

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
TALLAHASSEE, FLORIDA

IN RE: Petition to adopt rules on margin reserve and
imputation of contributions-in-aid-of-construction on margin
reserve calculation, by Florida Waterworks Association.

DOCKET NO. 960258-WS

BEFORE: CHAIRMAN JULIA L. JOHNSON
COMMISSIONER J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER DIANE K. KIESLING
COMMISSIONER JOE GARCIA

PROCEEDING: AGENDA CONFERENCE

ITEM NUMBER: 3

DATE: June 10, 1997

PLACE: 4075 Esplanade Way, Room 148
Tallahassee, Florida

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FPSC-RECORDS/REPORTING

1 PARTICIPATING:

2 Wayne Schiefelbein, Esquire, representing Florida
 Waterworks Association
 3 Matthew Feil, Esquire, representing Florida Water
 Services Corporation
 4 Mike Twomey, Esquire, representing Sugarmill Woods
 Civic Association
 5 Jack Shreve, Esquire, representing the Office of
 Public Counsel
 6 Senator Anna Cowin

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7 STAFF RECOMMENDATIONS

8 (PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF FOR
 9 ISSUES NOS. 1 AND 2.)

10 Issue A: Should the Commission take additional evidence on
 the issue of the rule's impact on rates?

11 Primary Recommendation: Yes, the Commission should schedule
 another hearing to take additional evidence on the issue of
 12 the rule's impact on rates if the hearing can be scheduled
 within the next two months.

13 Alternative Recommendation 1: Yes, the Commission should
 take additional evidence; however, a hearing is not
 14 necessary. The additional staff analyses of the impact on
 rates should be filed and interested parties given the
 opportunity to file responses.

15 Alternative Recommendation 2: No, the Commission should not
 take additional evidence. The Commission has followed all
 16 required rulemaking procedures and interested persons have
 been given an opportunity to address the Commission and
 17 submit information on the impact of the proposed rule and
 FWA's alternative proposal.

18 Issue 1: Should the Commission adopt proposed Rule
 25-30.431?

19 Recommendation: Yes, the Commission should adopt proposed
 Rule 25-30.431, F.A.C., with the changes recommended by
 20 staff as shown in Attachment 1 of staff's memorandum dated
 April 2, 1997.

21 Issue 2: Should the rule as approved by the Commission be
 filed for adoption with the Secretary of State and the
 22 docket be closed?

23 Recommendation: Yes. The rule should be filed for adoption
 once the rule challenges filed at the Division of
 24 Administrative Hearings are disposed of.

P R O C E E D I N G S

1

2 CHAIRMAN JOHNSON: Item 3.

3 MS. MOORE: Commissioners, Item 3 is the water and
4 wastewater margin reserve rule docket. The first --
5 there are two recommendations in this docket. The
6 first has to do with the procedure and whether the
7 Commission should hold an additional hearing or take
8 additional written evidence on the potential impact of
9 the rule on rates. The second recommendation dated
10 April 2nd has to do with adopting the rule.

11 If you approve either the primary recommendation
12 or the Alternate 1 in the May 29th recommendation, then
13 there is no need to take up the earlier recommendation
14 on adopting the rule today. There would be no need to.
15 I want to note one thing that has changed from the
16 recommendation. The DOAH, Division of Administrative
17 Hearing rule challenge has been further abated to
18 November 30th on motion of the Waterworks Association
19 and Florida -- Southern States, now Florida Water
20 Services Corporation. As to participation on the first
21 recommendation that you are taking up, participation is
22 unlimited or is permissible. If you get to the second
23 recommendation then participation is limited.

24 CHAIRMAN JOHNSON: Is someone going to walk
25 through these items?

1 MS. MOORE: I'm sorry?

2 CHAIRMAN JOHNSON: Is someone going to walk
3 through the Issue A, the recommendation?

4 MS. MOORE: In the May 29th recommendation, Issue
5 A is whether the Commission should take additional
6 evidence on the issue of the rules impact on rates.
7 The primary recommendation is that, yes, the Commission
8 should schedule another hearing and take additional
9 evidence if that hearing can be scheduled within the
10 next couple of months.

11 There is additional information that was prepared
12 by staff during the legislative session on legislation
13 that was proposed to set the margin reserve period, I
14 believe, at seven years. That information isn't in the
15 record of the proceeding, and then staff's
16 recommendation on adopting the rule with changes
17 proposes a -- recommends a five-year margin reserve
18 period. While there was evidence at the hearing on the
19 impact, potential impact on rates, there has been some
20 concern that or some interest in having the additional
21 studies in the record. The Alternative Recommendation
22 1 is --

23 CHAIRMAN JOHNSON: I want to ask you questions so
24 it won't be confusing on that first one just to make
25 sure I understand the position there. There were sort

1 of two issues; one, a public workshop with hearings for
2 the public, for the customers to testify and to
3 participate. And the other was like an evidentiary
4 hearing. This recommendation, does it address both, or
5 is it saying the one hearing would be the technical
6 hearing and the opportunity for customers to
7 participate if we decide that we wanted to do that?

8 MS. MOORE: It is a recommendation for an
9 additional hearing, it would be in the nature of an
10 evidentiary hearing. Not a formal 120.57 hearing, but
11 a rulemaking hearing where customers could participate
12 in that. And it could be held out of town, but it was
13 more in the nature of a second hearing very similar to
14 the one you held in December, but limited to the issue
15 of impact on rates, potential impact.

16 COMMISSIONER GARCIA: I just want to make sure,
17 because I understood it sort of as Commissioner Johnson
18 was saying, that we are going to have an evidentiary
19 hearing and then we will take customer testimony. For
20 some reason I had thought that we were going to do two
21 things, but we will do it here and we will take
22 evidence.

23 MS. MOORE: We could do it here or we could do it
24 at another location.

25 COMMISSIONER GARCIA: Right.

1 MS. MOORE: But our recommendation is if you do
2 have an additional hearing to have it on the issue of
3 the potential impact on rates. That is the
4 information. There has been some interest expressed in
5 getting -- there has already been a full hearing and
6 there were workshops, or at least one workshop prior to
7 the rule being proposed. And staff's concern is that
8 if you have workshops -- we are beyond that in the
9 process, but that also the delay that it would cause or
10 postponement would be --

11 CHAIRMAN JOHNSON: Help me with the delay issue,
12 and I notice in here that staff has stated that if this
13 -- that if we couldn't get the schedule within the next
14 two months then we shouldn't -- what should we do,
15 nothing? Should we not take the evidence in -- under
16 the primary, if we can't get something scheduled in two
17 months, what are you suggesting that we do?

18 MS. MOORE: Alternative 1, that written
19 submissions be accepted.

20 CHAIRMAN JOHNSON: And what is the -- I understand
21 that this has been a long process, but what is the harm
22 to be suffered in waiting longer? Is it because it has
23 been a long time and we don't want to be longer?

24 MS. MOORE: Generally. But, no, also there are
25 two pending DOAH rule challenges on the proposed rule.

1 The challenges do not challenge our having an unadopted
2 rule. There is, of course, that potential. And once
3 you find yourself in that position, the statute says
4 that the agency -- a defense is moving expeditiously
5 and in good faith to adopt a rule. The other --
6 another reason would be that the hearing has been held
7 and the further we go perhaps the more stale the
8 information gets.

9 CHAIRMAN JOHNSON: Okay. Let me -- let's go back
10 to the first point, because I thought you all were
11 tying those two together, but I'm still not clear on
12 how those pending challenges are impacted by us taking
13 longer than two months. Could you explain that again?

14 MS. MOORE: They have been abated to the end of
15 November. That has happened since we wrote the
16 recommendation. It's not a certainty, of course, but
17 as long as the utilities continue to ask that it be
18 abated perhaps there is no rush. However, there is
19 always the possibility at the hearing an administrative
20 law judge could deny further abatement.

21 CHAIRMAN JOHNSON: So the abatement has not been
22 granted, it has just been requested?

23 MS. MOORE: No, it's granted through the end of
24 November, but we have to keep filing status reports
25 and --

1 CHAIRMAN JOHNSON: But the abatement is -- it has
2 been abated.

3 COMMISSIONER CLARK: I don't see that as a
4 problem. They always do that. They are not anxious to
5 take a rule that's not final. A while, a long while
6 back we had a rule that must have taken three years to
7 get through, and they abated it for that long. I mean,
8 they are not anxious to take up a rule that is not
9 final, and I don't see that as a problem at all.

10 CHAIRMAN JOHNSON: Let's go to the second reason,
11 then. You were saying that the hearing has been held
12 and you're concerned that perhaps the information would
13 be stale?

14 MS. MOORE: Well, this rule docket has been open
15 for over a year, and it was initiated by a petition,
16 and we have had a hearing. Certainly if we are going
17 to have another hearing or additional submissions, then
18 that information can well be current. And it's
19 possible, you know, that DEP regulations or other
20 things will change.

21 CHAIRMAN JOHNSON: What is the harm? And I do
22 understand, and I do have some sensitivity in us taking
23 three or four years, or two years to get rules through,
24 so I am sensitive to that. But I try to look at them
25 on a case-by-case basis, and I'm really trying to

1 understand if we ended up in that predicament where we
2 couldn't hear this in two months and have a hearing in
3 two months, what harm is actually suffered so that I
4 can gauge that when making my determination. Maybe
5 it's worth it to get more information to wait longer.

6 MS. MOORE: I think it's a balance, and there is
7 -- in the statute normally rules must be filed for
8 adoption within 90 days of being proposed. That time
9 period is told when there is an administrative rule
10 challenge, it is also told for the period when you are
11 having a hearing. Recently the Joint Administrative
12 Procedures Committee has told us that we do need to at
13 least notice hearings within 90 days. They don't view
14 kindly and may reject the filing of a rule if there are
15 greater than 90-day periods without any activity in the
16 rule file.

17 CHAIRMAN JOHNSON: So on balance, and I understand
18 we have some new information now since this was filed,
19 but with the abatement being granted to November 30th,
20 on balance is staff's position still looking at all of
21 the issues that if we were in a position where we
22 couldn't hold a hearing in two months, that we should
23 adopt the alternative, given the fact that it has been
24 abated and we do have this additional information?

25 MS. MOORE: Yes. And part of that recommendation,

1 the basis for that was the next hearing date that
2 looked like could be scheduled was January, and we
3 believe that was an unreasonable delay.

4 COMMISSIONER CLARK: Madam Chairman, I would just
5 -- I would just respond to that in this way, but let me
6 ask a question first. Is it still true that a
7 proceeding is considered still pending while the public
8 hearings are still going on?

9 MS. MOORE: Yes.

10 COMMISSIONER CLARK: And under the APA, isn't our
11 discussion of it at agenda considered part of the
12 public hearing?

13 MS. MOORE: That's correct. And the time for
14 filing is extended to time certain on the last public
15 hearing. But we have been warned by JAPC staff that
16 there has to at least be a notice of that hearing
17 within a 90-day period. But it's no longer pending and
18 we have not put that to the test.

19 COMMISSIONER CLARK: We have to do something
20 affirmatively to indicate that the public hearing is
21 continued.

22 MS. MOORE: That's right.

23 COMMISSIONER CLARK: The other part in terms of
24 having a policy out there, or if we adopt policy, we
25 are subject to being challenged on the basis that we

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1 have an unwritten rule.

2 MS. MOORE: Unadopted rule.

3 COMMISSIONER CLARK: Unadopted rule. It would
4 seem to me that based on the recommendation in item --
5 I don't know what it was, 30, 40, something.

6 COMMISSIONER DEASON: Item 45.

7 COMMISSIONER CLARK: Is that Gulf? That we are --
8 it is something we can accomplish on a case-by-case
9 basis and, in fact, do it now. I mean, a lot of the
10 record is made up of what margin of reserve should be.
11 I guess what I'm trying to indicate to you that I don't
12 think that a two-month time frame is critical.

13 MS. MOORE: Well, I think there is a defense in
14 that a rule is presumed practical unless particular
15 questions addressed are of such a narrow scope that
16 more specific resolution of the matter or that matters
17 aren't sufficiently resolved.

18 CHAIRMAN JOHNSON; If we continue to operate --
19 it's not like we don't have a policy. It's incipient
20 policy. And if we continue to operate under that
21 incipient policy until we could hold this particular
22 proceeding, I think the burden may be harder when we
23 are challenged because it's not a rule. But in each
24 and every instance we just have to prove that up if it
25 were challenged as an unwritten rule or policy of the

1 Commission, is that correct?

2 MS. MOORE: Well, we have to show that -- unless
3 we show that it is not practicable or feasible, then we
4 have to show that we are moving expeditiously and in
5 good faith.

6 COMMISSIONER CLARK: You can't incipiate forever.

7 MS. MOORE: No.

8 CHAIRMAN JOHNSON: Okay. Going back to another
9 question, because I'm not as concerned with that
10 two-month deadline, and you're right, it is a balance.
11 And on balance getting this information I believe that
12 it would be important to have as a part of our record
13 to make our determination. But the other issue, the
14 public workshop for the customers versus the
15 evidentiary hearing. Now, staff is suggesting that we
16 can do both at the same time whether in Tallahassee or
17 at a remote location?

18 MS. MOORE: Rulemaking doesn't distinguish between
19 customer workshops and hearings as in a rate proceeding
20 where you have service hearings. In rulemaking any
21 affected person can request a hearing or file comments.

22 CHAIRMAN JOHNSON: And that's the same -- in the
23 law, I guess, when they were referring to a public
24 workshop, then that is what we are calling a hearing
25 or --

1 MS. MOORE: No, in Chapter 120 in the rulemaking
2 provisions before you ever -- before an agency proposes
3 a rule, during the rule development process, it
4 publishing a notice that it is developing a rule, and
5 offers the opportunity for workshops. Any person can
6 request a workshop and request it in a different part
7 of the state. That's in the rule drafting stage, yes.

8 CHAIRMAN JOHNSON: Okay. So are we suggesting,
9 because it appeared to me that some or at least one of
10 the requests is for the public workshops. Do we still
11 have the discretion to hold those public workshops?

12 COMMISSIONER CLARK: I think we are sort of
13 getting mixed up in semantics. Usually in the APA they
14 talk about workshops being held prior to a rule
15 proposal. And afterwards it's called a public hearing.
16 And we would just -- yes, it's a more free-flowing
17 proceeding, but it would be what I think you have in
18 mind.

19 CHAIRMAN JOHNSON: One of the other suggestions
20 that had been made is that if we hold these hearings
21 that we notice them differently. I mean, I agree with
22 staff's analysis that we have complied with the law
23 with respect to the noticing provisions and using the
24 Florida Administrative Weekly. But there was some
25 suggestion that if we decided to hold either one, or

1 two, or however many hearings that we notice the local
2 newspapers. Has that ever been done, and how could
3 that be accomplished?

4 MS. MOORE: Not to my knowledge has it ever been
5 done in a rulemaking or apart from rate cases where the
6 utilities are required to publish notice.

7 CHAIRMAN JOHNSON: If we were to hold a public
8 workshop then would we notice it? How would we notice
9 it?

10 MS. MOORE: Our method of noticing, in addition to
11 the Florida Administrative Weekly, is to provide notice
12 to anyone who has requested notice or who has appeared
13 in the proceeding. But we not only maintain a list of
14 people that have requested notice of anything, or any
15 rule, or any particular rule, but we would also
16 maintain and take requests for this particular rule and
17 mail notice to them. But as far as a general newspaper
18 notice, I don't believe we have done that at all in
19 rulemaking or for our own hearing.

20 COMMISSIONER DEASON: Commissioners, I appreciate
21 the discussion we are having here, and I think it's a
22 legitimate issue concerning reopening the record and
23 having additional hearings. I think any time you
24 reopen a record it is a very serious question. But I
25 think that we need to review what got us to where we

1 are and why there is a request to reopen the record.

2 We initiated rulemaking and we proposed a rule
3 which we thought best incorporated what we considered
4 to be our existing policy. It just so happens that
5 during the meantime our policy has kind of fluctuated a
6 little bit with some recent decisions based on a
7 case-by-case basis and the evidence in the record in
8 those. But nevertheless we proposed the rule. We went
9 to hearing and now we have a recommendation in front of
10 us which significantly changes the amount of a margin
11 of reserve all the way to five years.

12 And there is concern that if that had been
13 proposed to begin with, and perhaps more information
14 gathered on customer impacts of five years, that that's
15 something that we should have taken into consideration.
16 I guess what I'm saying is that I have concerns with
17 the five years in the rule that is in front of us. I
18 cannot vote to support that. If that is what is the
19 concern for reopening the record, perhaps we need to
20 address that issue. And if there is a majority on this
21 Commission to not approve five years, perhaps there is
22 no need to reopen the record.

23 I think that we are in a state of flux, that we
24 need to go back to a case-by-case basis. And then in
25 each individual case we will have a form in front of us

1 and we will have customers that have been put on
2 notice, and we will have service hearings, and there
3 will be an issue identified as to what is going to be
4 the margin of reserve and potentially how that is going
5 to affect rates. And then when we go through a series
6 of those hearings perhaps then at some future time we
7 will be prepared to adopt a rule which specifies five,
8 four, three, six, seven, I mean, we have got a whole
9 wide margin that has been -- of periods of time that
10 have been discussed. But as it stands today, based
11 upon the record that's in front us today, I cannot
12 support five years. That is just one point of view.

13 COMMISSIONER KIESLING: Well, let me -- since we
14 are kind of jumping ahead, let me throw in my two cents
15 on that. I also cannot support a rule that says five
16 years. However, I believe that based on the record
17 evidence that we have in front of us I can support a
18 rule that says three years. I think even three years
19 is pushing it, but I can live with that. And the
20 reason that I am very concerned about the length of
21 time, and I think that three years is the outer limit
22 that I can support, is that simply in my mind shifts
23 too much of the cost of future growth to current
24 customers.

25 I think it is unconscionable to load up current

1 customers with that much of an increase in rates to
2 support growth that they may not even be there to
3 enjoy. I think that we should make decisions about
4 what we think is the appropriate margin of reserve
5 without regard to rules that other agencies may have
6 passed that do not take into consideration the cost
7 that is going to be passed on to customers. So, that's
8 where my thinking is.

9 I feel that there is an adequate record as it
10 stands now to support at maximum three years. And if
11 that doesn't garner a majority of support on this
12 Commission, then I agree with Commissioner Deason that
13 we should go back to a case-by-case basis until we can
14 figure out what is appropriate, because our policy has
15 been changing. I don't think that we are at the
16 incipient policy stage because, in fact, in the last
17 two or three cases we have used different time periods
18 than our policy up until then had supported. So, I
19 just figured I would lay all my cards on the table and
20 tell you where I am, and express my feeling also that
21 if we go with three years or stick with the policy that
22 is currently in place to further develop it, then I
23 also think I could skip the first two issues, because I
24 think that there is adequate support for doing that.

25 CHAIRMAN JOHNSON: Any other comments?

1 COMMISSIONER GARCIA: Madam Chairman, I would like
2 to hear from the parties that are here.

3 CHAIRMAN JOHNSON: Okay. Let me allow staff,
4 though, the opportunity to key up the other two
5 alternatives.

6 MS. MOORE: The Alternative Recommendation 1 is to
7 take additional evidence, but take written submissions
8 rather than having a hearing. And that would give
9 other persons an opportunity to respond to the written
10 submissions. The disadvantage is that if the
11 Commission wants the additional information it would
12 not give them the opportunity to question the parties'
13 filing. The third, or Alternative Recommendation 2 is
14 not to take additional evidence and to go ahead and
15 take up the second recommendation and adopt a rule.

16 CHAIRMAN JOHNSON: Thank you. Any other
17 questions, Commissioners? Seeing none, Public Counsel,
18 if you would like to --

19 MR. SHREVE: I guess so. I'm not sure who can
20 participate and who can't at this point with the issues
21 that have been coming, but I do have some comments on
22 this. For one, I assume the staff is not talking about
23 opening it back up just for information that they want
24 to put in, and information they developed. I would
25 assume that is open if they are going to do that. I

1 know the staff, after the company filed their testimony
2 asked for some changes in the assumptions, which then
3 changed the percentages but not the money. That is not
4 in the record, although I hope it has not been
5 considered by the staff in their five-year
6 recommendation.

7 But, there are calculations that have been done by
8 the staff. I don't think they show all of the impact
9 to you that happens on an individual case-by-case
10 basis, and it does change on an individual basis
11 depending on the build-out of the system, the length of
12 the system. In Commissioner Kiesling's three years
13 there are some cases that might be very appropriate.
14 There are some cases that will run the rates through
15 the roof for the individuals.

16 This is what is I have never understood as to why
17 there has to be a rule on margin of reserve. Maybe on
18 CIAC it's different. Maybe you want to take the rule
19 up and say, okay, if we are going to have margin of
20 reserve maybe we should have a rule on how much CIAC we
21 should impute. But on margin of reserve it really
22 doesn't make that much sense. The pressure, and I'm
23 talking about you've got this pressure on you from the
24 staff, and the utilities and other parties, the
25 pressure is not on you just to get a rule, but the

1 pressure is on you to make you change the decisions you
2 have been making and that is exactly what you see now
3 in the recommendation and the utility's filings.

4 I can't understand how you would want to put a
5 rule that would lock you in for a development that's
6 only been there two years and the build-out is going to
7 be ten years, and you have put in a three or even a
8 year and a half margin of reserve. It will be a
9 totally different impact on a few customers than it
10 would if the development is built-out in 90 percent. I
11 don't even think that is appropriate for a rule.

12 I think you -- and we have disagreed and still
13 disagree with the decisions you have made, but you have
14 made them on an individual case basis and looked at the
15 situation that existed before you and did what you
16 thought was right. If you are going to lock yourself
17 into having a rule that tells you are going to do this
18 in each and every one, I will guarantee you you are
19 going to be looking for ways out of it.

20 MR. SCHIEFELBEIN: Commissioners, excuse me.

21 Wayne Schiefelbein --

22 CHAIRMAN JOHNSON: No, excuse me. We are
23 operating in an orderly manner here.

24 MR. SCHIEFELBEIN: Well, Commissioners, we are not
25 following the script as was indicated by the staff

1 recommendation that indicates the participation is
2 limited to the issue of whether to reopen the record or
3 not. If we are going to debate the merits and the
4 substance of the rule, we're game. But we do not
5 appreciate being deprived of that opportunity if Mr.
6 Shreve is given cart blanche to go into the substance
7 of the rule. Those issues are clearly indicated as
8 where parties may not participate.

9 CHAIRMAN JOHNSON: Well, what I don't appreciate
10 is you interfering in this process. If you have an
11 objection, then state your objection and then I will
12 allow you or I will decide whether or not to allow you
13 to state the rationale for your objection.

14 Mr. Shreve, do you have any other comments?

15 MR. SHREVE: That's all. Thank you very much,
16 Commissioner. Thank you.

17 COMMISSIONER CLARK: Mr. Shreve, let me just ask
18 one thing in terms of policy. It seems to me that -- I
19 guess the comment I indicated to staff that at some
20 point we can no longer incipiate on our policy, and if
21 it appears that we have been following one policy of 18
22 months that we have got to put that in a rule at some
23 point.

24 MR. SHREVE: Commissioner, I think that is an
25 excellent question, and we have been talking about this

1 for years. I mean, this started a long time ago as to
2 whether or not you could continue making these
3 decisions on an incipient policy and prove it up in
4 each case. I don't know that that's where the
5 rulemaking requirements go. I mean, what if you have a
6 different factual situation for each case? You don't
7 have a rule that says you are going to require of each
8 utility for each customer a \$5 O&M expense. That
9 changes on an individual case. You don't have -- I
10 mean, there is so many things in each individual case,
11 and I see this as the same thing. I think there may be
12 some things in there -- now, you have moved on to
13 different levels with the -- return on equity, that is
14 one thing that has kind of changed and it can be
15 challenged everything like that.

16 But to me this is different, because each
17 individual case has a different factual situation. And
18 I have wrestled with this same thing. Do we need a
19 rule? Do you want to have a rule that would say zero
20 margin of reserve in every single case? Do you want to
21 have a rule that will have seven years margin of
22 reserve in every single case? Or do you want to have
23 the ability to make the decision on the facts that are
24 before you on each case? And would you make a
25 different decision? That's where I don't know that the

1 rule -- that rulemaking requires a rule in that
2 situation.

3 COMMISSIONER CLARK: So you will defend us if
4 somebody says we have a policy that we have adopted
5 over and over again and haven't put it in a rule?

6 MR. SHREVE: I will, and I would defend it better
7 if you would start going our way on some of this.

8 CHAIRMAN JOHNSON: Thank you, Mr. Shreve.
9 Senator Cowin.

10 SENATOR COWIN: Thank you, Madam Chairman. You
11 know, Calvin Coolidge once said that when he was
12 running for President that he wanted to go to
13 Washington, D.C. and not make any laws because every
14 law restricted us. And as a senator, I certainly
15 realize many times we need to not have quite so much
16 regulation and we will have a little bit more freedom.
17 And if your deliberations yield to a case-by-case, my
18 comments really are not necessary, so I would yield to
19 that. But in light that I have come to speak on the
20 issue of having public hearings, I would like to
21 address that.

22 First of all, I want to thank you very much for
23 deferring this issue to after the session and to the
24 time when I can come and speak to you about it. For
25 the record, I would like to correct a letter that was

1 in response to my May 6th letter from Mr. Gatlin on
2 Point 3, where he spoke about Mr. Mike Twomey, an
3 attorney who he stated was one of my advisors, who
4 attended a December hearing. He is not one of my
5 advisors. I have spoken with him on numerous occasions
6 when he has come to my office here in Tallahassee, he
7 has told me himself he has not participated in the
8 December hearing, but I don't know that for a fact.

9 The other thing I would like to address is a
10 little bit on the letter that I did write to you on
11 May 6th, and I'm requesting that you hold proposed
12 hearings on this rule, if indeed you wish to adopt
13 this, concerning the margin reserve granted to
14 utilities and the corresponding imputation of the CIAC.

15 I think -- it is my belief that it would be
16 improper for this Commission to adopt rules regarding
17 the margin reserve which have such a significant
18 financial impact without first scheduling public
19 hearings to notify the public and receive citizens'
20 input. The citizens have not been notified, and are
21 not aware of the implications of the Commission's
22 notice of rulemaking. It was published in the
23 Administrative Weekly. I am a customer. I have not --
24 and I am pretty active, I think, politically in what is
25 going on. I was not aware of this. I was aware of

1 some activity legislatively which you are aware did not
2 pass for the very issue that you are trying to address.
3 Even if the notices were explicit and correct, the
4 overwhelming majority of our citizens were totally
5 unaware of your rulemaking process. And there is no
6 way that they could possibly be aware of the
7 significant rate increases that could result from this
8 proposed rule change without adequate notice in the
9 form of public hearings.

10 I believe that the utility industry, which was
11 involved in the inception of this rulemaking process,
12 that not only were the ratepayers of Florida not
13 adequately noticed, but that your intent is to provide
14 a policy of providing an 18-month margin reserve with
15 full implementation of a CIAC. Again, if it is on a
16 case-by-case basis, I think that that is a far better
17 approach. It gives you a little bit more flexibility.

18 I understand, however, that the staff currently is
19 recommending a margin reserve of five years to be
20 granted with no offsetting of the construction,
21 contribution-in-aid-of-construction. This drastic
22 change in your policy, again, will affect wastewater
23 and water bills, and I don't think that the ratepayers
24 fully understand the impact.

25 As a matter of fact, just before I came here, I

1 received a letter from a constituent that was addressed
2 June 6th. It was actually sent to you, and then there
3 was a handwritten notice about -- that very recently,
4 the date of this particular letter was dated May 27th,
5 I received it June 6th. My notice, as a matter of
6 fact, of the responses to my May 6th letter by Mr.
7 Gatlin was not received until June 9th, and that was
8 only upon my request by the Public Service Commission
9 and the company.

10 In the letter she said very recently it was
11 brought to her attention, the date of this letter is
12 May 27th, and she questions, and I quote, "Where is the
13 public interest represented here? There was no notice
14 publicly." Again, she goes ahead and states that it's
15 not the Commissioners of the Public Service
16 Commission's job to balance what is -- is not to
17 balance what is in the public interest. In a note to
18 me specifically, she stated, and I quote, "My only wish
19 is that I would have known about this sooner." Again,
20 here is a constituent who has this exact problem.

21 There are many Florida citizens that have invested
22 their life savings in homestead properties, that have
23 purchased them with full knowledge of the utility
24 overheads required in the future to maintain their
25 households. There have been dramatic changes in the

1 ratemaking formulas as proposed by your staff, and they
2 can impact tremendously on fixed income residents. My
3 district is comprised, as well as Florida, as you know,
4 by many retired people. I, as a customer, have noticed
5 a dramatic increase in rates to the extent that I pay
6 in the neighborhood of \$150 a month for water and sewer
7 rates.

8 The notice that I had received, which is
9 interesting, this again, I did not send away for, it is
10 unsolicited, as was the other letter that I referred to
11 you. This came from another constituent, and it was in
12 reaction to the investors' response, and they are
13 talking in terms that the Florida Public Service
14 Commission grants Florida Water, which is one of the
15 companies, which is Southern States Utilities, which is
16 one of the companies that would be benefiting by this
17 rule change, a rate increase \$11.1 million higher than
18 that was authorized when the rate case was filed in
19 June of '95. Whether or not this is accurate or not,
20 this is coming from the company themselves that they
21 received more than what was requested, \$11.1 million
22 more in their own -- in their own statement.

23 Further, what is very interesting about this, the
24 ink was not even dry on that rate case, and as you
25 know, I was there testifying before you when they went

1 ahead and came in. I mean, I don't even know how long
2 it took, but the ink wasn't even dry before they
3 solicited your input to increase the rates again
4 through this rulemaking change. Now, what kind of
5 impact? This one company, granted, its the largest --
6 according to what they're saying -- the largest
7 privately-owned water and wastewater utility. But,
8 this one company of which this is just one impact,
9 provides water to 120,000 customers, and wastewater
10 treatment services to 54,000 customers. That is a lot
11 of people that will be impacted by your very rule
12 change.

13 One minute, I have these in numbers. Okay. On
14 the staff analysis, the very analysis that was -- or
15 the actual notice that was sent to you by your staff,
16 actually states, and I want to bring up at least four
17 different points. One, there is additional information
18 available on the potential impact, and I'm quoting,
19 "That changes to the proposed rules might have on rates
20 that the staff believes is relevant." So your own
21 staff believes that there is more information. Two,
22 that interested persons will benefit from having the
23 opportunity to review the additional information.
24 Three, the opportunity to ask questions of staff and
25 other persons submitting evidence on this issue they

1 rule as being important. And, four, and your own staff
2 -- and this is all coming out of their staff
3 recommendation -- the staff believes that it would be
4 proper for the Commission to consider the additional
5 information.

6 Further on the staff goes to say, "The legislature
7 has provided the agency to make changes to proposed
8 rules during the course of the rulemaking proceeding."
9 And further, that this rule change has such a broad
10 impact to the pockets of customers that it is
11 potentially greater than even rate cases, some rates
12 cases. And yet when you have rate cases that have
13 changes, what do you do, you have public hearings.

14 Let's not deny the effective ability of
15 positioning the Public Service Commission with proper
16 noticing and debate in handling this manner. I
17 request, Commissioners, that you not abrogate your
18 responsibility to the customers who depend on you for
19 fair and open and deliberative investigation and for
20 information.

21 I would like to address a little bit more on my
22 letter which I stated to you that before a final vote
23 is taken, at a minimum the public should be made aware
24 through local newspapers distributed through Florida of
25 your staff's recommended rule. Public hearings, not

1 just one hearing. Not a hearing that is confused with
2 evidence and whatever. Customers don't understand
3 that. I have gone to many of your hearings and they
4 have been well presented, given good information, and
5 hand-outs, that's what customers need. And older
6 people who are impacted by this cannot come to just one
7 meeting up in Tallahassee or in Orlando, they need to
8 have meetings to come throughout the state with such an
9 impact to hear not only the utilities', but the staff's
10 rationale as to why they should be required to support
11 future growth with the increased rates. And,
12 Commissioner Kiesling, you know, when you look at the
13 different rates, I don't see how you would want to lock
14 yourself into one particular rate. Certainly it would
15 be far better to take circumstances as they come on a
16 case-by-case basis.

17 Commissioners, you should be complimented on
18 expressing your intention to the public, and I want to
19 compliment Chairman Johnson for her personal influence
20 in trying to make this a more open process. It is
21 starting to be noticed. I think what you could say to
22 the public is that we really do care and that you
23 really do represent not only utilities' interest as far
24 as what is fair and reasonable for their rate of return
25 and so that they can make profits, but you can balance

1 it with public input. Now is the time to put that
2 policy to work. This is the time when the proof of the
3 pudding is going to see if you really do mean what you
4 say. And I certainly urge, number one, that you do it
5 on a case-by-case basis, which would be far better, or
6 number two, if you decide to go ahead with this rule,
7 that you do have many public hearings so that the
8 public can provide input. Thank you.

9 CHAIRMAN JOHNSON: Thank you very much, Senator.
10 Mr. Twomey.

11 MR. TWOMEY: Thank you, Madam Chairman and
12 Commissioners. I will be brief. I'm Mike Twomey. I'm
13 here on behalf of the Sugarmill Woods Civic
14 Association, Inc. As you are probably aware, I have
15 lobbied fairly extensively against the legislation on
16 this matter last session and have taken the opportunity
17 to speak to some of you about my views on this subject.

18 I would suggest first that you adopt Commissioner
19 Deason's recommendation that you -- if I understood him
20 correctly, drop the whole issue of a rule and go back
21 to a case-by-case basis that you have engaged in for
22 the last 20 or 30 years. On that point, there is no
23 big deal, I think, about worrying about delays, the two
24 months staff spoke to. You have been doing this for 20
25 or 30 years, you can continue it for another year or

1 two, get some more operating experience and see if you
2 need to go from there.

3 I suggest going back to the case-by-case analysis
4 because we discovered primarily as a result of Senator
5 Cowin's request that you do certain number crunching
6 during the legislative session, that you nor your staff
7 knew what some of the outlying increases would be as a
8 result of the proposed rule, be it a five-year rule or
9 a seven-year period as proposed by one of the bills
10 before the legislature. We saw as a result of the
11 numbers that you crunched, which you didn't have
12 beforehand, that in some cases rates could go up as
13 much as 26.7 percent with Palm Coast. We saw other
14 examples where rates went up substantially. In some
15 cases they didn't. One of the things we know for sure
16 is that you can't know what other outliers might be out
17 there because the rate of increase on any rule, whether
18 it's three years or five or seven, is because it is
19 fact specific to the system. And you don't have the
20 staff and it would not be a productive use of your time
21 or your staff's to go through and look at the numbers
22 for every system, in part because you don't have the
23 current numbers, growth and so forth.

24 So it seems to me that Commissioner Deason's idea
25 is an excellent one, that is that you don't waste your

1 time, you don't invite rule hearings, you don't invite
2 rate cases. You address it as it comes up on a
3 fact-specific basis. You have it and then you go
4 forth. If you don't get rid of the rule and you
5 consider going forward with the rule, I would recommend
6 on behalf of my clients that you adopt your staff's
7 primary recommendation, that you have hearings and that
8 you do it in the field, if you will, so that customers
9 can participate as recommended by Senator Cowin.
10 That's really the only decent way to do it, I think, so
11 you put them on notice and you get their input, as
12 well. Thank you.

13 CHAIRMAN JOHNSON: Mr. Schiefelbein.

14 MR. SCHIEFELBEIN: Good morning, Commissioners.
15 Wayne Schiefelbein, Gatlin Schiefelbein and Cowdery, on
16 behalf of the Florida Waterworks Association.

17 Chairman Johnson, I apologize for my interruption
18 earlier. I did not know of any other way to express my
19 discomfort with hearing Mr. Shreve go beyond what I
20 thought were appropriate items for discussion, but I
21 apologize for that.

22 I would like to address some of the comments that
23 have been made here. Obviously the Florida Waterworks
24 Association is in support of staff's second alternative
25 recommendation, which is to proceed immediately to a

1 vote on the proposed rule, whether that be thumbs up or
2 thumbs down, as far as what the contents are on that.

3 Now, I would like to sort of very quickly, because
4 you have heard this before, but I would like to remind
5 you all when you talk about delay on this, that we have
6 been at this now for six years.

7 The industry has tried very hard, starting with
8 staff workshops in '92, well into '93, beginning with
9 that we have tried very hard to get you to address this
10 policy, which is very expensive to litigate in each
11 rate case. It's an expense to the utility, expense to
12 the Commission and an expense to Mr. Shreve and the
13 customers, ultimately.

14 We have been given assurances starting in 1993 and
15 in February 1995 at an Internal Affairs that this would
16 be put on a fast-track, that was 2-1/2 years ago. A
17 workshop in July 1995 that staff put on where we were
18 assured that prompt action would be made. And then, of
19 course, in March of '96, 15 or 16 months ago, the
20 Florida Waterworks Association asked you to address
21 this through formal rulemaking.

22 We would like you to keep that in mind when you
23 consider what is the problem with additional delay.
24 Please keep in mind that the Administrative Procedures
25 Act does provide that rulemaking is not a matter of

1 agency discretion, and that if you have an agency
2 statement that is of general applicability, that you
3 must adopt it by the rulemaking procedure, quote, as
4 soon as feasible and practicable.

5 And I think that no matter how you want to
6 interpret the chronology of this over the last six
7 years, I would suggest that letting this thing slip
8 into some sort of an endlessly open record would not
9 comply with that.

10 I would like to also very quickly say, address
11 other harm that can arise in a further delay. I
12 mentioned that you would be violating, in my opinion,
13 the law, the APA, the expense of litigation, and so
14 forth, but you would also be --

15 COMMISSIONER CLARK: Mr. Schiefelbein, please tell
16 me how I'm going to be violating the law, that concerns
17 me.

18 MR. SCHIEFELBEIN: Yes, ma'am. Just by virtue, I
19 think, that you are continually applying a policy that
20 qualifies for the definition of a rule, and that you
21 are not proceeding to rulemaking as soon as feasible
22 and practicable.

23 COMMISSIONER CLARK: Which policy is that? What
24 policy have we been applying?

25 MR. SCHIEFELBEIN: The policy of approving very,

1 very short margin reserve periods, and the policy of
2 offsetting whatever rate base might be represented by
3 that margin reserve through the imputation of CIAC.

4 Mr. --

5 COMMISSIONER CLARK: So if we wanted to avoid
6 that, we should move quickly to adopt the 18 month and
7 the CIAC?

8 MR. SCHIEFELBEIN: That would certainly be an
9 option, yes, ma'am.

10 COMMISSIONER CLARK: Which is not one that you are
11 supporting.

12 MR. SCHIEFELBEIN: Well, I dare say I would prefer
13 to see this Commission conclude its decision-making on
14 this. And if there is a -- we can pursue our rights
15 over at DOAH, if need be.

16 One thing that I would like to comment on, also,
17 there has been talk about how abatement of the DOAH
18 action has been extended to November 30th. It's my
19 understanding -- we have tried to avoid the expense to
20 all concerned of duplicative proceedings, and we have
21 been very patient on that. But it's my understanding
22 that we would be perfectly in our rights, once we
23 became persuaded that this is a charade and that we are
24 not headed toward adoption of a rule, by requesting the
25 DOAH administrative law judge to end the abatement.

1 Obviously there would be an opportunity for the
2 Commission to respond to that and so forth, but I don't
3 believe that that abatement, continued abatement gives
4 a license to just let this thing spin out of control,
5 which I believe it is.

6 Very quickly, Commissioner Deason, you said the
7 policy has changed. I don't believe the policy really
8 has changed. There has, since this rulemaking docket
9 has opened up, there has been I think that you
10 initiated it, an effort to perhaps cut back on the
11 imputation, the so-called 50 percent imputation
12 approach. I want to tell you right now that the bottom
13 line effect of that 50 percent imputation in case after
14 case in the last nine or ten months is to effectively
15 wipe out the approved margin reserves. Nothing has
16 really changed. You may call it a different name, but
17 the bottom line numbers don't lie. And we are seeing,
18 for example, in one case, using an average test year, a
19 so-called 50 percent imputation, we are looking at a
20 situation where the margin reserves, the net margin
21 reserves did not even extend outside of the test year.
22 Which has essentially been your policy with the full
23 imputation, so I respectfully want to point that out.

24 There has been a lot of talk. Mr. Shreve
25 indicated rates are going to run through the roof,

1 Senator Cowin indicated that the rates are going to
2 skyrocket from our proposal. You know, there is no
3 evidence of this, and all this talk about the staff
4 analyses, which I have examined in detail, they are
5 about this high, staff very gamely tried to respond to
6 a climate of hysteria created over in the legislature
7 this year on a different proposal than what you have
8 before you today. And, in fact, the only --

9 COMMISSIONER GARCIA: If you will remember it
10 wasn't created by us at the legislature.

11 MR. SCHIEFELBEIN: I would agree with that, yes,
12 sir, I certainly would. But by waving in the air
13 Scenario 10 on the floor of the Senate, which is the
14 only basis for any of these so-called outrageous rate
15 increases, that paper that was waved in the air has got
16 on it staff disclaimers that say that these
17 calculations that we have prepared have no basis in
18 reality, are based on unrealistic assumptions. I mean,
19 essentially, if you get beyond the emotion of this and
20 look at the facts, this rate impact question has been
21 analyzed in this proceeding, and I don't see a need to
22 get further into it.

23 Now, I am astounded that Mr. Shreve is here today.
24 I have nothing but respect for the man, but, I mean,
25 Public Counsel is the statutory representative of the

1 citizens of the State of Florida. Public Counsel
2 participated in this hearing every step of the way.
3 They prefiled comments, they prefiled various
4 information, they cross examined all the witnesses at
5 the hearing. They were certainly there. We can't have
6 -- I don't know what the population of Florida is, but
7 we can't have a separate hearing when you want to do
8 rulemaking. You will never get any rules if you have
9 one for each community in the state. Mr. Shreve was
10 there, he had the funding to do the job and he did the
11 job, and took his best hold and made his case. And
12 it's in the record and we don't -- to talk now about
13 reopening the record from Public Counsel, I think, is a
14 bit disingenuous.

15 CHAIRMAN JOHNSON: Let me ask you one question.

16 MR. SCHIEFELBEIN: Yes, ma'am.

17 CHAIRMAN JOHNSON: And I know you have more notes
18 there, and certainly you will be allowed to finish.
19 You stated that there is no evidence in the record, I
20 believe you stated, to show that there will be
21 outrageous increases. Is there evidence in the record
22 to show that there will not be outrageous increases?

23 MR. SCHIEFELBEIN: I believe there is, yes. I
24 think there is ample evidence that --

25 CHAIRMAN JOHNSON: Under the five year, under the

1 five year that is being proposed by staff?

2 MR. SCHIEFELBEIN: Yes, ma'am, I believe there is.
3 I think staff discusses that in their main
4 recommendation, which we are not supposed to be -- I
5 thought that parties were not supposed to be talking
6 about here. But I believe there is information that
7 shows generally, I believe, five to ten percent rate
8 increases as if the rule, adoption of the rule would
9 result in rate increases, which is not, of course, the
10 case. A utility still has to come in, file a rate
11 case, make its case. Of course, the proposed rule says
12 unless otherwise justified there may be situations
13 under that rule where you do not approve the five
14 years.

15 CHAIRMAN JOHNSON: And the five to ten percent
16 that you talk about staff referencing in their
17 recommendation, was that fact-specific based on system
18 analysis or was it based on a methodology?

19 MR. SCHIEFELBEIN: I believe it was based on a
20 model. Staff could correct me if they are wrong, but I
21 believe it was based on various assumptions and a
22 model.

23 CHAIRMAN JOHNSON: And if the Commissioners didn't
24 feel comfortable with that particular model and
25 determined that that wasn't sufficient to determine the

1 impact on rates, what would you suggest that we do?

2 MR. SCHIEFELBEIN: Well, I think in practicality
3 and given your obligation to proceed expeditiously to
4 rulemaking, I think that you should vote what you
5 believe is appropriate based on the record that we have
6 after an orderly proceeding.

7 CHAIRMAN JOHNSON: Thank you for that answer. Go
8 ahead.

9 MR. SCHIEFELBEIN: Well, in conclusion -- I could,
10 of course, go on forever and we don't need to hear
11 that. But I believe that we have had a proceeding
12 conducted properly under the Administrative Procedures
13 Act, we have had -- the citizens of the State of
14 Florida have had full representation by the Office of
15 Public Counsel. We have a record, we have a six-year
16 chronology of this which has up to now been nothing but
17 delay. We think the time is ripe for the Commission to
18 vote. We would ask that they vote today on the
19 rulemaking. Thank you.

20 CHAIRMAN JOHNSON: Thank you, Mr. Schiefelbein.
21 Are there other parties here to speak?

22 MR. FEIL: Yes, ma'am, if I could. Matthew Feil
23 here for Florida Water Services Corporation. I would
24 concur with most of Mr. Schiefelbein's comments.
25 Florida Water prefers the second staff alternative,

1 which is for you to proceed with the rulemaking now.
2 That failing, however, we would prefer the Alternative
3 Number 1 in the staff analysis. The parties have
4 expended a great deal of time and effort, as has the
5 Commission, on the hearings and workshops that have
6 taken place since 1991. And it seems to me that if you
7 do you want additional evidence in the record
8 concerning the rate impacts, the most expeditious way
9 and cost-effective for you to do that would be the
10 Alternative 1. But, again, Florida Water prefers the
11 second alternative.

12 With respect to Mr. Schiefelbein's suggestion that
13 you vote on a rule that reflects your historical
14 policy, Florida Water believes that that does have
15 certain benefits to it. The DOAH challenge would
16 proceed in that event. However, if a delay of just
17 several months is the alternative, we could have an
18 industry favorable rule, Florida Water would be
19 amenable to that, as well.

20 Referring to the staff recommendation, I'm not
21 sure what comments Senator Cowin was making with
22 respect to Florida Water specifically. I won't address
23 them and take up any more of your time. However,
24 again, I concur with most of the comments that Mr.
25 Schiefelbein made, and we would ask that you adopt the

1 staff's second alternative.

2 CHAIRMAN JOHNSON: Thank you.

3 MR. SCHIEFELBEIN: If I may very quickly. I was
4 not suggesting -- I can't read you all's minds, that
5 you necessarily go ahead and adopt a rule that codifies
6 historical policy. I am recommending that you go ahead
7 and adopt a rule that represents your best handle on
8 the issue. That may be historical policy, that may be
9 somewhat of an incremental change. It's not my
10 preference that you adopt the policy. But wherever the
11 chips fall, I'm saying the time is ripe for adopting a
12 rule. Thank you.

13 CHAIRMAN JOHNSON: Any other comments?

14 Commissioners, any questions?

15 COMMISSIONER CLARK: I do have one question. It
16 seemed to me somewhere in the recommendation from
17 staff, and this is on the substance of the rule, the
18 staff indicated that they didn't think three years was
19 appropriate, and they gave a rationale. And I was just
20 -- it wasn't supported in the record. Let me see if I
21 can find it.

22 CHAIRMAN JOHNSON: And maybe staff could assist,
23 too, in why there was a change from three to five
24 years. I thought it had something to do with the DEP
25 testimony and the testimony from the technical experts,

1 but I know what you're talking about.

2 COMMISSIONER CLARK: Somewhere you just sort of
3 rejected out of hand the notion of three years.

4 MS. MOORE: There is, on Page 6, a reference to
5 the testimony that supported the three year. Mr.
6 Crouch testified there. It's in the third paragraph.
7 I'm not sure that's what your reference is.

8 COMMISSIONER KIESLING: Which numbering system are
9 you looking at when you said Page 6? I mean, I've
10 got --

11 MS. MOORE: Page 6 of the April 2nd
12 recommendation. I only have one set of pages on that.
13 It would be six from the beginning.

14 COMMISSIONER KIESLING: Okay.

15 COMMISSIONER CLARK: Oh, I know one thing you
16 indicated that they have to have the five year planning
17 horizon because they wouldn't otherwise be eligible for
18 the loan funds. I didn't understand that.

19 MS. MOORE: That was testimony from, I believe,
20 DEP. N.D., would you like to answer that?

21 MR. WALKER: There was a witness for DEP, Mr.
22 Hoofnagle (phonetic), that said that there is a loan
23 program that is being made available for water systems,
24 I think, and that a certain planning horizon would be
25 needed or they would not be eligible to even take part

1 in that. And he said that five years was, you know,
2 what would be the minimum expectation for a company
3 that --

4 COMMISSIONER CLARK: Yes. But I don't see why if
5 we have a margin of reserve that says three years they
6 are still not eligible. I don't understand the link
7 between the two. It seems to me they can be doing the
8 planning.

9 MR. WALKER: I guess the disbursement of the
10 funds, if they felt that the applicant didn't have at
11 least a five-year plan of sufficient facilities that
12 they would not qualify to come in and obtain funds from
13 that, from that agency.

14 COMMISSIONER CLARK: Well, it seems to me that the
15 more -- I don't understand how the margin of reserve
16 would preclude them from doing that sort of planning.
17 I mean, the margin of reserve to me is trying to reach
18 an equitable basis for allocation of the cost for plant
19 that needs to be built, and there is --

20 MR. WALKER: Margin --

21 COMMISSIONER CLARK: Go ahead.

22 MR. WALKER: The margin reserve has several
23 aspects to it; it's not only that the plant has to be
24 there for growth that's going to occur in the future,
25 there is a demand that can be enlarged just with

1 existing customers. Their demand can require more
2 capacity than the test year condition.

3 COMMISSIONER DEASON: But don't our used and
4 useful calculations try to take that into consideration
5 by looking at maximum day flows as opposed to average
6 day flows and things of that -- trying to capture what
7 is reasonably expected to be deviations in consumption
8 because of weather or whatever the condition may be
9 that causes those fluctuations?

10 MR. WALKER: We try and take into account the
11 demand of customers as a normal condition, and
12 hopefully the test year will bear that out. Margin
13 reserve is there for extra demand by existing
14 customers, it's there to take account of the
15 opportunities that exist for economies of scale. If a
16 company is having to be very rigid and careful in its
17 planning, it will not be willing to make extended
18 investments that will benefit the utility and the
19 customers current and future, everyone, at some future
20 time. There are a number of arguments that to me
21 justified five years as an appropriate term. At least
22 one thing, it puts us into harmony with what other
23 agencies are sponsoring in the environmental sense.

24 COMMISSIONER DEASON: Well, wouldn't you agree
25 that those other agencies are from a planning

1 standpoint and basically putting the utility on notice
2 that when you reach this threshold you need to start
3 looking. But that doesn't mean you've got to have five
4 years of capacity in plant in the ground ready to serve
5 when that time period is reached. It just says you
6 need to start looking at your alternatives. And there
7 is a big difference between the amount of investment
8 required to start looking at alternatives and the
9 amount of investment required to have five years of
10 capacity in the ground ready to serve customers.

11 Wouldn't you agree with that?

12 MR. WALKER: I would agree with that. I don't
13 think it's that rigid. That they don't say, okay, make
14 100 percent of your investment today to be able to
15 serve demand that is going to occur over the next five
16 years. There are other things that you have to take
17 into account to be willing to accept the five-year
18 plan. It's not just how much you spend, what is the
19 average sort of investment over time, but are you
20 taking into account other things. Are you giving
21 consideration to inherent economies of scale that will
22 be missed if you don't allow for some added capacity.
23 The fact that the utilities will make a sizable
24 investment in just the basic cost that will be there,
25 whether it's a half-million gallon plant or it's a one

1 million gallon plant. A lot of those costs are sunk
2 costs that if you don't allow recognition of this added
3 term, you're going to be in the long-term producing
4 higher rates for everyone.

5 COMMISSIONER DEASON: Well, I think you have just
6 hit on a term, economies of scale, which is probably
7 the crux of this whole matter, and what we need to be
8 focusing on, and what we do not at this point have a
9 good handle on, in my opinion. Are you saying that it
10 is your opinion that to have five years of capacity of
11 plant in the ground ready to serve is always going to
12 result in the most economic configuration of plant
13 construction? It could be seven, it could be three.
14 Don't you agree it would probably change on a
15 case-by-case basis?

16 MR. WALKER: It probably changes every case.
17 Every utility has a special set of circumstances, but
18 what we were trying to do is formulate a rule that we
19 thought would be useful in the majority of cases. And
20 that if it was not, if five years was not appropriate,
21 then we would have an opportunity for someone to come
22 forward and say, "No, five years it shouldn't be. It
23 should be three. It should be seven." But we tried to
24 say if we can come to a hearing with certain
25 understandings, we can save cost and save argument.

1 CHAIRMAN JOHNSON: Could you explain that a little
2 bit more of how if we codified the five-year rule we
3 were still giving flexibility. Is it in the rule for
4 the parties to come forward and argue for seven or
5 three. And if we anticipated that, again, if we are
6 having that kind of flexibility, why have the rule?
7 It's almost like we are acknowledging that there are
8 facts -- that this varies on a fact-by-fact basis.

9 MS. MOORE: It's a standard applicable in many
10 cases. But the rule language is unless otherwise
11 justified the margin reserve period for facilities will
12 be five years.

13 COMMISSIONER DEASON: But don't you think that is
14 a tremendous shift in the burden of proof, who has got
15 to come forward? I mean, historically utilities come
16 forward, they justify the dollars they have invested,
17 saying this was a prudent decision. We built this size
18 plant because this was the forecasted load, and we
19 could build this plant at this cost, an incremental
20 costs were insignificant in relation to the forecasted
21 growth and show all of that. And that is their burden.

22 And with this rule, aren't we shifting the burden
23 to other intervenors, Public Counsel or homeowners
24 associations or Attorney General or whomever to justify
25 something less than five years?

1 COMMISSION STAFF: Yes.

2 COMMISSIONER DEASON: Okay.

3 COMMISSIONER KIESLING: And I have a concern
4 there, because it seems to me that what we were trying
5 to do in the rule was to set a default level of margin
6 reserve. And then when we use words unless otherwise
7 justified, that suggests to me that, you know, it's
8 mostly going toward the company justifying something
9 higher. I mean, why should the customers have to come
10 in and put on a case to justify something less than
11 what is in the rule?

12 MS. MOORE: They anticipated OPC or staff would
13 also, if they didn't believe that five years was
14 justified.

15 MR. HILL: I guess I have to --

16 COMMISSIONER KIESLING: But my point is that if we
17 are setting a default level, hopefully to avoid some
18 litigation, we ought to set it where we think it really
19 is and then make those companies that want more come in
20 and justify it, rather than setting it high and making
21 either staff or Public Counsel come in and argue for
22 why it should be less.

23 I mean, it seems to me a default level ought to be
24 the most common denominator, and then anything else
25 would have to be specially justified. And that's why,

1 Commissioners, why I say that, you know, I think three
2 years is the outside limit. And, you know, I'm not
3 saying that I wouldn't support it if there was support
4 on this Commission to do a rule where we are right now
5 at 18 months and still include the justifying language
6 so that if a utility thinks they can prove up something
7 more than 18 months, they can come in and try to do it.
8 But I think that a default level should be the lowest
9 point, not the highest point.

10 MR. HILL: That language, I have to accept
11 responsibility for that. Quite frankly, I wanted an
12 opportunity to come in and perhaps lower it and for the
13 exact reasons that you say. When we started out on
14 this particular rule, in my mind, anyway, probably the
15 most important issue was should this agency impute CIAC
16 on the margin.

17 The actual period of time included in the margin,
18 18 months, 24 months, three years, five years, seven
19 years, that in my opinion, anyway, that was not the
20 most pressing issue. It was the imputation of CIAC.

21 Then during the course of the most current
22 hearings, because this has gone on for six or seven
23 years, we did have witnesses from the DEP. And I found
24 that testimony rather confusing. Because, on the one
25 hand, I agreed with the concept that they presented

1 that we all need to be using a long-run planning
2 horizon and we should adopt the most economic staging.
3 And while I liked that, it seemed that then suddenly to
4 say, well, five years. That then takes away the long
5 range planning and the appropriate staging.

6 Five years immediately tells you that over a
7 20-year planning horizon you are going to have four
8 building periods. And I don't believe that's
9 appropriate for every utility that is out there. I
10 think the most economic staging will be depend on what
11 they anticipate serving and will depend on that
12 long-range planning horizon, and I think we do want
13 them to build the most economic plant. But I don't
14 think it ties to the five years as much as it ties to
15 the long-run planning horizons and the appropriate
16 staging.

17 So I felt a lot more comfortable if I had an out
18 to say, "Fine, I will grant you the five years, but I
19 want an opportunity to come in and say it shouldn't be
20 five, it should be three or it ought to be 18 months."
21 And I think certainly I would not have a problem with a
22 rule that kept the same time period but addressed the
23 issue of imputation of CIAC.

24 And one of our goals was to eliminate litigation
25 of this not only post-hearing, but even during the

1 course of our proceedings. Can we eliminate this as an
2 issue, can we be fair and adopt a rule and eliminate
3 this as an issue. And that was really the thrust of
4 all of this. And I think somewhere along the line via
5 the DEP testimony, we sort of got away from the
6 long-range planning horizons and appropriate staging
7 and ended up with the five years that perhaps is a
8 proxy for that, but given the number of utilities that
9 we regulate, I still lean more towards appropriate
10 long-range planning and most cost-effective staging in
11 determining the period of time that you allow in the
12 margin.

13 CHAIRMAN JOHNSON: Any other questions? Mr.
14 Shreve.

15 MR. SHREVE: Commissioner, I apologize. I will be
16 very brief, but it's something that I think you need to
17 know that somehow has, I'm sure, inadvertently been
18 missed by the staff and Mr. Schiefelbein, and I know
19 they will agree with this. When they had the
20 discussion about the five or 10 percent and Mr.
21 Schiefelbein said it had something to do with the
22 model, there was a model submitted by Mr.
23 Schiefelbein's witness, Debra Swain, and the staff is
24 aware of this, that said the increase would be 35
25 percent. The five or 10 percent came after the record

1 was closed on some questions based by staff. It was
2 Mr. Schiefelbein's witness that said 35 percent and it
3 was her model.

4 MR. SCHIEFELBEIN: Excuse me, may I please respond
5 to that briefly? Yes, ma'am?

6 CHAIRMAN JOHNSON: Yes.

7 MR. SCHIEFELBEIN: That's a misrepresentation,
8 perhaps inadvertent by Mr. Shreve. This is information
9 that was also repeated up the hill. The so-called 35
10 percent rate increase was based upon a financial model
11 that was developed only to demonstrate trends and not
12 to predict actual rates.

13 The purpose of the schedule was to show what the
14 general impact on rates would be if two changes were
15 made. First, to change the margin reserve and CIAC,
16 and the second to increase the size of the plant
17 constructed. There was an expectation that both of
18 these changes would result in rate increases. However,
19 as that model demonstrates, there would be no average
20 increase in rates in the first five years after the
21 extension of the margin reserve period and the
22 elimination of imputation. It was not -- basically,
23 that study showed general trends and did not in any
24 sense indicate that a 35 percent rate increase would be
25 generated by this policy change that we have advocated.

1 Thank you.

2 CHAIRMAN JOHNSON: That was one of my concerns,
3 though, as we look at the impact on rates. We did have
4 the testimony of the witness that talked, perhaps as
5 you said, in generalities with respect to the 35
6 percent. But there wasn't any concrete information for
7 the Commissioners to rely upon to determine the rate
8 increase. Staff then, I think Mr. Shreve was correct,
9 after the record was closed, reviewing that
10 information, went and did some further analysis to get
11 what they thought would be more appropriate for the
12 Commissioners to base their decisions upon. Still,
13 some of the senators requested that they didn't want
14 models, they wanted real facts, and were getting more
15 information.

16 Certainly most of the facts that were generated by
17 staff indicated that perhaps the range was between five
18 and ten percent. But, the issue was the outliers and
19 how do we handle those. And certainly everyone can see
20 that there will be outliers. But there is no formula,
21 there is no evidence, there is nothing here to address
22 that. And for us to in a blanket manner adopt
23 something where we don't know the impact on those
24 outliers or those companies that we didn't -- not
25 because of our fault, but because the information isn't

1 available for us to do the analysis.

2 What do we do in a case like that? We do have a
3 responsibility to understand the rate impact of our
4 decisions before we make them. We have some general
5 information, but I don't necessarily feel that
6 comfortable with that information. I know I directed
7 Doctor Bane and Mr. Hill to, for every system in
8 addition to the systems that have been requested by the
9 senators, let's even do everything that we can possibly
10 do to find out as much information as we can. And we
11 did that, but they have cautioned me that, yes, there
12 are some outliers, and certainly we couldn't do -- I
13 think we only ended up, and this isn't only because it
14 was a huge task, but about 15 percent of the systems
15 that we regulate.

16 It does make one a bit nervous as to the impact on
17 our customers. And it's something that I think we
18 ought to be in a position to address. I guess what
19 staff is saying is that, well, by adding that little
20 language if there was a situation where there was an
21 outlier, then staff could come back. But my concern
22 is, I think as Commissioner Deason stated, is there a
23 heightened burden of proof? I mean, do we have any
24 criteria? Do we say if the rule leads to an increase
25 of more than 5 percent it will not be allowed? I mean,

1 how do we draw the line and how will we be making those
2 decisions with any certainty for the customers, the
3 companies, or the Commissioners as to where we are
4 going to end up on this thing.

5 MR. HILL: I think the way the rule currently is
6 worded, that would be up to staff to come in and
7 explain to the Commissioners that this is not a five or
8 ten percent increase, to do this would be a 30 percent
9 increase, and I think the burden would fall on us or
10 Mr. Shreve to show you that it was not in the public
11 interest to follow the rule in that specific case.

12 An alternative would be to put a ceiling in the
13 rule that, you know, in no event -- we will grant such
14 and such, but in no event will it exceed 10 percent.
15 So I think there are ways to address what you point out
16 as far as outliers.

17 COMMISSIONER KIESLING: Well, I have to say that I
18 think you cannot put in a rule a cap based on what the
19 percent increase is going to be. I think that that is
20 one of those areas where it even becomes more fact
21 dependent on what is a reasonable cap. And if I could
22 just say again, that's why I would be willing to
23 support a rule that went back to our policy of 18
24 months unless justified, and let the companies come in
25 and try to justify it. I don't think the customers, or

1 the Public Counsel, or our staff should have to go to
2 the time and expense unless the company thinks that
3 they need more than that and they can justify it.

4 I would also indicate that I would be willing to
5 support a rule that has the 50 percent imputed CIAC,
6 and recognizing that I believe I have voted against
7 that on a couple of occasions because I thought it
8 should be 100 percent or nothing. But as a compromise,
9 you know, I think that we can try 50 percent because we
10 have done that in the last several cases. I don't know
11 at what point we are ready to make a motion.

12 COMMISSIONER CLARK: Let me ask -- I still have a
13 question. Senator Cowin, you had indicated that there
14 needs to be hearings out in -- where customers can come
15 to the hearing. I guess my concern is that it seems to
16 me that the real -- there wouldn't be any service
17 concerns we would be asking them about, because this
18 wouldn't be specific to any utility. But it seems to
19 me that there may be a need for more technical
20 information that Public Counsel has been providing us.
21 And I guess I want to get more information from you
22 with respect to what additional information we would
23 likely get from the public if we went out and held
24 hearings. And where would you suggest we hold the
25 hearing?

1 SENATOR COWIN: Well, this is presupposing, of
2 course, that you actually go forward with wanting to
3 adopt the rule. From listening to your deliberations,
4 it appears to me that you have the most flexibility and
5 the customers would be better served by on a
6 case-by-case, as the case came before you that it be
7 decided at that particular time what the effect is on
8 the rates. By putting in a blanket rule, unless it has
9 a minimum, Senator Kiesling --

10 COMMISSIONER KIESLING: I'm not a Senator.

11 SENATOR COWIN: I mean Commissioner. Sorry. I'm
12 so used to saying that.

13 COMMISSIONER KIESLING: That's all right. And I
14 have no aspirations to be known as that.

15 SENATOR COWIN: Where do you live?

16 (Laughter.)

17 COMMISSIONER DEASON: Well, I would have voted for
18 you.

19 SENATOR COWIN: But I think unless we do that --
20 it just seems to me, and maybe I'm a little bit naive,
21 that it's just going to make more and more problems for
22 you, because it just seems to complicate every time
23 something comes in you are going to either have to
24 justify it up or justify it down. It would be far
25 better just to eliminate the rule and give yourselves

1 some flexibility. Certainly the opportunity is there
2 legislatively to take care of some of these matters.

3 COMMISSIONER GARCIA: I think what Commissioner
4 Clark, though, is trying to address if we were to --
5 which would not be, in essence, passing the rule, if we
6 were to vote out the primary recommendation, where you
7 would feel we could have some of those hearings.

8 Clearly that does not in any way say that we approve
9 the rule. What we are trying to do is get further
10 testimony in and to clarify certain issues that we may
11 have some doubts on, and then try to address the issue
12 that you have brought to us, which is to try to let the
13 citizens participate. And forgive me if I'm restating
14 you incorrectly.

15 COMMISSIONER CLARK: No.

16 SENATOR COWIN: And I apologize for digressing a
17 little bit, but I do think that it could be regionally
18 by the very minimum with notice to the public as you
19 very well do in your publications or in newspapers. I
20 think regionally, five, six regions, seven regions
21 would be minimum, I would imagine, in order to have the
22 kind of input as to the impact of the rule in the
23 specific areas. Aside from regionally, then perhaps
24 maybe where the services are the most provided.

25 COMMISSIONER CLARK: I guess I'm -- what

1 information are we likely to get from the customers
2 with respect to the technical aspects of this? What
3 would you expect we would hear from them? And I pretty
4 much know that when there is a potential rate increase
5 they are going to be against it.

6 SENATOR COWIN: Well, you know, I have been in a
7 lot of these hearings, and I hear what you're saying as
8 to, you know, how are these people going to testify.
9 Obviously their primary concern is how the rule is
10 going to impact on their rates. And it would behoove
11 the companies, you know, the water companies to send
12 out notices, I would imagine, to their customers as to
13 how, you know, using the margin of reserve at whatever
14 it is, how it is going to affect their particular
15 rates.

16 COMMISSIONER CLARK: The only thing I have a
17 concern about is it seems like when we have done those
18 sorts of things in other areas, unless there is a rate
19 case pending, I can think of a telephone case it seems
20 like we went out to do something, unless there is a
21 rate increase pending we generally don't get a lot of
22 people out.

23 SENATOR COWIN: I guarantee you will get plenty of
24 people out there when they understand what the effect
25 of this particular rule is. You have made changes in

1 rules before, but I'm not quite sure of how many rules
2 have had such a broad impact and to the dollar amount.
3 You can do various scenarios, but the bottom line is
4 there are various scenarios, and the rates can increase
5 dramatically. And it's like doing a rate case. I
6 think you will get input when it affects peoples'
7 rates. The reason why people come out to those rate
8 case hearings is because their rates are going up. And
9 I think it behooves the Commissioners to -- the
10 Commissioners and the staff and the utilities to say
11 why they absolutely need to charge present customers
12 for future growth. They have to justify that. I think
13 the justification and the rates.

14 CHAIRMAN JOHNSON: One of the things, Senator
15 Cowin, that I understood that you suggest -- and not
16 prejudging where the vote is going to be on this,
17 because we may not need to do this, but since the issue
18 was raised, one of the things that I gleaned from your
19 letter was not just an opportunity for us to hear from
20 the customers, but for us to educate the customers.

21 SENATOR COWIN: That is the point that I made.

22 CHAIRMAN JOHNSON: To have the staff, to the
23 extent that there is a proposal, explain what the
24 proposal is, to have the industry groups explain what
25 their position is, but it was more of that educational

1 tone. On the other issue of if we did decide to do
2 this and getting people to participate, we are all very
3 conscious of our budgets and not wastefully spending
4 taxpayers' money. If I understand it, the way that the
5 APA currently reads, generally if we were starting this
6 process we would give notice, I guess, through the FAW,
7 and the hearings could be requested by customers. And
8 if they requested it then we went to their location.
9 As opposed to us assuming that there was a desire, they
10 would have to ask for the particular hearing.

11 MS. MOORE: That's correct. Well, they are
12 workshops, and it would be -- in the statute the
13 workshops are conducted by staff, but --

14 CHAIRMAN JOHNSON: So perhaps if we get to that
15 stage and we need to consider that, I know there was a
16 suggestion of notice in the local newspapers. Maybe we
17 can work on -- if we got to that we could work through
18 those issues, whether it's bill stuffers to the
19 customers, and then they would have to let us know if a
20 hearing should be held regionally. There would be some
21 opportunities for us to perhaps develop the best way to
22 reach the customers in the most economically efficient
23 way.

24 COMMISSIONER GARCIA: It might even be possible to
25 use our teleconferencing systems which are located in

1 all the major cities in the state. So, in essence, we
2 could probably use that also to sort of address the
3 needs of those customers that wished to participate. I
4 mean, because I just hearken back to I think it last
5 week, it's a blur now, but the FPC customer hearings,
6 which were -- I mean, clearly it was an issue for
7 rates. I mean, the testimony wasn't technical, but
8 clearly the company had an opportunity to inform the
9 public. We had an opportunity to be whipped by the
10 public and, again, all the information there and move
11 on from there. But clearly I don't think it was a
12 waste of time. I think it was good for the customers.
13 And the only problem is that I don't know if we tried
14 to find another five or six days it would be quite
15 difficult to find that in our calendar. As you know,
16 Senator, how tough it is to get you here on time
17 typically traveling across the state. Well, we have to
18 travel with a whole group of people, and it might be
19 difficult. But I think maybe that could be addressed
20 later on, Chairman, as you pointed out.

21 CHAIRMAN JOHNSON: If necessary.

22 COMMISSIONER CLARK: Madam Chairman, if I could
23 just give an indication of what my concerns are. I
24 think that we are vulnerable to a challenge currently
25 with respect to the fact that we have pretty routinely

1 done an 18 month margin of reserve and imputed CIAC.
2 And my concern is that the APA is pretty clear you are
3 supposed to move to rulemaking when your policy becomes
4 developed. I am aware of the fact that what staff has
5 suggested is a change in that policy. So I don't know
6 that we have to adopt the rule that is proposed, but I
7 am concerned that we need to do something. But more
8 than just the constraints of the APA, I think there is
9 a benefit in terms of economic planning to eliminate
10 the issue where it can be eliminated, because a lot of
11 times when you spend a lot of money on this expense and
12 by not having a rule you encourage companies to make
13 uneconomic decisions, they become, in effect, more
14 expensive for the customers. So I do think there may
15 be a long-run benefit to the customers in terms of
16 encouraging economic planning, eliminating it as an
17 issue, providing for harmony with the environmental
18 laws.

19 But I don't want to suggest that I think five
20 years is the way to go, because just as we have an
21 obligation to recognize harmony, I think they do, too.
22 I am uncomfortable with doing a three year margin of
23 reserve in this instance. I'm not sure that was as
24 fully developed as it could be, and for that reason I
25 would like to have time to take additional evidence on

1 the issue. I'm not disturbed by the fact that there is
2 two months, that perhaps we can't do it in two months.
3 I do have a concern about having a bunch of public
4 hearings, because I'm not sure that we can schedule it,
5 and I'm not sure its cost-effective. But the notion of
6 providing for some telecommunications, using our
7 system, I mean, we have a wonderful new building, we
8 are supposed to be using this technology to reduce the
9 cost of regulation, that we ought to explore that
10 alternative. In that sense, I'm not willing not to go
11 -- at this point to say let's adopt the 18 months or
12 let's do nothing, because I think there are benefits to
13 doing the rulemaking.

14 Let me also point out that there is an alternative
15 to us to allow more input from the whole legislature on
16 how they feel about this. There is the possibility of
17 adopting a rule that is our best shot at it. That what
18 we think is a fair way to accomplish what needs to be
19 done, and then let it not take effect until after the
20 next legislative session. And then the people who have
21 a real feel or people who will be impacted like you
22 have been, Senator Cowin, will have the opportunity to
23 look at what we have done. And you will have a clear
24 picture of what we are recommending, not this
25 continually moving target that is frustrating to

1 everyone. That is something we don't need to discuss
2 now, but I guess I'm not willing to scuttle the whole
3 process because we have been doing it for five or six
4 years.

5 COMMISSIONER DEASON: Well, I guess I'm concerned.
6 Who is proposing we scuttle the process?

7 COMMISSIONER CLARK: I meant not adopt a rule, not
8 go forward at this time. I thought I heard that, that
9 we could continue on the way we were going and doing it
10 on a case-by-case basis. I have concerns that the APA
11 won't allow us to do that, and I have concerns that
12 it's not good public policy not to adopt as a rule a
13 position on margin of reserve to help reduce the cost
14 of regulation. I mean, one thing that always surfaces
15 in water and wastewater is that while an investment or
16 an issue if it involves the telephone company or an
17 electric company it's a big dollar issue, but when you
18 spread it across a lot of customers it doesn't have a
19 big rate impact. But that is one of the things we
20 always struggle with with water and wastewater. The
21 same issue there has an enormous impact on customers
22 and we need to be careful of that.

23 COMMISSIONER GARCIA: I would just say that I
24 agree with Commissioner Clark, basically everything she
25 said, and I would add to the fact that the legislature

1 is having an interim project on water. And there is no
2 need to hurry. Clearly the legislature is looking at
3 this. And with that I'm going to move staff primary
4 recommendation with the Chairman -- allowing the
5 Chairman certain discretion to see if we can set up
6 some hearings, if necessary, in some way so we can hear
7 the public comment. And in no way does, I think, this
8 change anything. The industry -- it may not please Mr.
9 Schiefelbein, but he began from a point of saying vote
10 it out, I don't care what happens, just give me a
11 policy. We have been here six years, so let's get it
12 all through. I know you corrected yourself later on,
13 but I think that we need to look at it, and if some
14 more information can be helpful in making the decision,
15 I'm all for it.

16 COMMISSIONER CLARK: Let me see if I can clarify
17 what you're saying with respect to 1. That it would be
18 the primary.

19 COMMISSIONER GARCIA: Right.

20 COMMISSIONER CLARK: Well, some hybrid between the
21 primary and the alternative. That the Commission
22 should take additional evidence, that we would include
23 in that scheduling a hearing, but that we would
24 endeavor to use our telecommunications teleconferencing
25 facilities to accomplish that, so that we are not --

1 that we can conserve resources, but still get the
2 input. I think we have done that when we have had to
3 do the agenda and we certainly have offices where that
4 can be accomplished. We have previously used other
5 facilities, but I would foresee maybe another day of
6 hearing, perhaps two, but it would be -- we would do it
7 here and use our teleconferencing facilities to get the
8 customer input in the regions that we need to do that.

9 CHAIRMAN JOHNSON: Now, let me make sure I
10 understand that. A hearing on staff's proposed rule,
11 no rule, just kind of we are open to -- is the target
12 the five years, 18 months --

13 COMMISSIONER CLARK: Well, I guess I would like a
14 response to the three year. And let me tell you where
15 I'm coming from. I understood that about at three
16 years you've got to start building, and you've got to
17 begin that extra amount of plant. And it seemed to me
18 that that was a good starting point. Certainly more
19 than the five years. I had difficulty with the notion
20 of the two years of planning design of it.

21 MS. MOORE: So you would want staff's analyses of
22 the potential rate impact on three year.

23 COMMISSIONER CLARK: One thing I didn't mention is
24 we have been -- one of the things I think people who
25 watch this process, specifically the JAPC and DOAH, are

1 concerned about is when a rule changes dramatically
2 from its proposal to its adoption, then it raises
3 issues of notice. And I guess to avoid that I would
4 like to see the three years thoroughly addressed.

5 COMMISSIONER GARCIA: But with the understanding
6 we are still looking at the rule that staff has before
7 us. Because, again, while I agree with some of the
8 suggestions made by Commissioner Kiesling, I don't know
9 if I have the information right now to vote that out
10 and to change that rule that substantively right here
11 and right now. And I wouldn't have a problem with some
12 additional information on the three years to be
13 provided for us.

14 COMMISSIONER CLARK: Yes, I guess that's my
15 request, is that there be additional information on a
16 three year and that there be appropriate language in
17 the rule that makes it clear that the three year is a
18 benchmark, but it is still the burden of the particular
19 applicant to show that that is appropriate.

20 COMMISSIONER GARCIA: And I think Commissioner
21 Kiesling's language was very good on that.

22 COMMISSIONER KIESLING: Well, except that what I
23 modified it to was let's go to the bottom, to the
24 common denominator, the lowest common denominator,
25 meaning 18 months, which is our policy now. And then

1 requiring the companies to justify anything over that
2 along with a 50 percent imputation of CIAC.

3 I would like the opportunity, I'm not sure where
4 we are with this as a motion and whether there has been
5 a second, but I would like the opportunity to make some
6 comments about reopening this process for more hearing.
7 And I am deeply troubled by the frequency with which we
8 seem to be not having the process be over when it
9 should be over. And by that I mean that in this
10 instance we have held the workshops that were required
11 by statute, we have held the hearing that was required
12 by statute, and rightly or wrongly staff has now from
13 all of that come up with a proposal. I don't agree
14 with that proposal. I think that it should be a
15 different amount of time as I have expressed.

16 But I think there just comes a point where we need
17 to not abandon our procedures and the statutory legal
18 requirements in order to open these things up to more
19 and more input after the recommendation has come in.
20 And part of my concern with that is that hindsight is
21 always 20/20. We go out, we get everybody's best shot
22 at the evidence, at cross examination, at
23 participation, and then what I see is a trend toward
24 having staff give us a recommendation and then allowing
25 everyone to come in and take pot shots at that and say

1 we need to reopen the record for new information. And
2 I don't think we do need to reopen the record for new
3 information or for more information here. I think that
4 we can adopt our policy, which I think we have to do
5 because of the incipient policy and rulemaking
6 requirements, and our policy being the 18 months, and
7 then let the chips fall chips fall where they may with
8 DOAH or with an appeal.

9 I think that there is nothing to be served that is
10 good for the future procedural integrity of this agency
11 by reopening the record to get more input on a rule
12 that we don't even know what the rule is going to be.
13 I don't know how people can come in and provide any
14 meaningful comments on it if we don't even know what
15 the rule is going to be yet. I don't know what the
16 customers could come in and say other that we don't
17 want a rate increase.

18 COMMISSIONER GARCIA: Commissioner, but I can't
19 vote on this today because I don't know the rule you
20 are proposing. I mean, you have made a suggestion here
21 today which is very valid, and sounds good, but you are
22 asking us to vote on something substantially different
23 than what we were looking at initially.

24 COMMISSIONER KIESLING: Yes, I'm asking you to
25 vote on something that is supported by the record, the

1 hearing we have already held.

2 COMMISSIONER CLARK: Madam Chairman, can I ask a
3 question? We have been going for awhile now, and I
4 made the mistake of drinking water, and I was wondering
5 if we could just take about ten minutes.

6 CHAIRMAN JOHNSON: Sure. We will recess for ten
7 minutes.

8 (Off the record briefly.)

9 CHAIRMAN JOHNSON: If everyone could settle in, we
10 are going to go back on the record.

11 COMMISSIONER DEASON: Madam Chairman, before we
12 get started, I think I need to clarify something
13 because either rightfully or wrongfully I took the
14 liberty of making some comments early on in this
15 process, and I think they have been misconstrued to
16 some extent.

17 First of all, let me indicate I agree with
18 Commissioner Kiesling that we need to reach a
19 conclusion in this case. We have gone through all of
20 the requisite noticing and procedural matters that were
21 contemplated in this docket. We have had the hearing,
22 we have had the responses, we have gone through that
23 process, and it has been compiled by our staff and a
24 recommendation is made. And we need to make a decision
25 either to disagree with that recommendation, agree with

1 it, modify it, make a decision, and close this case.

2 Now, the comments that I made early on, and
3 perhaps unfortunately I used the term we need to go to
4 a case-by-case basis, and I think that was misconstrued
5 as scuttling this entire process. Far be it, that was
6 not the case at all. I think we need to make a
7 decision. When I used the terminology case-by-case,
8 what I was trying to make the point was that we need to
9 adopt the least common denominator approach in this
10 case, which I think would be the 18 months, which is
11 the policy that we have had previously, but that which
12 I indicated and still believe today is in a state of
13 flux, and that we do not yet have a final policy, and
14 that's why we need to go back to the case-by-case
15 approach. By doing that we will get the information
16 from customers as it is affecting their rates at the
17 time a request is filed.

18 I also think that we need to get a better handle
19 on the concept of economies of scale and that we don't
20 have that. We have record evidence full of what is
21 required by other regulatory agencies in terms of
22 planning and things of that nature. I think that we
23 can only get a good handle on what constitutes
24 economies of scale on a case-by-case basis and get some
25 of that under our belt before we change the 18 months.

1 And it may be that if we go through that process we
2 find out that the majority of the cases are always
3 going to be at least 36 months, and maybe we will adopt
4 that, and then we will eliminate some of that
5 litigation, which I agree with Mr. Schiefelbein is
6 expensive. And whatever level of comfort we can reach
7 is what we should do, but I'm not there yet.

8 So I'm not suggesting we scuttle this process. If
9 anything, I would think that we should adopt the rule
10 as proposed with the exception of the five years, which
11 I cannot agree with, and I think that I personally have
12 had enough experience thus far with the concept of CIAC
13 imputation that I'm comfortable with 50 percent CIAC
14 imputation and would incorporate that into the rule.
15 That's my position. I just thought it needed to be
16 clarified because I thought it was misunderstood.

17 CHAIRMAN JOHNSON: Let me make sure I understand.
18 When you say the rule as -- oh, you mean as it
19 currently exists, our incipient, the 18 months?

20 COMMISSIONER DEASON: No. I think staff has some
21 very good language in their rule. They have some
22 definitions, some concepts that are in there, and I
23 think that with the elimination of the five years, and
24 instead the 18 months, that I think that we have a
25 valid rule that is based upon the evidence in this case

1 and we can go forward from that. And to the extent the
2 utilities believe they have a solid case and believe 18
3 months is not relevant to them and is not appropriate
4 and does not result in just and reasonable rates, they
5 have the opportunity to present that and we will look
6 at it with open minds and make a decision.

7 And I would hope that we would get more
8 information on a case-specific basis as to the
9 economies of scale and what from an engineering
10 standpoint, why it was decided to build this increment
11 of plant versus another increment of plant. And if it
12 just so happens it's a larger increment of plant, to
13 justify that larger increment of plant, that it was the
14 economic thing to do and that rates will be lowered in
15 the long-run. And if that can be shown, by all means
16 that's what should be allowed in terms of a margin of
17 reserve. But just to blanket say staff recommends that
18 we do it five years and then have staff or Public
19 Counsel show that three or two is more appropriate, I'm
20 not comfortable with that process.

21 CHAIRMAN JOHNSON: Any other questions? Let me
22 make sure, and I know you just tried to clarify it for
23 me. But you would take out the staff's five years and
24 just insert the 18 months and everything else, the 50
25 percent CIAC would stay the same?

1 COMMISSIONER DEASON: Well, I believe staff is
2 recommending no imputation whatsoever, is that correct?

3 MS. MOORE: That's correct, that the rule as
4 proposed says --

5 COMMISSIONER DEASON: 100 percent.

6 MS. MOORE: Well, no, it says just shall be
7 imputed.

8 COMMISSIONER DEASON: I'm comfortable based upon
9 the evidence in the record and what I think constitutes
10 good policy on a going-forward basis is to have 18
11 months in the rule with 50 percent CIAC imputation.
12 And if there is anything that is in staff's language
13 that is inconsistent with that that needs to be
14 changed, I will agree to modify that. But I think as
15 far as the definitions and the concepts that are in
16 staff's proposed rule, they have done an outstanding
17 job in laying out that, and that needs to be part of
18 the rule. So the problem that I have is the five years
19 and the no imputation part of staff's, that's the two
20 things that I would change.

21 CHAIRMAN JOHNSON: Okay.

22 COMMISSIONER KIESLING: And just -- I mean,
23 Commissioner Deason has more articulately than I
24 apparently was able to express what I would also be
25 willing to support in this rule. Those are the only

1 changes I would make, and I still think we need to
2 reach closure and go forward.

3 CHAIRMAN JOHNSON: So thus if we were to adopt
4 that -- I guess one of your concerns is that we not
5 keep the record open until you get evidence. One of my
6 concerns was that we didn't have enough evidence in the
7 record to support the five years and we had problems
8 with rate impact. So what we are saying here is at
9 least with respect to our experience that we have with
10 incipient policy and that the evidence that staff
11 believes supports five, we feel comfortable with it
12 supporting the 18 months, and staff thought it was
13 total imputation of CIAC, 50 percent, because also we
14 have had some real practical experience with those
15 numbers.

16 COMMISSIONER KIESLING: Yes. And I would just --
17 well, I will shut up.

18 CHAIRMAN JOHNSON: Any other questions? And if we
19 were to adopt this, then there would be no need to hold
20 the hearings and that just kind of --

21 COMMISSIONER KIESLING: Yes, because I think the
22 place that customers can have the most impact is when
23 there is actually a rate case so they have some numbers
24 in front of them that have meaning. And I want to hear
25 from customers on rate cases. I think that that's what

1 is appropriate. But by passing this rule, that doesn't
2 mean that every utility in the state is going to come
3 in and immediately apply for a rate increase. So the
4 place that the rule may have impact is on customers
5 only when their utility comes in and asks for a rate
6 increase and tries to justify more, and then we will
7 take all the evidence in the world.

8 CHAIRMAN JOHNSON: And I think the other reason
9 for perhaps not holding the public hearings if we were
10 to adopt this policy, it's not a dramatic change. It's
11 not something that the customers and at least the
12 companies aren't accustomed to dealing with. It is
13 more of a codification of our policy. The 50 percent
14 imputation certainly we have applied in the last couple
15 of cases, but we have had some experience with that,
16 too. So that appears to make sense. Any other
17 comments?

18 COMMISSIONER KIESLING: Well, I just have one
19 more. Plus, if we go ahead and pass a rule, then it
20 goes to DOAH and there is going to be a hearing at
21 DOAH, and at that hearing at DOAH, if there is any more
22 evidence that has an impact on this that would have
23 changed what we are going to do, then that is the place
24 for that evidence to be introduced.

25 CHAIRMAN JOHNSON: Any comments?

1 COMMISSIONER CLARK: And to what end?

2 COMMISSIONER KIESLING: To what end? DOAH can say
3 we passed the wrong rule.

4 COMMISSIONER CLARK: So DOAH could come back and
5 say the other year --

6 COMMISSIONER KIESLING: No. All they could do is
7 invalidate it. They could say, no, this 18-month rule
8 isn't based on an adequate record and we invalidate it.
9 If you want to go back and try rulemaking again, go
10 ahead. But they don't tell us what rule to pass.

11 COMMISSIONER CLARK: Okay.

12 COMMISSIONER GARCIA: It appears that my motion
13 doesn't have three votes, so I'm going to go ahead and
14 withdraw it. And, I guess, Commissioner Kiesling, I
15 don't know which, either Kiesling or Deason made a
16 motion, and if you want to vote that --

17 COMMISSIONER KIESLING: I don't know that either
18 of us did, but I will be happy to make the motion. And
19 I think it's clear from the record what it is, that we
20 go forward with alternative -- I move Alternative
21 Number 2, that we do pass the rule out, but that it be
22 for a period of three -- or, excuse me, of 18 months
23 instead of five years, and that the CIAC imputation be
24 50 percent. Other than that, the terms of the rule
25 would be the same.

1 COMMISSIONER KIESLING: Is there a second?

2 COMMISSIONER DEASON: I second the motion.

3 CHAIRMAN JOHNSON: Any further discussion? All
4 those in favor -- oh, I'm sorry. Senator Cowin.

5 SENATOR COWIN: Thank you very much. First of
6 all, I appreciate you wanting to bring closure to this,
7 because I think that this is an issue that really
8 should bring closure, and I think the 18 month margin
9 is what you have enough testimony and certainly back
10 history on. However -- and you have advertised that
11 previously, and I think that's all good. I would
12 question, and I hope you could just reconsider the CIAC
13 imputation of the 50 percent, because the advertisement
14 was at 100 percent, and I know you have tried to bring
15 some closure to this and some agreement, but if you're
16 again trying to bring it back to where you wouldn't get
17 any challenge and you wouldn't need any public hearing,
18 and certainly you wouldn't as it was advertised before,
19 you would want to keep the imputation as to the way it
20 was previously stated. Either that or leaving it open
21 as far as saying it must be imputed. I think once
22 you start locking it in where you have not advertised
23 it, where you have not had any input specifically on
24 that is when you run a little bit afoul.

25 COMMISSIONER CLARK: Madam Chairman, I would just

1 indicate that I have concerns about us voting on that
2 motion. I would be inclined to continue the process.
3 I would point out that rulemaking is a legislative
4 process and that it contemplates public input and
5 consideration of forward-looking concerns, not just
6 what is in the record, what has happened in the past,
7 but what is the best policy to follow. And I have no
8 concerns about it doing violence to a process because I
9 think it complies with the notion of getting as much
10 input.

11 I have concerns about the 18 months, because I
12 think it is somewhat out of sync with the requirements
13 that utilities face with respect to the environmental
14 laws. I have concerns about its impact as far as what
15 is the most economic planning. I'm not sure it will
16 help in eliminating it as an issue. I would just like
17 to continue the rulemaking on that. I think you both
18 have indicated that our current policy seems to be the
19 18 months, but we are hearing more and more in the rate
20 cases that this 18 months is being contested as not
21 being appropriate. So I would just continue on and get
22 more information about it.

23 CHAIRMAN JOHNSON: I think one of the things, and
24 I think we ended before the break with respect to your
25 suggestion that we perhaps leave the record open and

1 get more information. What caused me some concern is
2 which rule we would be dealing with and how that
3 process works itself out. If we noticed three years
4 and then we came up with five years would we be in this
5 same situation again. And is it providing enough
6 certainty to the process. And I'm somewhat tempered by
7 the companies saying that they would rather have
8 certainty at this point in time than to keep this thing
9 open and gathering more information so that they can
10 pursue what other remedies they might have.

11 So with that kind of in mind, it gets a little
12 more difficult for me. Sure, before adopting the three
13 or the five years, I needed to have some more evidence.
14 I wanted to know about the impact on rates. But if we
15 aren't going to adopt the five or three years, then I
16 can feel comfortable with 18 months because we have the
17 history dealing with that, and I can move forward. So
18 it's kind of a Catch-22.

19 COMMISSIONER CLARK: I'm not saying your position
20 is without merit.

21 COMMISSIONER GARCIA: I won't go that far, either,
22 but I have to agree with Commissioner Clark. I think
23 that this is an ongoing evolving process as we try to
24 do this, and I think that certainty is not that
25 necessary. I don't think we are that pressed. We have

1 been here for awhile, we can continue forward. But
2 with that said, again, I don't think we've got the
3 three votes on this side.

4 CHAIRMAN JOHNSON: There is a motion and a second.
5 Any further discussion? Seeing none, all those in
6 favor signify by saying aye. Aye.

7 COMMISSIONER DEASON: Aye.

8 COMMISSIONER KIESLING: Aye.

9 CHAIRMAN JOHNSON: Opposed.

10 COMMISSIONER GARCIA: Nay.

11 COMMISSIONER CLARK: Nay.

12 CHAIRMAN JOHNSON: Show it approved on a
13 three-to-two vote.

14 MS. MOORE: I would like to make sure we have it
15 right. The rule language will say 18 months, the CIAC
16 provision will be 50 percent. That is Issue 1, and you
17 are approving Issue 1 on that recommendation with these
18 changes, the changes recommended by staff except for
19 the period of time and the amount of CIAC. And you are
20 approving Issue 2, which is to file the rule with the
21 changes.

22 CHAIRMAN JOHNSON: And, Senator Cowin, I know you
23 have got to run, but with respect to your last comment,
24 those comments were well taken. I find some comfort in
25 the 50 percent imputation because it isn't such a

1 drastic change. Oftentimes when we come out with a
2 rule we do make some modifications. Certainly if we
3 had gone for three or five years, I understood the need
4 for the public to have more of an opportunity to
5 participate, but we have used 50 percent CIAC before.
6 The 18 months is a codification of our policy. I
7 thought that this was a good start to provide the
8 companies with some certainty and with the customers,
9 also. Thank you for your participation.

10 SENATOR COWIN: Thank you very much, Madam
11 Chairman. I think the closure on it is very good, and
12 hopefully we will get information out to the public on
13 the 50 percent impact.

14 CHAIRMAN JOHNSON: And we will try to work very
15 closely with -- I know you have been concerned, and so
16 has Public Counsel, with our Consumer Affairs providing
17 as much customer information as we can. We are going
18 to try to work on that program so that they understand
19 some of the rules and policies that we are passing
20 through the Commission. Thank you.

21 MS. MOORE: And a notice of the rule change is
22 published in the FAW and will be mailed out to those
23 people on the mailing list.

24 CHAIRMAN JOHNSON: Thank you.

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)

COUNTY OF LEON)

I, JANE FAUROT, Court Reporter, do hereby certify that the foregoing proceedings was transcribed from cassette tape, and the foregoing pages numbered 1 through 85 are a true and correct record of the proceedings.

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

DATED THIS _____ day of June, 1997.

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