

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 080035-EU

In the Matter of:

PETITION FOR DECLARATORY STATEMENT
CONCERNING RIGHTS UNDER RULE 25-6.115,
F.A.C. BY TOWN OF PALM BEACH, TOWN OF
JUPITER ISLAND, AND TOWN OF JUPITER
INLET COLONY.



PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 4

BEFORE: CHAIRMAN MATTHEW M. CARTER, II
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER KATRINA J. McMURRIAN
COMMISSIONER NANCY ARGENZIANO
COMMISSIONER NATHAN A. SKOP

DATE: Tuesday, March 18, 2008

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

REPORTED BY: LINDA BOLES, RPR, CRR
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1 PARTICIPATING:

2 JESSICA CANO, ESQUIRE, appearing on behalf of Florida
3 Power & Light Company.

4 R. SCHEFFEL WRIGHT, ESQUIRE, and JOHN T. LAVIA, III,
5 ESQUIRE, appearing on behalf of the Town of Palm Beach, the
6 Town of Jupiter Island and the Town of Jupiter Inlet Colony.

7 CHARLES FALCONE, Mayor, appearing on behalf of the
8 Town of Jupiter Island, Florida.

9 DANIEL COMERFORD, Commissioner, appearing on behalf
10 of the Town of Jupiter Inlet Colony.

11 MICHAEL COOKE, GENERAL COUNSEL, RICHARD BELLAK,
12 ESQUIRE, and CONNIE KUMMER, representing the Florida Public
13 Service Commission Staff.

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P R O C E E D I N G S

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3 CHAIRMAN CARTER: Commissioners, we are now on Item
4 4. Give staff a moment to get adjusted here. And let's turn
5 our tabs to -- Commissioner Argenziano, remember, in the
6 Legislature you used to say "In Tab 4"? My brain went back to
7 the good old days about Tab 4, but it's actually Item 4. We
8 are on Item 4. Let me get my notes here together.

9 Staff, you're recognized.

10 MR. BELLAK: Thank you, Mr. Chairman.

11 Item 4 is a petition for declaratory statement which
12 has four subparts to it. I believe the, the parties are here
13 to address the Commission on this.

14 There are some oral modifications. One of them
15 involved a close the docket issue, which was simply that you
16 could close the docket if you either granted or denied the
17 petition. But that's become complicated because of a change
18 yesterday afternoon in the language to a declaratory statement
19 of subpart four, so it complicates matters a little bit.

20 As to the first three subparts of this petition, the
21 recommendation remains the same. You can close the docket if
22 you either grant or deny the petition.

23 As to the fourth subpart, staff recommends that you
24 not consider the new language that's being offered as a
25 substitute simply because the staff hasn't had an opportunity

1 to evaluate the new language on an overnight basis. And the,
2 the issue has implications for other dockets which are going to
3 come up in the spring that involve the, the governmental waiver
4 factor, and so that would have to be taken up, the new language
5 would have to be taken up either in a future agenda or as part
6 of a future filing in a separate petition.

7 CHAIRMAN CARTER: Okay. Commissioner Edgar, you're
8 recognized.

9 COMMISSIONER EDGAR: Mr. Chairman, in order to move
10 us along and get us in the proper posture, I would be willing,
11 if it's appropriate at this time, to offer a motion in support
12 of the staff recommendation on Issues 1 and 2, which would, I
13 think, then put us in the posture to hear from the parties.
14 And I would point out that staff has just described to us that
15 there may be some suggested language changes for one of the
16 requested statements. And I have not seen a language change,
17 so I'm hoping that we'll either hear about that or see it when
18 we hear from the parties.

19 CHAIRMAN CARTER: Commissioners, are you clear on the
20 motion in terms of Items 1 and 2? Can we get a second?

21 COMMISSIONER McMURRIAN: Second.

22 CHAIRMAN CARTER: Commissioners, it's been moved and
23 properly seconded. All in favor, let it be known by the sign
24 of aye.

25 (Unanimous affirmative vote.)

1 Okay. Show it done.

2 Let's take a moment here. So part of it is a request
3 for intervention. And also the Towns of -- I'm drawing a
4 blank, one of my over 50 moments -- Jupiter Island and Palm
5 Beach have asked for leave to address the Commission.

6 Let's do this, Commissioners. Let's give the
7 attorneys on either side ten minutes. And then I'd like to
8 hear from the Mayor and the Commissioner -- and the Councilman,
9 and we'll do that. So we'll have -- I think it'll be -- let's
10 hear from the attorneys first and then we'll hear from Mayor
11 Falcone and Commissioner Comerford. Did I get it right?

12 COMMISSIONER COMERFORD: Correct.

13 CHAIRMAN CARTER: Comerford.

14 Mayor Falcone, good to see you again. Thank you for
15 coming.

16 MAYOR FALCONE: Thank you.

17 CHAIRMAN CARTER: Okay. Who's on first, Mr. Wright
18 or --

19 MR. WRIGHT: Mr. Chairman --

20 CHAIRMAN CARTER: You're recognized.

21 MR. WRIGHT: -- I think it's our petition, so I think
22 I'm first.

23 CHAIRMAN CARTER: You've got it. Ten minutes.

24 MR. WRIGHT: Thank you, Mr. Chairman, Commissioners.
25 My name is Robert Scheffel Wright. I'm with the law firm Young

1 van Assenderp, and I have the privilege to represent the Town
2 of Jupiter Island, the Town of Jupiter Inlet Colony and the
3 Town of Palm Beach, Florida, in this declaratory statement
4 petition. I am going to be as brief as I can, after which
5 Mayor Falcone and Commissioner Comerford would like to address
6 you.

7 I'm going to save my remarks about our request number
8 four, which is the one to which staff commented a moment ago,
9 regarding an agreed statement that we and FPL finally worked
10 out yesterday afternoon, immediately after which I communicated
11 it to the staff. But it was what it was and I'll talk about
12 that briefly at the end.

13 We have asked you for three other declarations that
14 staff are not recommending deferral of today. And our first
15 request is, other than number four, which is very, very
16 significant, is the issue with the greatest cost impact on the
17 towns. We've asked you to declare that where a town does all
18 of the underground construction and installation work and
19 removal work too, that's another issue I'll come to later, and
20 where we pay FPL for its basic design work, which we pay for
21 when we pay them for the binding cost estimate, and where we
22 pay them for all of their field engineering time to review and
23 inspect the work as it is in progress, then FPL may not charge
24 us and charge a town or a city or any other local government
25 any charges for corporate overheads.

1 We believed that we had this issue worked out a year
2 ago when FPL, responding to a direct request from me, wrote to
3 us the following. "FPL believes that there is agreement on
4 calculating and applying corporate overheads. But to clarify,
5 FPL's CIAC binding estimates will include all direct FPL or FPL
6 contracted costs and all appropriate overheads related to those
7 costs. The estimate will not include any allocated corporate
8 overheads on work contracted by the applicant."

9 This past fall unfortunately it turned out that FPL
10 was applying different practices, which led us to renew
11 negotiations with FPL. But unfortunately these were
12 unsuccessful and that in turn precipitated our petition for
13 declaratory statement.

14 I want to show you some simplified examples of what
15 we're talking about. Jay, if you could put up the -- Jay?
16 This is my law partner, John T. Lavia, III.

17 CHAIRMAN CARTER: Mr. Wright, you know, just kind of
18 disclose that up-front, okay, just on how you were going to
19 proceed with your remarks. Yeah. That's how I feel. The way
20 you're looking, that's how I feel.

21 Okay. Continue.

22 MR. WRIGHT: And Mr. Lavia also has 8-1/2 x 11 copies
23 to hand out.

24 Mr. Chairman, I apologize.

25 CHAIRMAN CARTER: Apology accepted.

1 MR. WRIGHT: Thank you, sir.

2 Now I mentioned that these are simplified examples.
3 They're simplified because we've assumed that certain factors
4 or variables in the CIAC equation are zero: The net book value
5 of removed overhead facilities, removal costs and salvage
6 values.

7 Again for simplification, as I mentioned, we pay FPL
8 for design work when we pay for the binding cost estimate at a
9 tariffed rate and we pay FPL for its engineering time to review
10 and inspect our work in the field, which ensures that it's
11 built to FPL's standards and consistently with all applicable
12 codes. These simplified examples do not show this.

13 The first example shows the very easy case where FPL
14 constructs all the underground facilities, does the removal
15 work and everything else. FPL's cost for the underground job
16 is \$10 million. That includes roughly \$2 million of corporate
17 overheads, which they allocate when they do the work. Absent
18 any credits at all, FPL would charge the town this amount for
19 the underground installation. However, pursuant to your rules
20 and FPL's tariffs, FPL gives the town credit for the cost of
21 equivalent overhead facilities, approximately \$2 million; the
22 GAF waiver which reflects the estimated storm restoration cost
23 savings, also consistent with your rule and FPL's tariff, which
24 is another \$2 million in this example because the GAF waiver is
25 25 percent of ten minus \$2 million, so that's \$2 million; and

1 they also are required to give us credit for estimated other
2 operational cost savings.

3 We, a year and a half ago, submitted to the
4 Commission a study, the MUC that is, that indicates that that
5 value is about 26 percent of the otherwise applicable CIAC.
6 FPL has not furnished their number yet, so for this
7 illustration I have used our number, which I rounded to
8 25 percent, which makes it another \$2 million. You could
9 change it to a dollar, you could change it to minus a dollar,
10 you could change it to \$500,000 or anything else. The results
11 for these purposes will be exactly the same.

12 In this case, FPL's cost is \$10 million. The credits
13 are \$6 million, which means that the town will pay FPL a CIAC
14 of \$4 million. FPL then books \$6 million to its
15 plant-in-service accounts.

16 The next example addresses the case where the town
17 does all the work, subject to the same assumptions as above,
18 and again with the expressed proviso that the town pays FPL for
19 their design work and also for the review and inspection work.
20 This example represents our position as to how the payments
21 should flow. And as you'll see, it shows that the town's
22 proposed treatment is fully transparent as compared to the case
23 where FPL does the work. The town constructs and installs the
24 new system. At the end of the project we give FPL \$10 million
25 worth of completed underground facilities. We are entitled to

1 the credits, the equivalent overhead costs, the GAF waiver and
2 whatever the other O&M differential cost is determined to be.

3 In our proposal, there would be a net CIAC of
4 \$4 million because we will have contributed, in kind,
5 \$10 million worth of underground facilities against which we
6 get at \$6 million credit flowing back us to, leaving a net
7 contribution to FPL of \$4 million worth of facilities. FPL
8 books \$6 million to its plant-in-service accounts, and we are
9 in exactly the same situation as if FPL does the job. I submit
10 to you this is obviously transparent, fair, just and reasonable
11 because it produces the same results as in the case where FPL
12 does all the work.

13 Now the third example illustrates FPL's position.
14 Here FPL effectively claws back about \$2 million of the
15 corporate overhead costs, and that their number ranges from 18
16 to 22 percent but close enough to use 20 percent for the
17 example. They claw back about \$2 million of the cost in
18 computing what it would otherwise pay to the town. So we would
19 still give FPL \$10 million worth of underground facilities, but
20 FPL only gives the town \$4 million back. FPL's
21 plant-in-service is \$4 million. Our net CIAC is \$6 million.
22 This is not fair, it's not just, it's not reasonable and it's
23 not transparent.

24 Now how does FPL claim to justify this? They call
25 these costs direct engineering, supervision and support costs,

1 but they can't identify any such costs that are directly
2 associated with or caused by or incurred by FPL because we're
3 doing the underground work. Remember, we pay for the design
4 work, we pay for all the field inspection and review work, and
5 we pay for that at fully loaded labor rates. We pay \$70 an
6 hour under present-day conditions.

7 The best -- the only specific item that FPL suggested
8 in their response on this was that they are, they have four
9 full-time distribution engineers working on underground
10 conversion work. Well, you still need to ask what these folks
11 are doing and you also need to look at the magnitude of the
12 costs involved. I submit to you that what these folks are
13 doing is preparing binding cost estimates for which FPL is
14 paid, doing field review and inspection for which FPL is paid,
15 and preparing ballpark cost estimates. By -- and I'm going to
16 skip the detail, but your rule prohibits charging for ballpark
17 cost estimates.

18 Additionally, you should consider the magnitude. If
19 you have \$70 an hour times 2,000 hours per engineer per year
20 times four engineers, that's \$560,000 a year. FPL would
21 propose to collect more than three times this amount just from
22 Jupiter Island's job alone. They would propose to collect more
23 than 13 times this amount just from the Town of Palm Beach's
24 job alone.

25 Now I want to -- and I meant to do this at the

1 outset, but this is a convenient time to do it. Our -- we have
2 three principles here that underlie our positions with respect
3 to these requested declaratory statements and with respect to
4 undergrounding altogether. We fully expect to pay FPL for any
5 legitimate, reasonable, prudent, direct costs that FPL incurs
6 in connection with an underground conversion project where a
7 town does all the work. We expect to receive fair credit for
8 the value that we create for FPL in constructing and
9 contributing to FPL a completed underground system, and we
10 believe that the results, whether FPL does the work or whether
11 we do the work, should be transparent, excuse me, should be
12 transparent.

13 Now I, I will say I thought about this probably as
14 much as anybody and we have thought about this about as much as
15 anybody, and there may be a factual issue in here somewhere,
16 but we haven't been able to find it. If we have to have an
17 evidentiary hearing on this and if we have to go back and
18 revisit the rule language that uses the word "avoided" in its,
19 in its phrasing, we're ready to do that. If we have to have a
20 complaint proceeding, we're ready. I've got it composed in my
21 mind, I've got the first round of discovery composed in my
22 mind. We're ready to go.

23 But the bottom line is this on Issue 1. Charges must
24 be fair, just and reasonable. That's fundamental. And they
25 must be transparent, whether we do the work or whether the town

1 does the work. Our proposal achieves this result. FPL's does
2 not.

3 Our request number two -- okay. I'll be very brief
4 in touching on items two and three and I'm just going to have
5 to come back to four.

6 Our request number two asks you to interpret your
7 rule, which refers specifically to construction and
8 installation order, to also require FPL to allow us to remove
9 overhead facilities, which is a necessary component of the, on
10 any underground conversion job. You don't leave the facilities
11 up there.

12 There's a, a legal point that I want to make, and
13 Commissioner Comerford will talk more about the substance of
14 this. Asking for this declaration, I submit to you, is
15 entirely appropriate because we're asking you to interpret what
16 construction and installation means to include removal of
17 existing facilities. Rules cannot and typically do not address
18 every conceivable possible case or component of what is or is
19 not included within a term, in a rule. This is a completely
20 legitimate request for declaratory statement to interpret your
21 rule.

22 Finally, number three asks that you declare that FPL
23 is required to furnish materials at a reasonable cost. We
24 believe we're in agreement with FPL, and it would be acceptable
25 on this issue and it would be acceptable to us if you simply

1 declined to rule on this issue one way or the other.

2 With regard to issue four I'll just be very brief.
3 We thought we had worked this out in November. There was an
4 exchange of correspondence between myself and Ms. Kummer that
5 essentially confirms this, and I submit to you that the
6 language we gave staff yesterday is --

7 CHAIRMAN CARTER: Why don't we do -- why don't we
8 forestall issue four until we get there. All right?

9 MR. WRIGHT: Oh, certainly.

10 CHAIRMAN CARTER: Let's just wait on that. I gave
11 you two minutes because I threw you off with that --

12 MR. WRIGHT: You're generous and I appreciate it.
13 Mayor Falcone is --

14 CHAIRMAN CARTER: Not a problem. We'll deal with,
15 we'll deal with that issue four at that time because I think
16 staff wants to weigh in on that too, and, Commissioners, we
17 probably want to weigh in as well, but on issue four. Let's do
18 that. And thank you. Thank you.

19 MR. WRIGHT: Thank you, Mr. Chairman.

20 CHAIRMAN CARTER: Now, FPL, you're recognized.

21 MR. WRIGHT: Could Mayor Falcone address you now?

22 CHAIRMAN CARTER: Well, no. Remember, I said we're
23 going to let the attorneys go first, get you guys out of the
24 way, then we're going to hear from the big guys, you know?
25 That's not big in size. That's just in stature. You're

1 recognized.

2 MS. CANO: Good morning. I'm Jessica Cano appearing
3 on behalf of Florida Power & Light Company.

4 It's FPL's position that none of the requested
5 declarations submitted by the petitioners are warranted here,
6 and, accordingly, this petition should be denied.

7 The first requested declaration is inconsistent with
8 the process set out in Rule 25-6.115 for calculating the CIAC
9 owed by an applicant for underground conversion. At its core,
10 however, this is really a dispute concerning the amount of
11 direct engineering, supervision and support costs that FPL can
12 or cannot avoid as a result of the applicant performing the
13 underground installation work.

14 FPL does agree that the costs specifically avoided as
15 a result of the applicant performing this work can be removed
16 from the calculation. However, Mr. Wright and his clients
17 highly underestimate FPL's role in supervising and
18 participating in the work when an applicant does, in fact,
19 perform the underground installation.

20 That being said, FPL has been working with the towns
21 and will continue to work with the towns to identify all
22 specifically identifiable costs that can be avoided and will be
23 removed from the charge. As a result, FPL agrees with staff's
24 recommendation on this request that the first declaration
25 concerns disputed factual issues, which I think is supported by

1 the fact that Mr. Wright passed out this handout offering a
2 variety of situations, and as a result this matter shouldn't be
3 resolved by a legal declaration.

4 With regard to the second request that a utility is
5 required by the rule to permit an applicant to perform the
6 overhead removal work, that would in effect amend the rule, as
7 staff has indicated in their recommendation, to include a new
8 requirement that isn't actually stated therein.

9 The language of the rule gives an applicant the
10 ability to construct and install the underground facilities
11 only with no mention of the overhead facilities. Now perhaps
12 if the wording of the rule was done in a way that was more
13 broad such as permitting the applicant to perform the
14 conversion work or something more vague like that, Mr. Wright's
15 and the town's interpretation could work. But the actual
16 language of this rule permits an applicant to install and
17 construct the underground facilities specifically.

18 Again, that being said, nothing in the rule prevents
19 the utility from allowing the applicant to do the overhead
20 removal work, and FPL is currently working with the towns to
21 reach mutual, agreeable terms to permit the town to do such.

22 Regarding the third request for a declaratory
23 statement, Petitioner requests that -- we believe they're
24 requesting that a particular commercial arrangement is required
25 by the rule whereby FPL sells certain materials to the town and

1 then has them transferred back. Again, this language isn't in
2 the rule, it's not supported by anything specifically in the
3 rule, and, again, as is the case with the previous
4 recommendation, FPL isn't opposed to working with the towns in
5 achieving that objective and that end result. Thank you.

6 CHAIRMAN CARTER: Thank you.

7 Mayor Falcone, you're recognized, sir.

8 MAYOR FALCONE: Thank you, Mr. Chairman,
9 Commissioners. Good morning. I appreciate the opportunity to
10 address you today on this subject. I have written testimony
11 and I ask that it be included in the record. I will not read
12 the testimony. I'll briefly summarize it.

13 We have been working toward underground electric
14 service or had that goal in our town since the year 2000.
15 That's going on eight years now. And for, for a very long time
16 FPL did everything to discourage us. We were nevertheless
17 persistent. We carried our message up to you, we talked to the
18 staff, spoke to each of the Commissioners at the time, the ones
19 that were seated at that time, including some of you. There
20 was really no change in attitude or policy until Hurricane
21 Wilma in late 2005. Now it was the last of several hurricanes
22 that ravaged Florida and I think perhaps the straw that broke
23 the camel's back.

24 And it's fair to give credit where it's due. FPL
25 deserves our praise because they turned around. They changed

1 their position. They saw the reality. They went public with
2 that reality. Nevertheless, the fact is that the industry, the
3 utility industry has had its own policy pretty much across the
4 country, pretty much self-serving, pretty much not in their
5 interest, not necessarily in the public interest that they take
6 the view that underground conversions are not effective, not
7 cost-effective, don't improve reliability, they just improve
8 esthetics. It's not true. That's propaganda, that's utility
9 propaganda.

10 But the wonderful thing here is FPL changed its
11 position after Wilma. They saw the reality, went public with
12 it. They proposed the GAF, a 25 percent cost sharing, and they
13 fully justified that based on avoided storm restoration costs.
14 They also reformed their policy in other important ways such as
15 right-of-way, using the right-of-way to install underground
16 facilities in some cases, and FPL became supportive of
17 underground conversion.

18 Now you might ask is the Florida Public Service
19 Commission supportive? Well, you did approve the GAF, the
20 25 percent cost sharing last year. But you have a CIAC policy
21 that's ambiguous and perhaps wrong. I think it's wrong.

22 Your staff recommends that you should reject our
23 request. In other words, don't clarify this rule, don't
24 clarify the ambiguity. The GAF runs out in six months, but
25 staff doesn't want you to clarify this ambiguous policy so that

1 the towns can figure out what it will cost to convert and so
2 that the towns can explain to their residents what it will
3 cost? Of course, you, the Commission, haven't spoken yet to
4 this.

5 The staff memorandum says that we should negotiate
6 these issues with FPL. We've tried. But I can tell you that
7 negotiating with a giant monopoly when there's no other option
8 isn't real negotiation.

9 No. I look to the Public Service Commission to set
10 the policy clearly. FPL knows that they could be at risk if
11 they interpret an ambiguous policy in our favor without your
12 okay. They need to get recovery of costs from either us or
13 from the customers. I'm sympathetic with them. You will
14 ultimately decide whether they can put costs in rate base. So
15 their only safe course in dealing with us up-front is to err on
16 the safe side, which may mean overcharging us, but you can
17 settle the matter by clarifying the policy. If you don't, let
18 me be clear, you'll discourage underground conversion.

19 Jupiter Island is presently constructing its system.
20 This will continue all this year and part of next, and we hope
21 to finish, we expect to finish before the hurricane season in
22 2009, a year from -- more than a year from now. But due to the
23 cost ambiguity we're proceeding at some degree of risk. Other
24 towns are not that far along. They may not exercise conversion
25 depending on costs and depending on your policy. But I won't

1 kid you; Jupiter Island is going to do it anyway regardless,
2 but other towns may not or won't.

3 We would very much like to do all the remaining work
4 other than the first phase that's already underway with our own
5 contractors. We'd like to do all the work ourselves. Why?
6 Because we found this to be an effective way to carry out the
7 project. We're good at contracting. And the competitive
8 market is very favorable to us as buyers at this time. This is
9 a good time to be buying these services.

10 However, prior to making that decision, we need your
11 clarification on at least one part of our petition, that's the
12 fourth part, and it looks like we're coming together on that.
13 So we're optimistic that that will be resolved. That's if the
14 town does all the work itself and hands over the system to FPL,
15 which we plan to do, it will get appropriate credits by way of
16 a check from FPL. Earlier FPL said, "We don't write checks.
17 We haven't got a checkbook." Well, that flies in the face of
18 your statement that nothing will prevent us from doing all the
19 work ourselves, with provisions, of course.

20 Of course, the main issue is the first part of our
21 request, number one. Corporate overhead should not be applied
22 when the town does the work. FPL makes the argument that when
23 towns ask -- what towns are asking for is contrary to the rule.
24 If it can't be read the way we ask, then I believe the rule is
25 wrong and sets up the wrong test.

1 Bear with me on this. The rule should take the
2 status quo as the starting point where no underground
3 conversion takes place and then measure the additional costs
4 due to the conversion project. It seems self-evident that that
5 should be the test. The test should be that as a result of the
6 project, no additional costs are borne by the general
7 ratepayer.

8 But the, but the present rule, and FPL points it out,
9 sets up a test that compares the case when the town performs
10 the work, the conversion work, versus when FPL performs it; a
11 meaningless comparison in my impression. FPL applies corporate
12 overheads to their own work. That's traditional accounting
13 policy. They explained -- then they explained that these
14 overheads are not avoided if the town does the work. Well of
15 course they're not avoided. Overheads can't be avoided. In
16 fact, overheads aren't avoided even if the project is not
17 undertaken. By FPL's logic, the town should pay these
18 overheads even if they choose not to go forward -- an
19 absurdity. The present rule puts costs on the applicants that
20 would, that would be incurred by FPL even if the conversion
21 project had not been undertaken.

22 With regard to the four engineers that FPL points
23 out, this helps to make our point. Those costs are completely
24 identified. They can be charged directly. They don't need to
25 be part of overheads. If you know who it is, what it is, when

1 they work, that can be charged directly, and we're all in favor
2 of that.

3 Now the staff's claim that these matters should be
4 resolved through negotiation with a giant monopoly is
5 unrealistic. Their claim that it requires a complaint
6 proceeding with discovery, et cetera, is wrong because you can
7 prove our point on the back of an envelope or the back of a
8 napkin. And it's impractical because the GAF runs out in six
9 months, and the towns need to know quickly what their costs
10 will be.

11 So I ask you, please, clarify your CIAC policy.
12 Please don't close this docket on number one. Ask the staff to
13 look into it, give them direction on the policy, the principles
14 under which they, they should look at it.

15 I thank you for your attention.

16 CHAIRMAN CARTER: Thank you, Mr. Mayor.

17 Councilman Comerford, you're recognize.

18 COMMISSIONER COMERFORD: Yes. Thank you,
19 Mr. Chairman. Good morning, Commissioners.

20 I currently am a Commissioner in the Jupiter Inlet
21 Colony in the northern part of Palm Beach County which consists
22 of 226 homes. As an aside, I also am the vice chairman of the
23 board at the Palm Beach Zoo, which FPL serves as our corporate
24 partner and is doing a fantastic job at the zoo, currently
25 sponsoring a white alligator on loan from the Audubon Zoo in

1 New Orleans.

2 I want to speak briefly about why we need a new
3 system in the Jupiter Inlet Colony. We have a system which is
4 50 years old, has 74 percent backyard easements. Much of the
5 original poles, wooden poles are still there. Some of them are
6 in such bad shape that they've completely rotted off at the
7 base and are only being held up by the wires that hold them up
8 to the two adjacent poles. Many support lines are hanging
9 loose, transformers are poorly maintained, and we're in
10 desperate need of a new system.

11 Now we could go with an overhead system. We did
12 consider it briefly. But given that the GAF is now available
13 and given that the technology has advanced enough that people
14 have confidence in undergrounding, and given that FPL has done
15 a complete turnaround on encouraging undergrounding, which, of
16 course, we support, we've decided that this would be a good way
17 for us to go.

18 I should point out that in the past our Commissioners
19 ten years ago had asked for a price for undergrounding and were
20 given a price which is five times the price that we were given
21 last year, clearly a price that was meant to discourage them
22 from proceeding with undergrounding, and, of course, they did
23 not underground at that time. So we're looking to underground
24 right now.

25 The two issues that we need to talk about where we

1 are in the process is that we're getting our final surveying
2 done within a month. We're about to pay FP&L for the binding
3 cost estimate and we hope to begin the project as soon as
4 possible. And like Mayor Falcone, we're going forward with the
5 process. And ours is a fairly small job, and we feel that many
6 other people in this state probably will be discouraged and not
7 go forward. We are going to go forward, but we are running out
8 of time on the GAF credit. We do need to have some, some
9 declaratory statement to clarify what the rules are.

10 And I just wanted to brief, speak briefly about
11 removal. I'm very clear -- in our petition we asked "When the
12 town proposes to perform all construction and installation of
13 the underground facility, FP&L must allow the local government
14 applicant to perform the work involved in removing the overhead
15 facilities." The response from FP&L is that they disagree with
16 our interpretation and they emphasize the words "constructing,
17 installing" and claim that the rule doesn't cover removal.
18 Well, I agree, it doesn't cover removal. Okay?

19 And the staff, when they agreed with FP&L in saying
20 the staff agrees with FPL on the rule, does not address the
21 removal of overhead. I wrote a comment at the time that I
22 received this. I said, "In fact, the rule is silent on the
23 subject of removal altogether. Does this omission mean that
24 the old overhead system should not be removed at all, thus
25 creating a danger to public safety?" Of course not. Obviously

1 it should be removed, and it would make sense for it to be
2 removed by the entity, either us or FP&L, who's building the
3 new underground system, and, yes, with the proper safety
4 inspections taking place by FP&L's staff. So I would agree
5 with Mayor Falcone -- with Schef Wright that a rule cannot
6 cover all contingencies. The rule also doesn't say that FP&L
7 should remove anything. It's silent as to who should remove
8 it.

9 We're simply saying that if we're in there doing the
10 job, we should be allowed to remove it. Because to leave it
11 there, obviously that's not the intent of the rule. They don't
12 want the system sitting up there with wires on it causing a
13 hazard to the public.

14 And also I would like to make one comment about,
15 about the corporate overheads. On the face of it, charging
16 corporate overhead roughly about 18 percent for work that FP&L
17 does not perform would seem unfair, particularly in light of
18 the fact that corporate overhead is already included in the
19 calculation of the rate paid by the general body of ratepayers.
20 In addition, a return of equity investment of approximately
21 11.92 percent, I know that's not approximate, that's exact, in
22 2007 is also guaranteed in the rate that the general ratepayers
23 pay. Okay? To charge corporate overhead for work that FP&L
24 does not do is simply another way of unjustly, in my mind,
25 increasing the bottom line. We are happy to pay corporate

1 overheads as part of the cost of the work performed by FP&L.
2 But to pay them, in the case of the Jupiter Inlet Colony, you
3 know, six or seven hundred thousand dollars on a \$2 million
4 project seems a little bit egregious and large to replace a
5 badly maintained system, a very old system. That's clearly
6 unfair and cannot be justified.

7 We at the Jupiter Inlet Colony continue to be happy
8 to pay all costs incurred by FPL that directly relate to the
9 project so that FP&L's overall system is improved and, number
10 two, that there be no cost to the general body of ratepayers.
11 And that's very important us to. We're happy to pay whatever
12 it is and we don't want anything passed along to the general
13 body of ratepayers, but we only want to pay for work that is
14 performed for us and enhancing the overall system. Okay?
15 Thank you very much for your --

16 CHAIRMAN CARTER: Thank you so kindly, Councilman
17 Comerford.

18 Commissioners, just before we go further, I need to
19 do one thing.

20 I'm sorry. Jessica, I did not get -- I hate to be
21 informal. I did not get your last name.

22 MS. CANO: It's Cano, and that's C-A-N-O.

23 CHAIRMAN CARTER: C-A-N-O? Thank you so kindly. I
24 had one of my over 50 moments there. I got the Jessica part.

25 Before we proceed further, would you like to respond

1 to the Commissioner and the Mayor before we go further? I
2 mean, obviously it's at your discretion.

3 MS. CANO: Just a couple of really brief comments.

4 CHAIRMAN CARTER: You're recognized.

5 MS. CANO: Thank you. Two discrete matters and then,
6 and then a couple of general comments.

7 First of all, the direct engineering, supervision and
8 support costs that FPL charges and which the towns referred to
9 as overhead is directly related to the amount of conversion
10 work going on in FPL's system. Again, their position
11 underestimates the role that FPL will play, even though the
12 towns themselves will be performing the underground
13 construction and installation.

14 Secondly, FPL is certainly not suggesting that unused
15 overhead poles and lines should remain where they are despite
16 the undergrounding. FPL is only disputing that the rule
17 requires FPL or a utility to permit the applicant or the town
18 to do that overhead work. And, again, we're working with them
19 to permit them to do such.

20 And generally I would just note that the comments we
21 heard today that the rule may be wrong and that the rule is
22 silent on certain topics supports our position that what
23 they're really requesting is a rule amendment as opposed to a
24 declaratory statement, and for that reason we agree with
25 staff's conclusion that the request should be denied. Thank

1 you.

2 CHAIRMAN CARTER: Thank you.

3 Commissioners, let me, let me do this, kind of bring
4 this around, if I may. What I'm going to ask staff to do is
5 kind of put us in a proper posture so we can go forward from
6 there. I know you may have some questions either for staff or
7 the parties, but at least let's kind of get ourselves in there.
8 I know we've dealt with Issues 1 and 2.

9 COMMISSIONER EDGAR: And three.

10 CHAIRMAN CARTER: And three. See? So, staff, you're
11 recognized to kind of bring us back in for a landing so we can
12 go forward from this point. You're recognized.

13 MR. BELLAK: Thank you, Mr. Chairman.

14 I think that what comes, what factors out of this is
15 what the, the staff says on, on Page 5 of the recommendation,
16 which is that though the staff recommendation varies from issue
17 to issue, they have in common staff's conclusion that
18 controverted factual matters not amenable to resolution by
19 declaratory statement are concerned -- there's nothing in the
20 staff recommendation that doesn't encourage the towns to
21 negotiate very vigorously as to the reduction to the extent
22 they can obtain it for their expense in this. But it goes
23 further to say that the Commission should declare as a matter
24 of law that the amount should be zero. That's something
25 different from vigorously working to reduce the, the cost.

1 And FP&L takes issue with the idea that the direct
2 engineering, support and supervision under these circumstances
3 is going to be absolutely zero or that it's reasonable for the
4 Commission to declare that as a matter of law it's always going
5 to be zero as long as the towns are doing the direct work. And
6 theoretically in any particular case it might be very low or it
7 might be moderate or it might be higher, but that's exactly
8 what you have a controverted, factually intense hearing about.
9 It's not something that is amenable to a declaration of law.
10 So that's why we came to the conclusion we came to. It, it
11 doesn't implicate that the costs should be high or excessive or
12 anything like that.

13 But I think that in the Mayor's own remarks he
14 indicated that FPL is playing it safe and wants to err on the
15 side of charging more rather than less. But even the
16 implication there that the charge should be more or less takes
17 it out of the category of being zero as a matter of law.
18 That's the problem. It's a factual issue.

19 And our recommendation is not a recommendation in
20 support of any particular level of cost or that those costs
21 shouldn't be avoided if at all possible. And something like
22 that also is at play in the second and third statements. The
23 fact that the Commission is recommending, staff is recommending
24 that the Commission not in effect amend the rules by reading
25 into the rules something that isn't there hasn't apparently

1 stopped FPL and the towns from reaching an agreement as to
2 those issues. As I understand it from what's been filed, FPL
3 doesn't really object to charging the amount for the materials
4 that the towns are going to be using that the towns are
5 indicating should be charged and hasn't interfered with FPL's
6 discussions with the towns about disassembling the overhead
7 facilities. But their concern is that it amends the rule for
8 the Commission to state as a matter of law that whenever a town
9 is going to do the undergrounding work, then as a matter of
10 right they also get to disassemble the overhead facilities. It
11 may be that that's a good idea to flesh out in a rulemaking
12 procedure. But under those circumstances everybody would get
13 to find out what the pluses and minuses of adding that to the
14 rule would be as opposed to having it declared as a legal
15 matter just because in this particular instance it seems like
16 it probably would be practical and probably will work out. I
17 mean, there's a difference between a negotiation and a
18 declaration from this Commission as a matter of law. So it
19 seems to, it seems to the staff that these are factual matters
20 that are subject to adjustment based on the facts and that's
21 the problem with making it a declaratory statement.

22 CHAIRMAN CARTER: Thank you.

23 Commissioners?

24 COMMISSIONER McMURRIAN: I've got a question.

25 CHAIRMAN CARTER: Commissioner McMurrian, you're

1 recognized.

2 COMMISSIONER McMURRIAN: I had a question for Mr.,
3 Mr. Bellak. Does a complaint proceeding have to go to a
4 hearing? You said they're factual matters. But do those
5 factual matters in a complaint proceeding, does that need to be
6 a hearing or can it be done PAA?

7 MR. BELLAK: Well, I think it would -- let's assume
8 that they're controverted factual matters, that there's a
9 genuine disagreement between the parties as to what the DSS
10 should cost in a particular situation. That means there's
11 going to be a protest if the PAA is not something that
12 represents both parties' points of view, there's going to be a
13 protest and there's going to be a resolution. But I'm not sure
14 why the towns assume that the resolution would result in a
15 higher rather than a lower cost if all the facts got fleshed
16 out and the Commission considered the debate.

17 CHAIRMAN CARTER: Okay. Commissioners?

18 Commissioner Edgar, you're recognized.

19 COMMISSIONER EDGAR: Thank you. The -- Mr. Wright
20 and the Mayor and the Commissioner, I think all three brought
21 up the issue of the time frame with the GAF. And so I would
22 like to ask our staff to speak to that issue specifically as to
23 how that would, would or would not impact the staff
24 recommendation.

25 MS. KUMMER: Commissioner, the GAF tariff, the

1 governmental adjustment factor tariff, was approved for a
2 specific time frame. It does expire October of this year. The
3 Commission approved that limitation because we were not
4 comfortable with the numbers on either the storm restoration
5 costs or anything else in that tariff. It was sort of thrown
6 out there as a best first effort to give us some experience
7 until we could get some real numbers. But we set the deadline
8 in October so that we would have a mandatory review. It
9 wouldn't just simply continue without anymore Commission
10 oversight.

11 The utility will file sometime later this spring or
12 this summer an assessment of the tariff, how they think the
13 costs are in fact going, what further research they've done,
14 what further information they've gathered on whether or not the
15 25 percent is the correct number. And at that time we would
16 also, we could also look at the interaction of the GAF tariff
17 with the rule, which is the point four that we're going to be
18 discussing later.

19 CHAIRMAN CARTER: You're recognized.

20 COMMISSIONER EDGAR: So, so more specifically if the
21 staff recommendation were to be adopted for Issues 1 through 3,
22 because unless I've missed it I think we still have some
23 further discussion on the point four or the requested four,
24 would, would or would not that October '08 time frame have a, a
25 negative impact on the project that the towns are working

1 toward?

2 MS. KUMMER: It's, it's hard for me to say because I
3 have not been privy obviously to the negotiations between the
4 company and the customers.

5 But if I could go back to a question that
6 Commissioner McMurrin asked. Normally in a complaint
7 procedure what happens is that one party files a complaint. In
8 this case it would be the towns objecting to the charge that
9 Power & Light has charged them. We would -- staff would then
10 request Power & Light to provide all supporting documentation
11 to justify their position. Staff would review that and attempt
12 to reach a resolution informally without bringing it to the
13 Commission. If we were unable to reach a resolution, then we
14 would bring it to the Commission as a PAA.

15 CHAIRMAN CARTER: Commissioners?

16 COMMISSIONER EDGAR: I do have one.

17 CHAIRMAN CARTER: You're recognized.

18 COMMISSIONER EDGAR: Thank you.

19 On a different point, and this is to Ms. Cano.
20 Ms. Cano, in your, your first round of comments you made a
21 statement and I missed the last part of it, so I'd like to come
22 back to it. And I think that what you said was that speaking
23 on the requested statement one, that it should not be addressed
24 as a declaratory statement, but that it should be resolved in
25 another manner. But I missed -- I missed the end of your

1 statement. And so if, if you could, could speak to that point
2 again as to what your recommendation would be for another way
3 to work towards resolution on these issues.

4 MS. CANO: Sure. Just, and it's essentially similar
5 to what staff has indicated, which is that this is a, really a
6 factual dispute as to what costs will and will not be avoided
7 by FPL when an applicant performs the underground work. So
8 it's our position that it's just a factual issue that shouldn't
9 be resolved by a declaratory statement as to the law, but
10 rather the applicable rule does provide that if there's a
11 dispute as to costs, that can be resolved in a complaint
12 proceeding. Thank you.

13 CHAIRMAN CARTER: Okay. Commissioners?

14 Staff, how do we -- I know we've discussed this and
15 let me just kind of -- Mr. Wright, I did say I'd come back to
16 you on issue four. You are recognized, sir.

17 MR. WRIGHT: Thank you. Before that, may I make a
18 30-second response to --

19 CHAIRMAN CARTER: Sure. A 30-second response is
20 appropriate.

21 MR. WRIGHT: -- to Commissioner Edgar's question
22 regarding the time frame?

23 I can't tell you for sure exactly what the impact
24 will be. I can tell you for sure that this, that the matter of
25 the GAF's expiration in October of this year is of grave,

1 overwhelming concern to these towns, in particular Palm Beach,
2 and also to other entities, other towns and cities out there
3 who are contemplating undergrounding projects.

4 The problem we have, and this is just kind of an
5 explanation, the problem we have is that there's still two
6 items out there that we long since thought -- one we thought we
7 had resolved. We thought we had the corporate overheads issue
8 resolved last March when FPL wrote me what I read to you
9 earlier. And the other issue that remains unknown is what the
10 other operation and maintenance costs credit is going to be.
11 You don't have to trim trees for undergrounding facilities, you
12 don't have to have a pole inspection program for underground
13 facilities. These are potentially big numbers, as illustrated,
14 based on actual, real engineering cost analysis, as we've given
15 to you quite a while back. These are significant values. It's
16 very difficult for a town to make a decision to go forward when
17 there's potentially 25 or 50 percent additional of the CIAC in
18 play. That's -- I just wanted to explain it's very important
19 to my clients.

20 CHAIRMAN CARTER: That was your 30 seconds, right --

21 MR. WRIGHT: Yes, sir.

22 CHAIRMAN CARTER: -- to respond to her?

23 Now you're recognized for issue four.

24 MR. WRIGHT: Thank you.

25 Mr. Chairman, Commissioners, I will say that in

1 particular Mr. Butler and I have had a very sound working
2 relationship over time and we have negotiated an awful lot of
3 things, as you have seen. You know, we brought you a
4 stipulation a year ago that we were able to work out.

5 With regard to issue four, sorry, I should say
6 request number four of our declaratory statement, there is an
7 ambiguity in your rule which we believe is, is susceptible to
8 clarification by a declaratory statement.

9 The ambiguity in the rule is the last sentence of
10 25-6.115(11)(b), which says, "At no time will the costs to the
11 customer be less than zero." While we don't think that that
12 should be read to mean that we would not get paid for the
13 credit values that we create, the GAF credit and the cost of
14 the equivalent overhead facilities where we do all the work, we
15 were concerned enough about it to ask the Commission staff what
16 their position was on this issue. I did. I called Connie.
17 Connie said, "I've got to think about that." She and other
18 staff considered it, spoke with FPL, and confirmed back that
19 our view, the town's view is, is the correct view. And that is
20 where we do all the work, we would, in fact, get a check back
21 from FPL for at least the GAF credit and the cost of the
22 equivalent overhead facilities.

23 Now I'd submit to you that it's natural, it's in the
24 tariff, it's in the rule that we should also get credit for
25 whatever the avoided O&M costs are as well, as contemplated by

1 the rule and specified in FPL's tariff. But that's kind of an
2 aside issue. And Ms. Kummer wrote me a letter on January 8th
3 that says just that.

4 Following up on that, you know, she also said, quite
5 properly, "This is just staff's position. If you want to know
6 for sure, you need to file a petition with the clerk and ask
7 the Commission for its ruling." That is what we have done.

8 And then that brings -- then FPL made a response that
9 in my view created a lot of confusion because it began with a,
10 with a, with a conditional phrase that does not apply. And the
11 conditional phrase was, "If the towns are contending that the
12 rule should be interpreted to require payments where costs,
13 where credits exceed costs." That's not what we're contending
14 and that really threw everything into confusion. I thought we,
15 I thought we were there, FPL had agreed, staff had agreed, we
16 had agreed, we thought we were there and we were asking you for
17 what Ms. Kummer and I had previously written down in
18 correspondence. And I've got copies of that correspondence, if
19 you want it. It's brief.

20 But, so then after that I got with Mr. Butler, we
21 negotiated, we negotiated, we negotiated. I suggested some
22 language. The language that, that we delivered to staff
23 yesterday shortly after I -- I received it yesterday morning
24 from FPL, ran it by, considered it for a little while, ran it
25 by my clients, and got back to FPL and said we're in agreement

1 and sent it over to the staff. I will submit to you that, that
2 the language that we've got, and I've got copies of that too,
3 if you'd like, or not, is substantively equivalent to what we
4 had previously agreed on. So we think you can, can grant the
5 requested declaration.

6 CHAIRMAN CARTER: Okay. Now first, first of all,
7 staff said they haven't had an opportunity to give a thorough
8 analysis of the language. You remember they said that?

9 MR. WRIGHT: Yes, sir, I do.

10 CHAIRMAN CARTER: Okay.

11 MR. WRIGHT: And it's just one of the realities of
12 how things went back and forth. I'm sorry.

13 CHAIRMAN CARTER: That's the first thing.

14 Secondly, on an interesting note -- and you've been
15 involved in the process for, I don't want to say how old you
16 are, but certainly at least 20 years. And what do you say to
17 what staff is saying is that this is, this process would be
18 tantamount to changing the rule without going through the
19 processes that are necessary when you go through a rule, to
20 establish a rule?

21 MR. WRIGHT: Well, there are, there are a couple of
22 issues inherent here in your question. There is kind of a
23 bigger picture legal question.

24 Where does interpretation of a rule stop and
25 amendment end, you know? Very briefly, back on the removal

1 issue, you know, it's not completely clear where the line is.
2 We assert that where the rule says the applicant gets to do all
3 the construction and installation work, which is 90 percent of
4 the total value of the job anyway, removal should be
5 interpreted as a necessary part of the construction and
6 installation. Certainly removal isn't -- the word "removal" is
7 not in the rule, but there are a lot of rule interpretations
8 where the word involved is not in the rule. And so we assert
9 that that's an appropriate interpretation.

10 In this case what you've got is the ambiguity, the
11 potential ambiguity. And it's real, you know. It was enough
12 of a concern that we felt obliged to ask, you know, what about
13 this last sentence of (11)(b), "At no time will the cost to the
14 customer be less than zero"? Does that -- could that be
15 interpreted to prevent us from being paid back the value that
16 we create for FPL in terms of the avoided equivalent overhead
17 costs and the avoided storm restoration costs as reflected in
18 the GAF waiver, could that be interpreted to prevent that? And
19 when I first called Ms. Kummer, she said, "Schef, I really
20 don't know. I'm going to have to talk about that with other
21 staff." She did. They -- staff discussed it with FPL, and we
22 came to agreement that, no, it should not be interpreted in
23 that way.

24 But on -- I apologize for the long answer, but the
25 point is that you've got an ambiguous rule, and a declaration

1 to clarify, as we have asked, we think is completely
2 appropriate. Just as a matter of regular declaratory statement
3 law, you're entitled to ask for a declaratory statement as to
4 the interpretation of a rule where you have doubts about the
5 rule. That's what the rule on dec statement says, and that's
6 all we've asked you for.

7 CHAIRMAN CARTER: And in listening to staff, they're
8 saying that it may be nominal, we don't know. It may be
9 nominal or it may, it may be some insignificant amount. But in
10 the process of, of changing the entire rule for one particular
11 case, then you've kind of gone down a road for other entities
12 like this that you may put yourself in a posture where you've
13 actually amended the rule without going through the necessary
14 processes.

15 MR. WRIGHT: Sticking to issue four, again, you know,
16 it might be desirable to amend the rule. But then, you know,
17 that begs back to the question of where does interpretation
18 stop and amendment begin. What we've got is, is a case where
19 we really need to know. It makes a huge difference to us. I
20 mean, in rough terms for Jupiter Island, considering the whole
21 town job, in rough terms the cost of the equivalent overhead
22 facilities that factors into that job is probably a little bit
23 north of \$2 million or it may be more than a little bit, and
24 the GAF credit is another \$2 million. If we're going to spend
25 \$10 million to install the new underground system, it's a big

1 difference whether we get \$4 million back from FPL or not.

2 We thought, you know, again, we thought we were in
3 complete agreement that that's how the process would work. We
4 do have this ambiguous sentence in the rule and that's why we
5 asked for this clarifying declaration. And, again, I think
6 it's not -- like I said, it might be nice to amend the rule but
7 we need to know now.

8 CHAIRMAN CARTER: Okay. Commissioners, I was
9 listening -- I appreciate your answers from both parties.

10 MR. WRIGHT: And I would say, I would say --

11 CHAIRMAN CARTER: Do you have more?

12 MR. WRIGHT: We have -- I just wanted to say we have
13 tried to move this ball forward as rapidly as possible. I do
14 apologize for the short notice to staff, but it's not because
15 of a lack of due diligent effort on this end of the table. We
16 tried. It just unfortunately, it was yesterday before we could
17 get to the language.

18 CHAIRMAN CARTER: Well, maybe we can move it forward.

19 I lost my train of thought on that, about staff
20 saying there are factual disputes and there are -- a situation
21 of even interpretational dispute of the rule itself. So -- and
22 from listening to staff, and correct me if I'm wrong, is that
23 that tends to say it does not lend itself to a declaratory
24 statement, particularly when you say as a matter of law. Did I
25 not hear you correctly on that one?

1 MR. BELLAK: Well, it -- the, the issue differs
2 slightly from one subpart to the next. It seems like the first
3 subpart is a dispute about which costs are avoided. And so
4 that's something that can be resolved as a, as a factual
5 dispute rather than a declaratory statement.

6 The second one, which is about removal of overhead,
7 it seems like they're, they're in agreement about that as a
8 factual matter. Whether that should always be the case in
9 every instance and as to every factual situation is something
10 that should be a rulemaking rather than a declaratory
11 statement. Because it may work out fine with respect to this
12 situation, it may not for a different utility in a different
13 situation. But that would seem to be more of a rulemaking than
14 a declaratory statement.

15 The third one is about materials cost. And that
16 seems as a matter of fact to be one point of agreement in this
17 particular situation but doesn't seem to be requiring a
18 declaratory statement from what was filed. And the fourth
19 matter may or may not be appropriate, but we haven't had time
20 to look at it.

21 CHAIRMAN CARTER: Okay. Commissioner Edgar.

22 COMMISSIONER EDGAR: Thank you, Mr. Chairman.

23 I'm just a touch confused, so I apologize.

24 CHAIRMAN CARTER: Sorry about that. I probably
25 contributed to it.

1 COMMISSIONER EDGAR: No. No. It's not you. It's
2 me.

3 I think I'm clear on one, two and three. On four
4 though we've had some discussion about maybe some alternative
5 language, and I'm just not quite sure what exactly that is. So
6 if I could have that clarified just for my benefit. And I
7 apologize if everybody else is much clearer. But, I mean,
8 there is the issue of has, has staff had the opportunity to
9 review it and give us a recommendation? But, quite frankly, I
10 haven't had the chance to review it, and I'm just not sure what
11 it is. And so I'd like to have that clarified by whomever
12 would be the appropriate person to do that. Thank you.

13 MR. WRIGHT: Mr. Lavia can hand out copies of the
14 language.

15 CHAIRMAN CARTER: Let's do this though,
16 Commissioners. In view of the fact that staff has not had an
17 opportunity to review it and give us a recommendation on their
18 review, I'm not real comfortable -- I mean, I'm not real
19 comfortable at this time, Commissioners. I think that they
20 just got the information, and we want to be fair to everybody,
21 all utilities and all communities that are going to go through
22 this undergrounding process, because we want to be fair, as
23 fair as we can. We all -- ever since I've been here we've been
24 open and above and we want to be fair with everyone. And I
25 think in order for us to make that ruling we're going to need

1 to have all that information. And I'm not real comfortable
2 right now, unless staff has had an opportunity to evaluate that
3 and make some kind of recommendation to us on that.

4 Commissioner Edgar, I, I probably added to the confusion
5 because I was like a ping pong ball trying to follow this thing
6 along. But I'm just -- at this point in time, Commissioners,
7 I'm not comfortable without further, you know, review and
8 analysis from staff.

9 COMMISSIONER EDGAR: Thank you, Mr. Chairman. And I
10 apologize if I got ahead. I just wanted to make sure that if
11 it was something we were going to discuss, that I had it in
12 front of me because that, I need to have it in front of me.
13 But if this is not the appropriate time to move forward on it,
14 that's just fine with me. Thank you.

15 CHAIRMAN CARTER: I think we could do it in fairly
16 short order. I mean, we don't have to drag it out or anything
17 like that. Certainly staff can review it and have it ready for
18 us within, within the next cycle of agenda or something like
19 that certainly. But I just would feel comfortable -- I think
20 we want to be fair to the communities, we want to be fair to
21 FPL, but we also want to be fair to the process because we want
22 other communities to look at opportunities for undergrounding
23 and other kind of storm hardening activities, but we also want
24 to make sure that -- and I appreciate what Mayor Falcone and
25 Commissioner Comerford were saying, is that they don't want to

1 put it on the backs of the general body of ratepayers, and
2 that's correct. So I'd like to have enough information to make
3 a decision that's going to be -- so we can be open and
4 aboveboard. Is that if everybody knows what the rules are,
5 then they know how to play by them. So that's where I'm coming
6 from.

7 Mr. Cooke, can you kind of put us in a posture where
8 we need to be here, give us some kind of recommendation on
9 where we need to go? Because I think that, Commissioners, I
10 think that with this information and staff having an
11 opportunity to review this, we can probably go forward.

12 Commissioner Argenziano, you're recognized.

13 COMMISSIONER ARGENZIANO: If I just can make a
14 suggestion or ask a question. And I mean this with all due
15 respect, it just may come out differently. But with all due
16 respect, since we're all of equal status, I think that the
17 Commissioners would have to agree or want to agree -- I happen
18 to agree with that. I don't have enough information to make a
19 decision on that new language and would like more time. But I
20 think since we're all of equal status, I think it would be good
21 to get it on the record whether all the Commissioners feel the
22 same way.

23 CHAIRMAN CARTER: Good. I thank you, Commissioner.
24 Because, as Commissioner Edgar said, I hadn't seen the language
25 and that's one thing I was assuming -- maybe other

1 Commissioners probably -- let me just kind of see where
2 everyone is, if you want more information or if you've seen the
3 information or whatever, but I have not seen it. And let's
4 start with Commissioner McMurrin, then Commissioner Skop.

5 COMMISSIONER McMURRIAN: I am in agreement with
6 waiting until we get the language in front of us and for staff
7 to have more time to review it and advise us on that too. So I
8 agree with that. Thank you.

9 CHAIRMAN CARTER: Commissioner Skop.

10 COMMISSIONER SKOP: Thank you, Mr. Chair. I'm also
11 in agreement with that. I don't like making decisions on the
12 fly. I like to make well-informed decisions. So thank you.

13 CHAIRMAN CARTER: That's a technical term; right?

14 COMMISSIONER SKOP: Yes, sir.

15 CHAIRMAN CARTER: "Decisions on the fly," that's a
16 very technical term.

17 Let's do this. And, Commissioners, I think that
18 staff, they were nodding when I said they could probably do it
19 in fairly short order, so maybe they can get this together to
20 us as soon as possible. We know about the October -- Mr.
21 Wright, we were listening. We know about the October deadline
22 out there for the GAF and we want to encourage as much
23 creativity as possible, particularly when communities are
24 putting resources on the line to protect the citizenry from
25 losses due to a storm or other kind of natural disasters and

1 those kinds of things. So, Mr. Cooke, can you help us out
2 here?

3 MR. COOKE: Thank you, Commissioner. I think --
4 well, number one, we've dealt with Issues 1 and 2, so those are
5 voted upon. We're dealing with Issue 3, which has four, as I
6 view it, four separate requests for interpretation of our rule
7 to specific facts, and you've heard staff's position on one,
8 two and three. We had yesterday received from Mr. Wright --
9 and I know they were working diligently to try to resolve
10 things, so this is in no way any, you know, criticism of the
11 parties to this. However, staff is uncomfortable at this
12 point, having just received that language, trying to draw a
13 conclusion, particularly in light of the declaratory statement
14 process and the shortcomings that you've heard us discuss
15 today.

16 I view the new language that was submitted yesterday
17 as in essence an amendment of the petition for a request for a
18 declaratory statement, so it's my view that we could take more
19 time on that issue. There is a 90-day clock, in other words,
20 on declaratory statements, but I view that new language as
21 presenting new information that would allow us to take more
22 time on that. We would, I'm sure, make every effort not to
23 take 90 days but to bring this back as soon as we could. I
24 believe staff would want to have discussions with the
25 petitioner, et cetera, to try to understand better this

1 language that's being proposed so we can figure out if, in
2 fact, we can draw a conclusion of law or not.

3 So I believe what staff is recommending is
4 essentially carving out this request four in Issue 3 and
5 deferring it to a future agenda, but acting on requests one,
6 two and three, however you deem, whether you want to accept
7 staff's recommendation or not on those three requests.

8 CHAIRMAN CARTER: Commissioner McMurrin.

9 COMMISSIONER McMURRIAN: Thank you. I have a
10 question and I'm not sure who to direct it to on staff, and I
11 know we've talked a lot about requested statements two and
12 three already. But I guess as -- and I think one is more
13 complicated, so I want to leave it alone for now. But on
14 two and three, it seems to me that even in the rec it reflects
15 a lot of agreement in a sense between the two parties. If they
16 can come to some agreement on those particular issues, do they
17 need us to do anything? I mean, I know that we've got a
18 request for a declaratory statement. But if the town and FPL
19 can work together and work out those particular issues, does
20 the Commission need to be involved at all and say anything with
21 respect to those provisions in the rule or anything else or is
22 this something that can be worked out in like a contractual
23 matter between those two entities? Do we know?

24 MR. COOKE: That's a very difficult question to
25 answer. I think to some extent there are questions about what

1 FP&L would feel comfortable being able to recover in various
2 cost recovery proceedings and whether this somehow would run
3 afoul of those types of questions. But there's just so many
4 unknowns that it's difficult for me to give a precise answer to
5 that.

6 However, if they have a specific agreement with
7 specific facts saying these are the costs, this is how we're
8 going to apply it, it makes the use of a declaratory statement
9 process that much more effective.

10 COMMISSIONER McMURRIAN: Chairman, I guess -- I think
11 Mr. Wright wanted to comment on that, and I'd be fine with
12 listening to them. I just don't know if we're at that stage,
13 so I'll leave that up to you.

14 But I guess it seems to me like it's -- they can get
15 close on some of these issues and that perhaps -- I do agree
16 that there are enough factual issues there that this isn't
17 appropriate for declaratory statement. That's my personal
18 belief. I do agree with the staff rec on all three of those
19 requested statements and putting off requested statement
20 four for more analysis there.

21 But I guess when I read it, it seemed to me that it
22 was something that perhaps could be worked out, some kind of
23 agreement formed and that presented to us for whatever we
24 needed to address in that. If it somehow was perceived as
25 changing our rule, I think that brings on more complicated

1 issues, but I'm not sure that some of these things would. It
2 seems to me if you agree on whether or not the town can remove
3 the overhead facilities and they agree on how much that cost
4 should be, that as long as there's no impact, I guess, on the
5 general body of ratepayers, that perhaps they should be able to
6 agree on who removes that and how that's compensated for
7 between them. But, again, I'm thinking out loud, but I do
8 agree with the staff rec on the first three requested
9 statements.

10 CHAIRMAN CARTER: Commissioners? Commissioner Edgar.

11 COMMISSIONER EDGAR: Thank you, Mr. Chairman.

12 I agree with the comments that Commissioner McMurrian
13 has made. And if there are no further questions, I think I can
14 make a motion that would put us in the posture of the next
15 step. And if you recognize me for a motion, I'll give it an
16 effort.

17 CHAIRMAN CARTER: You're recognized.

18 COMMISSIONER EDGAR: Okay. We have, as Mr. Cooke has
19 pointed out, dealt with Issues 1 and 2. So on Issue 3, I also
20 agree that there are some factual issues that I am just not
21 comfortable that a dec statement at this time is the best way
22 to proceed.

23 I do recognize that with the rule that we have and
24 the time frame and the fact that we put that time frame -- my
25 thinking at the time was, as Ms. Kummer has described, that we

1 had some questions, I had some questions about what the impact
2 on other ratepayers would be and some of the equities of that
3 and, therefore, for lack of a better term, to put it in place
4 kind of as a pilot project to get some additional information,
5 was my thinking at the time. And because of that we want to
6 encourage those communities that are interested in it to
7 proceed so that we can get some of that information. But yet
8 the proposed statements one, two and three, I am not
9 comfortable that a dec statement at this time is the best way
10 to proceed.

11 So my motion would be on statements one, two and
12 three, that we accept the staff recommendation. On proposed
13 statement four, that we defer and ask our staff to bring that
14 back to us at -- with -- in the time frame that they can,
15 recognizing that there are some issues that we need to move
16 forward on. And then that would make the additional Issue 4,
17 close the docket, a, no, do not close the docket obviously and
18 keep it open until it comes back before us.

19 COMMISSIONER SKOP: Second.

20 CHAIRMAN CARTER: I have a motion and a second,
21 Commissioners. I'm not going to even try to restate it, but I
22 think we all understand it. If there's any questions, I'll
23 have Mr. Cooke to explain it. If there -- if there -- and as
24 we, as we vote, I think what Commissioner McMurrian had to say
25 is probably something that maybe FPL and the parties can

1 continue to work expeditiously on this and take care of it.
2 This is cutting edge. This is an exciting new opportunity for
3 us. This is something that we think is a great deal. The
4 communities are putting their resources at risk and they're
5 doing -- and the company is being forward thinking, and, you
6 know, I think they should continue. Because that's kind of
7 what we had envisioned as a pilot project because there was a
8 lot of unknowns there.

9 With that, Commissioners, all in favor, let it be
10 known by the sign of aye.

11 (Unanimous affirmative vote.)

12 All those opposed, like sign. Show it done.

13 And do we need to -- did you put that in the motion
14 about the close docket?

15 COMMISSIONER EDGAR: I did.

16 CHAIRMAN CARTER: She did. Okay. But, staff,
17 please, expeditiously on this issue.

18 Mr. Wright and to FPL, please continue to work
19 expeditiously on this issue. Mayor Falcone, as always, great
20 to see you and I thank you for your forward thinking.
21 Commissioner Comerford, thank you for coming here to see us
22 again and be with us and all. I thank you for innovative
23 thinking, what your communities are doing. I think it's great
24 for the State of Florida. Thank you.

25 Commissioners, we are close to a break for the court

1 reporter. It's time, it's time, it's time for a break for the
2 court reporter. And when we return, we'll be on Issue 14. We
3 are on recess for ten minutes.

4 (Agenda Item 4 concluded.)

5 (Recess taken.)

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1 STATE OF FLORIDA)
2 COUNTY OF LEON)

CERTIFICATE OF REPORTER

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

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

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

DATED THIS 24th day of March, 2008.

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

**Testimony by Dr. Charles A. Falcone
Before the
State of Florida Public Service Commission
In Tallahassee, FL
On March 18, 2008
Docket No. 080035-EU**

Mr. Chairman, Commissioners, Good Morning. I appreciate the opportunity to address you today on the subject of electric power distribution system underground conversion, and particularly an applicant's Contribution in Aid of Construction (CIAC) for such underground conversion. I will avoid repeating the comments already made to you by our counsel, Robert S. Wright, Esq.

Briefly, my background is as follows. I am a retired Senior Vice President from American Electric Power Company, which I believe is the largest electric utility holding company in the United States, serving in 11 states, where I was responsible for the company's transmission policy, system operation, wholesale power marketing, transmission service marketing, and I served as the "relationship manager" for all the company's dealings with over 100 municipal and cooperative utilities. Today I am Mayor of the Town of Jupiter Island.

I will add that I worked in several utility roles, but never as a rates and tariffs analyst. We always had competent staff to do that, and perhaps some of it rubbed off on me, but I suspect not too much.

I ask that this testimony, copies of which are available in written form, be included in the record.

The Town of Jupiter Island has had the explicit goal to replace its aging overhead distribution system with an underground cable system since the year 2000. During the first several years of that period, FPL representatives discouraged us from doing it, both with their speeches and their policies. We were undeterred, and we even carried our story to Tallahassee, spoke to the staff, spoke to all the commissioners then seated, including some of you. But there was no change in policy or attitudes at FPL or, in our perception in Tallahassee, until Wilma in 2005.

The hurricanes of 2004-05 changed things at FPL. It's only fair to give credit where it is due. FPL deserves our praise and thanks, and I know I speak for all of the Towns, for coming forward with its Storm Secure Program, part of which is a revised policy for underground distribution conversion. Wilma and her earlier sister hurricanes demonstrated brutally what happens to flimsy old overhead distribution poles and wires. The cost FPL paid to restore all the damage to its OH system was enormous – more than \$1.3 Billion by FPL's estimate submitted in the GAF Waiver docket. The time it took to

clarification on at least one part of this Declaratory Statement, that is the fourth part, which is briefly, *if the Town does all the work itself, and hands over ownership of the underground system—the finished product—to FPL, that it will get the appropriate credits for an equivalent overhead system and the GAF (and additional O&M cost savings) by way of a check from FPL.* Most of the project cost is labor, and if we do it all, we will have to pay our contractors more than the utility-calculated CIAC, so we would not get the overhead system credit, the GAF, or the other O&M credit unless the utility writes us a check. Why did we petition you for a declaratory statement? Because the policy is unclear, and apparently FPL interpreted it another way. They may be coming to agreement with us. Your staff agreed with us on this point in an earlier letter, and against us in the current memorandum.

On the second and third parts of our Petition, FPL urges that you deny, even though in one of them—*provide the materials at a reasonable cost to the Town*—they are in agreement, and in the other—*allow the Towns to carry out the removal of the old overhead facilities*—they are willing to consider it, but they don't want it to be part of the Rule. We think that these are perfectly reasonable requests for perfectly reasonable interpretations of your Rules, but it's immaterial to us whether they're in the rule, as long as FPL is willing to do it. So we don't have much of a difference with FPL on these two.

The big issue is the first part of our Request, *corporate overheads should not be applied when the Town does the work.*

FPL makes an argument that what the Towns ask for is not what the Rule says. The Staff agrees. I think the Rule is ambiguous, and perhaps it can't be read the way we ask. If so, I believe that the Rule is wrong—or mis-stated-- and sets up the wrong test.

As FPL aptly states, "*The Rule takes as a starting point the cost for the utility to perform the underground conversion work itself, and then reduces that amount by identifiable cost savings resulting from the applicant doing the work. This ensures that the general body of customers is not harmed by applicants performing all or a portion of underground conversion work...*"

But the Rule should take the status quo as a starting point, where no underground conversion takes place, and then measure the additional costs due to the conversion project.

The Rule should assure that *as a result of the project, no additional costs are borne by the general ratepayer. There should be no additional burden, but at the same time, there should be no windfall to the general ratepayer.* This is a very different test, but FPL's proposed interpretation of the present Rule would put some costs on the applicant that would be paid by the general ratepayer even if the project was not undertaken, thus creating a windfall to the general ratepayers or to FPL. Our residents are FPL ratepayers, and the Rule would have them paying twice for these overhead costs.

constructing underground facilities in road rights-of-way, a very important change. They augmented staff to perform design studies and cost estimates.

Is the Florida PSC supportive of underground conversion? You did approve GAF last year, but you have a CIAC policy that is quite ambiguous, and perhaps actually wrong. Your staff recommends that, rather than clarify the ambiguity in the policy, you should simply reject our request for declaratory statements on all four points. We have about 6 months left until the availability of the GAF credit runs out, and the staff doesn't want you to clarify the ambiguous CIAC policy so that towns can figure out what it will cost them to do an underground conversion, and so that the towns can explain to their residents what it will cost and that they should vote YES in a referendum.

Of course, you the Commission haven't yet spoken to this.

Your staff says in their memorandum that we should negotiate these issues with FPL. We certainly have tried, but I have to tell you that negotiating policy with a giant monopoly, when there is no other utility to turn to and no other option, isn't a real negotiation. No, I look to the PSC to set the policy clearly. FPL knows that they could be at financial risk if they interpret an ambiguous policy in our favor, without your OK. They need to get recovery of costs either from us or from the general body of customers. You will ultimately decide whether they can put costs in rate base, so their only safe course is to err on the safe side-- overcharge us. They take a risk the other way. But you can settle the matter by clarifying the policy. If you won't do it, let me be clear--***you will discourage underground conversion.***

Jupiter Island is presently undergoing the construction phase of its underground conversion, which will continue in full swing all of this year and part of the next, and we expect to have it completely finished before the hurricane season next year, 2009. We're so earnest in doing it that we proceed at some degree of economic risk, since the cost is unclear due to the ambiguity of your policy. Other towns are not that far along or that bold, and may or may not exercise conversion depending on cost estimates, and especially on clarification of your CIAC Policy.

Under FPL's direction, our town conversion is divided into 5 phases, each approximately one fifth of the Town's geography, and we are presently in the first phase, Phase A. We decided to do part of the construction work on Phase A ourselves, specifically the excavation and conduit installation. Per formal contractual arrangements with FPL, we are doing this part and FPL, or its contractors, will do the remainder of the work—cable pulling, connections, transformer installation and removal of the old overhead system.

We are very nearly ready to contract for Phase B, and work on the remaining phases is also underway. We would very much like to do all the work on Phase B and the remaining phases with our own contractors. It's because we have found this to be an effective way to carry out the project, and the competitive market for these services is very favorable to us as buyers at this time. However, prior to making the operational decision to do all the work ourselves in Phase B, we would need your and FPL's

restore service following the several hurricanes was incredibly lengthy, and customers lost tremendous value due to FPL's inability to supply electricity because of these prolonged outages. We all know that the "cost" of unserved energy is enormously greater to the customers than the nominal price of electricity otherwise served, on the order of 100 times the retail price, if not more.

We are in the beginning stage of a long period of increased anticipated hurricane frequency, according to the US Weather Service. FPL quickly recognized this and in this regard FPL is way out in front of all utilities in Florida, and most other investor-owned utilities in the USA. After the multiple hurricanes of 2004-05, FPL gave fuller appreciation to the "hardening value"—the storm-defensive value—of underground electric distribution, and reformed its policy for dealing with it. Today they officially encourage underground service, and underground conversion of overhead service.

Prior to the change, underground electric conversions were virtually non-existent. Now we can expect to see a number of Towns in Florida at least try to exercise this option. At Jupiter Island, our whole-town conversion is under way **RIGHT NOW**.

I cannot overstate the significance of FPL's epiphany. I'm glad that most of you are relatively new to electric utility regulation, because you are unlikely to be anchored in the myths of the past with regard to the merits of underground utilities. I spent my whole career in the electric utility industry. I went to many Edison Electric Institute (EEI) meetings, where the industry privately works out policy positions and finds common ground in the various areas of its business, in the industry's own self interest. This is perfectly legal. One area where they found common ground long ago—I was there, and they have not changed-- is the industry policy on underground electric conversion. There are economic reasons for utilities to discourage those conversions, which I would explain if my time today were not limited. Their position is that underground conversions are not cost effective for the customer, nor do they improve reliability, they only produce aesthetic benefits. I have read two dozen reports from many different states, all funded by utilities and performed by consultants hired by utilities, and all say about the same thing.

Well, that's very interesting, but *it isn't true*.

It's utility propaganda at its worst, in their interest but not in the public interest. Like much propaganda, it became conventional wisdom.

It's certainly not true in Florida, or in many other locales where the forces of nature are especially unkind to overhead poles and wires. We at Jupiter Island, and some other towns, understood this, long before the hurricanes of 2004-05. We were vocal and expressed the point forcefully. The press was very interested. The utilities weren't.

The miracle is that FPL's position changed! After Wilma, there was a sea change at FPL. They saw the reality, sorted it out and went public. They proposed the GAF, and fully justified it based on avoided storm restoration costs. They accepted the concept of

As FPL also indicates, "*FPL presently employs four distribution engineers who are working full time on underground conversions. Unless FPL collects the costs for these engineers and their associated support and overhead through CIAC, these costs will fall unfairly upon FPL's general body of customers.*"

Very true! I think FPL's statement helps us to make our point, because these costs are fully identified and can be charged to the applicants directly, through time sheet entries. Also, the cost of these four engineers and their support is but a tiny fraction of the cost that FPL is proposing to allocate to our projects as "DSS Costs"! The total annual cost for these 4 distribution engineers is about one-third the amount that FPL would, with its interpretation, collect *just from Jupiter Island* through its claimed "DSS Costs." The staff's suggestion that these matters should be resolved through negotiation with a giant monopoly is unrealistic. Their suggestion that it requires a complaint proceeding, with discovery, etc is wrong because you can prove this on the back of an envelope, and impractical because the GAF runs out in 6 months and towns and their residents need to know up front what the cost will be.

Commissioners, you are our hope. We believe that by approving GAF for at least a trial period, you were explicitly encouraging towns to undertake underground distribution conversion. Please clarify your CIAC Policy in a way that facilitates these conversions, by assuring that the general body of customers does not bear any costs caused by underground conversions, but that towns that convert are not required to bear costs that FPL's general body of customers would bear in any event.

Thank you for the opportunity to address the Commission.