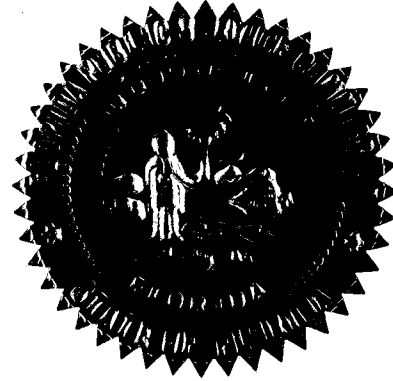


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 060508-EI

In the Matter of

PROPOSED ADOPTION OF NEW RULE
REGARDING NUCLEAR POWER PLANT COST
RECOVERY.



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PROCEEDINGS: AGENDA CONFERENCE
 ITEM NO. 5

BEFORE: CHAIRMAN LISA POLAK EDGAR
 COMMISSIONER J. TERRY DEASON
 COMMISSIONER ISILIO ARRIAGA
 COMMISSIONER MATTHEW M. CARTER, II
 COMMISSIONER KATRINA J. TEW

DATE: Tuesday, December 19, 2006

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

REPORTED BY: JANE FAUROT, RPR
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1 APPEARANCES:

2 WADE LITCHFIELD, representing Florida Power & Light
3 Company.

4 ALEXANDER GLENN, representing Progress Energy
5 Florida, Inc.

6 MICHAEL J. TWOMEY, representing AARP.

7 JOHN McWHIRTER, Florida Industrial Power Users Group.

8 HAROLD MCLEAN, ESQUIRE, Office of Public Counsel,
9 representing the Citizens of the State of Florida.

10 MICHAEL COOKE, General Counsel, LARRY HARRIS, ESQUIRE
11 and Tim Devlin, representing the Commission Staff.

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1 P R O C E E D I N G S

2 CHAIRMAN EDGAR: Item 5. Mr. Harris.

3 MR. HARRIS: Good afternoon -- I guess it's almost
4 afternoon. Larry Harris on behalf of the Commission.5 This is staff's recommendation to propose new Rule
6 25-6.0423, nuclear power plant cost recovery. Commissioners,
7 we're going to be handing out a type-and-strike version of the
8 rule that's been filed with our recommendation, and the
9 recommendation starts on Page 11. We would request that you
10 all basically throw away the rule that's attached in your file
11 package and substitute this type and strike version as staff's
12 recommendation of the rule you should propose.13 Staff is here and prepared to answer any questions
14 you have. This is a rule proposal open to public
15 participation. I believe there are a number of parties here
16 who wish to -- or persons here who wish to address the
17 Commission.18 CHAIRMAN EDGAR: Okay. Thank you. We'll go ahead
19 and make sure everybody has the proper or most recent version
20 in front of them that we will be beginning our discussions
21 from.22 MR. GLENN: I can begin if you'd like, Madam
23 Chairman.

24 CHAIRMAN EDGAR: Mr. Glenn.

25 MR. GLENN: Alex Glenn on behalf of Progress Energy

1 Florida.

2 We appreciate the significant effort that staff has
3 put into in developing the proposed rule. While we agree with
4 most of the proposal, the rule as written falls short, we
5 believe, in carrying out the Governor's and the Legislature's
6 express intent to promote investment in new nuclear power
7 plants. Most significantly, the rule should be revised to
8 require an annual prudence determination by the Commission and
9 that all costs approved as prudent by the Commission in each
10 annual review would not be subject to later challenge. I'm
11 going to provide copies to you of what has previously been
12 provided to OPC and the staff, and which actually, I believe,
13 is a red line of the red line you just received.

14 There are a couple of key points, I think, that we
15 have an issue with. One is the annual prudence review. The
16 second is language that is in the rule that would require a
17 specifically administrative finality.

18 Now, our proposed changes that you are receiving now
19 are consistent with Congress's intent under the Energy Policy
20 Act of 2005. It's consistent with the Governor and the
21 Legislative's intent and the express language of the statute
22 which sought to encourage the construction of new nuclear
23 plants through innovative and creative regulation. The
24 legislation specifically said that the rule shall be designed
25 to promote utility investment in nuclear power plants and allow

1 recovery in rates of all prudently incurred costs and shall
2 include but not be limited to a specific subset of items. And
3 our proposal, we believe, is sound public policy.

4 The Commission and all parties are in a better
5 position to determine the prudence of a utility's actions
6 closer in time to when the costs are actually incurred, rather
7 than go back later in time and reconstruct facts and evidence
8 when people, witnesses may have left, memories have faded,
9 documents are gone. Here we could be spending potentially up
10 to a half a billion dollars, if not more, a year in certain
11 years on the construction of this project. Customers will
12 benefit by more closer and more frequent review of costs in
13 which the utility has the burden to prove that all of its costs
14 are prudent. Utilities benefit by gaining greater certainty of
15 which costs are allowed and those that are not on a realtime
16 basis.

17 The bottom line is that the rule, as written, does
18 not do enough, in our opinion, to encourage the development of
19 new nuclear plants and their attendant fuel diversity and
20 reliability benefits to customers. If the company receives its
21 preconstruction carrying costs and preconstruction costs only
22 to retain the significant risk that the Commission could
23 require the refund of that money years later, that's a risk
24 that we cannot take. It would be difficult to justify to our
25 board of directors that a utility should take a five, six,

1 seven-billion-dollar risk to build a nuclear power plant and
2 associated transmission facilities and potentially subject the
3 company with catastrophic losses later in the process. Our
4 proposal implements the Legislature's express intent which we
5 believe will benefit all customers in Florida.

6 Thank you.

7 CHAIRMAN EDGAR: Mr. Glenn, that was more brief than
8 I was expecting.

9 Mr. Litchfield, do you have comments at this time?

10 MR. LITCHFIELD: Thank you, Madam Chairman. I will
11 try to be as brief.

12 By way of background, I'd like to make a couple of
13 points. Nuclear generation has provided our customers over the
14 years with a very reliable cost-effective source of base load
15 generation. We do believe that nuclear generation should
16 continue to play an important role in meeting growing customer
17 demands as part of a diverse utility generating portfolio.
18 However, as Mr. Glenn has indicated, and I think as all of the
19 parties at this table have indicated in their prefiled
20 comments, we all recognize that constructing new nuclear
21 generation presents a host of very difficult issues for any
22 utility, not the least of which is the overwhelming challenge
23 that the utility faces in having to fund billions of dollars in
24 costs on a single project that will face obstacles and hurdles
25 every step of the way.

1 We know that the experiences of the last round of
2 nuclear construction were pretty severe. They are still very
3 fresh in the minds of investors and not terribly encouraging to
4 any company that is considering pursuing nuclear generation.
5 As a result of some very protracted and highly contentious
6 proceedings, both administrative and judicial, many companies
7 were forced to accept significant disallowances or significant
8 delays in the recovery of their costs. Today, of course, these
9 very same plants are among the most reliable and cost-effective
10 sources of generation on a utility system, but the path to get
11 there was extremely rocky and came at a high cost to
12 shareholders. We think this is a very important background for
13 the discussion that we are having today with respect to the
14 rule.

15 As Mr. Glenn indicated, the Florida Legislature has
16 acted to attempt to break through some of these residual
17 disincentives from past experience, as has Congress attempted
18 to do so. The rulemaking that you are considering today is an
19 important part of that process as well. Time will tell whether
20 these efforts to remove disincentives have been sufficient to
21 encourage nuclear generation in the state, but what we are
22 about to do today, I think, is an important step in that
23 regard.

24 We think that the staff has done some very positive
25 things in this regard in their recommended rule. We have had

1 several discussions with staff, with Public Counsel, and others
2 relative to some of these points, but there remain, I would
3 say, three very key issues in our mind where we don't feel that
4 the rule goes quite far enough.

5 One is to remove the language that addresses
6 administrative finality, and you'll see that in your rule on
7 Page 17, Line 12. We think the introduction of that term,
8 which to our knowledge does not appear in any other rule of
9 which we are aware, adds a level of confusion as to whether and
10 if so when, the company would ever have finality with respect
11 to costs that it had brought before this Commission, which we
12 have recommended, and I think at one time Public Counsel had
13 recommended be brought to you on an annual basis for you to
14 review both projections and actuals on an annual cycle basis in
15 order to determine the reasonableness and the prudence of those
16 costs for purposes of cost-recovery, and we believe consistent
17 with the legislative intent to provide the company with some
18 degree of assurance that it is pursuing the proper path.

19 The costs that it is incurring are reasonable and
20 prudent and then it can then engage in the next year of
21 construction activity incurring yet again significant costs
22 over that cycle with some degree of confidence and surety that
23 this Commission recognizes that those costs are reasonable and
24 prudently incurred. So we would advocate removing that clause
25 from the rule.

1 As Mr. Glenn indicated, we would advocate that the
2 prudence review be one time and one time only, and that it be
3 done on an annual basis. We think that the period of time
4 within which it can be conducted is more than ample. We
5 conduct need determinations in 135 days. We conduct full base
6 rate cases in eight months. And this is a large item, but a
7 single item nonetheless of rate base of a company, and you
8 would have costs before you. I think two or three different
9 times you would have the proposed costs, you would have
10 auditing rights throughout that process, and we really see no
11 reason why this could not be done on an annual basis and
12 provide some definitive conclusion and finality with respect to
13 those costs.

14 The other item that I will mention is with respect to
15 site selection costs. What the rule does is that it draws a
16 distinction between pre-site selection costs and
17 pre-construction costs, and it does so on the basis of a
18 definition in the legislation with respect to construction
19 period. Now, the legislation doesn't define site selection
20 costs. It doesn't define pre-construction costs, but it does
21 define a pre-construction period.

22 And then with respect to pre-construction costs, the
23 legislation is very clear in allowing clause recovery, cash
24 clause recovery of those costs on an annual cycle. And we
25 would urge this Commission to treat pre-site selection costs no

1 differently. We don't think that the legislation precludes
2 that result. In fact, we think the legislation clearly
3 endorses creative and innovative and alternative forms of
4 cost-recovery.

5 Keep in mind that these are the very first costs that
6 the company will incur, the very first bucket of costs. We
7 think that, therefore, they should merit treatment as least as
8 favorable as the second bucket of costs that the company will
9 incur, i.e., the pre-construction costs.

10 One last point that I would raise, and this is more
11 by way of clarification. In our discussions with staff, we had
12 talked about the concept of litigation costs. Now, with all of
13 the uncertainty that we would face in undertaking a project
14 like this, there is one certainty and that is there will be
15 litigation costs. And they likely will be very significant.
16 And we would propose, and we would ask for clarification that
17 these costs would be treated no differently than any other
18 project costs even if they are not specifically itemized in the
19 rule.

20 And the source of our concern is in staff's
21 recommendation that refers to these costs as being treated upon
22 the request of the utility. I think the term used is on a
23 case-by-case basis, which gave us some pause that somehow they
24 were going to be treated differently than other project costs.
25 So that's one clarification as opposed to a proposed rule

1 modification that we would suggest, and you won't see that,
2 obviously, in our proposed mark-up.

3 And with that, Commissioners, I would conclude my
4 comments. Thank you.

5 CHAIRMAN EDGAR: Mr. McLean.

6 MR. McLEAN: Good morning, Madam Chairman,
7 Commissioners.

8 Background-wise it was once the case, in fact, before
9 this statute a utility who chose to undertake capital projects
10 of this magnitude could look to accumulate AFUDC over the term
11 of the construction period and eventually that AFUDC would be
12 capitalized. They would be permitted to earn a return of and a
13 return on that AFUDC along with their actual investment in the
14 plant. And in the case of nuclear plants, I understand that
15 that could be deferred as much as ten years.

16 The Legislature made what I think was an enlightened
17 judgment to suggest that we should do better than that, and
18 that customers should actually advance some value to the
19 companies to persuade them to engage in nuclear generation,
20 which we all feel over the long haul is advantageous because of
21 the lesser cost of fuel, the initial large investment
22 notwithstanding.

23 So I am prepared to say that the legislation and the
24 staff's version of the rule, which construe and flesh out that
25 legislation, does an excellent job at eliminating many, if not

1 most, of the risks that the utility faces in this spectacularly
2 large investment which they are going to undertake. The staff
3 version of the rule does not hold them harmless. And I believe
4 that the version -- the criticism of the rule that you have
5 heard from Florida Power and Light and Florida Progress goes a
6 long ways toward holding them harmless in contrast to what the
7 staff version of the rule does.

8 However, lest you think that we are miles apart,
9 speaking only for the Office of Public Counsel, we are not,
10 really. We have been negotiating for about two weeks, and I
11 kind of think if we had two or three more days to work out our
12 differences, we probably would have got there.

13 Let me tell you three concerns that we have and
14 three differences that we have with the staff recommendation.
15 The first is not really a difference. I initially, and on
16 behalf of the office initially opposed the annual prudence
17 review. I have come to revisit that. I think it's probably a
18 good idea for you to take an annual look at this program, a
19 pervasive look, and enter a judgment as to whether you believe
20 the investment undertaken to that point is prudent or not
21 prudent and make whatever adjustments you think necessary.

22 I don't particularly want to emphasize the annual
23 aspect of that; however, it should certainly be more than once,
24 like over a ten-year period, but I understand that staff has
25 workload issues regarding the period and I do, too. I tell you

1 frankly if you ultimately adopt this rule, I will probably go
2 to the legislature on behalf of my own office and ask for more
3 resources to deal with this. Because as fellow counsel pointed
4 out -- he didn't point out quite this way, but I will -- there
5 is going to be a bunch of money come through this rule. A lot.
6 Maybe more so than you have ever seen before. In the few
7 sentences that set up this annual prudence review, you are
8 likely to see six, maybe eight, perhaps ten billion dollars
9 pass under the bridge. There is nothing wrong with that so
10 long as it is given a thorough review by the Commission.

11 So back to the point of annual. We're not
12 particularly wed to annual. I'm happy to work with staff to
13 determine, and with the companies to determine what an
14 appropriate period would be. Annual works well, you can keep
15 up with it, but if it were every two years, no offense coming
16 from this corner.

17 There are phrases which set up this annual prudence
18 review. As I say, many billions of dollars will pass through
19 that, but there is no analog for the notion of minimum filing
20 requirements. Now, when I mentioned that to Progress
21 initially, there were weak knees in the crowd because what they
22 thought I was talking about was MFRs to initiate a rate case.
23 That's not at all what I'm talking about. There ought to be
24 enumerated criteria in this rule that tell the utility what to
25 file, what kinds of things to file, just like you do in a rate

1 case. And it should be the case that having satisfied those
2 modified minimum filing requirements, for want of a better
3 term, that you could, without the participation of an
4 intervenor, be in a position to enter your final order
5 regarding the prudence of the investments, confident that you
6 have competent and substantial evidence in the record. You
7 need something more than a bare allegation of entitlement. You
8 need details much as you require in a rate filing, because
9 there are many billions of dollars that are going to come
10 through here.

11 What we don't want to do is get into a situation
12 where, in the very short time period we have to deal with this,
13 we don't want a bare allegation such that we have to go
14 discover what their case is, and then once we discover it,
15 criticize that case. All I'm saying is that you should by
16 means of this rule tell them what you want to hear about so
17 that you can determine an intelligent -- you can make an
18 intelligent determination as to whether that investment is
19 prudent or imprudent or needs adjustments -- adjustment, as the
20 case may be.

21 Now, once you enter those annual judgments, a
22 dispute, mild dispute I might add, has arisen between my office
23 and the companies, and staff is a party to it, about what is
24 the finality of that decision you make. That brings to my mind
25 what is the finality of any decision you make. And I believe

1 that the state of the law speaks for itself. And the notion of
2 administrative finality arises from statutory law and from
3 constitutional law. There are exceptions to administrative
4 finality. They are extremely narrow. We don't run across them
5 that much. I can hardly think of any electric or telephone
6 case over the years where we have directly addressed
7 administrative finality. It has been addressed a time or two
8 in water and wastewater. But the fact is the words that staff
9 includes, which we strongly support, in its recommendation is
10 that these decisions that you make on a yearly or maybe every
11 two years, whatever the period is, the decisions that you enter
12 regarding the prudence of the expenditures will be final to the
13 extent that administrative finality permits.

14 And I think my phraseology is not good, but it refers
15 the reader, the practitioner, the affected party to the
16 existing body of administrative case law that deals with
17 administrative finality. I don't believe that any tighter
18 standard is prudent on your part, and I don't think that any
19 tighter standard is probably legal on your part, because I
20 believe administrative finality, as I say, has both statutory
21 and constitutional stature.

22 And a concern sometimes articulated by Commissioner
23 Arriaga is you must be careful not to bind future
24 Commissioners, Commissions, in a way that you shouldn't. It is
25 true that the statute and the rule are both designed to lessen

1 the risk that utilities face. I have some doubt as to whether
2 the extent, the body of case law that deals with
3 administratively finality now creates a very large gate through
4 anyone might pass to revisit your existing decisions regarding
5 the prudence. And I doubt, too, whether it is even legal for
6 you to attempt to do that.

7 The reason we have consistently insisted on the words
8 administrative finality is because that term precisely adopts
9 existing case law as it is written in the state of Florida. We
10 can all look to the cases and determine what surety that gives.
11 Mr. Litchfield said that they are looking for some degree of
12 confidence in the quality of your decisions. Our response in
13 support of the Commission rule as it is written is that
14 administrative finality gives a very, very high degree of
15 confidence. And that if you purport to absolutely foreclose
16 for yourselves and all future Commissioners a revisiting of any
17 of those reasons, for any of those reasons you might well have
18 acted unwisely and perhaps illegally.

19 My recommendation to you is we are close enough
20 together on this rule, I think that our differences are
21 reconcilable. We may be able to find a better phrase than
22 administrative finality, although I doubt it since it happens
23 to be a phrase I came up with, but there could be. There is
24 room for compromise.

25 On the enumeration of what they should file, I think

1 we can work that out. My recommendation to you would be to
2 propose staff's rule, particularly since I understand you have
3 a deadline, propose it and I think therein are, in a practical
4 sense, something like 30 more days before one's opportunity,
5 and affected parties opportunity to draw it out and request a
6 hearing is something like 30 days hence.

7 I firmly believe that we can work together as we have
8 for the past few days and work out these differences, the
9 holidays notwithstanding I think we can still do it. As a
10 matter of fact, I think if we had had another day or two, we
11 probably could have done it this time. But I appreciate you
12 giving me the opportunity to address the Commission, and thank
13 you.

14 CHAIRMAN EDGAR: Thank you, Mr. McLean.

15 Mr. Twomey.

16 MR. TWOMEY: Madam Chair, Commissioners, good
17 afternoon. Mike Twomey for AARP.

18 AARP did not take a position on the legislation, but
19 the legislation, in fact, passed. You have the statute. You
20 have the necessity for this rule. We would support everything
21 that Mr. McLean said with respect to the filing requirements to
22 give some specificity to the companies, to the intervenors,
23 ditto with the concept of administrative finality. And lastly,
24 and very quickly, I want to echo Mr. McLean's notion that a
25 whole bunch of money is going to be coming before the

1 Commission for examination and review to determine its
2 prudence. And in that regard, I would suggest to you that the
3 time constraints that are placed upon yourselves, your staff
4 and the customer intervenors in this draft rule are
5 unnecessarily restrictive. It requires that the companies file
6 by May 1st of each year. That will have given the companies
7 effectively on an annual review process up to 12 months to
8 prepare their case. The rule goes on and requires that the
9 Commission hold a hearing by August 15th, the following
10 August 15th. That is three and a half months, Commissioners.
11 Three and a half months from the date of filing of the
12 application or the petition to holding the hearing, which, of
13 course, as you know, doesn't count for the time you have to
14 subtract for the pre-filing of testimony, prehearing statements,
15 prehearing conferences and the like.

16 We don't know how much you are going to get each year
17 to be examined. You may have more than -- you have two
18 companies sitting here, you may have more than one application
19 at a time. It may be a hundred million, it may be 200 million,
20 it may be \$300 million a year. These plants, as stated earlier
21 by the company attorneys, are going to be very expensive. You
22 should allow yourself -- as it is right now under the statutory
23 clause for rate cases, which in many cases are less than those
24 amounts, you allow -- you are allowed, and the staff is allowed
25 and the customer intervenors are allowed upwards of eight to

1 nine months. The companies, I don't believe, can make any
2 suggestion that they will be harmed by the Commission and the
3 staff and the customer intervenors having that much time to
4 review. What you have to do -- that is to the contrary, they
5 may openly suggest that there being insufficient time for their
6 customers and the staff and the Commission can only benefit
7 them. They can't be harmed by having enough time. So I would
8 urge you to not accept this three and a half months. You
9 should not hamstring yourself knowingly and willingly. You
10 should increase the time length to at least six months, and I
11 would urge a greater month time period in terms of eight or
12 nine months.

13 Thank you.

14 CHAIRMAN EDGAR: Mr. McWhirter.

15 MR. McWHIRTER: Madam Chairman and Commissioners, I
16 represent a group of industrial consumers, and I would like to
17 at the first say that my group strongly endorses the idea of
18 fuel diversity. We strongly encourage the utilities to move
19 forward with their plans with respect to nuclear plants,
20 because we think that's in the public interest and to go
21 forward as fast as possible, and we will support such items as
22 are prudent to pass along the cost of these investments without
23 creating a feather bed operation.

24 The rule is good in theory, but you are passing a
25 theory without knowledge of the real facts. All we know, as

1 Mr. McLean says, it's going to be a bunch of money. Currently,
2 as I reported to you in November, we found that items that go
3 through the cost-recovery clause now constitute more than
4 70 percent of the total revenue collected by the utilities.
5 Now, these are revenues that are collected without review of
6 whether or not the utility has a proper rate of return on its
7 equity, without a review of the depreciation that has occurred
8 with respect to the facilities that are in the ground, and
9 other aspects.

10 I think in spite of the fact that the Commission is
11 concerned about base rate cases and the arduousness of them, it
12 is beneficial to occasionally have a base rate case. And if
13 you go forward with cost-recovery items without a base rate
14 case, what happens is you lock in a depreciation rate on
15 existing facilities that never gets looked at again until you
16 have your annual depreciation studies or your quadrennial
17 depreciation studies, and that could be a serious item. You
18 don't look at the appropriate return on equity unless you have
19 a base rate case. Most importantly, you don't fully recognize
20 the growth in utility sales, although they project what the
21 sales may be in the annual fuel clauses.

22 And one of the concerns that we would have with this
23 rule is the possibility for double recovery of things that
24 might be included in the nuclear plant costs that are already
25 covered in the base rates that customers are charged. We saw

1 this happen in the storm cases where linemen whose salaries
2 were paid for their normal operating activities were put into
3 the storm charge. There needs to be examination to ensure that
4 those kinds of things happen.

5 And so being aware of those potential problems, I
6 have to strongly recommend what Mr. Twomey has said and what
7 Mr. McLean has said, that you need to have time for study, you
8 need to have intelligent study and you need to have
9 flexibility. You don't want to adopt a rule that's chiseled
10 into stone long-range, important policies that don't have the
11 facts at the time that the rule is adopted. So I would
12 encourage you to treat this rule as a working document.

13 I would further encourage you to give us a little
14 more time to negotiate the details to let the concerns of
15 consumers as well as the concerns of the utilities who are
16 planning to go forward with nuclear plants to participate and
17 discuss the matters openly. Secrecy is going to be a big issue
18 in these cases. It's not addressed in this rule at all, but my
19 guess is that when you are dealing with a nuclear plant and the
20 concerns about security, a lot of the information that's going
21 to come out is going to be confidential. So we need to be sure
22 that the confidential information is clearly open to study by
23 qualified experts.

24 I won't prolong the general discussion that I have
25 given you, but only to say I would suggest to you that this

1 rule has got to have flexibility to be reevaluated from time to
2 time as the facts come out. Thank you.

3 CHAIRMAN EDGAR: Mr. Glenn.

4 MR. GLENN: Madam Chairman, if I could respond
5 briefly to a couple of things that a couple of the other
6 parties have said.

7 Number one is the OPC statement about holding the
8 utilities harmless. Nothing could be further from the truth.
9 There is one thing that I think everybody here is in violent
10 agreement on, and we want transparency, openness and review.
11 And we are willing -- we are an open book as we are in the fuel
12 clause docket, the ECRC, and our base rate proceeding.
13 Everything that we do the staff has, and OPC and intervenors
14 have access to. We want that to continue.

15 This is not a hold harmless agreement, anything but.
16 We have the burden to prove prudence. That rests on us, and we
17 will be proving it every single year. The only certainty that
18 we get in this process is if we manage that project
19 appropriately and prudently. That is number one.

20 Number two, about Mr. Twomey's comments on timing.
21 One thing, and we have had some good discussions with staff on
22 this, is that it is not a three-month process here. First of
23 all, we initially offered to do it through the fuel clause in
24 the same time frame, which gives you an additional three
25 months. That was rejected by OPC and others who wanted a

1 separate review and earlier on, so that you could then set the
2 factors for the fuel case in September. So we have, at the
3 request of intervenors, done that.

4 The second thing is this is an open book all year.
5 It is like a tax audit of the PSC. The PSC has staff at our
6 corporate headquarters all year reviewing documents. This is
7 the same thing. We discussed that with staff here, and I agree
8 with Mr. McLean that I think we need some more meat on the
9 bones of what actually is going into a petition. I think that
10 is a good thing. I don't think it is appropriate for this
11 rulemaking, but we can have audits that occur and that will be
12 ongoing throughout this process, so that everybody is going to
13 see on a realtime basis what contracts are we executing, how
14 are we managing those contracts, what work order changes have
15 been done. We want transparency.

16 As to Mr. McLean's argument, I don't believe that we
17 need that in the rule, per se. I think we need to sit down
18 with the parties all involved and say what is that MFR
19 suggestion. But that can be done outside of the rulemaking
20 process. Because I do agree with Mr. Twomey, we need some
21 flexibility because we are going to have lessons learned from
22 year one to year two to year three on what actually needs to be
23 done.

24 Those are the key points. I don't have anything
25 else.

1 CHAIRMAN EDGAR: Thank you.

2 Commissioners, before I open it up for questions,
3 let's look to our staff. Mr. Harris, Mr. Devlin, Mr. Cooke,
4 Doctor Bane, are you in a position that you can speak to some
5 of the points that have been questioned and also maybe some of
6 the red line suggested language that was passed out?

7 MR. DEVLIN: Madam Chair, I think if it is okay with
8 the Chair, we will do a little tag team on this.

9 CHAIRMAN EDGAR: That's fine.

10 MR. DEVLIN: The issue or one of the issues I think
11 that seems to be most important to the parties is the prudence
12 review, so let's speak to that first. And, we understand,
13 although this is an issue that sort of was brought to our
14 attention sort of late in the process, but we understand the
15 need and agree with the annual prudence review. And we
16 understand it would reduce uncertainty for the company; and,
17 therefore, reduce financial risks for the companies.

18 At the same time we think it is real important to
19 balance that against the need to ensure only prudent costs are
20 being asked to be recovered by ratepayers. So there is -- the
21 time line proposed by the company, we feel, is unreasonable,
22 and I'll give you three reasons for that.

23 First of all, and I think it was articulated somewhat
24 by Mr. Twomey and Mr. McLean, that we would have a very short
25 time frame to get an audit review done in time for a hearing in

1 August. If you look at our August 15th hearing date and back
2 out with the testimonial deadlines and rebuttal testimony
3 deadlines, et cetera, that would leave an audit report due date
4 around May. And, remember, the filing as we have articulated
5 in the rule for construction costs would be April, and it is
6 unreasonable.

7 And it is true, Mr. Glenn is right, there is a lot of
8 preliminary work that can be done during the year, but that's
9 preliminary work. You really need to have the construction
10 costs, actual or finished, for the year before you can really
11 finish your audit work. That's number one.

12 Number two, this isn't like a normal audit, and
13 Ms. Vandiver is back here, and she can back me up on this, I
14 think. Normally when we audit, we verify that what they spent
15 is what they spent, and they booked it properly, et cetera. We
16 are talking about prudence review, and I think that's a step up
17 from the normal verification accounting type of auditing that
18 we do.

19 Somebody asked me, could you define what prudence
20 means, and that is difficult, but I would say it goes beyond
21 just verification. It means that you ensure that the costs are
22 being expended in the most efficient and prudent way, the most
23 efficient way for the benefit of the ratepayer. That's an
24 extra burden, if you will, a responsibility in the audit; and,
25 therefore, it takes more time and resources.

1 The third point is we will be dealing with it on an
2 annual basis, and, again, we agree that there is great benefit
3 in doing this, but we will be dealing with big dollars, and
4 we'll be dealing with mainly contract or project type costs.
5 In many instances they won't be complete, and that just adds to
6 the complexity. An example that we kicked around that we would
7 see is the site clearing contract. There may be a site
8 clearing contract that we review after the site is chosen. And
9 it may be that in reviewing the actual costs that the site
10 clearing may only be half done, and it just would be difficult,
11 not impossible, but more difficult to evaluate the prudence of
12 contracts that are half executed.

13 Anyway, with those points in mind, again, we
14 attempted to craft an annual prudence review process that
15 appears to be unacceptable to the companies. I think as the
16 parties mentioned, there is a lot of room for negotiation here.
17 I don't think we are very far apart. I think we can maybe move
18 up the deadline for filing. Right now it's April 1st. We know
19 that the companies close their books in January. Maybe they
20 would be amenable to an earlier filing. And at the same time,
21 at the back end maybe we could have a hearing later than
22 August 15th on the prudence. I think the other issues we can
23 handle in that time frame, but we are talking about, I think,
24 around \$500 million or so a year in construction costs per
25 company. And I think we just need to give adequate time and

1 effort to ensure that only prudent costs are recovered by
2 customers.

3 MR. HARRIS: And building on than point, the annual
4 prudence review is something that is very unusual, you know, as
5 Mr. McLean mentioned. Generally a company books it. At the
6 end of the project they come in and say, here is what we did,
7 and it's prudent, and we want to put it in base rates. This
8 annual prudence review is something that the Commission hasn't
9 done before. And we see that as a very strong incentive to the
10 companies removing disincentives to nuclear plants. But with
11 that, given the fact that it's going to be annual and could be
12 spread out, we do see some merit to the administrative finality
13 concept being on the end.

14 And I'll give you the example that Mr. Devlin used
15 with site selection. You have an ongoing process. Let's say
16 it takes three years. You have year one, year two, and year
17 three. In any one year the company might come in and
18 demonstrate that it is prudent in that year and do that for
19 three years. But at the end of the project there might be
20 something, you know, that fell through the cracks, for lack of
21 a better word, that ends up to be not prudent. If each year
22 they had a signed off nonreviewable final prudency
23 determination, there would be no way to fix that.

24 Now, we're not saying that that language necessarily
25 has to be in the rule. I think that the law is what it is, and

1 you all might have the chance to go back and open it up. But
2 it at least removes the argument that someone could make that
3 you all thought about this, that you knew about the concept of
4 administrative finality, and by leaving it out of the rule this
5 Commission made a decision that that concept would not apply to
6 these types of costs. So for that reason, we are sort of
7 comfortable leaving that concept in, at least at this point.

8 Another point that the companies made, moving on, was
9 this idea with the site selection costs being treated
10 differently. We are not opposed to substituting the word
11 "separate" proceeding for "limited" proceeding, that doesn't
12 bother us. What does concern us is that they would try to lock
13 us into -- automatically through the clause. Staff sees part
14 of this rule as giving future Commissions as much flexibility
15 as possible. We prefer our language, which is the method of
16 recovery. We believe that means you all could do it through a
17 clause, but there might be some other method, a surcharge, a
18 base rate, something like that that makes more sense for those
19 particular costs. And we would like you to have the
20 opportunity, the flexibility to consider those options. We are
21 worried that if we lock you in through the rule to only clause
22 recovery for site selection costs, we have taken away a little
23 bit of flexibility from you all, and that is not something we
24 want to recommend that you do.

25 You heard Mr. Devlin mention that we might have some

1 room to negotiate on the time, and I think that we do. All of
2 the parties indicated that with a little bit more time we could
3 probably get together, and I believe that to be true. As I see
4 this process, we are recommending that you propose a rule
5 today. We haven't published a notice of that rule proposal in
6 the Florida Administrative Weekly. That will take -- if our
7 Clerk's Office could get it done today, it would be published a
8 week from Friday. That's ten days from now. Then there is the
9 statutory period of 21 days for parties to look at that notice
10 of proposal, any person who gets the FAW to look at that and
11 either file written comments or request a hearing. That's
12 another 21 days. So realistically it's about 31 days from now
13 before we could actually get a rule adopted.

14 That's time for us to sit down with the companies,
15 sit down with the intervenors, sit down with the customer
16 representatives and try to figure out if there is a way we can
17 come together and come up with a consensus that we could
18 recommend to you all that you adopt. And one way I would see
19 this perhaps happening is the written comments during that
20 21-day period could be a joint written comment. We all have
21 sat down, we have agreed to this, we would suggest you adopt
22 the rule with the following changes.

23 By my quick calculations it looks like the 21-day
24 period, if we could get the FAW notice done today and out,
25 would be sometime around January 19th. We have an agenda

1 January 23rd. It's possible if all the parties are able to sit
2 down in the near future and work this out that as quickly as
3 January 23rd we could have a recommendation to you all to adopt
4 with certain changes that everybody agrees to. I'm not
5 committing to that, but I'm saying that's one way I see that
6 this process could unfold.

7 CHAIRMAN EDGAR: To our staff, do you have other
8 comments on the red line, red marked, red lettering, whatever,
9 that was distributed by Mr. Glenn and Mr. Litchfield?

10 MR. HARRIS: Yes. There are some other red lines in
11 here that have not been addressed by the parties. We could
12 address those if you all are inclined to hear our rationale for
13 not taking them up. We have seen there are changes on Page 13,
14 on Page 14. I don't think that they are big points. And if we
15 are going to sit down and negotiate, these are things that we
16 can talk about and see if we can come to some resolution that
17 everyone agrees whether those particular words should be
18 included or stricken.

19 CHAIRMAN EDGAR: Thank you.

20 MR. HARRIS: We would advise that you not make those
21 changes today and propose the rule as staff has handed it out.

22 MR. LITCHFIELD: Madam Chairman, may I address those
23 particular strike-throughs on our part briefly?

24 CHAIRMAN EDGAR: Sure.

25 MR. LITCHFIELD: I think they really underscore the

1 heart of our concern that if that language remains, the clause
2 in that proceeding, effectively we get no comfort other than
3 they won't be reviewed subject even to administrative finality
4 in that proceeding, but they can be reviewed in any other
5 proceeding.

6 MR. COOKE: Commissioners, can I just touch base on
7 the administrative finality question for a second? In this
8 point in particular, the intent of that phrase was to make sure
9 since we were going to have the intent of the phrase in that
10 proceeding in those places, was to make sure that if we do have
11 a hearing in August on the carrying costs and the
12 pre-construction costs, that when those numbers get folded in
13 later in the year into the clause recovery, that they not be
14 revisited at that time.

15 I think that's separate and apart from the issue of
16 administrative finality, which I can address briefly because it
17 is a complicated or a very complex issue, and it's hard to
18 articulate. But in my mind, the whole concept is that at some
19 point administrative agencies' decisions are final. However,
20 courts have recognized over time that because of the ongoing
21 oversight and the need to protect the public interest, there
22 are certain exceptions to that.

23 And some of the exceptions that courts have
24 articulated are if there has been intentional
25 misrepresentation, something along the lines of fraud, or they

1 have even used phrases such as if there are significant changed
2 circumstances that necessitate protection of the public
3 interest, an agency can have some chance to go back and look at
4 a prior decision it has made.

5 This concept of administrative finality is a
6 judicially created one. I think we were comfortable having the
7 language in the statute because we think it's there, and we
8 think it is restating what the case law says. And I think this
9 may be a first time for us in terms of writing a rule that says
10 we are going to do prudence review, and at the end of that
11 review we won't revisit it. And that raised some concerns
12 about whether we were somehow perhaps going to be perceived as
13 waiving the concept of administratively finality.

14 I'm not so sure that it's necessary to include the
15 term administrative finality in the rule because it's a
16 judicial concept. And I think Mr. McLean was even alluding to
17 this, I'm not so sure we could waive that. We may not be able
18 to. It's there. It's not something we created. So I'm sort
19 of on the fence with regard to that phrase. It was preferable
20 to have it in there because we believe it is a concept that
21 applies to administrative decision-making. But I also think
22 that if we do have a little more chance to discuss it with the
23 parties, we may be able to resolve that issue.

24 CHAIRMAN EDGAR: Thank you.

25 Mr. Glenn, in your opening comments I believe you

1 said that the rule does not go far enough to encourage
2 investment in nuclear generation in this state. Can you show
3 me where in the statute you think -- what in the statute do you
4 think this rule does not do that the statute directs?

5 MR. GLENN: Well, I think the statute is explicit in
6 that what the Commission should be doing in its rulemaking is
7 promoting the development of nuclear power plants by --

8 CHAIRMAN EDGAR: So you don't think this rule does
9 that?

10 MR. GLENN: I don't think it does as written. With
11 the uncertainties that exist with this administrative finality
12 issue, with a review that may be reopened at some later date,
13 that is a disincentive for utilities to invest that kind of
14 significant capital dollars only with a very real possibility
15 of somebody much later in the game coming back and challenging
16 the prudence of those costs. So that's the disincentive that I
17 am referring to. With respect to administrative --

18 CHAIRMAN EDGAR: Is that the same thing as this rule
19 does not promote renewable generation in the state?

20 MR. GLENN: I'm not sure what this rule does. It
21 provides some incentives as it is currently written, and those
22 incentives are --

23 CHAIRMAN EDGAR: Well, I thought what the rule did is
24 provide some incentives per the direction of the statute and
25 lay out a process for review of costs and cost-recovery

1 mechanisms.

2 MR. GLENN: It does outline what the statute says.
3 The statute gives you flexibility and the legislature gives you
4 flexibility to determine what that process is. The process
5 that is being proposed is a process that's similar to what we
6 have today. And what we have today does not work for a nuclear
7 power plant. We cannot commit the sins of the 1970s and '80s
8 where companies were bankrupted financially because they would
9 expend years of dollars only to have --

10 CHAIRMAN EDGAR: Mr. Glenn, are you saying that this
11 rule takes us back to the 1970s in this state, because I don't
12 agree with that.

13 MR. GLENN: I think it does more than what we have.
14 But the risk that we have with reopening proceedings later in
15 time is a real substantial risk that we have to weigh as a
16 company to determine whether to proceed with a project like
17 that.

18 CHAIRMAN EDGAR: Okay. I would like to look to our
19 staff for a minute. And, Mr. McLean, if you can give me just a
20 minute, I will come back to you.

21 MR. McLEAN: Thank you.

22 CHAIRMAN EDGAR: I believe I just heard Mr. Glenn
23 basically say that the rule, as our staff has proposed, is
24 basically business as usual as we always have.

25 MR. HARRIS: We disagree with that.

1 CHAIRMAN EDGAR: And that is not my understanding,
2 and so I would like to ask our staff to speak to that.

3 MR. DEVLIN: I will take first shot at it and then
4 they can chime in, because there is at least two huge
5 differences between what we are looking at here in this
6 rulemaking and how we regulated back in the 1970s. One is a
7 substantial early recovery of costs which is prescribed by
8 statute. But based on Progress's own estimates, we are talking
9 about in excess of a billion dollars of pre-construction costs,
10 and AFUDC, or carrying charges and construction that would be
11 recovered before commercial operation. And back in the '70s
12 that would not have been the case, those costs would have been
13 recovered from commercial operation forward. So that was a
14 tremendous benefit and a tremendous incentive, I think, for
15 nuclear.

16 And the other big difference -- at least I perceive
17 it as a big difference -- never before in the history of the
18 Commission, the best I can tell, we will be pre-approving the
19 prudence of this nuclear power plant before commercial
20 operation. Now, there is some debate on how soon can we do
21 that. We are debating that point right now. But the fact of
22 the matter is there will be 100 percent, or close to 100
23 percent, pre-approval of all costs before commercial operation,
24 which significantly reduces the risk, and I would think would
25 be a significant incentive.

1 MR. HARRIS: And two more points. They are in the
2 statute, but the company is recovering their carrying costs and
3 the construction balances on a yearly basis. We are talking
4 probably hundreds of millions to a billion dollars worth of
5 construction balances. The interest on that will be fairly
6 significant. They are recovering that every year.

7 And, finally, the statute provides, and the rule
8 makes it clear, that if something happens and the plant doesn't
9 get completed, they get to recover those costs. That's in the
10 statute. But that could be a fairly significant amount of
11 investment that they are being, by statute and rule, allowed
12 recovery of. So I strongly disagree that this rule does not
13 promote investment in nuclear power plants. It is head and
14 shoulders above anything the Commission has ever done before.
15 Some of it is mandated by statute, but some of it is creative
16 thinking outside of the box solutions to problems to promote
17 investment in nuclear power plants.

18 CHAIRMAN EDGAR: Alternative cost-recovery
19 mechanisms.

20 MR. HARRIS: Yes, ma'am.

21 CHAIRMAN EDGAR: Mr. McLean.

22 MR. McLEAN: Yes, ma'am. The notion that this either
23 returns us to the conditions of the '70s or nearly does so, to
24 quote a friend of mine, nothing could be further from the
25 truth. This is a quantum leap away from what we would have had

1 before this statute had there been a proposal before you to
2 build a nuclear plant.

3 And on the narrow issue of administrative finality,
4 every affected party who appears before this agency or any
5 other administrative agency of the State of Florida, faces
6 administrative finality in the decisions of that agency. As
7 Mr. Cooke, I think, eloquently explained, administrative
8 finality has built in exceptions, none of which we would expect
9 to see in this process. That's the law of the land. That is
10 the lay of the land.

11 The use of administrative finality, in my view,
12 captures exactly the judicially established case law without
13 expansion, and I submit that they are looking for an expansion,
14 the companies, without expansion and without subtraction. It
15 takes, adopts, puts affected parties on notice, as rules
16 should, that the decisions of this agency are always subject to
17 the notion of administrative finality. It does not, in my
18 view, create this huge exception such that it returns us to the
19 '70s. It simply isn't so.

20 Thank you.

21 CHAIRMAN EDGAR: Commissioners, any questions?

22 COMMISSIONER DEASON: A question for staff.

23 CHAIRMAN EDGAR: Commission Deason.

24 COMMISSIONER DEASON: Mr. Harris, it is your
25 recommendation that we propose the rule, the version that you

1 distributed to us this morning, correct?

2 MR. HARRIS: Yes, sir.

3 COMMISSIONER DEASON: But I think in your
4 presentation you also indicated that there was not a problem in
5 your mind of changing the term "limited," when modifying the
6 term proceeding, to change that to "separate." In other words,
7 change language from "limited proceeding" to "separate
8 proceeding."

9 MR. HARRIS: That's correct.

10 COMMISSIONER DEASON: Can you explain why that is not
11 a problem? And if it is not a problem, should we go ahead and
12 incorporate that change in the rule that we propose or do you
13 still think we just need to propose the version that you
14 distributed this morning?

15 MR. HARRIS: We have no problem with changing the
16 words on Lines 19 and 20 of Page 12 from limited to separate.
17 We had initially -- you know, the idea we were trying to
18 capture here is that site selection costs should be -- we
19 wanted to allow the recovery up front, you know, prior to the
20 plant going into commercial service. But there is a confusion
21 in the statute about whether they could be recovered in the
22 exact same manner as pre-construction costs, which is through
23 the clause on an annual proceeding.

24 And so what we tried to do is come up with sort of a
25 compromise where the company would be able to come in at a

1 determining time, which we have defined as the filing of a need
2 determination, and say, okay, these were our site selection
3 costs, and we would like to recover them now. And we thought
4 the way to do that would be through a separate proceeding of
5 some type.

6 We used the idea of a limited proceeding simply
7 because that is a term that I have heard here at the Commission
8 in my time, and I thought I sort of understood what it meant.
9 The companies were concerned with that. And in their minds the
10 term of art limited proceeding can have some negative
11 implications. It can lead to expansion, to more of a base rate
12 type of proceeding, and so they were uncomfortable with that
13 phrase. That is fine with me and I believe with the technical
14 staff. We are not concerned about the term "limited
15 proceeding" versus "separate proceeding." What we were
16 concerned with is the concept that these site selection costs
17 would be treated in a manner separately from pre-construction
18 costs, but that the company would still be allowed to recover
19 those prior to being booked and when the plant goes into
20 commercial service down the road.

21 It's the part on Line 22, the period of clause that
22 we have a concern with striking. And as I mentioned earlier,
23 we believe method for recovery allows the Commission some
24 discretion to determine the best way to do it, and it could be
25 through a clause, and that would be appropriate for the

1 Commission to determine if they made that decision. But it
2 could be something else. And we don't want to lock the
3 Commission into requiring the clause when the separate
4 proceeding might point to a better or a different method.

5 So to answer your question, Commissioner, if you
6 would like to change "limited" to "separate" we don't object to
7 that, and we could do that today.

8 CHAIRMAN EDGAR: Mr. Harris, just so I'm clear, on
9 behalf of staff, you are expressing no concern with the
10 suggested language change to Page 12, Lines 19 and 20?

11 MR. HARRIS: Correct.

12 CHAIRMAN EDGAR: Lines 19 and 20, but some concern
13 and not recommending the suggested change to Page 12, Line 22.

14 MR. HARRIS: Correct.

15 CHAIRMAN EDGAR: Okay.

16 Commissioner Deason, did you have any further
17 questions or comments on that point?

18 COMMISSIONER DEASON: No.

19 CHAIRMAN EDGAR: Okay.

20 Commissioner Arriaga.

21 COMMISSIONER ARRIAGA: I think I heard all the
22 parties say that they are close to additional negotiations and
23 possibly some kind of agreement. And I am understanding that
24 staff is proposing that we approve this as just modified and
25 allow you more time to go back to the drawing table and come

1 back in the future with a potentially negotiated rule. Am I
2 understanding correctly?

3 MR. HARRIS: Roughly, yes, Commissioner.

4 COMMISSIONER ARRIAGA: If that were to be the case, I
5 just want to make sure that there is a commitment that you are
6 going to come back with something and this is not going to be
7 the final document.

8 MR. HARRIS: This would be the initial document that
9 you propose. Any party can, within that 21-day period after
10 publication, request a hearing or file written comments. You
11 have heard some fairly strong concerns by the other people at
12 this table. I would anticipate that were there to be no
13 negotiations prior to that 21 days expiring, someone would file
14 a request for hearing or written comments on it.

15 COMMISSIONER ARRIAGA: And may I continue, please?
16 Did you want to say something?

17 CHAIRMAN EDGAR: Go ahead.

18 COMMISSIONER ARRIAGA: Well, fine. I've got two or
19 three questions, so if you want to intervene now, that's fine.

20 CHAIRMAN EDGAR: I'm sorry, we will work through it
21 together, Commissioner Arriaga.

22 I guess I just had a little bit of a concern, and
23 maybe I didn't hear exactly right as I was trying to re-read
24 for the 150th time the rule at the same time I was trying to
25 listen. But I would have a little concern with requiring our

1 staff to make a commitment of changing language. I have no
2 problem at all if, indeed, that if that is the direction the
3 body wants to go, asking them to work with the parties and
4 think through and do additional analysis and good thought and
5 work together and see if changes are something that with all of
6 that they could or would recommend, so just a fine point.

7 I have -- well, let me just make a comment,
8 Commissioner Arriaga, and then I look forward to hearing your
9 questions.

10 Mr. McLean, I appreciate very much your statements
11 earlier on about being close on some language and being willing
12 to work even though it is the end of the year, and all of that.
13 We all still work very hard, and I appreciate you being willing
14 to do that and dive in and continue to work. Getting the
15 language right to the best of our ability with the knowledge
16 that we have at this point in time is very, very, very
17 important, and it is very important to me. And if we need to
18 take some additional time to get it more right, then, you know,
19 it's good to know that we maybe have the option to do that.

20 So, Mr. McLean, I appreciate your commitment to do
21 that. I know we have the commitment of our staff to do the
22 same and look at it very closely after our discussion here if
23 indeed that is what we want to do. And I certainly would hope
24 that we would have the same commitment from the industry and
25 also from the other interested parties.

1 I do have some frustration, though, that I feel
2 compelled to express, and that is that this statutory language
3 was passed, I believe, in May. We knew that we were going to
4 be sitting here this fall having these discussions. We
5 requested comments back in, I think, August. We received
6 comments, and I'm very appreciative, and I'm appreciative of
7 receiving the red line version as well. We have asked before
8 if parties or interested persons have some concerns about
9 language. It is always very helpful for us to see in writing
10 other suggested language, so I thank you for that.

11 But even so, I have some frustration. The statute
12 passed in May. We requested comments back in August. We had
13 an item much, much, much earlier in a little rougher version
14 initially put out for agenda back in October. A number of
15 concerns were expressed. We pulled it, asked for additional
16 work and review from all parties. We agendaed it in November,
17 and in November I was told we need two more weeks. We need two
18 more weeks. And so I said, okay, take three and get it right
19 to the best of our ability. And here I am at the end of
20 December hearing we need more time. I always need more time.

21 So it is very, very, very important that we get it
22 right. If, indeed, we need some more time and we can make real
23 constructive progress, then I am very, very open to that. But,
24 yet, I just put out that we have been working on this for over
25 six months, and I would hope that we would really, really,

1 really be able to get everybody to get serious about looking
2 and working on the potential areas of difference.

3 And also, Commissioner Arriaga, I would say if indeed
4 we want -- and, again, I'm open to it, but if we want to ask --
5 you know, pass something out today, which I think -- or propose
6 something out today, which I think is a procedural step that we
7 need to take, with changes, with one change, with three,
8 whatever is the will of the collective body, that we recognize
9 that this is a multi-year process that we are still looking at,
10 and that we have taken really some huge and significant steps.

11 I also think that if we are going to direct or
12 request our staff and parties to continue to work on the
13 language to get it closer to perhaps full consensus that we
14 are -- they and we are all in a better position if it is after
15 some discussion and we are able to hear one another on some of
16 these points and the staff is able to hear from us, as well.

17 So, thank you, Commissioner Arriaga, for allowing me
18 to say that, and I look forward to your questions.

19 COMMISSIONER ARRIAGA: Well, I think I share with you
20 the same frustration. And one of the reasons I do share that
21 frustration, and I will share this with all of you, is that I
22 just went through a nomination and appointment process, and it
23 just happened that this year the co-chair of that oversight
24 committee that the Legislature has set up to review and
25 overview the PSC is Representative Atkinson. And he happens to

1 be the sponsor of this nuclear bill at the Legislature. And if
2 you look at the record of that public meeting of the oversight
3 committee where they nominated us for appointment,
4 Representative Littlefield and myself, Atkinson asked every one
5 of us, every one of the candidates if we understood the purpose
6 of the nuclear bill. If we understood that we had to go above
7 and beyond normal business to promote nuclear energy. And each
8 one us, including me, told him we were very clear on what the
9 intention of the Legislature was.

10 So I am as frustrated as you are because we need to
11 pass this. We need to get it done. But I'm listening, I'm
12 hearing that there is a possibility of negotiation, there is a
13 possibility of coming to an agreement. And if that were the
14 case, I just don't want to hang a rule on somebody's head that
15 would not allow them to negotiate in good faith. That's what I
16 said, and maybe it was a very difficult word, Madam Chairman, a
17 commitment from staff. And you're right, maybe we cannot ask
18 staff to commit today. But at the same time, I may not want to
19 commit myself to the current rule. So I have to find a balance
20 here of what do we do.

21 If we allow you to negotiate, we pass this under at
22 least the good faith understanding that you are going to go
23 back to the drawing table, see all the written arguments and
24 ~~briefs that are going to come in, and come back to us in the~~
25 future. And if there is no agreement, well, you are going to

1 hear some comments from us. You should be able to understand
2 where the Commission is coming from. We are going to give you
3 enough hints for you to take it into consideration to come up
4 with something that will probably meet all of our expectations.

5 Let me make one final comment. The basic problem I
6 have here is that -- and Mr. Cooke, our General Counsel, just
7 said, and I think OPC has stated, it isn't easy, especially for
8 me, a humble engineer, to understand what administrative
9 finality is. It's not easy to explain. It's not easy to
10 understand. It is a very difficult concept. And said in
11 layman's terms, it is like a sword on somebody's head that is
12 going to be hanging there for the next 10, 15, 20 years, and
13 that I'm going to pass it through your throat if I feel like I
14 need to investigate what you did ten years ago.

15 I do understand the concept of administrative
16 finality as the right that future generations, future
17 Commissioners have to come in and review what was done. I
18 understand that. But at the same time I am responsible for my
19 acts today. And if I make a determination of prudence review,
20 I am assuming that responsibility, and I am thinking that my
21 staff was capable enough to give me the proper numbers for me
22 to make that decision.

23 I'm trusting you, I'm trusting your professional
24 capacity, and you are at the same time trusting the judgment
25 that I have to make. To make a judgment today thinking that I

1 am going to leave the door open for somebody in the future to
2 come in and say, oh, I forgot that I needed to look at File
3 Number ABC that should have been filed, but maybe it isn't,
4 because ten years have passed. That kind of issue on a company
5 does not promote nuclear energy.

6 So we have to balance administrative finality with
7 regulatory certainty, which is my concern here. How do we
8 provide regulatory certainty to these companies if we have the
9 sword of administrative finality stuck into a rule? The rule
10 does a lot, and I share with the Chairman that the rule does a
11 lot. It is a very forward-looking rule, and I think it meets
12 the expectation of Representative Atkinson.

13 But my question would be does it do enough? Are we
14 leaving doors open in the middle so that the companies may not
15 avail themselves of the rules? I think the purpose here is to
16 make sure that nukes are built, because we need that energy.
17 We said it over and over and over, we need nuclear energy. Ten
18 years from now if we don't have it, we are going to look back
19 and say we did not do our job as Commissioners. And to get
20 hung up on terminology and placing constraints on companies
21 that have to invest five billion dollars because we may have
22 forgotten to review what we had to review, that's a problem. I
23 have that big problem. I just wanted to share that with you.

24 Thank you, Madam Chair.

25 CHAIRMAN EDGAR: Thank you. I am looking for that

1 lightning rod.

2 Commissioner Carter.

3 COMMISSIONER CARTER: Thank you, Madam Chair.

4 Just briefly, we have a deadline here not established
5 by us, but established by our bosses, the Florida Legislature.
6 We have a product in front of us that is not a perfect product,
7 but it's certainly a product that was arisen to with quality
8 research, good sound legal reasoning, a plain reading of the
9 statute, and negotiations in good faith by all the parties.

10 I think, Madam Chairman, what we need to do today is
11 we need to go ahead on and approve this with the adjustments
12 that have been recommended by staff, and allow the parties
13 since they are that close together, you have got 31 days to get
14 it all taken care of, and then they can come back with a
15 unanimous recommendation.

16 But because of what the Legislature, our bosses, have
17 asked us to do, I would want us to say, well, we are just
18 taking it as a recommendation. But when the Legislature put a
19 specific date on it, that means that they want us to do
20 something by that date. It is not perfect, but it's
21 significantly better than what we had before. So I would move
22 this staff recommendation with the corrections presented by
23 staff.

24 CHAIRMAN EDGAR: Thank you, Commissioner Carter. And
25 I think Commissioner Tew wanted to make a comment or a

1 question.

2 COMMISSIONER TEW: It actually was a question. I'm
3 sorry I didn't get in there sooner. I have a little bit of
4 cold symptoms over here, so bear with me. I was going to ask
5 earlier, but I think Mr. McLean did a good job explaining what
6 he intended by the phrase administrative finality. But I
7 thought while we are all here, I will try to follow up on some
8 of that. It is just based on some recent experience with that
9 terminology and the body of case law that surrounds it. It's
10 definitely not a model of clarity for me, and so I do want to
11 understand it better. And I think staff already said that they
12 think whether we include it or not that it's still a concept
13 that applies. And I wanted to hear from each of the parties on
14 whether or not they think that that is the case.

15 And I should also say, before I turn it over for an
16 answer to that question, that I am encouraged by the parties'
17 comments. It does seem to me -- and I asked staff a lot about
18 this yesterday, whether or not if we give everyone time to get
19 together that we are actually going to get somewhere. And I
20 think from the comments we have heard from everyone that it
21 would be worth some period of time to do that.

22 But, again, I was just wondering, again while we are
23 here, if everyone agrees that that concept of administrative
24 finality applies whether or not there is language in the rule
25 that suggests that terminology?

1 CHAIRMAN EDGAR: Commissioner Tew, who were you
2 posing your question to?

3 COMMISSIONER TEW: Actually, I would assume all the
4 parties except for staff, because I think Larry already
5 answered that question earlier.

6 CHAIRMAN EDGAR: Okay. Mr. Twomey, you look like you
7 want to start.

8 MR. TWOMEY: Yes, ma'am. Briefly, I think the
9 answer, Commissioner Tew, is that as Mr. McLean suggested, you
10 can't take it away. You can't take it away no matter how much
11 you want to. If you have it in the rule, however, a draft rule
12 now and take it out, that would -- if I was the company later,
13 I would make the argument to a later Commission that you tried
14 to take it out and, therefore, misrepresentation, fraud,
15 mistake, and that kind of thing. The things Mr. Cooke told you
16 about were not applicable here, which is what we are trying to
17 capture is misrepresentation, fraud, mistake and that kind
18 of -- a very narrow list of things that you want to keep your
19 eye on. But to answer your question, if you take it out, you
20 can't take it out.

21 CHAIRMAN EDGAR: Mr. McLean.

22 MR. McLEAN: Yes. My notion is that it was
23 judicially, and I think Mr. Cooke shares this with me, it's
24 judicially established. There is a body of case law that
25 describes administrative finality. Let me try this one with

1 Mr. Arriaga's observation that it is like a sword hanging over
2 a throat. The sword of Damocles is hung by a thread. This
3 sword hangs by a carbon steel cable the size of a Buick. This
4 is not something that we can simply come up and say, you know,
5 back in the last decade we forgot to look at this particular
6 thing. That doesn't get a case reopened in terms of
7 administrative finality.

8 There are fairly well-enumerated criteria, fraud and
9 material mistake. Mistake doesn't mean you forgot to do
10 something. It means you multiplied two times two and got five
11 or something like that. I think, and I haven't researched this
12 question and don't want to represent that I have, but that's
13 the case law we're stuck with. I think that's what
14 administrative finality means, and that is exactly the concept
15 that we are trying to seize by the term administrative
16 finality.

17 I think in the course of our negotiations to come,
18 which I hope you will permit to happen, I think we can come up
19 with language that neither expands nor contracts existing case
20 law and that none of us will be offended with. And I can get
21 even more flexible on that point if we have some articulated
22 MFRs, pardon the expression, or some enumerated criteria that
23 they must satisfy for a prima facie showing of relief that we
24 can criticize should we choose to do so.

25 So I think that we're spending a great deal more time

1 on administrative finality than it probably merits, but I
2 understand the companies' concern. I don't think that we
3 can -- I don't think that you can constitutionally limit the
4 opportunity of a party to challenge your decisions according to
5 the case law of the state. I have not researched it, but that
6 is my impression.

7 CHAIRMAN EDGAR: Mr. Glenn, did you want to join in
8 this discussion?

9 MR. GLENN: Sure. One thing on administrative
10 finality to the carbon steel analogy, I may have believed that
11 before OPC filed its petition to seek a refund of \$143 million,
12 which we'll be arguing in a few moments, so looking back ten
13 years is very fresh in my mind. So I think that is a really
14 reasonable concern that we do have. It's not in any statute.
15 It's not in any regulation that this Commission has. Why is it
16 being put in now?

17 MR. LITCHFIELD: And if I might add to that, Madam
18 Chairman, I think the concern is that the doctrine of
19 administrative finality is not absolutely crystal clear in the
20 law, and it is subject to various interpretations, similar to
21 the interpretation that Mr. Glenn alluded to earlier as to what
22 will be argued here before you this morning. And I think that
23 is essentially what the company is concerned about, is that
24 Mr. McLean, as well intentioned as he is, will not be Public
25 Counsel, perhaps, ten years from now when this plant is still

1 being constructed, and we don't know how it will be applied.

2 What we are looking for -- what we are looking for is
3 certainty and assuredness with respect to the costs that we
4 incur during a given year, that those are checked off, they are
5 signed off on, they are reviewed, they are evaluated and then
6 we all move on to that next year of the construction cycle with
7 some certainty and assuredness that what we are doing is
8 accurate, correct, appropriate and that we are not subject to
9 being second-guessed down the road.

10 I think the concern is as occasionally has been
11 applied or has occasionally may be argued to be applied the
12 doctrine administrative finality, which suggests that somehow
13 if it wasn't an issue explicitly spelled out in the case, if it
14 wasn't specifically raised in testimony, if it wasn't
15 specifically in the order, administrative finality couldn't
16 possibly have attached to that. Those are the kinds of
17 concerns that we have, the kinds of arguments that are likely
18 to be raised. We need certainty on an annual basis.

19 CHAIRMAN EDGAR: Commissioner Tew, did you -- okay.

20 Commissioners, any other questions at this time?

21 Okay.

22 Commissioners, I do believe we have a motion that has
23 been made. We have had some discussion. We can have some more
24 if we need to. Is there discussion, other questions, or,
25 actually, Commissioner Carter, perhaps you could restate the

1 motion so that we are all fresh.

2 COMMISSIONER CARTER: Thank you, Madam Chair, for
3 your courtesy.

4 The motion is that we would accept staff's
5 recommendations with the changes that Mr. --

6 CHAIRMAN EDGAR: Harris.

7 COMMISSIONER CARTER: Mr. Harris said -- thank you --
8 were insignificant and make that to be our recommendation, and
9 the parties -- we would ask that all parties would negotiate in
10 good faith. We shouldn't have to say that, but we will ask
11 that, and allow the time to run its course. And at that point
12 in time whatever recommendations or negotiations they could
13 arrive at, they will have plenty and ample time to do that.

14 CHAIRMAN EDGAR: Thank you, Commissioner Carter. So,
15 again, for clarity, my understanding of the motion that you
16 have made to us is that we would propose the language that was
17 initially passed out by our staff as a substitute for the
18 language that had been in the original item with the one slight
19 change in Lines 19 and 20 on Page 12.

20 COMMISSIONER CARTER: Yes, ma'am.

21 CHAIRMAN EDGAR: Thank you.

22 Commissioners, is there a second?

23 COMMISSIONER DEASON: Madam Chairman, I'm going to
24 ~~second the motion. But I do have a question that I probably~~
25 should have asked earlier, but if you will indulge me.

1 CHAIRMAN EDGAR: You may.

2 COMMISSIONER DEASON: And this is a question to
3 staff, and it concerns the concept of administrative finality.
4 And this is the situation. If a proceeding is noticed, and if
5 we are going to -- just for the sake for this question, assume
6 we are going to have annual prudency proceedings. And if a
7 proceeding is noticed as a prudency proceeding and that there
8 are costs identified for there to be a determination of the
9 prudency of the incurrence of those costs and a number of
10 issues are raised, and those issues are litigated in that
11 proceeding, and there is a determination by the Commission on
12 those issues, either the costs were prudent, or there were some
13 imprudent costs, and there would be a determination of that and
14 those would be addressed.

15 At the end of that, and parties participated, is that
16 party or even future parties as far as that goes, under the
17 concept of administrative finality are they precluded from,
18 say, a year or two or ten years later saying, oh, there was a
19 seventh or eighth issue that we didn't identify that we should
20 have identified. And it is not because of mistake or fraud or
21 misrepresentation, it is just that there was an issue there
22 that we overlooked, we didn't raise it; we want to raise it
23 now. Would that be permitted under administrative finality?

24 MR. COOKE: Commissioner, my reaction to that would
25 be that it would be precluded. That unless there is some

1 significant change in circumstances that necessitates
2 revisiting from the public interest standpoint, in other words,
3 something out there beyond the prudency review that occurred in
4 that proceeding, or if there were allegations of self-dealing
5 or fraud or misrepresentation. I think the concept of
6 administrative finality doesn't let you go back and revisit
7 decisions that were made looking at the record and doing the
8 normal course of things. I think it is narrower than that.

9 The problem with it is it is a judicial concept, and
10 it is laid out in various cases. And when we start looking at
11 it on a case-by-case basis, a good arguer can start arguing
12 that something is unusual and should be looked at again. But I
13 think -- and that is the concern the companies have, they want
14 as much certainty as possible. I would like to hear them say
15 that they are not trying to, by writing this rule without that
16 language, eliminate the applicability of administrative
17 finality on our prudency review.

18 COMMISSIONER DEASON: Do you think that's something
19 you could explore in further negotiations?

20 MR. COOKE: That is what I intend to do if that is
21 the direction you head us in.

22 COMMISSIONER DEASON: Okay. My second stands, Madam
23 Chairman.

24 CHAIRMAN EDGAR: Thank you, Commissioner Deason.

25 Commissioners, we have a motion and a second. Is

1 there any further discussion?

2 COMMISSIONER CARTER: Madam Chairman.

3 CHAIRMAN EDGAR: Commissioner Carter.

4 COMMISSIONER CARTER: I think that -- and I
5 appreciate Commissioner Deason for fleshing out that issue,
6 because really, what we are trying -- my major concern is
7 following the dictates of the Legislature, but by the same
8 token is that if we can make this better, and I think that all
9 the parties have listened to the dialogue and the discourse
10 heard from our General Counsel, and the parties understand
11 exactly what we are talking about, I think that, you know, we
12 can move forward on that. I don't think there is anybody that
13 is a party or an intervenor to this action can go away and say
14 this is not an issue that we want you to deal with when you
15 come back to us. That is just a comment, but I do appreciate
16 Commissioner Deason being able to flesh that issue out so it's
17 on the table so all parties can understand it.

18 CHAIRMAN EDGAR: Thank you.

19 I appreciate everybody's participation in this
20 discussion. It has been good discussion, good questions, good
21 answers. I appreciate everybody's work on this, and I think we
22 are going to ask you to keep working. And, personally, I would
23 appreciate if we all work real hard these next few days and see
24 if we can get the words to where we all have some comfort. I
25 think it's precedent setting. It is a proprietary to me, and

1 we want it to be the best that it can be to give clarity to the
2 consumers, to the interested parties, and to the industry. So,
3 with that, all in favor of the motion say aye.

4 (Unanimous affirmative vote.)

5 CHAIRMAN EDGAR: Opposed? Show the motion adopted.

6 It is about 1:15, and I think I could use a short
7 stretch. So how about we come back at 1:30, at which point we
8 will be on Item 8.

9 (Recess.)

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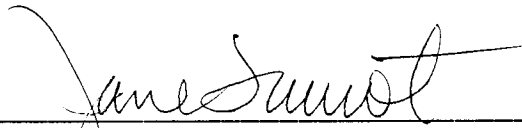
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I, JANE FAUROT, RPR, Chief, Office of Hearing Reporter Services, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

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 26th DAY OF DECEMBER, 2006.



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