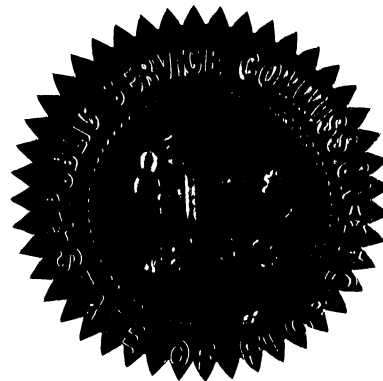


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 080001-EI

In the Matter of

FUEL AND PURCHASED POWER
COST RECOVERY CLAUSE WITH
GENERATING PERFORMANCE INCENTIVE
FACTOR.



VOLUME 5

Pages 638 through 699

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PROCEEDINGS: HEARING

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

DATE: Wednesday, November 5, 2008

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

REPORTED BY: LINDA BOLES, CRR, RPR
Official FPSC Reporter
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APPEARANCES: (As heretofore noted.)

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P R O C E E D I N G S

(Transcript follows in sequence from Volume 4.)

CHAIRMAN CARTER: We are back on the record. And when we left, Mr. Burgess was doing cross-examination, but he yields for Commissioner Skop.

Commissioner Skop, you're recognized, sir.

COMMISSIONER SKOP: Thank you, Mr. Chair. I'll just go ahead and defer until, my question until a later time.

CHAIRMAN CARTER: Okay. Mr. Burgess.

MR. BURGESS: Thank you, Mr. Chairman.

CONTINUED CROSS EXAMINATION

BY MR. BURGESS:

Q Mr. Jones, I'm trying to put into full context what seems to be this disconnect between the, our expectation of information being available and, and what you've relied upon to assure yourself that, that this particular individual was, properly received the unescorted access. And so I'm going to ask you is it fair to say that your assurance to the PSC in your testimony that this individual properly received unescorted access is based on your faith in the system and the process and the individuals who run it?

A Yes. My confidence is based on the system, the process, the corporate security manager that provided me the information, who is David Bonthron (phonetic). He's been with our company for 18 years. He is considered well respected in

1 the industry, so much so that he serves on the NEI task force
2 for access control and fitness for duty.

3 Q And is the reason that you did not feel the need or
4 believe you had the need to examine all the details about this
5 particular individual in his screening process was based on
6 your assurance or your belief that the system would have picked
7 it up if there had been a problem with this individual's
8 application?

9 MR. BUTLER: I'm sorry. I'm going to have to ask for
10 clarification. What do you mean by a problem with the
11 application?

12 MR. BURGESS: I'll withdraw the question and I'll
13 rephrase it this way.

14 BY MR. BURGESS:

15 Q Is, is your belief in the overall system of Florida
16 Power & Light what led you to conclude that you did not need to
17 examine all the details of this particular individual's
18 application to assure you that he was properly granted
19 unescorted access?

20 A My confidence in the NRC report that they had
21 examined our processes and programs and had determined us to be
22 in full compliance, the reports by our own quality assurance
23 organization that also inspects these programs, and the fact
24 that there's no findings, no violations, and, yes, my
25 confidence in David Bonthron and his ability and his

1 certification that the screening was done in accordance with
2 the matrix and that, and that the individual met the screening
3 requirements. Yes.

4 Q And that's what led you to conclude that you did not
5 need yourself to do a detailed examination into the facts of
6 the application of this particular individual after the fact;
7 is that correct?

8 A To be clear, first off, I don't know the name of the
9 individual in this case. All right?

10 Q Did somebody drill a hole in the pressurized piping?

11 A That is correct.

12 Q Pressurizer piping.

13 A That is correct.

14 Q Okay. That individual is who I'm speaking of.

15 A So am I.

16 Q Okay.

17 A So could you rephrase your question?

18 Q Yes. Is it, is, is -- what you just stated in
19 response to your previous answer, that is all the, the reasons,
20 your faith in this co-worker of yours and in the process of
21 Florida Power & Light is what led you to, is that what led you
22 to conclude that you yourself did not need to do an examination
23 of the, all of the circumstances surrounding the application of
24 the individual who drilled the hole in the pressurized piping
25 to assure yourself that he was properly granted unescorted

1 access?

2 A With all due respect, I think I already answered that
3 question. Did I not?

4 Q I'm asking you the question. I wouldn't ask you the
5 question if I thought you'd answered it.

6 MR. BUTLER: Mr. Burgess, I'm sorry. Would -- it
7 seems that the witness is having trouble distinguishing it from
8 prior questions. Can you rephrase, please?

9 MR. BURGESS: Okay. Well, in order to do it I'm
10 going to need to go back to a previous one in order to get the
11 previous answer.

12 BY MR. BURGESS:

13 Q What was the reason that you determined --

14 CHAIRMAN CARTER: Hold, hold it. Can you answer the
15 question?

16 THE WITNESS: The question that I did not --

17 CHAIRMAN CARTER: That he just asked you, can you
18 answer that question?

19 THE WITNESS: Yes, I can answer that.

20 CHAIRMAN CARTER: I'm never in favor, I'm never in
21 favor of going back. I'm not.

22 THE WITNESS: Yes, I can, I can answer that question.

23 CHAIRMAN CARTER: Okay.

24 THE WITNESS: Or at least I think I'm answering the
25 question. If I don't, then we'll try it again.

1 The reason that I did not examine all the source
2 documents for the original testimony is that I relied on the
3 subject matter expert that's in charge of that area to provide
4 the correct and valid information in regards to this case.

5 BY MR. BURGESS:

6 Q Okay. So can I justifiably say that your reliance on
7 that is what led you to conclude that you yourself did not need
8 to examine all of the specific details about this individual's
9 application to assure yourself that he was properly granted
10 unescorted access?

11 A My confidence comes from, first, the corporate
12 security access control manager, his competency, his integrity,
13 as well as the NRC inspection, as well as our own internal
14 quality assurance audits that the information that I receive is
15 valid.

16 Q Okay.

17 A That is correct.

18 Q And my question is and am I correct that that's what
19 led you to believe, to conclude that you did not yourself need
20 to examine the detailed information surrounding the application
21 of this individual?

22 MR. BUTLER: And I'll object that this is asked and
23 answered. I think that Mr. --

24 CHAIRMAN CARTER: I think he laid a foundation. I
25 think he laid the foundation for that. I think he went so far

1 but I don't think he completely answered the question.

2 MR. BUTLER: Thank you.

3 CHAIRMAN CARTER: Do you need him to rephrase it?

4 THE WITNESS: Well, the other -- well, no. No.

5 CHAIRMAN CARTER: Because he --

6 THE WITNESS: I think the other, the other factor
7 that plays in there is that, again, I'm very sensitive to, to
8 not looking at confidential information unless I absolutely
9 have a need to know that. So, therefore, I've never examined
10 anyone's personal history questionnaire, their FBI criminal
11 background check, their, what their answers were to the
12 600 questions, what the report was on the character
13 verification, the reference checks or the credit check for
14 anyone who's been granted access or denied access or in the,
15 in, when we've had someone with abhorrent behavior, we've
16 suspended their access. Is, what I want to know is at my level
17 in the organization did we follow the program, did we follow
18 the process, how do we know, how was it validated?

19 CHAIRMAN CARTER: But I think Mr. Burgess's --

20 THE WITNESS: And I rely on the senior manager's --

21 CHAIRMAN CARTER: Hang on a second. I think his
22 answer -- his question was based upon that, whatever processes
23 that you went through, did you find that to be a basis for
24 justifying the access to the area? Am I correct, Mr. Burgess,
25 is that where you're going?

1 MR. BURGESS: Yes. What I'm trying to get more, most
2 specifically is if this, this, his need to know basis and his
3 belief in the company system are what led Mr. Jones to conclude
4 that he himself did not need to look at this specific type of
5 information to assure himself that this person was properly
6 granted unescorted access. You know, I'm trying to, I'm trying
7 to -- it seems like a fairly straightforward concept, and I'm
8 trying to understand what led him to determine the need, that
9 he didn't need to look into this information that we've been
10 concerned about, that a number of Commissioners have asked
11 questions about, and I'm basically saying have we heard all the
12 reasons that he determined he did not have a need to do that
13 and to assure himself that access was properly granted?

14 CHAIRMAN CARTER: Okay. Mr. Jones --

15 THE WITNESS: Yes, you have.

16 CHAIRMAN CARTER: -- do you understand the question?

17 THE WITNESS: Yes.

18 CHAIRMAN CARTER: Okay.

19 THE WITNESS: Yes, Mr. Chairman. And yes.

20 MR. BURGESS: Thank you.

21 CHAIRMAN CARTER: Thank you.

22 BY MR. BURGESS:

23 Q And then would I be correct that if a Commissioner
24 determined that in order to assure the public that access,
25 unescorted access was properly granted, if a Commissioner

1 determined that in order to make that assurance to the public
2 they did need to see and understand all of these details, that
3 that has not been brought forward to them?

4 A You're asking me to give an opinion?

5 Q I'm asking you if that's -- yes. I'm asking you do
6 you agree that that has not been brought forward to a
7 Commissioner if a Commissioner believes that they need to look
8 at that?

9 A I agree that the personal history questionnaire, the
10 criminal offense adjudication table, psychological screening,
11 FBI criminal history, drug and alcohol screening, the FPL
12 supervisor need for access, that those confidential documents
13 have not been presented here.

14 MR. BURGESS: Thank you very much, Mr. Jones. That's
15 all we have.

16 CHAIRMAN CARTER: Thank you. Commissioner Skop.

17 COMMISSIONER SKOP: Thank you, Mr. Chairman.

18 Just, just one question with respect to the matrix.
19 A lot of discussion has been around the fact that the
20 requirements of the matrix were met; therefore, the hire was
21 appropriate and acceptable and procedures were followed.

22 I guess at some point is there inherent flexibility
23 within the hiring process? Because at the end of the day a
24 matrix approved by the NRC should not be dispositive as to
25 whether somebody was appropriately hired or not. That comes

1 into discretion where ultimately FPL has the ability to hire
2 contractors and review and screen their respective employees.
3 But is at any point, going to Mr. Burgess's question, does FPL
4 go beyond the matrix in terms of reviewing hiring decisions?

5 Because certainly here -- I think in retrospect I'm
6 not so sure that had additional attention been paid to this
7 particular person, wherever that kind of fell within or out of
8 the matrix, but I think what Mr. Burgess was getting to is
9 certainly some due diligence outside of the matrix might have
10 been appropriate.

11 And the way I'm rationalizing this is, you know, when
12 I worked in, for General Dynamics, worked with a nuclear test
13 engineer, and, you know, nuclear trained personnel by
14 discipline are very document driven, they follow the matrix,
15 they follow the procedure manuals to the T, cross them off each
16 time you put a checkmark by it, but, and that's for good
17 reason, for nuclear safety. But at the end of the day I wonder
18 if there's any discretion that should have come into play here
19 over and above the matrix. Because, you know, certainly you
20 could see some, some red flags that would have gone up for
21 whoever had the responsibility. And it may not have been you,
22 it may have been subordinates further down the management
23 chain, but somebody at the end of the day had to review the
24 background investigation results. And it seems to me that if
25 they just, you know, adhere to the matrix without putting any

1 independent thought into it, I mean, something like this could
2 theoretically happen again.

3 THE WITNESS: Yes, Commissioner, you are, you are
4 correct. We obviously do have discretion. And as I mentioned
5 before, we did find in a number of cases that our criteria is
6 more conservative than others.

7 Given this particular workforce, contracted
8 workforce, again -- and I'll mention that we bring in
9 approximately 1,000 people over the course of a refueling
10 outage. We do, we do encounter people with criminal
11 backgrounds.

12 COMMISSIONER SKOP: Let me, let me -- excuse me. Let
13 me interrupt you right there.

14 With respect to the, the generalization about how
15 many people are bringing in, brought in for an outage, you
16 know, I respect and appreciate that. But, again, we're dealing
17 with the issue of nuclear safety also. And to that extent, you
18 know, perhaps they, if they need to bring people in, they can
19 be precleared instead of trying to do it on an expedited basis.
20 But go ahead and continue.

21 THE WITNESS: Yeah. We, outage or not, we follow the
22 same process. So I just, with all due respect, I just take
23 issue with the word "expedited." I would say that when you're
24 getting ready for an outage, we bring in additional personnel
25 to, to process the information so that we can perform the

1 background checks and complete them. So if that's what you
2 meant by expedited, I do agree with that.

3 And I think as far as, as whether or not discretion
4 should have been applied here, again, you're talking about an
5 offense that was 16 years ago and absolutely no history from
6 that time up until the time that he applied for application to
7 us. And so I think you're speaking with the benefit of
8 hindsight. And I'm kind of treading on thin ice because now
9 I'm starting to get more into the actual criteria that's used
10 to determine whether someone is kicked out of the system or
11 not.

12 COMMISSIONER SKOP: Well, and to that point, and, I
13 mean, in the, at least from the perspective if I were going
14 through when I started my employment with General Dynamics and
15 I applied for, you know, the application for security clearance
16 or unescorted access, with that background I don't think I
17 would have been granted a security clearance or it would have
18 taken at least a year or more to get the type of clearance that
19 I had and you probably had when you were serving in the Navy
20 nuclear force. But I don't know how it works in the commercial
21 world, but, you know, to me there should have been some things
22 that no matter what type of offenses, no matter how long ago
23 should have raised, you know, should have flagged it for maybe
24 further eyes-on review as opposed to just --

25 THE WITNESS: Yes, Commissioner, there are certain

1 offenses. And based on the timeliness of those offenses, the
2 repetitive nature or a certain pattern of offenses or a
3 certain, certain type of offenses, that absolutely would, would
4 raise a flag. And, again, the NRC has mandated what the
5 criteria is and has set the standard for what's permissible to
6 allow access to a nuclear facility. And we've been through two
7 inspections and found to be in full compliance, more
8 conservative than requirement, and they consider our process a
9 model for others to replicate.

10 COMMISSIONER SKOP: But at the end of the day
11 certainly again over and beyond what the NRC requires,
12 certainly you have additional managerial discretion whether or
13 not to permit that contractor, I mean, whether or not to permit
14 that contractor to bring any given employee into a controlled
15 access nuclear containment, you know, building or what have
16 you.

17 But I guess what I'm struggling with is I hear a lot
18 of reference to the NRC. But at least from, you know, in the
19 civil context in a legal perspective, I guess, you know, if I
20 hire an employee and that employee went and did something
21 stupid, I might be held accountable civilly for negligent
22 hiring. But in this case what I see is -- and maybe
23 rightfully, again I'm not taking any position one way or
24 another, I'm just trying to seek to ask pointed questions to
25 gain a complete and thorough understanding of, of the situation

1 so I can make a well-informed decision on the merits. But it
2 seems to me that there's a lot of reference to the NRC, the
3 requirements and the matrix without any discussion or vetting
4 of what managerial discretion over and above the NRC
5 requirements was applied when you get in these types of
6 situations.

7 Because I've got to tell you, I don't think this, I
8 don't think I would be as desperate as to hire this person
9 noting -- you know, I'm not hiring him to do him -- I'm not
10 hiring that person for him to work sheet metal installing
11 gutters on my house. I'm hiring him to work in a, you know, on
12 a, on nuclear components inside a contained, in a very
13 controlled access environment. And I'm just --

14 THE WITNESS: Yes, Commissioner, I understand. And
15 nuclear technology is different, it is, it is unique, and
16 nuclear safety has, has got to be number one. And we take our
17 job extremely seriously, and our integrity and our reliability
18 and our trustworthiness is what ensures the safety of the
19 public. So we're just, just absolutely as frustrated, angry
20 that this individual would do that.

21 The management, we built in management discretion
22 into our matrix for, for screening. And, and, yes, we do have
23 the ability to go above and beyond that just the same as
24 someone has the ability to appeal an access denial.

25 But, again, I've got to say that, that without the

1 benefit of hindsight -- and the facts are that there are people
2 that have had transgressions in their past and we go to great
3 trouble to verify that that's been put behind them, and those
4 people are working at power plants, nuclear power plants all
5 over this nation. This is not a unique situation at all.
6 There is a low percentage that, out there that, how do I say
7 this, that has not ever been in trouble.

8 COMMISSIONER SKOP: And, you know, I appreciate that
9 because, I mean, some people have obviously -- I think as
10 Commissioner Argenziano raised the issue that, you know, they
11 commit indiscretions in their youth and, you know, there should
12 be the redemption factor accordingly. But, again, I guess in
13 lessons learned, noting what's happened, what would, what would
14 you or what is your organization doing differently as opposed
15 to what it may have done in the past, if anything?

16 THE WITNESS: What we did is we revisited that
17 matrix, we looked at that. As I mentioned, David Bonthron is
18 on the national task force, the NEI task force for access
19 control and fitness for duty. And when we compared our
20 adjudication table to others, we found ourselves to be more
21 conservative than a number of other utilities. And that's how
22 I got involved because actually I was the Vice President of
23 Plant Support, so at that time nuclear security fell under my
24 responsibility. And so, therefore, I had a need to know to
25 actually examine that matrix, and, and we saw no changes that

1 we needed to make. We saw no changes that we could make to
2 that matrix other than excluding anyone and everybody that had
3 ever had a transgression in the past to prevent that event.

4 COMMISSIONER SKOP: What about hiring better quality
5 employees that maybe don't have those transgressions so you
6 save yourself the trouble and the additional ratepayer expense
7 of having to remediate or screen in-depth people that, that
8 have transgressions or historical transgressions, whether they
9 be acquitted or convicted or what have you? But it seems to me
10 it would be more straightforward to try and find, you know,
11 those that don't have an arrest record or, you know, certain
12 things.

13 Again, if I were applying for a security clearance
14 with the background that I see of the person of interest, I
15 think my security clearance would be tied up in excess of a
16 year.

17 THE WITNESS: Again, the people that we hire and we
18 bring in are topnotch people, high integrity, high
19 trustworthiness, and those people that have had a transgression
20 in the past that have changed their way and they've
21 demonstrated that over a period of time and they've
22 demonstrated that with a good employment history with other
23 employers, other nuclear power plants, yes, we do employ those,
24 those people.

25 COMMISSIONER SKOP: Did this person --

1 CHAIRMAN CARTER: Would you yield, Commissioner?

2 Would you yield for a moment, Commissioner?

3 COMMISSIONER SKOP: Can we just -- two -- can I have
4 two more quick ones?

5 CHAIRMAN CARTER: Yeah. I think Commissioner
6 Argenziano has something to this point. I wouldn't want to --

7 COMMISSIONER SKOP: Okay.

8 COMMISSIONER ARGENZIANO: If he wants to finish.

9 COMMISSIONER SKOP: Yeah, just briefly finish.

10 CHAIRMAN CARTER: Okay. You may.

11 COMMISSIONER SKOP: The, the person of interest in
12 this case, did he have prior nuclear experience prior to
13 applying with you guys, with FPL? Because you just, you just
14 mentioned that you looked at people that have prior nuclear
15 experience.

16 THE WITNESS: I think that within the -- I'm not
17 sure. I think that within the FOIA report, that in the notes
18 he makes reference to this being the first time that he went to
19 work at a nuclear power plant. I think that's in those notes.

20 COMMISSIONER SKOP: Okay. And then one final quick
21 question and I'll yield to Commissioner Argenziano. To that
22 point then, wouldn't it be more prudent, more wise from a
23 management perspective, more prudent -- certainly FPL does a
24 great job in risk management. But if I had somebody with a
25 past, why would I -- you know, there's other things that they

1 could be doing during an outage that don't involve direct
2 access to restricted areas, unescorted access. Why couldn't
3 they have put somebody with that background to work elsewhere
4 rather than giving them unfettered, unrestricted access to
5 critical nuclear generating components?

6 THE WITNESS: Because that person obviously cleared
7 all the same screening that I did.

8 COMMISSIONER SKOP: Well, I would have a lot more
9 trust and faith and sleep well at night having you working on
10 it rather than that person, but -- in retrospect.

11 THE WITNESS: So, so would I at this point.

12 COMMISSIONER SKOP: Thank you.

13 CHAIRMAN CARTER: Commissioner Argenziano.

14 COMMISSIONER ARGENZIANO: You know, this is, it is
15 tough. Okay? But with all due respect, it probably isn't too
16 fair to say that anybody with a trans, you know, transgression
17 in the past is not worthy of working somewhere or is not a good
18 employee. I don't think that's what Commissioner Skop really
19 meant. Because it's hard to find even a presidential candidate
20 today who doesn't have some kind of transgression in their
21 past, as we've all heard in so many different accusations out
22 there.

23 The truth of the matter before us, what I see before
24 me is dismissed, dismissed and dismissed, and that makes a big
25 difference in the legal world. We live in a country where

1 you're guilty unless you're proven guilty. But to that point,
2 dismissed doesn't necessarily mean that you're not guilty.
3 There's many reasons that cases are dismissed. And to that
4 point is where I would want to know that because we're dealing
5 with not a Play-Doh factory, a nuclear power plant, that there
6 would be a little bit more discretion, as you indicated before
7 that you have, as to find out why those charges were dismissed.
8 Because we're not talking about a 17 or an 18 year old. We're
9 talking about the time of these so-called accusations or
10 charges but no convictions or not considered guilty, I guess,
11 the man in question was 33 years old. So to me that may be an
12 indicator that that would send a bigger red flag out. Okay.

13 And I'm wondering if I had to say if there's
14 something I would do differently today would be in looking at
15 those factors -- and I'm going, I'm going to step back again
16 because I believe we should find out what the NRC thinks about
17 something like that. Because if they're giving guidelines to
18 the companies, they should have looked at homeland security,
19 all of these issues we're dealing with in a nuclear power
20 plant. And I think that if the NRC is not sending down to the
21 utilities that these are key indicators, these are things you
22 should be looking at, that may be their mistake and they may
23 have to do that.

24 But, and the point that I'm trying to get at, since
25 you have discretion to go above and beyond what the guidelines

1 may be from the feds or the NRC or your own, is that you had an
2 indication, you had something here where there was a red flag.
3 The man was 33 years old at the time of these, I guess, I don't
4 know what you would call them since he wasn't guilty, charges,
5 and they are possible that he was guilty of every one of them,
6 I don't know that, but maybe that should have been a bigger red
7 flag to the company to look back to make sure that just because
8 he passed the psych test and the two, two psychologists,
9 psychiatrists, whoever they are, that maybe a little bit, a
10 little bit of more diligence upon the company's part to say,
11 hey, this may be a key indicator, this wasn't a kid when he got
12 in trouble, there may be a pattern here and maybe we need to
13 look deeper. And I heard you say before that you have the
14 discretion to go a little farther. Is that beyond the
15 company's control or ability to look or say that, you know, in
16 a case like this, this wasn't a person who, who now is an
17 outstanding employee or an outstanding individual and did
18 something when he was 18 or 19 or 20? Can you do that?

19 Can you, can you go back and look at, can anybody,
20 maybe staff can help me here or counsel can help me, can you go
21 back and look at why a case was dismissed and form some kind of
22 judgment from that? And perhaps that's where I'm getting at.
23 Maybe that's what should have been looked at.

24 MR. YOUNG: Commissioner, Keino Young. You can.
25 Usually when a case is dismissed, they put it in the notes

1 based, based on court records. For example, if a DUI is
2 dismissed, dismissed, they'll put dismissed, lack of evidence,
3 stuff like that.

4 COMMISSIONER ARGENZIANO: Uh-huh. Well, then again,
5 okay, if you can do that -- and then it goes back to the points
6 made before that, you know, obviously certain offenses have a
7 higher priority. You know, a DUI may not be a, it may be a
8 real bad, stupid, poor judgment on the individual's part, but
9 it may not be something such as high priority as vandalism
10 maybe or repeated criminal mischief charges or something like
11 that. So I would hope that in at least looking forward now
12 that the company would think about those key indicators. It
13 doesn't help us right now.

14 But in your response to Commissioner Skop you had
15 indicated that there wasn't much different, I don't think, that
16 was happening now besides following the guidelines. And the
17 guidelines seem to be pretty weak. And I don't know if, staff,
18 if we could even address that or have a question from this
19 Commissioner anyway to the NRC saying here's a particular case.

20 I mean, if utilities -- and I can't just fault the
21 utilities because if you've got guidelines from the NRC for a
22 nuclear power plant, you would hope that those guidelines maybe
23 can't encompass everything but would, would certainly have a
24 more stringent review of who can be allowed unaccompanied in a
25 nuclear power containment building.

1 MS. BENNETT: Even as you speak one of our attorneys
2 is reviewing the NRC guidelines for fitness for duty.

3 COMMISSIONER ARGENZIANO: Okay.

4 MS. BENNETT: So hopefully we'll be able to give you
5 an answer. It's a pretty thick document.

6 COMMISSIONER ARGENZIANO: Great. Thank you.

7 CHAIRMAN CARTER: Commissioner Skop.

8 COMMISSIONER SKOP: Thank you, Mr. Chairman. And
9 thank you, Commissioner Argenziano, for kind of clarifying what
10 I meant to say. Sometimes I'm a little bit wordy. But, again,
11 I was hinting at that managerial discretion. Because at the
12 end of the day it's FPL's own facility, they make the call who
13 gets in, who doesn't get in. And if they see something they
14 don't like, then they certainly have the discretion to tell Joe
15 contractor go hire someone else because we're not letting him
16 in there. But they also have equal discretion to grant or deny
17 access to critical areas. For instance, that person, if there
18 was a shutdown, and I don't know whether it was confined to the
19 containment building or not, maybe there is, you know, work to
20 be done, sheet metal work on the turbine deck or other
21 maintenance work that could have been performed. Again, I'm
22 not going to micromanage their contracting philosophies. But,
23 again, what's happened here deeply concerns me.

24 And I do have one question, and, again, this is
25 hypothetical, not to blow things out of proportion. But I

1 think in response to a previous question you indicated that
2 the, the hole that was drilled, and I saw it was about an
3 eighth-inch diameter, was caught during cold testing. And if
4 that hole that was drilled had not been a full penetration hole
5 and just been a partial hole but had weakened the piping
6 significantly, can you offer an opinion what might have
7 happened at full power in terms of where that hole was drilled?

8 THE WITNESS: In terms of where that hole was
9 drilled, depending on the -- if it would have been a partially
10 drilled hole, then there would not have been a leak to discover
11 a partially drilled hole.

12 COMMISSIONER SKOP: So what I'm saying is that --

13 THE WITNESS: So, so depending on the depth of the
14 hole, it may have revealed itself at higher pressure. And so
15 as a part of our startup sequence we go to full operating
16 temperature and pressure with the reactor shut down and, and do
17 what we call an overpressure test of the reactor coolant system
18 to test welds and mechanical joints that we've disassembled.

19 Had it not -- had that not caused the, you know, the
20 now thinner metal to fail, then if it did at the higher, at the
21 overpressure, and I don't mean like way overpressure, allowed
22 within the standards, it could have manifested itself there.
23 And but if it was at the perfect depth that the overpressure
24 would not have caused it to breach and show up as a leak and
25 then at some time later due to fatigue it would have manifested

1 itself, it would have been isolatable by a motor operated block
2 valve.

3 COMMISSIONER SKOP: Okay. So there would, it still
4 would have been significant resulting in a shutdown to do the
5 necessary repairs, but --

6 THE WITNESS: Yes.

7 COMMISSIONER SKOP: -- it could have been readily
8 isolated.

9 THE WITNESS: Yes, Commissioner.

10 COMMISSIONER SKOP: Thank you.

11 COMMISSIONER ARGENZIANO: Mr. Chair.

12 CHAIRMAN CARTER: Commissioner Argenziano.

13 COMMISSIONER ARGENZIANO: I feel the need, since I've
14 used the term "Play-Doh" many times, I think Play-Doh makes a
15 very good product. Nothing derogatory about Play-Doh.

16 (Laughter.)

17 CHAIRMAN CARTER: Yeah, they do. Some of my kids in
18 Sunday school like to eat it. So don't eat that. I've got to
19 make sure I check the package and see if, make sure it's made
20 in the USA.

21 Commissioners, we can always come back to the bench,
22 but I want to proceed and allow the parties to continue with
23 their cross-examination.

24 Mr. Wright, you're recognized.

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

CROSS EXAMINATION

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BY MR. WRIGHT:

Q Good afternoon, Mr. Jones.

A Good afternoon.

Q My name is Schef Wright and I represent the Florida Retail Federation in this proceeding. I have just a few questions for you.

I just want to clarify something about your knowledge about the information in the FOIA report first. Earlier I believe you told Mr. Burgess that you received a copy of the report last Friday. Is that accurate?

A It was around last Thursday or Friday. I had it transmitted. I was in Wisconsin at the time.

Q My question for you is did anyone at FPL or anyone else tell you about the report or its content before last Thursday or Friday?

A I knew that we had, had submitted the FOI request, but I was not aware of this until I was getting prepped for this, this hearing. And then -- and so that's when I became aware of the report. And it wasn't until I was reviewing it in detail that I saw the, the log or the telephone that listed specifics around the criminal events.

Q On its face it appears that FPL received the document, Exhibit 54 now, on or about September 26th. I'm just trying to understand your personal knowledge. Did you have any

1 knowledge of the content of the report before last Thursday or
2 Friday?

3 MR. BUTLER: Excuse me. I'm going to object to the
4 form of the question. Lacking foundation. The document just
5 indicates that it was sent on September 26th, not when it was
6 received by FPL.

7 CHAIRMAN CARTER: Mr. Wright, you can rephrase.

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

9 BY MR. WRIGHT:

10 Q Mr. Jones, I believe that in your earlier testimony
11 you indicated that FPL received the document that's now been
12 identified as Exhibit 54 on or about September 26th; is that
13 accurate?

14 A I was basing it on the date on the letterhead. So
15 whether that was in a day or two, I couldn't tell you.

16 Q Okay. Well, I think he can still answer my question.
17 Did you become aware of any of the content of Exhibit 54 before
18 last Thursday?

19 A I had not seen any of the content or been aware of
20 the content until I received the hard copy.

21 Q Nobody told you about it or anything like that in the
22 meantime?

23 A You mean --

24 Q Before last Thursday.

25 A To the best of my recollection, no.

1 Q Okay. So you first saw -- is it accurate to say that
2 you first learned about the content and saw the report as you
3 were being prepared for this testimony this week sometime late
4 last week?

5 A That is correct.

6 Q Thank you.

7 A I had some, I had some contact, you know, about, you
8 know, witness preparation and the documents that were going to
9 be sent to me. That's why I hesitated. I can't nail it down
10 because what I've been doing for the last month is a refueling
11 outage in Wisconsin and so I've been at Wisconsin quite a bit.
12 So there's some phone calls about setting up appointments for
13 witness preparation and transmitting documents for that. And
14 so that's when I became aware last week, and then I received a
15 hard copy and that's the first I'd seen the specifics on the
16 criminal offenses.

17 Q In your summary you mentioned a report prepared by
18 FPL corporate security. That's accurate, yes?

19 A Yes.

20 Q Is it also accurate that that report concluded that a
21 single individual drilled a hole in the pipe we're talking
22 about?

23 A If I could just take a moment to refer to the report.
24 That's Exhibit 1, is it not?

25 Q That's my understanding.

1 A Yes. It does in fact say the investigation
2 determined, and the name is redacted, acted alone and was
3 working inside Unit 3 when the incident occurred.

4 Q Okay. Thank you. And you did just indicate the name
5 was redacted. So is it fair to say that the corporate security
6 report actually reflected on the appropriate confidential basis
7 the identity of the individual? That was known; correct?

8 A Yes.

9 Q Okay. When did you become aware of the corporate
10 security report?

11 A I don't recall the exact date that I became aware of
12 this. I do not recall the exact date that I became aware of
13 this corporate security report.

14 Q Were you aware of it before you filed your testimony
15 in this proceeding last April?

16 A The date of the report is June 5th, 2007. It was a
17 part of that submittal, was it not?

18 Q Which submittal are you speaking of?

19 A The April 3rd, 2008, testimony.

20 Q Well, it may be, but the copy of the testimony that I
21 have does not have an exhibit attached to it. And my question
22 was did you know about that report before you submitted your
23 testimony on April 3rd?

24 A I do not recall.

25 Q Okay. This is a clarifying question that I intend to

1 confirm something that I believe Mr. Butler told us before the
2 lunch break. But since he's not a witness and you are, I want
3 to see if we can confirm by testimony that it is true.

4 I believe that I heard Mr. Butler say that, that
5 under normal practices there is no investigation into the back,
6 FPL conducts no back, no investigation into the background or
7 details of specific criminal charges or their dispositions. Is
8 that accurate?

9 MR. BUTLER: I would have to add -- excuse me. My
10 comment was beyond what was provided in the FBI's own
11 fingerprint investigation report.

12 BY MR. WRIGHT:

13 Q And it is in that light I intended my question. If
14 you need me to state it again in full, I will.

15 A Please do.

16 Q Is it correct that FPL does not conduct any
17 investigation into the background specific charges or
18 disposition of specific charges beyond what would be reflected
19 in the background report?

20 A I don't know that that's true 100 percent of the
21 time.

22 Q Would you have an idea whether it's true 90 plus
23 percent of the time?

24 A No. I would have to go back and ask some specific
25 questions in corporate access control to validate. And the

1 reason that there's a question mark in my mind, if there was a
2 recent offense or -- you know, when you say never, that's -- I
3 do know that, that for people with current access, if there is
4 a personnel problem, we do get the detailed arrest reports and
5 all the facts surrounding the case.

6 Q In this instance there were no, it's my understanding
7 there were no charges brought against the individual. Is that
8 your understanding also?

9 A That is my understanding.

10 Q So does it follow from that that the individual would
11 not have to disclose any of this, these recent events on an
12 application?

13 A I can't speak to the application requirements for
14 other entities. There is no, there is no arrest to report, if
15 that's the question.

16 Q Well, the question is if -- we know that -- let me
17 put it in this context. We know that you will not hire this
18 person again because there is a record of his fingerprints.
19 But if there were another person with the same background
20 record, same events relating to, that occurred, drilled a hole
21 in a pipe, but no arrest, no criminal charges, no civil
22 charges, there would not be anything for that individual to
23 report on a new application, would there?

24 A If a person meets the screening requirements of the
25 adjudication table, then they will have passed that portion of

1 the screening. That is correct. You're using absolutes, so
2 you're putting me in a difficult spot.

3 Q Well, given that an individual would not have to
4 report any of this, there's no reason to think -- I'll say it
5 in a better way. Is there any reason to believe that this
6 other person with the same exact factual background would come
7 up any different in your evaluation than the person of interest
8 in this instance?

9 A A person with no criminal history would, would not be
10 flagged for our adjudication table. That is correct. If they
11 had some other history that came about due to the character
12 verification, credit check or the psychological profile, then
13 there may be further evaluation.

14 Q With your leave, Mr. Chairman.

15 Mr. Jones, I was not asking you about a person with
16 no criminal history. I was asking you about a person with the
17 exact same criminal history of charges, one guilty plea, and
18 with a known event that we know here of these events that would
19 never show up on an application, isn't it true that a person
20 with the same background should be expected to grade out the
21 same way in FPL's evaluation system?

22 A Yes, that is correct.

23 MR. WRIGHT: Okay. Thank you. That's all I have.

24 CHAIRMAN CARTER: Commissioner Skop.

25 COMMISSIONER SKOP: Thank you, Mr. Chairman.

1 A I'm sorry. Could you re -- I missed the first part
2 of the question.

3 Q I called him a secret perp. Whatever you want to
4 call him, this unidentified individual.

5 A Yes, he was an employee of a contractor.

6 Q How did you select this contractor? I mean, do you
7 bid it, do you call somebody you've used in the past, do you
8 look up sheet metal workers in the yellow pages? How do you
9 select this contractor?

10 A The way we select the contractor is we put together a
11 bid spec to select contractors, and the line side of the
12 management does a technical review to certify that the
13 contractor that is bidding on the work and certifying that they
14 can meet the technical specifications of the contract, that
15 they are technically qualified. Our integrated supply chain
16 handles the commercial terms to, from a low-cost provider to
17 ensure that, that they are the low-cost provider for the
18 quality of services that we want. In this case this particular
19 contractor works at nuclear power plants all over the country
20 and has worked for us for years.

21 Q Did you essentially ask them for a specific number of
22 workers and they send you that number or you tell them how many
23 you're going to need and they send you enough that if somebody
24 flunks screening, that you'll have enough, or how does that
25 work?

1 A The way that works is, yes, we specify how many pipe
2 fitters, welders, sheet metal workers, boilermakers, operating
3 engineers that we need and the contractor supplies those
4 personnel. We perform the, we perform the screening.

5 Q Does the contractor do any type of screening or is
6 there anything that they have to do before they send somebody
7 to you other than the technical?

8 A I don't know the answer to that question.

9 Q Who would know the answer to that?

10 A Our contract administrator for any given contractor.
11 The contractor -- we specify in the contract what the, what
12 requirements the workforce that they're going to bring has to
13 meet. But whether or not they actually go to any great lengths
14 to do that ahead of time, I don't know.

15 But I can, I can tell you that our process and
16 contractually is that when we bring in, when the contractor
17 supplies us workforce and we're going, and we're putting them
18 through the pre-access screening requirement and what we call
19 site-specific training to orientate them to the site and what
20 our rules and regulations and safety are, if they don't
21 complete the screening, they don't get paid. So there's a high
22 incentive for the, for the individual and the contractor to
23 supply us with people that they know will get through the
24 screening. And there are some obviously that, that do not, are
25 not successful at getting through the screening and are sent

1 away.

2 Q Do they send you extra people or do they send you the
3 exact number, and then if some don't pass screening, they have
4 to send you more until they get you the right number?

5 A It depends on the actual craft discipline. Some of
6 the craft discipline are shorthanded and the contractor is not
7 able to supply our required need. In other cases they have no
8 difficulty at all at meeting the quota.

9 And, again, the balance that we try and strike is
10 given what it takes to, the arduous process that you have to go
11 through to gain access is that when we shut down the unit and
12 open that breaker, we need to be able to start the work. And
13 so our -- but the more people we bring in, the more expensive
14 it's going to be. So we try and bring in the number we need
15 and maybe a little more, because we know there's going to be
16 some that aren't going to make it through, to ensure that when
17 we're ready to start work we have the qualified workforce to
18 start work.

19 Q If some of these people don't pass screening, do you
20 just work with the reduced number or do you make them send you
21 more people?

22 A We ask them for more people. In some cases if
23 they're not able to get more people, we might go to a
24 supplemental contractor or we might move work from our in-house
25 folks, one specialty to another specialty, and have our

1 in-house folks pick up that, that work.

2 Q Did your contract with this contractor provide any
3 type of indemnification agreement or some type of agreement
4 that if there were, their employees committed some act of
5 negligence or something, that they would cover the cost of
6 that?

7 A Our contract has, has incentives and penalties for,
8 sorry, for performance around industrial safety, around human
9 performance, security as in don't lose your badge or commit a
10 security infraction like, I'm going to use the term tailgating,
11 where you didn't use the card reader right. So there are --
12 and, but as far as quality of work, our contracts are, are
13 centered around the quality of work, that you deliver the goods
14 and services on time to the specifications free of defect or
15 material workmanship and for a warranty period. And their
16 limits of liability are typically limited to the quality, the
17 time, labor and material around the quality of the work.

18 Q Since this incident caused a five-day extension of
19 the outage, did you take any type of action against the
20 contractor to recover your damages and associated losses?

21 A We don't believe we have an avenue to take any kind
22 of action against the contractor to recover the damages.

23 Q Okay. And let me see if I understand this. This
24 employee that committed this sabotage, was he working for the
25 contractor?

1 A Yes, he was under the employ of the contractor.

2 Q And you don't feel like you have any type of claim
3 you can make against the contractor for this act of sabotage by
4 one of his employees?

5 A Our, our counsel has advised me that we do not have
6 sufficient grounds or evidence to pursue any action against the
7 contractor.

8 Q Did you all talk to the contractor about this?

9 A Oh, yes. Yes.

10 Q Did he deny this?

11 A Did he deny that the sheet metal worker was in his
12 employ?

13 Q One of his employees drilled the hole?

14 A Let me answer the question this way, is, is we've
15 talked to the management of the contractor. The manager of the
16 contractor knows that our corporate security investigation and
17 the FBI corporate security investigation believes they've
18 identified the person that committed the act and that the
19 evidence is strong and the evidence is circumstantial and
20 that's the information we provided to the contractor.

21 As far as, you know, from legal grounds and, you
22 know, prosecution, that is not my area of expertise. I can
23 only go on what our legal counsel says.

24 Q Do you know whether the contractor denied that his
25 employee drilled the hole?

1 A No, I do not know that.

2 Q Did you ask about it?

3 A I have not spoken directly to the contractor.

4 Q Did you ask anybody on your staff at Florida Power &
5 Light about it?

6 A If the contractor denied knowing -- denied any --
7 could you --

8 Q If he denied whether his employee drilled the hole.

9 A I have not asked that question of my staff, no.

10 Q Have you asked that question of anybody else at
11 Florida Power & Light?

12 A I have asked the question of Florida Power & Light
13 whether or not we were going to go after the individual or the
14 contractor, and I've been advised by counsel that we do not
15 think that we have sufficient grounds to do so.

16 Q Did you all report this to the police?

17 A Yes, we did.

18 Q Do you know what action they've taken?

19 A We reported it to the police, I think the Florida
20 Department of Law Enforcement, FBI. There's a number of
21 agencies that we notified. FBI took jurisdiction for the case.

22 Q When you found out that the FBI was not going to
23 prosecute, did you try to file this with the police or FDLE or
24 anybody else?

25 A I don't know the answer to that question.

1 Q Did you have any insurance that would cover this type
2 of incident?

3 A We have property insurance, but this type of -- and
4 it's limited to, you know, damage to the property, the extent
5 of the repair, and this did not meet the deductible for that
6 insurance. We also have accidental outage insurance. But,
7 again, this did not meet the deductible for the accidental
8 outage insurance.

9 Q What is your deductible on a policy like that?

10 A For the accidental outage insurance it's 12 weeks.

11 Q Oh, so it's not the amount, it was the time?

12 A Right. You'd have to, you would have to have an
13 event that would have you shut down for 12 weeks. And then
14 following the 12 weeks then the insurance would kick in.

15 Q Have you ever made an effort to get insurance that
16 would cover a lesser period of time?

17 A I don't know if, if we've made an effort to get
18 insurance that covers a lesser period of time.

19 Q Who would know that?

20 A Who would know that?

21 Q Yeah.

22 A Probably our property and loss insurance. It would
23 be pretty expensive.

24 Q More than \$6.1 million?

25 A Oh, yes. That's my opinion, it would be more than

1 \$6.2 million.

2 Q But you haven't had anybody that's told you that or
3 you haven't gotten quotes or anything like that?

4 A No. I personally --

5 CHAIRMAN CARTER: Ms. Bradley, would you yield for a
6 second for Commissioner Skop?

7 MS. BRADLEY: Yes, sir.

8 CHAIRMAN CARTER: Commissioner Skop.

9 COMMISSIONER SKOP: Thank you, Mr. Chair. Thank you
10 also, Ms. Bradley.

11 Just with respect to the question that was just asked
12 on insurance for smaller periods, has any consideration been
13 given to giving or getting insurance just for an outage and
14 would that policy premium be in excess of the amount incurred?

15 THE WITNESS: There's -- we do have accidental outage
16 insurance and the deductible is for 12 weeks. And let me
17 clarify, I have no idea what the premium would be for a shorter
18 period of 12 weeks, nor do I know what the current premium is
19 for the existing policy of 12 weeks.

20 COMMISSIONER SKOP: Okay. And just one point of
21 clarification.

22 THE WITNESS: I just was speculating based on what
23 lost revenue generation is for a day that a nuclear unit is
24 offline in addition to the fuel cost.

25 COMMISSIONER SKOP: And just one point of

1 clarification. I thought I heard that, that there's been a
2 decision made not to go after the individual in terms of civil
3 action by the company as well as the contractor. Would that be
4 correct?

5 THE WITNESS: That is, that is our current position.
6 I was advised by counsel that's our current position.

7 COMMISSIONER SKOP: And does the contract have
8 insurance that might offset some of the losses that are being
9 placed upon the ratepayer as a result of the outage?

10 THE WITNESS: I don't, I don't know the answer to
11 that question.

12 COMMISSIONER SKOP: Thank you.

13 CHAIRMAN CARTER: Commissioner Argenziano.

14 COMMISSIONER ARGENZIANO: A question to the point of
15 a civil suit, and maybe staff is better. I don't know. I
16 don't understand why not go after the individual in a civil
17 suit. I understand that hearsay I believe is not admissible in
18 a criminal suit but it may be in a civil suit. Am I correct?
19 It's not admissible --

20 MR. BURGESS: There are exceptions, there are
21 exceptions to the hearsay rule, including statements against
22 interest that one might argue that the statements fall within.
23 That's my interpretation of the hearsay.

24 COMMISSIONER ARGENZIANO: Okay. So then it could be,
25 it could be acceptable in a civil suit?

1 MS. BRADLEY: Under certain circumstances. It would
2 depend on why it was being offered and if it fell under some of
3 the exceptions.

4 COMMISSIONER ARGENZIANO: Because in reading the
5 transcripts, there was an individual who heard or was told by
6 this individual that he did drill the hole, and I think that
7 makes a big difference in going after someone. And if that
8 could be used in a civil suit, I wonder why the company would
9 not choose to do that.

10 MR. BUTLER: I would observe that the same evidence
11 rules apply in criminal and civil proceedings. So if there is
12 the evidentiary exception, it would have been available to the
13 U.S. Attorney's Office and presumably was considered by them as
14 well.

15 COMMISSIONER ARGENZIANO: Well, maybe I'm confused.
16 And I'm not a lawyer, okay, so I do need correction here, if
17 possible. But if I were the company, I mean, this is, I would
18 look at it as an act of terrorism. I would look at it as
19 vandalism, terrorism, and I would be -- I know that the U.S.
20 Attorney is going to make up his own mind, but did you ask the
21 U.S. Attorney, was the company somehow vigilant in asking for,
22 you know, a criminal complaint of some type saying pursue this?

23 MR. BUTLER: The only response we were given was
24 absence of evidence of a quality that they were comfortable
25 proceeding.

1 COMMISSIONER ARGENZIANO: Okay. So then let's say
2 for, for that reason you feel that there's nothing that you can
3 do on the criminal part of that. Then I still don't know why
4 not go after the civil part of it then and try, to try to have
5 that hearsay evidence included into a civil suit.

6 MR. BUTLER: Well, as I say, the same evidence and
7 code applies in the civil context. As Mr. Burgess had
8 indicated earlier, the standard of proof is different in a
9 civil context than it is in a criminal context. But the
10 fundamental problem is the evidence.

11 COMMISSIONER ARGENZIANO: Okay. In not legalese, in
12 everyday talk, so it's more possible or easier possibly in a
13 civil suit to get that heard, the hearsay introduced.

14 MR. BUTLER: I don't think so. I think that it's --

15 MR. BURGESS: The standard - excuse me.

16 COMMISSIONER ARGENZIANO: Wait. Let him finish.

17 MR. BUTLER: I don't believe so. The standard of
18 proof, how much proof you have to win your case in a civil case
19 is certainly lower than it is to get a guilty conviction
20 against someone in a criminal context. But what evidence the
21 court will admit and consider, I don't believe there are
22 significant differences in the evidence standard that applies
23 on whether you would have that evidence admissible in either of
24 those proceedings.

25 CHAIRMAN CARTER: Mr. Burgess.

1 MR. BURGESS: I wouldn't -- I was just -- the
2 standard of proof is significantly different. People are found
3 not guilty of a criminal violation and then later found to be
4 culpable in a civil suit, and there are many significant or
5 highly publicized cases in which that is the circumstance. So
6 you're right that someone could be pursued on civil grounds
7 that you would not have a very good case against on criminal
8 grounds.

9 COMMISSIONER ARGENZIANO: And if I could, just one
10 other question on that line. If someone was in a civil suit
11 found guilty, if this individual was found guilty in a civil
12 suit, would that then help in any time? Because as you're
13 saying right now, he can maybe go work someplace else. I hope
14 he's red flagged. But would that help somewhere down the line?
15 Could someone use that civil suit against him to keep him from
16 working someplace else?

17 And why isn't it -- and somebody, maybe our staff can
18 help us, does it makes sense that the U.S., that they don't
19 think there's enough evidence? From what I'm reading, it
20 sounds like there is. But, again, I'm not an attorney.

21 THE WITNESS: Commissioner, in regards to this
22 particular individual --

23 COMMISSIONER ARGENZIANO: Oh, I'm sorry. I didn't
24 know who was talking.

25 THE WITNESS: In regards to this particular

1 individual, we've flagged this individual in PAD, which is the
2 Personnel Access Database, which is the national database
3 that's used by all nuclear power plants. And so therefore they
4 will contact us if he applies to admittance to anywhere else,
5 and then we can share with them details of the event, the
6 circumstances around that event. And they, of course, would
7 make their own judgment.

8 Also, I did want to point out that the NRC, in
9 addition to the U.S. Attorney declining to prosecute, the NRC
10 staff notified us that they would not be pursuing civil action
11 against this individual.

12 COMMISSIONER ARGENZIANO: And I do find that,
13 Mr. Chairman, if I can just express, very hard to believe.
14 Even if there's evidence, I mean, that you can't introduce the
15 hearsay evidence, I would think that the crime rises to such a
16 level -- I look at it as terrorism. It rises to such a level
17 that a good attorney probably could argue and maybe make that
18 case in court. So I can't speak for the U.S. Attorney, but I
19 wonder why the heck they're not looking at something like that
20 and pursuing it to make sure, set precedent that, you know. I
21 mean, it looks like to me, and, again, I'm not an attorney, but
22 you read it, and I'm sure the other side can argue that
23 everything I said was incorrect and circumstantial or whatever,
24 but it seems to me that a good attorney could probably make the
25 case that, you know, with the tool, when you go out and check

1 out a tool and the person where he was and what he -- well, you
2 can't say what he said. But I would think that they would move
3 forward with that, and I don't understand the NRC or the U.S.
4 Attorney not moving forward.

5 CHAIRMAN CARTER: Thank you, Commissioner.

6 Commissioner Skop.

7 COMMISSIONER SKOP: Thank you, Mr. Chairman.

8 And, again, I just wanted to pose a question I guess
9 to Mr. Butler. I think he had given a response. And normally
10 I would ask the witness questions, but I think it's
11 appropriately directed to the response Mr. Butler gave.

12 I think that a very pointed question has been asked
13 to the extent that there may be civil liability either for the
14 person of interest and/or the contractor that was hired by FPL
15 as a result of what happened, and I think that would be under
16 the tort of negligence.

17 I guess my concern would be is why hasn't FPL
18 actively pursued that as opposed to just merely seeking to
19 impose the costs on its ratepayers? That's to me the easy way
20 out. Is it because in fact that as a result of doing the
21 background check that FPL had a hand in terms of hiring or
22 approving the hire of this position and may be comparatively
23 negligent?

24 MR. BUTLER: Well, as to the individual, first of
25 all, one of the just important considerations at least when one

1 is evaluating the potential of significant funds that might
2 offset FPL's loss to the benefit of customers, we do not
3 believe that this individual has any significant assets.

4 COMMISSIONER SKOP: I understand that point because I
5 would not go after him personally. It may be to prevent him,
6 get a civil claim like they did with the O.J. trial. But the
7 person with the deep pockets is likely the contractor, which I
8 would expect as an option of first recourse for the company to
9 go against its vendor or contractor rather than going directly
10 through us to the ratepayer. And please explain why that's not
11 been done here.

12 MR. BUTLER: Well, to start with, you know, the
13 contractor is the employer of the individual we suspect of
14 having drilled the hole. So the evidentiary problems that
15 we've been describing that would apply as an obstacle to
16 bringing a claim against the individual apply with respect to
17 proving that it is the employee of the contractor who is
18 responsible. So you have that level of concerns.

19 FPL, as Mr. Jones has testified, it conducted the
20 screening of the individual. Essentially the contractors make
21 people available as a pool of candidates. We conduct the
22 screening. We think we did a good job of conducting it for all
23 of the reasons we've discussed. But, you know, to whatever
24 extent there is an issue about the person notwithstanding the
25 screening being selected for access, it is essentially FPL

1 selecting the person for access.

2 The contract has significant liability limitations
3 generally. The one most particularly of significance here as,
4 you know, virtually all the contracts I've ever seen in the
5 nuclear vendor field is they have limitations on consequential
6 damages, and this is essentially a consequential damage. And
7 all of those factors together have led FPL to conclude that at
8 this point at least we don't feel that we have enough good
9 evidence facing those obstacles to have a productive claim
10 against the vendor.

11 COMMISSIONER SKOP: And I respect that response. I
12 mean, merely I think that you have to ask those difficult
13 questions. You know, there's a lot to be said about having
14 circumstantial evidence rather than, you know, directly
15 catching the person in the act or having video evidence. But,
16 again, that doesn't preclude, you know, law enforcement or
17 others from pursuing various criminal or civil action.

18 I mean, you've got a case pending down in Orlando
19 where you've got a mother on trial for capital murder on,
20 solely based on circumstantial evidence. So, again, I guess
21 we're being asked whether it's prudent to allow FPL to pass on
22 the cost of the purchased power as a result of the outage.

23 But equally I think it's important for us to make
24 sure that FPL has done everything in its power to protect its
25 ratepayer against such costs, and that would include looking

1 critically at the ability of prevailing or even reaching some
2 sort of a settlement with an insurer that the contractor might
3 have. Because anything is possible, but it's not possible if
4 you don't pursue it. It's a heck of a lot easier to just pass
5 it on to the ratepayer.

6 And I think that's the, some of the tension I'm
7 hearing from my colleagues is that we expect -- you know, FPL
8 is very adept at being risk averse, as -- and I'm going to go
9 there. I wasn't planning on going there. But as Mr., I'm
10 trying to think, Burgess mentioned, you know, it enjoys greater
11 than average ROE, and that's because it performs well and it's
12 been rewarded appropriately by this Commission.

13 But as equally pointed out by Ms. Bradley in her
14 opening comments that, you know, FPL is quick to pass all the
15 risk on to its ratepayers. And, you know, never once have I
16 seen during my time at the Commission FPL step forward
17 affirmatively and accept any form of responsibility for
18 anything. It's almost, it's of the mind-set, the misguided
19 opinion that it can do nothing wrong. And, I mean, to me
20 that's troubling at times. Because I'm not perfect, I've made
21 many mistakes since I've been on the Commission, but I'm man
22 enough to admit a mistake. But, you know, constantly in
23 reading prefiled testimony after prefiled testimony after
24 prefiled testimony, it's just a categorical denial of we're
25 innocent.

1 And, you know, I would expect to have issues of such
2 dollar magnitude thoroughly vetted, and I think the Commission
3 is doing an excellent job of doing that today. But, you know,
4 I think that we need to ask those difficult questions and
5 challenge FPL on, on the directions it's taken to make sure
6 that the issue is fully and appropriately vetted before we
7 allow such costs to be passed directly to the ratepayer.

8 MR. BUTLER: Understood.

9 COMMISSIONER ARGENZIANO: Mr. Chairman.

10 CHAIRMAN CARTER: Commissioner Argenziano.

11 COMMISSIONER ARGENZIANO: Just one quick question.

12 Does the contractor have an obligation to provide a background
13 screening or fingerprints before, you know, presenting the
14 employee to the company or at the time?

15 MR. BUTLER: That's probably better directed to
16 Mr. Jones. My understanding is no, that we do that screening
17 because we ultimately as the licensee have the obligation to
18 the NRC to ensure that it's done, done to the NRC standards.
19 But I'd defer to the witness.

20 COMMISSIONER ARGENZIANO: And I know that sometimes
21 in providing certain screenings the contractor does it as well
22 as the company, and I was just wondering if that is an
23 obligation of the contractor.

24 THE WITNESS: No, I don't believe that's an
25 obligation of the contractor.

1 COMMISSIONER ARGENZIANO: You're saying it's not.

2 THE WITNESS: No. No, Commissioner, I don't
3 believe -- it's our obligation to do the screening. We do
4 within our contracts have expectations that we're able to meet
5 end processing goals, which incents them to send us quality
6 candidates. And as I mentioned earlier, if they're not able to
7 complete the screening, then those people don't get, those
8 people don't get paid.

9 COMMISSIONER ARGENZIANO: Okay. And the reason I
10 asked --

11 THE WITNESS: But they're, but -- so let me try it
12 this way because I don't think I answered your question is
13 they're under no obligation to do the prescreening or FBI
14 fingerprint check for us.

15 COMMISSIONER ARGENZIANO: Okay. Because I know with
16 schools and construction in schools, the construction, it can
17 go either way. They can work with the school board or the
18 construction company then is the one who does the background
19 screenings and then presents that to the school. So I didn't
20 know if by NRC or some type of federal or company rule that
21 they provide a background check also.

22 CHAIRMAN CARTER: Thank you. Anything further from
23 the bench?

24 Ms. Bradley, thank you for yielding.

25 MS. BRADLEY: Thank you.

1 BY MS. BRADLEY:

2 Q Mr. Jones, is it not true though that any employer
3 would be liable for damages for negligent hiring retention if
4 they don't do a background check on an employee and they have a
5 criminal history similar to the crime that they commit?

6 MR. BUTLER: I object to that as calling for a legal
7 conclusion.

8 MS. BRADLEY: I'm just asking about -- he's a
9 supervisor, he hires. I'm asking about his understanding.

10 MR. BUTLER: I think you're asking for a legal
11 conclusion.

12 CHAIRMAN CARTER: Let's re --

13 MS. BRADLEY: Well, let me rephrase that.

14 CHAIRMAN CARTER: Rephrase it.

15 BY MS. BRADLEY:

16 Q Is it your understanding that any employer that
17 doesn't do a background check may be subject to liability if
18 they haven't done one if their employee commits a crime?

19 MR. BUTLER: I would again object to the question,
20 but the witness may answer it if he is knowledgeable in the
21 area.

22 CHAIRMAN CARTER: Just kind of rephrase, Ms. Bradley.
23 Ask him one question at a time.

24 BY MS. BRADLEY:

25 Q Okay. Let me rephrase it to ask you this. If you

1 hired an employee that committed a criminal act and you had
2 failed to do a background check and it would have revealed that
3 this person had committed something similar or something that
4 would have put you on notice that he might commit this act, do
5 you feel like you might be held liable for that?

6 MR. BUTLER: I'm going to object again. That's
7 calling for a legal conclusion.

8 MS. BRADLEY: Mr. Chairman, he's --

9 CHAIRMAN CARTER: Hang on. Hang on. Hold it. Hold
10 it. Hold it. Hold it. Hold it. Hang on. Let me, let me
11 think this through.

12 I believe, Ms. Helton, that she can ask his opinion
13 on that and he can say whether or not he had an opinion on it.
14 Is that correct or am I reaching? Did you hear the question?

15 MS. HELTON: I heard the question. I heard the
16 question. And I know we often have an objection here that
17 calls for a legal conclusion. But whether, whether that's an
18 appropriate objection or not, right off the top of my head I
19 can't say. Could I look it up real quick and --

20 CHAIRMAN CARTER: Well, let me ask you this. I'm
21 saying is that rather than -- if she asked him his opinion on
22 that, he could render that or not; is that correct? I mean,
23 after all he is senior management.

24 MS. HELTON: He is, he is senior management. He has
25 testified I think that he's not a lawyer. So I'm not sure that

1 he's offered up for his expertise on that particular subject.
2 And then whether we could accept his opinion or not is a whole
3 other matter.

4 MR. BUTLER: That is my objection. We're not
5 offering him as a lawyer.

6 CHAIRMAN CARTER: Okay. All right.

7 MR. BUTLER: And just, you know, whether somebody
8 could be liable --

9 CHAIRMAN CARTER: That's not a problem. Just
10 rephrase, Ms. Bradley.

11 BY MS. BRADLEY:

12 Q Okay. Mr. Jones, what is your understanding as far
13 as potential liability that you might have if you failed to do
14 a background check and have an employee that commits a crime
15 that the background check would have revealed?

16 A My understanding is that if we fail to do a
17 background check or any of these program requirements, we're in
18 direct violation of NRC regulations and we are subject to being
19 cited violations including up to, depending on the severity, a
20 civil penalty and additional sanctions by the, by the NRC. The
21 employee or employees who failed to do their duty would be held
22 accountable for the, for the company for failing to perform
23 their function commensurate with the, with, with the
24 circumstances and the, and the behaviors that they displayed.

25 Q Do you have any understanding of how that would

1 translate into a nonnuclear environment?

2 MR. BUTLER: I'd ask the witness not to speculate, if
3 he doesn't.

4 THE WITNESS: No, I do not.

5 BY MS. BRADLEY:

6 Q Have you ever worked outside the nuclear field?

7 A Yes, I have.

8 Q In what profession or job?

9 A Well, when I was in high school I worked at K-Mart.

10 CHAIRMAN CARTER: The blue light special.

11 (Laughter.)

12 BY MS. BRADLEY:

13 Q Did you do any hiring at K-Mart?

14 A No, I didn't.

15 Q And you've worked in no other job since you reached
16 adulthood?

17 A Since, since high school I was in the U.S. Nuclear
18 Navy, then I was employed a short period of time by the
19 Tennessee Valley Authority in their nuclear field, then
20 following that Florida Power & Light. So I've been in the
21 nuclear field since high school.

22 Q All right. Let me ask you about on Page I think it's
23 eight of your testimony you talked about the security checks
24 and different steps that you looked at. What is the purpose of
25 the screening?

1 A Which page of the --

2 Q I think it's Page 8. At least it is on mine.

3 A Page 8, Page 8 of the April filing or the September?

4 Q I believe this is the April 3rd, 2008.

5 A To which line are you referring to, please?

6 Q Well, it actually starts on seven and goes in and
7 around Line 3 through 16 you're discussing these steps.

8 A Yes.

9 Q Okay. One of the steps says, "Each individual must
10 successfully complete drug and alcohol screening and is then
11 subject to random drug and alcohol testing during the period of
12 unescorted access." What is successful completion of drug and
13 alcohol screening?

14 A Must be negative for alcohol and must be negative for
15 drugs.

16 Q Is this a one-time check.

17 A There's a pre-access check. And then after you've
18 completed that check, assuming that you complete all the other
19 requirements, and once you're granted unescorted access, then
20 you are in the random selection pool and you could be selected
21 at any time.

22 Also there is for cause testing under our continuous
23 behavior observation program. If we notice a change in your
24 habits or behavior or there is an event, you could be subject
25 to for cause testing.

1 Q And why is this important in a nuclear facility?

2 A It's extremely important in a nuclear facility
3 because you want to make sure that people that come through
4 that gate are fit for duty, they're alert and they're capable
5 of performing their job.

6 Q And if the person tests negative, why would you keep
7 testing them?

8 A The reason you keep testing them is because something
9 may change in that person's life for whatever reason and so you
10 do this random check to -- because we're talking about nuclear
11 power here, all right, and the consequences of an event are,
12 are severe. And so we do the random, random testing to assure
13 ourselves that people are fit for duty and able to accomplish
14 high quality work.

15 Q Would it be fair to say that a person with a history
16 of alcohol or drug use is more likely to have that reoccur?

17 A I'm not a doctor, so I can't offer an opinion on
18 that.

19 Q Well, as far as the security screening, would you be
20 more concerned about a person that has a history of alcohol or
21 drug use?

22 A Commissioners, I'm trying to think how to answer that
23 question without violating the confidentiality of the, of the,
24 of the personal history questionnaire or the, or the --
25 obviously the criminal matrix would be a criminal type offense.

1 But, yes, there are thresholds that if someone has had a
2 history, then that may be grounds to not admit them to the
3 power plant.

4 Q The individual involved in this incident was, I think
5 Commissioner Argenziano mentioned was about 33 years old when
6 his last events occurred, and he had a couple of alcohol
7 incidents and sometime in the past a drug use; correct?

8 A Yes. According to the documents, he had offenses
9 related to alcohol 16 years previous. Yes.

10 Q And this information actually came from your, your
11 screening and your records; correct?

12 A Yes. He actually admitted to using marijuana in the
13 '80s.

14 Q Would you agree that that should have given you a
15 heightened concern over the average person with no history?

16 A As compared -- someone with a history or a background
17 and someone that had no history or background, yes.

18 Q And if you had acted on that to have prevented him
19 unescorted access, this incident would not have occurred, would
20 it?

21 A We did act on the information provided and this
22 person met all the requirements for unescorted access to the
23 nuclear power plant in accordance with the NRC requirements.

24 Q This person had a guilty plea to a DUI, did he not?

25 A Yes, he did.

1 Q And he had another arrest for public intoxication;
2 correct?

3 A My information is that he had two arrests and there
4 was several charges stemming out of those two arrests.

5 Q And he admitted drug use, as you said, previously;
6 correct?

7 A He admitted to using marijuana in the 1980s. That is
8 correct.

9 Q And if you had used this history of drug abuse to
10 prevent him from coming into the facility, this incident would
11 not have occurred, would it?

12 MR. BUTLER: I'll object to that last answer.

13 THE WITNESS: We had no evidence of drug use in the
14 prior 16 years prior to his application.

15 BY MS. BRADLEY:

16 Q Mr. Jones, let me try to repeat this so you can
17 answer my question this time. If you had used this information
18 of prior drug use, prior alcohol problems and kept that, used
19 that to keep him from coming in with unrestricted access, this
20 incident would not have occurred, would it?

21 MR. BUTLER: I'll object to that as already asked and
22 answered.

23 MS. BRADLEY: Actually he hasn't answered it a single
24 time.

25 MR. BUTLER: He's answered it. You just don't like

1 the answer.

2 MS. BRADLEY: That's a yes or no question,
3 Mr. Commissioner.

4 MS. HELTON: I can't remember if he was asked that
5 question by Mr. Burgess, but I don't recall him answering the
6 question to Ms. Bradley that Ms. Bradley asked.

7 MS. BRADLEY: Do I need to repeat the question?

8 CHAIRMAN CARTER: Before you do, Ms. Bradley, any
9 idea about how much more you've got? I've got to trade out
10 court reporters. But I wanted to be able to give you an
11 opportunity to complete your line of questioning.

12 MS. BRADLEY: I hope not too much longer if I can get
13 some quick answers.

14 CHAIRMAN CARTER: Give me a time. I've got to give
15 them, I've got to trade out court reporters within the next ten
16 minutes, so I'm trying to get some kind of feel for you about
17 how much more you've got.

18 MS. BRADLEY: I will probably go over ten minutes.

19 CHAIRMAN CARTER: Well, let's do this now,
20 Commissioners. Let's give the court reporters a chance to --
21 and you just kind of remember your last question. Give the
22 court reporters a chance to trade out. They're going to need
23 about ten minutes. And we'll come back at 15 after. We're on
24 recess.

25 (Transcript continues in sequence with Volume 6.)

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

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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 17th day of November,

2008.

Linda Boles
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