particularly if there are any factual questions as
2 to, you know, the interpretation of what's in base rates. It
3 seems to me it's a question that simply gets reserved for
4 hearing and you decide -- you frame the issues in the case and
5 you decide at the end of the case the same way you decide any
6 other issues. Issue 1 may be a legal issue that's dispositive
7 and means you don't have to reach and vote on, you know,
8 factual Issues 2, 3, and 4.

9 CHAIRMAN BAEZ: So then the suggestion that perhaps
10 even a ruling on a motion to dismiss might be better dealt
11 with? I mean, is that fair?

12 MR. MELSON: I think the motion to dismiss is right
13 today, but if you chose to withhold ruling on that until the
14 end --

15 CHAIRMAN BAEZ: I guess if the grounds for the motion
16 to dismiss are ones that have to get argued --

17 MR. MELSON: No, sir.

18 CHAIRMAN BAEZ: -- or have to be --

19 MR. MELSON: Okay. I'm not being clear enough.

20 CHAIRMAN BAEZ: Maybe I'm losing you.

21 MR. MELSON: The question of what the stipulation
22 means is not a question that affects a decision on the motion
23 to dismiss one way or another. So whether you have questions
24 about the stipulation or not, the issue is, has Progress pled a
25 case for relief? The stipulation might be an affirmative

1 defense that gets raised, but it doesn't get raised as a motion
2 to dismiss.

3 COMMISSIONER DEASON: Mr. Chairman, based upon that
4 explanation by General Counsel, I'm prepared to make a motion.

5 CHAIRMAN BAEZ: There's no other questions?
6 Commissioner Davidson.

7 COMMISSIONER DAVIDSON: No questions.

8 CHAIRMAN BAEZ: Okay. I'm sorry.

9 COMMISSIONER DEASON: I move approval of staff's
10 recommendation on Issues 1 and 2.

11 COMMISSIONER DAVIDSON: Second.

12 CHAIRMAN BAEZ: There's a motion and a second. All
13 those in favor say, "aye."

14 (Unanimous affirmative vote.)

15 CHAIRMAN BAEZ: Thank you all.

16 (Agenda Item Number 7 concluded.)

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1 STATE OF FLORIDA)
 :
 2 COUNTY OF LEON)

CERTIFICATE OF REPORTER

3
 4 I, TRICIA DeMARTE, RPR, Official Commission Reporter,
 do hereby certify that the foregoing proceeding was heard at
 the time and place herein stated.

5
 6 IT IS FURTHER CERTIFIED that I stenographically
 reported the said proceedings; that the same has been
 transcribed under my direct supervision; and that this
 7 transcript constitutes a true transcription of my notes of said
 proceedings.

8
 9 I FURTHER CERTIFY that I am not a relative, employee,
 attorney or counsel of any of the parties, nor am I a relative
 or employee of any of the parties' attorneys or counsel
 10 connected with the action, nor am I financially interested in
 the action.

11 DATED THIS 11th DAY OF JANUARY, 2005.

12
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 15 (850) 413-6736