

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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 In the Matter of : DOCKET NO. 970410-EI  
 Proposal to extend plan for :  
 recording of certain :  
 expenses for years 1998 and :  
 1999 for Florida Power & :  
 Light Company. :  
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PROCEEDINGS: AGENDA CONFERENCE  
ITEM NO. 53

BEFORE: CHAIRMAN JULIA L. JOHNSON  
COMMISSIONER J. TERRY DEASON  
COMMISSIONER SUSAN F. CLARK

DATE: Tuesday, December 16, 1997

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

REPORTED BY: JOY KELLY, CSR, RPR  
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1 **PARTICIPATING:**

2                   **ROBERT ELIAS, FPSC Division of Legal**  
3 **Services.**

4                   **JOE JENKINS, DAVID GING, LEE COLSON, FPSC**  
5 **Division of Electric & Gas.**

6                   **JACK SHERVE, Office of Public Counsel**

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

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2           **CHAIRMAN JOHNSON:** We're going to reconvene  
3 the agenda conference. Item 53. Is the sound system  
4 on for the participants?

5           **MR. ELIAS:** Item 53 is Staff's posthearing  
6 recommendation in Docket No. 970410-EI. That case  
7 went to hearing shortly before Thanksgiving. And  
8 Madam Chairman I have been advised that Public Counsel  
9 wishes to address the Commission on this matter. This  
10 is posthearing. It is my understanding that neither  
11 party to the proceeding has any objection to Public  
12 Counsel addressing the Commission at this time.

13           **CHAIRMAN JOHNSON:** And it's your  
14 recommendation that we allow him to speak?

15           **MR. ELIAS:** With the understanding that  
16 parties -- that a posthearing -- postrecord comments  
17 by a nonparty raise due process concern. With the  
18 understanding that the parties have no objection to  
19 this procedure and are waiving their right to raise  
20 those kinds of arguments as a result of anything  
21 Mr. Shreve may say, no, we don't have --

22           **CHAIRMAN JOHNSON:** And I understand they  
23 have no objection. Commissioners.

24           **COMMISSIONER DEASON:** I have no objection.

25           **MR. SHREVE:** Commissioner, all we wanted to

1 point out, we're not getting involved in the hearings  
2 which we have stayed out of. We decided not to  
3 intervene. We decided not to intervene because of  
4 language that appeared in the proposed agency action  
5 that was never challenged and should have become  
6 final. That language is "This plan neither precludes  
7 an earnings review nor a review of a plan during the  
8 context of a proceeding to reset base rates."

9           This language was always agreed to by every  
10 party. Discussed it. We relied on it. We just found  
11 out yesterday, or just reviewed it and found that the  
12 Staff had left that language out of their  
13 recommendation in the proposed order. We made contact  
14 with the Staff and found that it is intentional, and  
15 we object to that being left out. We see no excuse  
16 for it. If you want to talk about due process, taking  
17 language like that out of a proposed agency action,  
18 after it has been accepted by the parties, and not  
19 opposed, that's a lack of due process; that's the  
20 reason we want to bring it to your attention now so it  
21 can be straightened out.

22           **CHAIRMAN JOHNSON:** Thank you, Mr. Shreve.  
23 Staff.

24           **MR. ELIAS:** Do you want me to address that  
25 now?

1           **CHAIRMAN JOHNSON:** If you could.

2           **MR. ELIAS:** The language that Mr. Shreve is  
3 speaking of is found on Page 2 of the proposed agency  
4 action. It reads "This plan neither precludes an  
5 earnings review nor a review of the plan during the  
6 context of the proceeding to reset base rates."

7           The Commission took one action in its  
8 proposed agency action. That was ordered that the  
9 plan attached to this recommendation -- or this order  
10 as Exhibit A is approved. The plan itself does not  
11 have that language in it. The plan does not -- the  
12 language in the plan just says "upon the Commission's  
13 own motion or petition filed with the Commission the  
14 recording of additional expenses under this plan may  
15 be altered or terminated by the Commission in the  
16 event that legislative, administrative or judicial  
17 action authorizing retail wheeling or deregulating the  
18 electric market is approved for Florida."

19           The plan itself did not speak to that  
20 provision. With the protest of the one issue that was  
21 decided by the Commission in the proposed agency  
22 action by AmeriSteel, i.e., protesting the plan in its  
23 entirety, this Commission decided in order  
24 No. 971070-PCO-EI, "The Commission's PAA --" and I'll  
25 quoting from Page 7 of the order, "The Commission's

1 PAA order takes one and only one substantive action.  
2 It modifies and extends the previously approved plan  
3 to two future periods. Since the PAA contained only  
4 one substantive action approving extension and  
5 modification of the plan, and that action has been  
6 protested, this is a de novo proceeding. Stated  
7 differently, there are no actions taken in the PAA  
8 which are not in dispute." Thus the whole substance  
9 of the PAA was in dispute.

10 Now --

11 COMMISSIONER CLARK: I'm getting confused.  
12 I thought a simple thing Mr. Shreve was requesting is  
13 that we simply say that what we've done here doesn't  
14 preclude its review in an earnings proceeding. And I  
15 thought we were always going to do that. That was one  
16 of the debates we had as to whether or not to let  
17 AmeriSteel become involved. And while we acknowledge  
18 that they had that avenue and would continue to have  
19 that avenue, we nonetheless found they had standing to  
20 do the protest. I don't understand why we're not  
21 going to include that language, I guess.

22 MR. ELIAS: Only because if we didn't it  
23 would be because we fully litigated these issues on  
24 the merits in this proceeding --

25 COMMISSIONER CLARK: If that was the

1 intention, that should have been made clear to  
2 Mr. Shreve.

3 MR. SHREVE: Commissioner, I agree with you.

4 COMMISSIONER CLARK: He's right about due  
5 process.

6 MR. SHREVE: This is very strange. Florida  
7 Power and Light we have no problem with; we have total  
8 agreement with them. AmeriSteel, nobody but the Staff  
9 has come up with this.

10 I suppose what they are saying is that by  
11 leaving this out we're precluded. That was never what  
12 you discussed. What was discussed in this issue was  
13 not in the hearings. The second part of that  
14 paragraph is included where that sentence is left out.

15 MR. ELIAS: And that second part of the  
16 paragraph is also part of the attachment, which was  
17 part of the recommendation, which was part of the  
18 order which was the plan.

19 The concern that we have is that based on  
20 some recent filings we could be litigating these very  
21 same issues two months from now. And we don't think  
22 that that was the Commission's intent when it went to  
23 hearing on --

24 COMMISSIONER CLARK: I just thought that --  
25 I just recall the arguments we had on it and that was

1 one thing Mr. Childs pointed out as a reason not to  
2 give standing, is that it was -- that this agreement  
3 would not preclude raising those issues in a earnings  
4 review. Did they disagree with that now?

5 MR. ELIAS: Does FPL?

6 COMMISSIONER CLARK: Right.

7 MR. SHEREVE: Mr. Childs and FPL have been  
8 very forthright in the whole thing and they do not  
9 disagree with that.

10 MR. ELIAS: My recollection of what exactly  
11 transpired with respect to Florida Power and Light's  
12 comments is a little bit different; was that since  
13 AmeriSteel could ask for a reverse make-whole rate  
14 case, that that would be a matter that they would have  
15 standing to challenge, or that they would have  
16 standing to participate in. But since rates weren't  
17 changing in this instance, that an individual  
18 ratepayer didn't have standing to challenge.

19 COMMISSIONER CLARK: You're recalling the  
20 argument?

21 MR. ELIAS: Yes. It was not that these  
22 issues would be subject to being litigated in a  
23 subsequent proceeding.

24 COMMISSIONER CLARK: I guess I would be  
25 uncomfortable not including that because I don't think



1 Mr. Shreve had notice that this -- if he wanted in  
2 this was his only opportunity.

3 MR. SHREVE: And I think yesterday Mr. Elias  
4 had a different opinion of it.

5 MR. ELIAS: Yesterday I thought it was  
6 language that was in the original plan that had  
7 somehow been excised from the plan. But this wasn't  
8 language in the plan. It was language in the PAA  
9 order when there was a significantly different  
10 procedural posture.

11 It's one thing not to preclude somebody from  
12 litigating an issue that's been decided by a PAA where  
13 there hasn't been a hearing on the merits. It's  
14 another thing again to make an affirmative statement  
15 in the order that even though we decided this issue at  
16 a full hearing, it was open to any person with a  
17 substantial interest, we're explicitly going to say we  
18 can raise these issues next month and we're going to  
19 hear them on the merits.

20 COMMISSIONER DEASON: Let me see if I  
21 understand. It was in the original PAA. It was not  
22 in the language of the plan, but it was in the order.

23 MR. ELIAS: It was in the order.

24 COMMISSIONER DEASON: The order was  
25 protested.

1 MR. ELIAS: In its entirety. We took --

2 COMMISSIONER DEASON: We went to hearing.

3 But the question of that particular language was not  
4 an issue addressed at the hearing.

5 MR. ELIAS: No, it was not.

6 COMMISSIONER DEASON: So we really don't  
7 have evidence to say it should be in or should be out,  
8 but it was in the PAA -- doesn't it seem that since it  
9 was in the original PAA, it really wasn't litigated in  
10 the protest, we would include it in the final order in  
11 this case?

12 MR. ELIAS: I'm sorry?

13 COMMISSIONER DEASON: That we would include  
14 that same language in the final order of this case.  
15 And to be clear, that language says it doesn't  
16 preclude those issues from being addressed. But I  
17 assumed there would be some burden on somebody's part  
18 to show it's a relevant issue, and the issue would  
19 have to be included.

20 MR. ELIAS: The thing that that flies in the  
21 face of is administrative finality.

22 We have been to hearing. We've heard  
23 evidence. We've made a recommendation. You're  
24 prepared to make a decision. And if that's the  
25 standard on a going-forward basis, anybody that

1 doesn't -- you know, that's not sure what they want  
2 to do with a PAA can stay on the sidelines until the  
3 PAA is final and then relitigate the issues two months  
4 later. And that's our concern.

5           COMMISSIONER DEASON: This whole thing was  
6 proposed with that language in it. I mean -- and  
7 apparently it was relied upon by at least one  
8 potential party. I would assume that perhaps the  
9 decision not to become involved in the protested case  
10 was because of reliance on the language in the  
11 original PAA order. Now, I'm not saying whether that  
12 was good or bad, but what I'm saying is that  
13 without -- I don't have anything in front of me, any  
14 evidence to say -- that says this was litigated; that  
15 says this language should be in or should be out. The  
16 only thing I have is a PAA order that had it in there,  
17 which seems to me as absent a showing it should be  
18 excluded, that we should probably err on the side of  
19 including it in whatever decision we make at this  
20 juncture.

21           MR. ELIAS: And that's a matter --

22           COMMISSIONER DEASON: That's our discretion.

23           MR. ELIAS: -- within your discretion. But  
24 I would point out -- I would draw a distinction  
25 between that language having any legal effect and

1 force at this point in time by way of the PAA order  
2 that was protested and became a nullity by virtue of  
3 the fact --

4 COMMISSIONER DEASON: But it's within our  
5 discretion to include such language now?

6 MR. ELIAS: -- have language in, recognizing  
7 that you may relitigate these same issues two or three  
8 months from now.

9 COMMISSIONER DEASON: We may. It doesn't  
10 mean we shall. It seems to me that if someone wants  
11 an issue included in some type of proceeding, they  
12 demonstrate how it is a relevant issue, and we either  
13 include it or exclude it.

14 I guess the Prehearing Officer would make  
15 that decision, and that decision is -- can be then  
16 appealed up to the full Commission, it seems to me,  
17 and that's the way we normally handle issue  
18 identification. And I assume that it would be the  
19 same in this situation. You're saying we have the  
20 discretion to make that decision.

21 COMMISSIONER CLARK: And I think,  
22 Commissioner Deason, in this case that we have serious  
23 problems with due process if we don't indicate --  
24 include that language. Because I certainly think --  
25 it wasn't clear to me, and I don't think it was clear

1 to the parties that this was their bite at the apple.

2 And it would be my preference to have it in.

3 CHAIRMAN JOHNSON: Was that a motion?

4 COMMISSIONER CLARK: Yeah. I guess I can

5 move --

6 CHAIRMAN JOHNSON: Do we have to take it as

7 a motion?

8 MR. SHREVE: Commissioner, can I say one  
9 thing I do disagree with. I appreciate the direction  
10 you're going right now.

11 But I disagree with your attorney in that  
12 whether you have discretion not to do it or not, if  
13 you put that in a PAA and someone relies on it and  
14 that is not challenged, it is final. You are handling  
15 every PAA that comes through here in that same way,  
16 and if we can't rely on what you put in a PAA, nobody  
17 throughout these hearings has ever argued that or  
18 taken that position, and I think it's strange that the  
19 Staff now wants to preclude other parties from coming  
20 in and being able to litigate this after we relied on  
21 it. And that's been discussed time and time again.

22 COMMISSIONER CLARK: Now, Mr. Shreve,  
23 whether we have to put it in there or whether we have  
24 discretion, I guess we can debate that, but I think it  
25 ought to be in there.

1 MR. SHREVE: Thank you.

2 CHAIRMAN JOHNSON: Staff, I suggest perhaps  
3 we handle that by motion. Should we handle it by  
4 motion?

5 MR. ELIAS: I think it might be appropriate  
6 to go through the issues in the case first.

7 COMMISSIONER CLARK: I really --

8 MR. ELIAS: Yes, I'd say a motion.

9 CHAIRMAN JOHNSON: You said you had some  
10 qualifiers there. You think we should wait for the --

11 MR. ELIAS: I was trying to think all the  
12 permutations of the decision. If the Commission turns  
13 down the plan, is it -- you know, does that render a  
14 concern about relitigating the issue as moot? And I  
15 guess not, so the motion would probably be  
16 appropriate.

17 COMMISSIONER CLARK: If I can just ask a  
18 question, I can probably move the whole item.

19 It wasn't clear with me with respect to 6,  
20 Issue 6, when you say "Should the plan be extended for  
21 1998, 1999, and set forth in the order?" And you say  
22 "No, it should be as modified." Could you be clear to  
23 me what has been modified, I perhaps missed it.

24 MR. SLENKEWICE: One of the things we  
25 modified, if you go to Attachment C, which is Page 35,

1 we eliminated the book-tax timing difference item  
2 because that item has been fully amortized and written  
3 off so it doesn't really need to be in the plan  
4 anymore.

5 COMMISSIONER CLARK: Okay.

6 MR. SLENKEWICZ: Then we modified Item 6  
7 because before it just said that we would put it in  
8 that unspecified depreciation reserve and we'd  
9 allocate it later. But talking with Witness Gower  
10 that, you know, he said it was subject to the  
11 Commission's disposition, so that we could do  
12 something other than just allocate it.

13 COMMISSIONER CLARK: You mean if I looked at  
14 the type-and-strike in the attachment I would have  
15 known.

16 MR. SLENKEWICZ: Yes, ma'am.

17 COMMISSIONER CLARK: Thank you for being  
18 nice about it, John.

19 COMMISSIONER DEASON: You all did indicate  
20 it was Attachment D, not Attachment C.

21 COMMISSIONER CLARK: Well, thank you.

22 MR. SLENKEWICZ: Attachment D is the revised  
23 plan.

24 COMMISSIONER DEASON: With those changes  
25 already made.

1                   **COMMISSIONER CLARK:** With that, I can move  
2 Staff with the understanding it would have the  
3 language in the order, the same language as in the PAA  
4 with respect to future proceedings.

5                   **CHAIRMAN JOHNSON:** Is there a second?

6                   **COMMISSIONER DEASON:** There's a second.

7                   **CHAIRMAN JOHNSON:** Show that then approved  
8 in total, unanimously. Thank you.

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1 STATE OF FLORIDA)  
2 COUNTY OF LEON )

## CERTIFICATE OF REPORTER

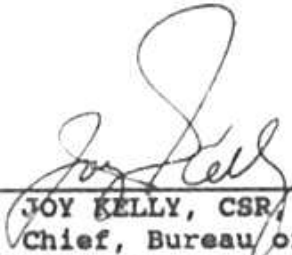
3 I, JOY KELLY, CSR, RPR, Chief, Bureau of  
4 Reporting, Official Commission Reporter,

5 DO HEREBY CERTIFY that the Hearing in Docket  
6 No. 970410-EI was heard by the Florida Public Service  
7 Commission at the time and place herein stated; it is  
8 further

9 CERTIFIED that I stenographically reported  
10 the said proceedings; that the same has been  
11 transcribed under my direct supervision; and that this  
12 transcript, consisting of 16 pages, constitutes a true  
13 transcription of my notes of said proceedings.

14 DATED this 6th day of January, 1998.

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