

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

DOCKET NO. 090109-EI

PETITION FOR APPROVAL OF SOLAR  
ENERGY POWER PURCHASE AGREEMENT  
BETWEEN TAMPA ELECTRIC COMPANY  
AND ENERGY 5.0, LLC.

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PROCEEDINGS: DISCUSSION

COMMISSIONERS  
PARTICIPATING: CHAIRMAN NANCY ARGENZIANO  
COMMISSIONER LISA POLAK EDGAR  
COMMISSIONER NATHAN A. SKOP  
COMMISSIONER DAVID E. KLEMENT  
COMMISSIONER BEN A. "STEVE" STEVENS III

DATE: Tuesday, January 26, 2010

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

REPORTED BY: JANE FAUROT, RPR  
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## P R O C E E D I N G S

1  
2           **CHAIRMAN ARGENZIANO:** Commissioner Skop,  
3 did you want to say something?

4           **COMMISSIONER SKOP:** Yes, Madam Chair.

5           Before we adjourn, I do want to raise a  
6 procedural matter in relation to a previously  
7 decided docket. And, again, this is strictly  
8 procedural. We previously had a PAA item, proposed  
9 agency action on the approval of a solar energy  
10 power purchase agreement between Tampa Electric  
11 Company and Energy 5.0.

12           The order for the Commission's decision  
13 was issued yesterday, and in that order I wrote a  
14 dissenting opinion. I was not on the prevailing  
15 side of the decision, so I'm not able to request  
16 reconsideration of the Commission's decision, but  
17 what I would like to do is just take this  
18 opportunity to respectfully encourage the members in  
19 the majority to consider revisiting its decision on  
20 the Commission's own motion to vacate the order and  
21 to order a full evidentiary hearing prior to  
22 rendering a final decision by the Commission on that  
23 docketed matter.

24           **CHAIRMAN ARGENZIANO:** Could you give us  
25 your reasons why?

1 Commissioner Stevens.

2 **COMMISSIONER STEVENS:** When was this done?

3 **COMMISSIONER SKOP:** This was done before  
4 you came on board.

5 **COMMISSIONER STEVENS:** So I can't request  
6 it?

7 **COMMISSIONER SKOP:** Right.

8 So the Commissioners would be Commissioner  
9 Klement, Commissioner Argenziano, and Commissioner  
10 Edgar.

11 **CHAIRMAN ARGENZIANO:** Well, let me ask. I  
12 guess you can't specifically --

13 **COMMISSIONER SKOP:** I can't speak to the  
14 substance, but what I can do is based on, you know,  
15 the concerns that were raised -- I know Commissioner  
16 Klement at bench had some questions that he would  
17 like to have seen answered, and I don't know if he  
18 got answers to them. I know I did not get answers  
19 to them.

20 But, again, on a procedural issue alone,  
21 the Commission, the members in the majority have the  
22 ability, it's my understanding, procedurally to  
23 revisit the decision, to move to vacate the order,  
24 and to send it to evidentiary hearing should the  
25 majority wish to do so.

1                   **CHAIRMAN ARGENZIANO:** Okay. Commissioner  
2 Klement, did you want to speak to that?

3                   **COMMISSIONER KLEMENT:** Not yet.

4                   **CHAIRMAN ARGENZIANO:** Anybody else?

5                   **COMMISSIONER KLEMENT:** Well, then I will  
6 ask, Commissioner Skop, what do you hope to achieve?  
7 Would you hope to compel TECO to reveal the contract  
8 as JEA did in the document you passed out?

9                   **COMMISSIONER SKOP:** Madam Chair, I'll  
10 briefly respond. Again, I need to keep this  
11 procedural.

12                   **CHAIRMAN ARGENZIANO:** Yes.

13                   **COMMISSIONER SKOP:** I think that the  
14 benefit of going to a full evidentiary hearing is  
15 that you are able, as Commissioner Argenziano always  
16 says, to gain additional information. So, again,  
17 there were questions that I had asked that were left  
18 unanswered. I believe you had a line of inquiry  
19 that did not get answered. But, again, I'm on the  
20 nonprevailing side of that motion, so my hands are  
21 tied.

22                   Again, typically, had I been a little bit  
23 more diligent in doing so, I would have recommended  
24 that we take it to hearing, but I'm not so sure that  
25 I would have prevailed in that. But, again, this is

1 my last ditch effort to try and raise a concern to  
2 the majority to see if there is a way to revisit it,  
3 vacate the order, and set it for evidentiary  
4 hearing.

5 **CHAIRMAN ARGENZIANO:** Mr. Kiser.

6 **MR. KISER:** Right. Madam Chairman and  
7 Commissioners, the proper procedure to try to  
8 follow -- what Commissioner Skop is trying to do is  
9 to have a motion to reconsider. And obviously that  
10 motion has to be made by one of the Commissioners  
11 that was on the prevailing side, and it should get a  
12 motion and a second in order to have discussion.  
13 Once that discussion has been held and you vote,  
14 then if you vote to reconsider, then you can go back  
15 and go into the whole issue and challenge the  
16 premise on which it was passed. And if you then  
17 decide -- after rehearing it, basically, you decide  
18 to stick with originally what happened happens, then  
19 you vote it down.

20 But if you vote to reconsider it, and you  
21 debate it, and you decide that you want to change,  
22 then you simply at that point make a new motion.  
23 But, procedurally, to go any further than what you  
24 have already done, someone needs to make the motion  
25 in order for discussion to continue.

1                   **CHAIRMAN ARGENZIANO:** Right.

2                   **COMMISSIONER KLEMENT:** Madam Chair.

3                   **CHAIRMAN ARGENZIANO:** Commissioner Edgar  
4 and then Commissioner Klement.

5                   **COMMISSIONER EDGAR:** Thank you, Madam  
6 Chair.

7                   I have two questions for our General  
8 Counsel along that timing. The first is do we  
9 have -- I'm uncomfortable from a number of aspects.  
10 But one of them is the fact that I am not aware that  
11 this was noticed, and it certainly would -- should  
12 we choose to go any further -- would impact entities  
13 that were parties to that docket. So I have a  
14 question about notice requirements.

15                   And then the second is I was not aware  
16 that the order for this item had issued, and I'm  
17 just wondering for -- just so I understand, is there  
18 a time frame for a motion for reconsideration? In  
19 other words, does it make a difference as to whether  
20 a motion for reconsideration would be before a final  
21 order of this agency had issued or after?

22                   **MR. KISER:** Let's go to the first issue.  
23 If the motion to reconsider is passed, then I would  
24 certainly suggest that it be scheduled with proper  
25 notice to all the parties at the next convenient

1 meeting of the Commission. So those people do have  
2 an opportunity to be here, be heard, et cetera.

3 I think what Commissioner Skop is looking  
4 for was a motion to at least have it reconsidered.  
5 And not necessarily you go back into the whole  
6 debate at this meeting, but at a subsequent meeting  
7 when people can be here to be heard.

8 On the second point that you raised, a  
9 motion for reconsideration can literally be made at  
10 any time, and usually the debate gets into how long  
11 after something is final, and usually that means you  
12 can't go past the very next regularly scheduled  
13 meeting. So there is still -- the motion can be  
14 made now, the motion could be made when the final  
15 order comes back up for the final vote on it, it  
16 could be done at that time, as well. As long as  
17 it's -- you know, it has got to be in the time frame  
18 of either before it comes up, or if it does come up,  
19 no longer than the very next meeting after that.

20 **COMMISSIONER KLEMENT:** Madam Chairman.

21 **CHAIRMAN ARGENZIANO:** Commissioner Skop  
22 and then Commissioner Klement.

23 **COMMISSIONER SKOP:** Thank you, Madam  
24 Chair.

25 I just want to clarify the intent of what

1 I'm asking the majority to do. I think our General  
2 Counsel may misunderstand, to some degree. I'm not  
3 really asking to reconsider the vote. What I'm  
4 asking the majority to do is revisit this issue, to  
5 vacate the order that was just issued, thereby  
6 setting the matter for a full evidentiary hearing on  
7 the Commission's own motion.

8 And to Commissioner Edgar's point, there  
9 would be no due process issue because this is  
10 strictly procedural on the Commission's own motion.  
11 Due process would attach when we have the full  
12 evidentiary hearing to have the parties before us  
13 present to go through the evidentiary thing as a  
14 basis for a later decision. So this is strictly  
15 procedural in nature.

16 **CHAIRMAN ARGENZIANO:** Let me ask you this  
17 question, because I am not an attorney. If you go  
18 to the full evidentiary hearing, does that then get  
19 you to a motion to reconsider? Is it solely for  
20 additional information, or what's the difference  
21 between a move to reconsider and the evidentiary  
22 hearing?

23 **COMMISSIONER SKOP:** The difference would  
24 be is that typically you have a proposed agency  
25 action which unless it's protested becomes a final



1 order. In this case, the Commission on its own  
2 motion would vacate its prior decision on the  
3 proposed agency action, and on its own motion order  
4 that that matter be set for a full evidentiary  
5 hearing. You would go do your hearing, you would  
6 take the record, you would have a staff  
7 recommendation, and then you would redecide the  
8 issue based on the evidence.

9 **MR. KISER:** I stand corrected. That is  
10 more accurate.

11 **CHAIRMAN ARGENZIANO:** Okay.

12 **MR. KISER:** I was thinking ahead to the  
13 motion to reconsider, and I thought that was what  
14 Commissioner Edgar had also asked.

15 **CHAIRMAN ARGENZIANO:** So then if we did  
16 that the way Commissioner Skop is recommending and  
17 we found that there was evidence, then there would  
18 be -- the way to remedy that would be through a  
19 motion to reconsider, or you have already vacated so  
20 there is no need to reconsider?

21 **COMMISSIONER SKOP:** There is no need to  
22 reconsider. Basically, what you are doing is you  
23 are putting it into an evidentiary hearing posture  
24 and start over.

25 **CHAIRMAN ARGENZIANO:** And then we start

1       anew.

2                   **COMMISSIONER SKOP:** Right.

3                   **CHAIRMAN ARGENZIANO:** Okay. Commissioner  
4       Klement.

5                   **COMMISSIONER KLEMENT:** A question on the  
6       legal and potential financial ramifications if we  
7       were to adopt such a motion. Is the company  
8       proceeding assuming that they have permission to do  
9       this, and what costs they might incur, and  
10      liabilities and charge to us?

11                  **MR. KISER:** At this point I don't think  
12      that there is much jeopardy about that. I'll stand  
13      corrected, but until that thing is final -- I mean,  
14      at this point all you have done is you have headed  
15      down one road, and there's several ways that -- you  
16      know, it's not final yet, and so until then I don't  
17      believe there is any liability to backtrack or  
18      change course.

19                  **CHAIRMAN ARGENZIANO:** Did you have  
20      something to add?

21                  **MS. BRUBAKER:** I'll simply share comments  
22      expressed to me from counsel for Energy 5.0 as he  
23      was calling to check on the status of the order and  
24      when it would issue, he did make comments that his  
25      client was very concerned about getting moving. I

1 don't know specifically if they are under some  
2 financial prejudice. I couldn't begin to speak for  
3 the company on that, but I did understand from  
4 counsel that there was a sense of urgency to get the  
5 project moving forward.

6 **CHAIRMAN ARGENZIANO:** Commissioner Skop.

7 **COMMISSIONER SKOP:** Thank you.

8 But the issue I see with that is that in  
9 this case they would be proceeding at their own risk  
10 because the order just issued yesterday, and it has  
11 not reached the end of its protest period. So,  
12 again, for them to do that is at their own peril  
13 because who knows if the order would be protested.

14 What I'm, again, just asking the majority  
15 it do, which is its prerogative strictly on a  
16 procedural basis is to revisit the decision, vacate  
17 the order, and send it to a full evidentiary hearing  
18 as the basis for creating a record to base the  
19 Commission's decision on.

20 **CHAIRMAN ARGENZIANO:** So let me get this  
21 straight. If we went to a full evidentiary hearing,  
22 basically it's to hear additional information that  
23 you may want to supply, is that it?

24 **COMMISSIONER SKOP:** It is to create a  
25 record, a evidentiary record that does not currently

1 exist.

2 **CHAIRMAN ARGENZIANO:** And instead of  
3 shooting it down by saying move to reconsider and  
4 start all over, you're just saying let's go do this,  
5 and if you are able -- if there's something addition  
6 that persuades Commissioners, then there would be a  
7 change. And if not, it would stand as the vote --  
8 we would have to vote again, I know.

9 **COMMISSIONER SKOP:** Well, we would vote  
10 again. But, again, because the order has already  
11 been issued, that the -- I think the proper  
12 procedural mechanism would be to have the majority  
13 make a motion to revisit the issue. If that were  
14 approved, the order would be then voted to vacate  
15 the order and order it sent to a full evidentiary  
16 hearing.

17 **CHAIRMAN ARGENZIANO:** I'm not sure that  
18 that is proper over reconsideration. I'm not sure  
19 there's, you know, there's one way to do it, but I  
20 understand what you are saying.

21 Kurt, and then Commissioner Klement.

22 **MR. KISER:** The only concern I have at  
23 this point is that any motion to vacate the order  
24 without all the parties being present, you know,  
25 that gives me some pause.

1                   **CHAIRMAN ARGENZIANO:** Due process.

2                   **MR. KISER:** Yes. Well, just to make sure  
3 that everybody has a chance to weigh in on it before  
4 anything is done that's permanent.

5                   **CHAIRMAN ARGENZIANO:** Okay. Commissioner  
6 Klement, and then Commissioner Edgar, and then back  
7 to Commissioner Skop.

8                   **COMMISSIONER KLEMENT:** What time frame  
9 would we be talking about for a full evidentiary  
10 hearing, if that were the case?

11                   **MR. KISER:** I would defer to Mary Anne.  
12 I'm not sure -- or Jennifer -- what the time frame  
13 is to get one of those done.

14                   **MS. BRUBAKER:** I'm struggling to remember  
15 if we have secured potential hearings dates for this  
16 case or not. I do not remember. Typically, we  
17 would recommend for a case that the hearing be set  
18 no fewer than 90 days to afford all affected parties  
19 a chance to conduct adequate discovery. And, of  
20 course, it would also depend on the availability of  
21 the Commission calendar.

22                   **COMMISSIONER KLEMENT:** So a minimum of  
23 three months and more?

24                   **MS. BRUBAKER:** Yes. Three months in which  
25 to conduct the hearing, and, of course, there will

1 be another month or two months to conduct  
2 post-hearing activities.

3 **COMMISSIONER KLEMENT:** Excuse me. Did I  
4 just hear General Counsel say that we can't do this  
5 motion until the parties have been given a chance to  
6 come?

7 **MR. KISER:** Well, hang on a second.

8 **CHAIRMAN ARGENZIANO:** And I think  
9 Commissioner Skop was going to comment on that in a  
10 minute.

11 Let me go to Commissioner Edgar, please,  
12 and then we will come back to Commissioner Skop.

13 **COMMISSIONER EDGAR:** Can I ask staff to  
14 remind me of the dates. What was the date that the  
15 Commission voted on this item?

16 **MS. BRUBAKER:** The Commission vote was  
17 December 15th.

18 **COMMISSIONER EDGAR:** December 15th. And  
19 is my memory correct that the item had come before  
20 us prior to that and we deferred for additional  
21 information?

22 **MS. BRUBAKER:** That's correct.

23 **COMMISSIONER EDGAR:** And what was the date  
24 that it came to us for discussion the first time? I  
25 don't remember if it was just two weeks or if there

1 was some --

2 **MS. BRUBAKER:** I regret to say I do not  
3 know that date immediately. We will be happy to  
4 find out.

5 **MR. KISER:** It was before my -- I started  
6 December 1. I know it was before then, so I don't  
7 have any information on it.

8 **COMMISSIONER KLEMENT:** I want to say it  
9 was October 26th or 27th, my first hearing.

10 **COMMISSIONER EDGAR:** And now that you've  
11 mentioned that, that kind of does jog my memory.

12 **MS. BRUBAKER:** That's correct, it was  
13 Commissioner Klement's first agenda. So whatever  
14 date that was.

15 **COMMISSIONER EDGAR:** So we heard this item  
16 in late October. Due to concerns that were raised  
17 at the time, my memory is that we agreed to defer as  
18 a Commission so that staff could work with the  
19 parties and do their own analysis, et cetera, to  
20 bring back additional information.

21 And then on December 15th, almost two  
22 months later, we had full discussion, asked  
23 questions, et cetera, took a vote. Then I'm  
24 hearing -- and I have not had -- I didn't realize  
25 the order had come out, so I have not had a chance

1 to read the dissent, but I do remember discussion at  
2 both of those meetings somewhat.

3 So my question is, today is, what, the  
4 26th?

5 **MR. KISER:** Yes.

6 **COMMISSIONER EDGAR:** Why the long delay in  
7 issuing the order? I mean, that's over a month.  
8 Don't we usually have like a 15-day time frame for  
9 final orders to be issued?

10 **MR. KISER:** Mary Anne.

11 **MS. HELTON:** Our goal is to issue orders  
12 within 20 days of the vote. And I know that I was  
13 given the order, I think, a little bit over a week  
14 ago, and I'll have to confess that I did not read it  
15 until first thing yesterday morning. And that is  
16 the same day that Commissioner Skop gave us the  
17 dissent, and so it was issued.

18 **COMMISSIONER EDGAR:** Okay. Thank you.

19 **CHAIRMAN ARGENZIANO:** Commissioner Skop.

20 **COMMISSIONER SKOP:** Thank you, Madam  
21 Chair.

22 And the Commission has been pretty busy  
23 lately with rate cases. So, again, you know, I'm  
24 doing the best I can juggling everything I need to  
25 do.



1                   But back to Mr. Kiser's point in terms of  
2 whether the Commission on its own motion has the  
3 legal authority to vacate its own order without it  
4 being a due process issue, and I would answer that  
5 question in the affirmative. The Commission is its  
6 own keeper of its own orders, and there is no due  
7 process violation should the Commission decide to  
8 vacate its own order. That does not affect the  
9 parties. It just, basically, sets it for  
10 evidentiary hearing, that would be my legal  
11 analysis. I might be corrected on that, but I think  
12 that probably is accurate.

13                   **CHAIRMAN ARGENZIANO:** Well, that would be  
14 good to know specifically which is the best way. I  
15 understand, I'm hearing a Commissioner saying that  
16 he has got a problem with something, and that's --  
17 I'm sorry. Kurt.

18                   **MR. KISER:** I just wanted to remind the  
19 Commission, under your own rules, the agenda for  
20 meetings, "The agenda shall state with specificity  
21 the items that will be considered at a meeting,  
22 hearing, or workshop. All matters involving the  
23 exercise of agency discretion and policymaking shall  
24 be listed and summarized on the agenda. Matters  
25 that are solely ministerial or internal matters that

1 do not affect the interests of the public generally  
2 may be included on the agenda."

3 So it would seem that the issue now having  
4 been raised, that obviously was not on our agenda,  
5 and that is pause for concern about, you know,  
6 moving too fast at this point, because there was no  
7 way for anybody to know as far as the general public  
8 that this item would come up, including the affected  
9 party here.

10 So that is -- again, I think having the  
11 discussion, but perhaps having this vote to do that  
12 would be more appropriate after it's listed and at  
13 the next agenda.

14 **CHAIRMAN ARGENZIANO:** Commissioner Skop.

15 **COMMISSIONER SKOP:** Madam Chair, that's  
16 what I was going to suggest. Again, I think I would  
17 differentiate between having an item before us like  
18 a normal agenda item where the public would have an  
19 interest and a procedural aspect on the Commission's  
20 own motion which can be done at any time during a  
21 docketed matter.

22 But in an abundance of caution, certainly  
23 it could be taken up at the next scheduled agenda,  
24 you know, on my birthday. I'll throw that in there  
25 again. But, you know, the bottom line, that would

1 provide adequate notice, but at the end of the day  
2 it's on the Commission's own motion. And at the  
3 February 9th agenda, if my math is right, the  
4 protest period would not have yet lapsed, thereby  
5 making the order final.

6 So I think we'd still be in a posture  
7 where we could accomplish procedurally what I would  
8 ask the majority to consider. Again, my hands are  
9 tied, or I would do it myself. I could always be  
10 tricky and change my vote and then move to  
11 reconsider myself, but that would be a little  
12 disingenuous, given the fact I wrote a dissent. So  
13 I'm happy to bring it up at the next agenda item, if  
14 we need to, to notice it, and I'll leave it to the  
15 majority to do what they want to do.

16 **CHAIRMAN ARGENZIANO:** Counsel.

17 **MR. KISER:** That is certainly our  
18 recommendation is that we handle that matter as to  
19 hold down any due process issues in violation of our  
20 own rules.

21 **CHAIRMAN ARGENZIANO:** Well, then that's  
22 probably what we need to do.

23 Members?

24 **COMMISSIONER KLEMENT:** I feel comfortable  
25 with that. I was prepared to consider the motion

1 for discussion purposes, but I would feel more  
2 comfortable making sure that the due process is  
3 okay.

4 **CHAIRMAN ARGENZIANO:** Absolutely.

5 Commissioner Edgar.

6 **COMMISSIONER EDGAR:** I just want to  
7 understand where we're going. So am I correct that  
8 I'm hearing our General Counsel recommend that the  
9 staff put an item on the next agenda that the  
10 majority reconsider their vote on a prior vote.

11 **CHAIRMAN ARGENZIANO:** I think you're  
12 asking for the issue to be brought up by the  
13 Commissioner, and then the Commission decides.

14 **MR. KISER:** Right. I think any type of  
15 attempt to go back, whether it's reconsideration,  
16 vacate the order, or any other procedural maneuver  
17 that would have the effect of setting that aside and  
18 causing other activities to have to take place  
19 before it become final, any discussion on that needs  
20 to be noticed, parties need to -- you know,  
21 obviously have a chance to be aware of it, and be  
22 here at that meeting and be heard.

23 There's any number of ways the issue that  
24 Commissioner Skop is bringing to the attention and  
25 asking to be put on the agenda -- there's a number

1 of ways that you can get back to it to cause it to  
2 have further proceedings or reconsideration of the  
3 vote on the matter. But whatever form it takes on  
4 that date, it's better to have it out and noticed so  
5 that people aren't caught by surprise.

6 **CHAIRMAN ARGENZIANO:** Commissioner Skop.

7 **COMMISSIONER SKOP:** Thank you.

8 I respect our General Counsel's position.  
9 The one point that I would take exception of is that  
10 while I do believe that it may be more in an  
11 abundance of caution and more prudent to put it as  
12 an item to be discussed, and I would raise it at  
13 that agenda just as I did today, and let the  
14 majority discuss, there is no reason for the parties  
15 to speak to that issue to the extent that it would  
16 be on the Commission's own motion and it has nothing  
17 to do with the parties. It's a procedural issue  
18 based on the discretion of the majority. So, again,  
19 I don't want to mix due process with a procedural  
20 issue, because there is no substantive due process  
21 implicated there. It's strictly procedural on the  
22 Commission's own motion.

23 **CHAIRMAN ARGENZIANO:** Any other comments?

24 Okay. Given that, that will be on the  
25 next agenda. Notice that that will be on the next

1 agenda. And if there is nothing else, we're  
2 adjourned.

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STATE OF FLORIDA )

: CERTIFICATE OF REPORTER

COUNTY OF LEON )

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

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

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

DATED THIS 3rd day of February, 2010.



\_\_\_\_\_  
JANE FAUROT, RPR  
Official FPSC Hearings Reporter  
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