

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

 In the Matter of : DOCKET NO. 980483-WU
 :
 Investigation into possible :
 overcollection of Allowance :
 for Funds Prudently Invested :
 (AFPI) in Lake County, by :
 Lake Utility Services, Inc. :



PROCEEDINGS: PREHEARING CONFERENCE

BEFORE: COMMISSIONER E. LEON JACOBS, JR.
Prehearing Officer

DATE: Friday, January 15, 1999

TIME: Commenced at 1:30 p.m.
Concluded at 3:38 p.m.

PLACE: Betty Easley Conference Center
Room 152
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: H. RUTHE POTAMI, CSR, RPR
FPSC Commission Reporter

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

1 **APPEARANCES:**

2 **BEN E. GIRTMAN**, 1020 East Lafayette Street,
3 Suite 207, Tallahassee, Florida 32301, appearing on
4 behalf of **Lake Utility Services, Inc.**

5 **TIM VACCARO** and **LILA JABER**, Florida Public
6 Service Commission, Division of Legal Services, 2540
7 Shumard Oak Boulevard, Tallahassee, Florida
8 32399-0870, appearing on behalf of the **Commission**
9 **Staff.**

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11 **ALSO PRESENT:**

12 **FRANK SEIDMAN**

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P R O C E E D I N G S

(Hearing convened at 1:40 p.m.)

COMMISSIONER JACOBS: Call the prehearing to order. Counsel, read the notice.

MR. VACCARO: Pursuant to notice, this time and place have been designated for a prehearing conference in Docket No. 980483-WU, investigation into possible overcollection of allowance for funds prudently invested in Lake County by Lake Utility Services Inc.

COMMISSIONER JACOBS: Take appearances.

MR. GIRTMAN: Ben E. Girtman, 1020 East Lafayette Street, Suite 207, Tallahassee, Florida 32301, appearing on behalf of Lake Utility Services, Inc. Appearing with me is Mr. Frank Seidman of Management and Regulatory Consultants.

MR. VACCARO: Tim Vaccaro on behalf of Commission Staff.

COMMISSIONER JACOBS: Could I get the spelling of your last name, Mr. Seidman?

MR. SEIDMAN: S-E-I-D-M-A-N.

COMMISSIONER JACOBS: Ready to proceed?

MR. VACCARO: Yes, Commissioner.

COMMISSIONER JACOBS: Do you have any preliminary matters?

1 **MR. VACCARO:** Yes, we do. We have two
2 customers who filed protests in this docket and
3 requested a hearing along with the utility, and their
4 names are Kathy Shutts and Sandy Baron. Neither of
5 these two ladies has provided any testimony or a
6 prehearing statement in this case. They're not at the
7 prehearing today. They've sent in a letter requesting
8 that they be excused. Both of these ladies have
9 requested that they merely be allowed to appear at the
10 hearing and speak as any other customer would during
11 the customer service portion of the hearing.

12 Counsel for the utility and I have discussed
13 this, and to my knowledge, we are in agreement on this
14 matter.

15 **MR. GIRTMAN:** Yes, Commissioner, we have no
16 objection to that procedure being followed. I just
17 wanted to be sure I understand that I will not be
18 needing to prepare cross-examination questions for
19 either one of those witnesses as we would do if they
20 were normally appearing as a party.

21 **COMMISSIONER JACOBS:** Now, because they
22 filed protests, they are parties, aren't they?
23 Waiving their rights to -- as parties is kind of the
24 status I'm hearing? Because they didn't have to do
25 anything to come in just to testify at the customer

1 hearing, did they?

2 **MR. VACCARO:** They didn't have to do
3 anything for that. They're basically waiving their
4 right to provide any new issues that have not been
5 identified in the draft prehearing order and any
6 testimony on any new issues.

7 **COMMISSIONER JACOBS:** So then in answer to
8 your question is that there's no testimony, so there's
9 no cross?

10 **MR. GIRTMAN:** Yes, sir. I just wanted to be
11 sure that my understanding was correct, that they have
12 not participated, other than filing the protests.
13 They have not filed prehearing statements. They have
14 not filed prefiled testimony. They have not filed
15 exhibits.

16 And my concern in preparing for the
17 hearing -- which Mr. Vaccaro and I have discussed
18 it -- to try to make sure that they have a full
19 opportunity to do what they want or need to do, but at
20 the same time I, as counsel for the utility, have an
21 opportunity to know ahead of time and be prepared to
22 respond to whatever their participation is going to
23 be.

24 **COMMISSIONER JACOBS:** Let's do this. Let's
25 write a letter back confirming that understanding,

1 really in response to their letter about today. Any
2 questions come up with that, then will deal --

3 MR. GIRTMAN: Right. Then I won't have to
4 be prepared to treat them as we normally would an
5 intervening party. Thank you.

6 COMMISSIONER JACOBS: Good. Anything else?
7 Preliminary matters?

8 MR. VACCARO: No. I believe we're ready to
9 go through the Prehearing Order.

10 MR. GIRTMAN: Commissioner, we probably
11 ought to wait to take this up toward the end of the
12 prehearing with testimony and exhibits, but I just
13 wanted to let you know that we are asking to have a
14 supplemental set of documents included as Mr. Wenz's
15 exhibits, and I have provided a copy to counsel and to
16 the Commission at the desk there.

17 COMMISSIONER JACOBS: Which I assume had not
18 been identified -- well, I'll tell you what, is the
19 only issue identifying it properly for purposes of
20 inclusion in the Prehearing Order?

21 MR. GIRTMAN: Well, we have reached a
22 stipulation, counsel have, as to stipulating to the
23 introduction of all of the documents, and I want to
24 include this with it just to be sure there's no
25 objection.

1 These were documents provided by the
2 Commission in response to a data request which we
3 submitted.

4 **COMMISSIONER JACOBS:** Okay. We'll just put
5 it in when we get to the section on exhibits.

6 **MR. GIRTMAN:** Okay. Thank you, sir.

7 **COMMISSIONER JACOBS:** Okay. Section 1,
8 Conduct of Proceedings, no changes there.

9 Section 2. I understand we had a desire to
10 supplement the background.

11 **MR. VACCARO:** Yes, Commissioner.

12 **MR. GIRTMAN:** Commissioner, we had in our
13 review of the initial draft --

14 **COMMISSIONER JACOBS:** This is your request?

15 **MR. GIRTMAN:** Yes, sir.

16 **COMMISSIONER JACOBS:** Okay.

17 **MR. GIRTMAN:** In the review of the initial
18 draft of the case background, we felt that it was
19 incomplete. And we're not, you know, tied to any
20 particular approach to the presentation of the case
21 background. It's not going to decide the case. But
22 in reading this in the future, I mean, people -- the
23 only thing people are going to know about this Order
24 is what's in the four corners of the document. And
25 there's a far greater history to this case than is set

1 forth in the case background. And we submitted a
2 draft proposal for consideration to bring into the
3 Order the history of this AFPI issue at that location.

4 Now, we're not wedded to the wording in that
5 draft either, but what we would like is a balanced
6 approach to setting forth the facts of the case. It
7 doesn't mention the Olesen protest of the developer.
8 It doesn't mention the initial investigation that was
9 done in regard to that complaint. It doesn't mention
10 the fact that we notified the Commission what we were
11 charging and that we were charging AFPI, and there was
12 no objection raised. None of those facts are in this
13 case background.

14 **COMMISSIONER JACOBS:** Are any of your
15 witnesses addressed in these facts?

16 **MR. GIRTMAN:** Yes, sir, the exhibits do.
17 But the point is that what is in here is not only
18 incomplete, but it's, we feel, a concern that it's
19 slanted. So anyone reading this thing says --
20 essentially what this says is you've got a customer
21 complaint in 1996. Staff looked at it and said,
22 "Well, we initially thought it was right, and then we
23 looked at it again and we thought it was wrong. And
24 we contacted the utility and the utility said, "Take
25 our answer or take it to the Commission." And that's

1 not quite the way it happened, Commissioner.

2 **COMMISSIONER JACOBS:** I understand. My
3 thought is the case background in the Prehearing Order
4 does you little good, if any, in addressing your
5 concerns. It sounds to me like you want something in
6 the record.

7 **MR. GIRTMAN:** Yes, sir, that's exactly
8 right. But at the same time -- this case background
9 is not going to decide the case. We know that, and I
10 don't want to make too big an issue of it. But I
11 don't think this fairly reflects the case background,
12 is all I want to say. And if we want to go on from
13 this and just leave it as it is, you know, if that's
14 your ruling, fine, we'll live with that, but --

15 **COMMISSIONER JACOBS:** Here's what I would
16 suggest, and we can do it this way. If you want to
17 provide an exhibit at hearing that says -- or if you
18 want to cite testimony of your witness which sets out
19 these, what I would suggest is a statement in the case
20 background that says -- doesn't even have to say
21 that -- as additional case background --

22 **MR. GIRTMAN:** How about this: We just add
23 this as an exhibit.

24 **COMMISSIONER JACOBS:** That would be my first
25 suggestion.

1 **MR. GIRTMAN:** Let's just do that.

2 **COMMISSIONER JACOBS:** Make this the text of
3 an exhibit --

4 **MR. GIRTMAN:** Sure.

5 **COMMISSIONER JACOBS:** -- and bring it in and
6 then you got it in the record or, alternately, cite
7 some testimony and put a little blurb in the case
8 background that --

9 **MR. GIRTMAN:** Right. The simplest way is
10 just -- we make my letter an exhibit to the
11 proceeding.

12 **MR. VACCARO:** My concern about that is that
13 what is in this case background is something that is
14 covered in the utility's testimony that has to do with
15 the original developer. What the utility -- my
16 understanding what the utility is arguing is the
17 developer came in, asked about AFPI charges in 1993.
18 The utility informed the Commission Staff that it was
19 charging this charge and Staff never said anything to
20 the contrary. And the utility is relying on that as
21 part of its testimony in its argument for why the AFPI
22 charges are applicable. I believe that's covered in
23 their testimony. If they would like to put this in
24 the record, they're welcome to put it in the record.
25 However, we would like to --

1 **COMMISSIONER JACOBS:** You reserve the right
2 to refute it.

3 **MR. VACCARO:** Well, actually -- can I have
4 just one moment, please?

5 **COMMISSIONER JACOBS:** Sure. (Pause)

6 **MR. VACCARO:** Commissioner, it's Staff's
7 opinion that what is contained in this background is
8 contained in the testimony and there is no need for
9 this. We do have cross-examination on this. So with
10 that in mind, we would prefer that this not be
11 stipulated as an exhibit concerning that we do have
12 cross-examination on that testimony. The case
13 background here is merely just a case background.
14 It's not dispositive of the issues. This is -- this
15 order is just setting up the procedure for hearing.

16 **COMMISSIONER JACOBS:** Help me understand.
17 Essentially what we have is a dispute as to
18 interpretation of a prior Commission order; is that
19 correct?

20 **MR. VACCARO:** Yes, that's part of it.

21 **COMMISSIONER JACOBS:** Now, in my mind there
22 are two ways to address that. One is we could set it
23 out as a separate legal issue that you guys can brief,
24 okay, as to what, indeed, is the legal impact of a
25 Commission order. That's one. And that gets resolved

1 with the eventual recommendation.

2 The other thing is if there's testimony that
3 already addresses these issues, okay, meaning it's
4 going to go into the record, I agree that this is
5 redundant, that there is redundancy here, and I guess
6 my only question is we get nothing by dealing with
7 this in the case background. So I don't want to make
8 it -- I agree, I don't want to make it a big issue in
9 the case background.

10 What my suggestion is, if you're concerned
11 that there is some undue taint by what's stated in the
12 case background, then I would suggest either citing
13 that testimony, or putting this up as simply making a
14 brief reference to it in the case background saying
15 that -- I mean, either that or let them supplement
16 their prehearing statement. One way would simply
17 bring out their point that they want to raise, is that
18 they would like to refute an interpretation that's
19 been put forth.

20 I don't have a problem with debating and
21 dealing with that debate, but I want to move on from
22 dealing with it here because I don't think this has
23 any particular relevance here.

24 **MR. GIRTMAN:** Commissioner, there are a lot
25 of things in the prehearing --

1 **COMMISSIONER JACOBS:** Would not something
2 like this have been put into the prehearing statement?

3 **MR. VACCARO:** It could be put in as a
4 position for one of the issues.

5 **COMMISSIONER JACOBS:** The essence of what
6 I'm saying is, there are a variety of avenues that we
7 could deal with this very straightforwardly. I tend
8 to think, and I'm prepared to say, that I don't think
9 it needs to be dealt with here because I don't think
10 it does you any good here.

11 **MR. VACCARO:** May I make a suggestion? That
12 we go ahead and agree to let the Utility submit it as
13 an exhibit at the hearing, but provided that Staff can
14 ask cross-examination on it if we deem it necessary.

15 **MR. GIRTMAN:** Sure. No problem.

16 **COMMISSIONER JACOBS:** That would be my
17 thought.

18 **MR. GIRTMAN:** All we want to do is have some
19 statement somewhere that we have a different
20 perspective on the case background.

21 **COMMISSIONER JACOBS:** And quite frankly,
22 that's almost -- that's very literally not redundant,
23 because as I understood it, this is testimony that you
24 were going to cross anyway.

25 **MR. VACCARO:** Yes.

1 MR. GIRTMAN: So what we would do then is
2 mark this correspondence dated December 23, 1988, from
3 me to Mr. Vaccaro -- we can -- why don't we deal with
4 that when we talk about the exhibits. We can finish
5 up and get the numbers to it and everything.

6 One final request, Commissioner, on the case
7 background. If you look at the last full paragraph on
8 Page 2, it begins "The utility requested that the
9 issue be submitted to the Commissioners". Again there
10 was a lot for factual background than that. There was
11 correspondence back and forth, data requests,
12 information provided. There was, I think, at least
13 three communications, pairs of communications, back
14 and forth. And it got to the point we were spending
15 so much time with this we said, "Please, Staff, agree
16 with us. But if you don't agree with us, I think
17 we're at impasse. Let's go ahead and have the
18 Commissioners decide it."

19 This sentence right here, I'd request that
20 it be deleted. It's not necessary to the Order. But
21 it suggests that the Utility said, "Go my way on our
22 first response," or "We don't like what you're saying,
23 and give the Commissioners a chance."

24 It doesn't do anything for the Order. And I
25 think it gives an unfair impression of the Utility's

1 intent.

2 **COMMISSIONER JACOBS:** I think it's marginal.
3 I think we can -- it doesn't hurt you. Quite frankly,
4 I would not cite it as a major issue. I think I'd
5 leave it there.

6 **MR. GIRTMAN:** Okay.

7 **COMMISSIONER JACOBS:** Anything else?

8 **MR. VACCARO:** No.

9 **COMMISSIONER JACOBS:** Okay. Section 3. No
10 changes? (No response.)

11 Section 4. No changes there. Move on to
12 Section 5.

13 **MR. VACCARO:** Commissioner, regarding the
14 order of witnesses and the issues --

15 **COMMISSIONER JACOBS:** Nothing in Section 5,
16 then we'll go on to Section 6.

17 **MR. VACCARO:** Oh, I'm sorry. Yes.

18 **COMMISSIONER JACOBS:** Okay.

19 **MR. VACCARO:** I'm sorry. I thought we were
20 in Section 6.

21 With regard to the issue numbers being blank
22 for which witnesses will testify to which issues,
23 we'll plan on filling those in once we've decided on
24 all the issues for the case. That's why that's left
25 blank for the time being.

1 **MR. GIRTMAN:** Just for the record, Mr. Wenz
2 will be testifying as to all issues.

3 **COMMISSIONER JACOBS:** Okay. With that
4 caveat, then we'll move on to Section 7 and that
5 revision also. Any changes here?

6 **MR. GIRTMAN:** I have a question in regard to
7 the bottom of Page 6 and top of Page 7, last four
8 lines on the bottom of Page 6 sentence begins
9 "Non-testifying staff's positions are preliminary."
10 Is it the Staff's intent to keep those two sentences
11 in the Prehearing Order?

12 **MR. VACCARO:** Those were put in here in case
13 we get to an issue where it turns out we don't have a
14 witness testifying to that issue. That's standard
15 procedure.

16 **COMMISSIONER JACOBS:** I'm sorry. I missed
17 where you are.

18 **MR. GIRTMAN:** Bottom of Page 6. It's the
19 fourth line from the bottom, the first words on the
20 line are "Administrative Code". Fourth line up from
21 the bottom.

22 **MR. VACCARO:** If I may, I just want to take
23 a look at Mr. Girtman's draft to make sure the
24 pagination didn't change. We faxed that to him.

25 **MR. VACCARO:** Mr. Girtman is four lines up

1 from the end of Staff's basic position, I believe.

2 COMMISSIONER JACOBS: Okay.

3 MR. GIRTMAN: Yes. It would be in the
4 middle of Page 6.

5 COMMISSIONER JACOBS: Sentence beginning
6 "Non-testifying"?

7 MR. GIRTMAN: Yes.

8 MR. VACCARO: The reason these lines are in
9 here, the utility has raised certain issues that were
10 not raised by Staff. To the extent that when we're
11 finished here today that there are issues that remain
12 to which we might not have Staff members testifying,
13 then that explains that our positions that will be
14 included in the prehearing order will be preliminary
15 pending completion of the record. If, on the other
16 hand, we do have witnesses for every issue, then those
17 two lines will be stricken.

18 COMMISSIONER JACOBS: I see. At any rate,
19 the parties -- you will be allowed to address the
20 issues whether or not there's testimony from Staff or
21 not.

22 MR. GIRTMAN: Right. Okay. Now, I just
23 want to understand the phrase "non-testifying Staff's
24 positions." Is that Staff members other than the two
25 who are listed as witnesses?

1 **MR. VACCARO:** Yes. That would be just
2 Staff's basic positions that are -- that go beyond
3 testifying for final arguments and for purposes of the
4 recommendation.

5 **MR. GIRTMAN:** Well, we would ask,
6 Commissioner, if the Staff has got any position
7 they're going to take, particularly posthearing, we'd
8 like a witness. We think --

9 **MR. VACCARO:** That's --

10 **MR. GIRTMAN:** Wait a minute. Let me finish,
11 please.

12 We're here to present the case. We're here
13 to have all of the issues brought forth and the facts
14 presented to the Commissioners so that you can make a
15 decision. If we have Staff, non-testifying Staff,
16 that's not listed as a witness, that's not going to be
17 there, not going to be subject to cross-examination,
18 they've got no part in this proceeding, I would think.

19 **MR. VACCARO:** If we have positions to
20 which -- for which we do not have witnesses, those are
21 merely preliminary positions. When we get to the end
22 of the hearing process and the utility provides its
23 brief and the record is complete, the Staff that shall
24 write the recommendation, based on the record, will
25 merely be taking the evidence that's in the record and

1 coming up with analysis under particular issues and
2 positions for those issues. So, therefore, any
3 position that we would give at this point would be
4 preliminary and based just on the information that's
5 been provided so far. It's really more of an
6 administrative process.

7 **MR. GIRTMAN:** That's my point,
8 Commissioners. If -- there are going to be
9 non-testifying Staff members who have to work on the
10 case. We understand that. But they have no right to
11 take a position in this proceeding if they're not
12 listed as witnesses. And if I misunderstand that,
13 please help clarify it for me.

14 **COMMISSIONER JACOBS:** There has
15 traditionally been a dual role of Staff. The first
16 role, which is very optional, is that a Staff person
17 comes in to actually supplement the record, help
18 create the record. They provide testimony, cross
19 examine, whole nine yards.

20 The secondary role of Staff, which is --
21 clearly happens in most cases, once the record is
22 complete, then the technical Staff reviews that record
23 and makes recommendations based only on the scope of
24 the record.

25 What I understand to be saying is that --

1 and let me step back for a moment. Also in most
2 dockets, preliminary positions are taken by Staff
3 who -- in lieu of making a prejudgment on all the
4 issues before the record is created, Staff generally
5 takes preliminary positions on issues just so parties
6 are aware of -- may be aware of any prevailing
7 positions that may be out there, that sort of thing.

8 What I understand this statement to be
9 saying is that it's to be consistent with that. That
10 Staff is -- any positions here are preliminary but
11 final positions are going to be based on the record
12 that's formed. Any Staff that testifies are acting in
13 the process of creating that record and so they fall
14 within that same confines.

15 **MR. GIRTMAN:** I know there's always been a
16 preference among parties, and a dilemma sometimes at
17 this Commission and a lot of other agencies and even
18 courts, about the separation of the participant as an
19 advocate for a position and the technical staff person
20 who is giving counsel and support and analysis for the
21 decision-makers. There's always been an ethical
22 question of where is that line supposed to be? And
23 how do we all work with the needs of the agency to
24 have both the advocate presented and the impartial
25 analysis done in support of the Commissioners?

1 Would there be any objection -- see, the
2 problem -- the concern that I've got is all this is
3 grouped in together under Staff. If we're going to
4 have a hearing I think we're going to have and is
5 traditionally had here, you've got your advocate
6 Staff. You've got Staff attorney; you've got the
7 Staff witnesses. And they come in there and they're
8 advocates for a position. That's fine. They ought to
9 do that. But they ought to be separate from the
10 technical advisory Staff who is going to be writing
11 the Staff analysis for consideration of the
12 Commission. And if we want to have a category we can
13 have a category. We can have the Staff here and then
14 the non-testifying support Staff. Some other kind of
15 title down here. But I have a concern about grouping
16 those together under one title "Staff." There is a --
17 or should be -- and I assume there is -- a major
18 separation between the advocate attorney and Staff
19 witnesses when they're Staff advocates on the one hand
20 and the non-testifying technical analysis people who
21 prepare the review and Staff recommendation for
22 consideration by the Commissioners. Those should be
23 separate and they should be presented as so in the
24 Order.

25 MR. VACCARO: Commissioner, Staff is never

1 actually a party to these matters. We're here to make
2 sure that the record is complete. There is no legal
3 requirement that I'm aware of that requires Staff to
4 be separated in this case. Staff is also not required
5 to even provide testimony.

6 A lot of the positions are developed based
7 upon what comes out in cross-examination on the
8 record. And in any event, there's a very good
9 likelihood that we probably will have a witness for
10 each one of these issues, but that was just --

11 COMMISSIONER JACOBS: I was just leafing
12 through here to see which ones were under the
13 witnesses that have been listed and which were not.
14 It looks like the vast -- in fact -- well, not all of
15 them but a good number of them -- let's do this.
16 Let's finish with the issue identification process
17 then I'll come back and deal with that, and
18 specifically with any issues that are left out there
19 where testifying Staff aren't addressed. Is that --

20 MR. GIRTMAN: Yes, sir. As long as it's
21 dealt with, it doesn't make any difference when.

22 COMMISSIONER JACOBS: Okay.

23 MR. VACCARO: Okay.

24 COMMISSIONER JACOBS: Okay. That takes care
25 of Section 7. As to your question to strike those

1 sections there, I'll deal with that at the same time;
2 okay?

3 Okay. Section 8.

4 MR. GIRTMAN: Commissioner, as a
5 preliminary, we had a preliminary prehearing
6 conference and ironed out a number of things. It was
7 very helpful to have. One of our concerns is that we
8 bring to the Commissioners, in a clear and concise
9 form, each of the elements that is important to the
10 case to decide -- for the Commissioners to decide what
11 are the facts. What are the issues that are relevant?
12 What are the facts relating to those issues? And
13 therefore, what are the conclusions that the
14 Commissioners will come to in regard to the ultimate
15 issue of whether a refund is required?

16 In that regard, we set forth what we
17 believed were the essential issues that the
18 Commissioners consider. And we tried to set them up
19 in a form that we can give you a straight yes or no
20 answer, and then if it was necessary to expand on our
21 answer and explain that answer or any variation or
22 exception we might have to the answer. We have
23 discussed with Staff -- Staff doesn't like a lot of
24 issues. I remember a case I had before
25 Commissioner Easley. We had about the same number of

1 issues. And Staff wanted essentially four or five
2 issues. And basically it was what happened and how
3 much is the utility going to pay, which is some
4 exaggeration of the Staff's position. But there were
5 a lot of -- those were ultimate conclusions that Staff
6 had wanted at that time. And to some degree, that
7 same effort is being put forth by Staff to find out
8 what's the ultimate conclusion.

9 Our position is that before we get to the
10 ultimate conclusion, we need to bring to the
11 Commissioners the elements that have to be decided
12 that will then bring you to your conclusion on those
13 ultimate decisions, those ultimate issues.

14 And Staff I don't think -- at least to my
15 knowledge they haven't changed their position, but
16 they wanted to eliminate or combine or consolidate or
17 do something with a bunch of these issues which we
18 feel are critical to the decision by the
19 Commissioners; that you have before you a clear and
20 concise picture of the whole picture. Not just a spot
21 here and a spot there, and is the sun shining in the
22 background?

23 So that's why we have the number of issues
24 that we have put forth. We took the Staff's issues
25 and consolidated them with ours. They had five or

1 six, I think. And we put all those together in our
2 draft and this is essentially, for the most part, what
3 we had put together.

4 COMMISSIONER JACOBS: Okay.

5 MR. GIRTMAN: Second point, and much more
6 briefly, is that we have -- we drafted them to try to
7 get clarity for the Commissioners. We wanted to give
8 you a yes or no. And the Staff in many of its
9 questions, or responses to the issues, doesn't say yes
10 or no. It says a bunch of stuff. In some cases it
11 doesn't really answer the question which we can get
12 to. What we were looking for was a yes or no and then
13 explain your position. And if they want to stay with
14 their positions and that's okay with the
15 Commissioners, then that's the way it will be. But we
16 thought it would be helpful to the Commissioners to
17 have both sides to be able to answer every question
18 and say yes or no and here's why.

19 That's my preliminary statement on issues.
20 Thank you, sir.

21 MR. VACCARO: I'd like to go and make a
22 preliminary statement then.

23 We've got two sets of issues in this case.
24 We have factual issues, which are Issues 1 through 15,
25 and then we have mixed issues of fact and law which

1 are four additional issues.

2 Staff believes that this case essentially
3 boils down to five main issues. Did the amendment
4 order approve AFPI charges? Are AFPI charges
5 applicable for -- to the territory based on the
6 tariffs that were filed after the amount order? Is
7 there a limit to the number to the ERCs? Is there a
8 106 ERC limit for collecting AFPI? Did the utility
9 overcollect? And if the utility overcollected, what
10 is the remedy? What needs to be done about that? We
11 think those are the five main issues. Those issues
12 are in this case. Everything else, we believe, the
13 other issues that have been raised by the Utility, are
14 basically arguments which go to support the basic
15 issues in this case.

16 We don't believe that if certain issues are
17 struck that the Utility will be harmed because there
18 are issues and we'll provide for them to make these
19 arguments. We just don't believe that the arguments
20 need to be spread out over so many issues is all.

21 **COMMISSIONER JACOBS:** Okay.

22 **MR. GIRTMAN:** Commissioner, it goes back to
23 what I was just saying a while ago. These are the
24 five ultimate issues. We agree on that part of it.
25 The ultimate issues. But the point is you can't get

1 there without deciding issues between here and there.
2 There are many issues in there that if you don't have
3 those to decide, it's just sort of a, you know, dart
4 game.

5 **COMMISSIONER JACOBS:** Can I get a copy of
6 the original filing in this?

7 **MR. VACCARO:** You want the original
8 Prehearing Statements?

9 **COMMISSIONER JACOBS:** No, the original
10 filing -- oh, this was a complaint, wasn't it?

11 **MR. VACCARO:** It was just basically an
12 investigation so there wasn't an initial filing. And
13 what we could do is we could go issue by issue and --

14 **COMMISSIONER JACOBS:** That's my intention.
15 Here's what I'm going to do. We're going to
16 go issue by issue, and we'll make a determination to
17 what extent that issue remains on the issue -- under
18 the issues here.

19 I'll say this: Historically there has been
20 a great deal of weight given to a party's preference
21 on issues, but I think it's been fairly clear that
22 redundancy is not something that we want to encourage
23 or endorse because it does exactly that. And so
24 having said that, we'll go issue by issue.

25 **MR. GIRTHAN:** If it's all right,

1 Commissioner, I would also like to have the
2 opportunity for Mr. Seidman to add comments as he
3 deems appropriate as we go through these, if he feels
4 something is relevant.

5 COMMISSIONER JACOBS: Okay. Issue one.

6 MR. VACCARO: Before -- let me just, as a
7 preliminary matter, if Mr. Seidman is going to speak,
8 he does need to be approved as a qualified
9 representative, which you can do right now, but we
10 just have to clarify that.

11 COMMISSIONER JACOBS: I was under the
12 impression you were co-counsel.

13 MR. GIRTMAN: No, he's a consultant. He's
14 not an attorney.

15 COMMISSIONER JACOBS: Then we do need to do
16 that.

17 MR. VACCARO: I'm sorry. I missed what you
18 just said.

19 COMMISSIONER JACOBS: He said he's not an
20 attorney so we do need to --

21 MR. VACCARO: Right. And we're just taking
22 a second to check the rule on that. If you could just
23 give us one moment. (Pause)

24 A written request should have been filed.
25 However, since we're at this point I'll just cite you

1 to the rule. It's 28-106.106. And basically it
2 indicates that the representative has to be able to
3 show that he's qualified to appear in the
4 administrative proceeding and capable of representing
5 the rights and interests of the party.

6 **MR. GIRTMAN:** Commissioner, Mr. Seidman is a
7 former employee of this Commission. He has been a
8 witness, an expert witness, in proceedings before this
9 Commission for at least two decades and the Staff
10 knows that. He's been qualified as a Class B
11 Practitioner before this Commission and the Staff
12 knows that.

13 **COMMISSIONER JACOBS:** He's qualified as
14 Class B.

15 **MR. GIRTMAN:** Yes, sir.

16 **COMMISSIONER JACOBS:** Okay. Granted. Okay.

17 **MR. VACCARO:** I'm sorry, I didn't --

18 **COMMISSIONER JACOBS:** I understand he's been
19 qualified as a Class B Practitioner previously?

20 **MR. VACCARO:** One moment. (Pause)

21 **MS. JABER:** Let me enter an appearance on
22 behalf of Staff. My name is Lila Jaber.

23 I'd be remiss in not telling you that the
24 Uniform Rules took effect earlier in '97, so our Class
25 B rule was repealed with the implementation of the

1 qualified representative rule. We're not arguing that
2 he's not a qualified representative. You just need to
3 make a finding that he is a qualified representative
4 pursuant to the Uniform Rule.

5 **COMMISSIONER JACOBS:** Let me be clear. I'm
6 not acting under the Class B Practitioner. I'm basing
7 my finding of qualification on the fact that he's
8 served in that role and participated in proceedings
9 which would necessarily have required certain skills
10 and capabilities, and because of that I qualify him as
11 a -- give me the new name again.

12 **MR. VACCARO:** Qualified representative.

13 **COMMISSIONER JACOBS:** Qualified
14 representative, and we'll grant him that status.

15 **MR. GIRTMAN:** That you, Commissioner.

16 **COMMISSIONER JACOBS:** Okay. Issue 1. Now,
17 let me do this, let me ask you to contrast -- and I'll
18 start with you Mr. Girtman because you indicated this
19 was -- and I guess Mr. Seidman -- contrast Issue 1 and
20 Issue 2 and help me understand the differences.

21 **MR. GIRTMAN:** Let me read this just a
22 moment. (Pause)

23 **MR. SEIDMAN:** Commissioner, I think the
24 response to that is really in part of the Staff's
25 answer to 1 when the issue was "Did the Order require

1 LUSI to charge the customers, in the additional
2 territory granted, the rates and charges previously
3 approved in its tariff?"

4 Part of the response is, "However, AFPI
5 charges were not approved." Therefore, we brought out
6 Issue 2 as a specific issue to deal with whether or
7 not AFPI charges were specifically approved. The
8 proposition is they were.

9 MR. GIRTMAN: The Staff position has been,
10 as we understand it, first their position was that --

11 COMMISSIONER JACOBS: I'm sorry. I don't
12 want to get to the point of arguing positions. Here's
13 what I'd like to do. I want to try and get through
14 this pretty much on a glacial mode. Let's see what
15 would happen if we -- I don't want Issue 1 or 2.
16 Let's work with Issue 1 since we're on that one. "Did
17 order number" as cited here in the order, "require
18 LUSI to charge the customers, in the additional
19 territory, the rates and charges previously approved
20 in its tariffs for the Crescent Bay system," including
21 the AFPI charges in there?

22 MR. GIRTMAN: Well, there are two separate
23 issues, sir, and if I could respond to that.

24 If you go back to this order -- I don't have
25 the exact wording in front of me -- but essentially it

1 said the rates and charges -- not just rates -- the
2 rates and charges no exceptions --

3 COMMISSIONER JACOBS: I understand.

4 MR. GIRTMAN: It said those are to be
5 charged --

6 COMMISSIONER JACOBS: I don't want to argue
7 what your response would be. What I want to ask you
8 is does that get to the question?

9 MR. GIRTMAN: It doesn't.

10 COMMISSIONER JACOBS: Okay. Help me
11 understand.

12 MR. GIRTMAN: And the reason that it doesn't
13 is because the first question deals with specifically
14 what did the Order say. The Order said the rates and
15 charges. And the Staff's response is, well, it didn't
16 say AFPI charge. And so our second question is did it
17 include the AFPI charge? And then the two positions
18 are stated there. But if we try to combine those and
19 say did the order require that the rates and charges,
20 including AFPI --

21 COMMISSIONER JACOBS: So the question would
22 be then did rates and charges, quote/unquote, mean
23 AFPI in that order?

24 MR. SEIDMAN: That's correct.

25 MR. GIRTMAN: Yes, sir.

1 **COMMISSIONER JACOBS:** Which Issue 2 says
2 now.

3 **MR. GIRTMAN:** Right.

4 **COMMISSIONER JACOBS:** So --

5 **MR. GIRTMAN:** But the preliminary threshold
6 question is did the order require the rates and
7 charges currently -- then currently in effect in
8 Crescent Bay also be applied to the additional
9 territory. Because --

10 **COMMISSIONER JACOBS:** Let me --

11 **MR. VACCARO:** Commissioner, may I --

12 **COMMISSIONER JACOBS:** I understand your
13 issue. Let me step back for a moment. And given
14 Staff's response to Issue 1, could we -- is that
15 really an issue?

16 **MR. GIRTMAN:** Well, we'd have to then come
17 back and change our position. And the Staff's -- I
18 don't want to try to dictate what Staff's response is,
19 but Staff's response is incomplete because other
20 things weren't specifically said. They weren't
21 excluded either. They didn't say all rates and
22 charges except AFPI. And so we thought it clearer and
23 simpler just to raise the first question: Did the
24 Order say rates and charges applicable to new
25 territory? Yes, it did. Then the next obvious

1 question is: Did it include AFPI? And if you merge
2 those two together then it clouds the issue. It
3 really avoids requiring to decide the two issues.

4 MR. VACCARO: Commissioner, may I say
5 something?

6 COMMISSIONER JACOBS: Right.

7 MR. VACCARO: I don't think it clouds the
8 issue. I think the issue in this case is -- one of
9 the issues is whether or not AFPI was approved in that
10 Order. What the Utility is arguing throughout its
11 testimony, its position is that the rates and charges
12 were approved. Therefore, that must have included
13 AFPI. So I think the only issue you really need to
14 get to whether or not AFPI was approved.

15 COMMISSIONER JACOBS: Here's my point
16 because I want to be careful. I'm conscious of what
17 you're saying.

18 If the issue is whether or not all rates and
19 charges approved in the prior order apply without
20 distinction, then we have no case, okay. In addition,
21 if that is the question in the case -- let me step
22 back for a moment.

23 If the question is whether or not the rates
24 and charges that were approved in that order had
25 relevance in the new territory, which is another

1 question. That's not what we're here about. What
2 we're here about is a disagreement as to what that
3 term meant. What we're here about is not whether or
4 not there was an Order. Whether or not that order had
5 application. What we're here about, as I understand
6 it, is what did that term mean. Now, Mr. Seidman, I
7 cut you off early. You had a point that you wanted to
8 make on that?

9 **MR. SEIDMAN:** No. I wanted to speak with
10 Mr. Girtman for a minute, see if we could come to a
11 conclusion on it.

12 (Discussion off the record.)

13 **MR. GIRTMAN:** Commissioner, how about this
14 possibility. If we drop Issue 1 and take Issue 2 and
15 drop the word "specifically" to make it read "were
16 AFPI charges approved for the additional territory,"
17 and then let us consolidate our answers.

18 **MR. VACCARO:** We don't have a problem with
19 that. We can go ahead and do that. But I want to go
20 ahead and bring up one other thing, and I don't want
21 to muddy up the waters here, but I think if we're
22 looking at Issues 1 and 2, I think we should also look
23 at Issue 4. Because I think, again, that Issue 4 is
24 very similar to the other two issues. And I think
25 that 1, 2 and 4 could all be consolidated down into

1 one issue.

2 COMMISSIONER JACOBS: Why don't we make that
3 determination when we get there.

4 MR. VACCARO: Okay.

5 COMMISSIONER JACOBS: Let's go ahead -- it
6 sounds like we're okay on that and you all can
7 consolidate your responses. And so we would remove
8 Issue 1 -- well -- and Issue 2 remains reworded to say
9 "were APPI charges approved for the additional
10 territory." And why don't I say "granted in Order No.
11 PSC-92-1369-FOF-WU."

12 MR. VACCARO: So it's "Were APPI charges
13 approved for the additional territory granted in
14 order" et cetera.

15 COMMISSIONER JACOBS: Is that acceptable?
16 Is that acceptable to the Company?

17 MR. GIRTMAN: Yes, sir, that's fine.

18 COMMISSIONER JACOBS: Okay. Issue 3.

19 MR. VACCARO: Staff would like to --

20 MR. GIRTMAN: Excuse me just a moment. That
21 changes the issue. The question is were they approved
22 in the Order, not were they approved for the territory
23 granted in the Order. A totally different issue.

24 MR. VACCARO: I don't see how it's a
25 different issue.

1 **COMMISSIONER JACOBS:** I can see the
2 difference, but I don't know -- I understand the
3 difference but I don't know that it has particular
4 merit here. But I'm -- if it will help you, then I'm
5 okay with leaving the "granted" out.

6 **MR. GIRTMAN:** I would appreciate that
7 because it makes a significant difference to our
8 presentation.

9 **MR. VACCARO:** That's fine with Staff.

10 **COMMISSIONER JACOBS:** Okay. Issue 3.

11 **MR. VACCARO:** Staff would like to propose a
12 revision to this issue to make sure it's a little
13 clearer. "Did the tariffs which were approved
14 subsequent to the issue of Order No.
15 PSC-92-1369-POF-WU render AFPI charges effective for
16 the additional territory?"

17 **MR. GIRTMAN:** Commissioner, they changed the
18 question from what does the Order say to what does the
19 tariff say. And what we want to address is what does
20 the Order say.

21 **MR. VACCARO:** That's not what this issue --
22 at least from Staff's perspective, what this issue was
23 originally placed in our Prehearing Statement for was
24 to get across the point that the AFPI charges became
25 applicable through the administrative tariff process.

1 And this is distinct from whether or not the Order
2 actually approved it.

3 MR. GIRTMAN: Well, that --

4 COMMISSIONER JACOBS: Let me ask you this:
5 If you go with what your interpretation of Issue 3
6 should say, isn't it redundant then to Issue 2? How
7 is it different from Issue 2, even the prior and the
8 existing.

9 MR. SEIDMAN: Was this a Staff issue
10 initially?

11 MR. VACCARO: Well, this was an issue that
12 Staff initially drafted for the Prehearing Statement
13 which we provided to the utility and was included in
14 your Prehearing Statement.

15 MR. GIRTMAN: We didn't drop any of the
16 Staff issues. We just consolidated all of them.

17 COMMISSIONER JACOBS: So this would have
18 been redundant, then, wouldn't it have?

19 MR. VACCARO: No, at least not from --

20 COMMISSIONER JACOBS: I understand -- when
21 you drafted it you had one interpretation but it
22 sounds like the Company didn't. And now we need to
23 come to an agreement on what Issue 3 really means.

24 MR. GIRTMAN: If we're talking your answer,
25 Tim, needs to come in response to a question about the

1 tariff. If we can keep this question in relation to
2 what did the Order say, then maybe we can look at
3 consolidating that with No. 2. Give me just a moment,
4 please.

5 Unless it's redundant someplace else,
6 Commissioner, we could just reword the issue to make
7 it relate to the tariff instead of the Order. I think
8 that satisfies Tim's concern.

9 MR. VACCARO: May I make a suggestion, then?

10 MR. GIRTMAN: Sure.

11 MR. VACCARO: Again, this is a sort of
12 skipping ahead but I don't want us to get too confused
13 as we get further down the line. The Utility raised
14 an Issue No. 9 which asks if the tariff sheets,
15 revised in compliance with the Order, whether or not
16 they applied to the additional territory. And I think
17 with some rewording we could probably just use this
18 issue --

19 COMMISSIONER JACOBS: Instead of this.

20 MR. VACCARO: Instead.

21 MR. GIRTMAN: Okay.

22 COMMISSIONER JACOBS: Let's look at that and
23 see if that's possible.

24 MR. VACCARO: But what we would suggest for
25 some slight rewording on this, "Did the tariff sheets

1 submitted subsequent to issuance of order such and
2 such apply."

3 MR. SEIDMAN: Subsequent to the order comply
4 with -- is that --

5 MR. VACCARO: Yes -- no, substituted -- "Did
6 the tariff sheets submitted subsequent to issuance of
7 the Order, of Order number such and such apply to the
8 additional territory."

9 COMMISSIONER JACOBS: Can I say "pursuant
10 to" or something like that? Because I don't know
11 which tariff -- the concept is I want to make sure we
12 address the proper tariffs.

13 MR. VACCARO: What's important and what
14 Staff's concerned about is there's a question about
15 whether or not the Order approved the AFPI charge and
16 there's a question about whether the tariff made it
17 applicable. And we don't --

18 COMMISSIONER JACOBS: My concern is wholly
19 of form rather than substance. My concern is I don't
20 know which tariffs we're talking about. So I'm trying
21 to figure out how to make sure that that's made clear
22 without listing out a whole bunch of tariff sheets.
23 So whatever way you guys want to do that is fine with
24 me. I don't want to get into the substance of it.

25 MR. GIRTMAN: Commissioner, we have a very

1 limited number of tariff sheets involved, and I don't
2 think there's any question about that. We can
3 understand it, but if we need to add something under
4 for the Commissioners' consideration -- it's clear to
5 us.

6 **COMMISSIONER JACOBS:** I know. That's fine.
7 But I think if there is an exhibit that references
8 them or something like that, just cite it here or
9 something like that. That's fine with me. That's my
10 only concern. Other than that, then proceed with how
11 best this meets your concerns.

12 **MR. VACCARO:** Can I have just one minute?
13 (Pause)

14 What if we were to say "Did Third Revised
15 Sheet No. 27.3 make the AFPI charge applicable to the
16 additional territory?"

17 **MR. GIRTMAN:** There are actually a couple of
18 other tariff sheets that are referenced in that
19 tariff. As long as the understanding of the issue is
20 that it's not just that one tariff but it's the
21 incorporation of the other tariffs, that's fine.

22 **MR. VACCARO:** Correct.

23 **MR. GIRTMAN:** That's fine.

24 **COMMISSIONER JACOBS:** Now -- so we will
25 strike Issue 3.

1 **MR. GIRTMAN:** And, Commissioner, we would
2 like the opportunity to perhaps consolidate the
3 wording. As issues are eliminated or merged, we will
4 have to come up with some new language.

5 **COMMISSIONER JACOBS:** Very well. And I
6 assume you guys --

7 **MR. VACCARO:** Are we talking about for the
8 positions?

9 **MR. GIRTMAN:** Yes, on the positions.

10 **MR. VACCARO:** That's no problem. After we
11 get all the issues consolidated I'll provide those to
12 you and you can fax me a list of your new positions
13 and we'll include those.

14 **MR. GIRTMAN:** Sure.

15 **COMMISSIONER JACOBS:** Okay. That takes us
16 to -- and we have a reworded -- how do you want to do
17 this? Why don't we go through and just resolve the
18 issues first. Your guys can come back and figure out
19 how to --

20 **MR. GIRTMAN:** Commissioner, I think -- we've
21 worked very well on these things so far. What I would
22 recommend that we do is that, with your permission,
23 that they do the redraft, submit it to us. We'll put
24 together our consolidated positions, get it back to
25 them and get a draft back together. And if you'll

1 allow us to determine if we can stipulate to them,
2 then we don't need another continuance of hearing.

3 **COMMISSIONER JACOBS:** Great. Okay. We're
4 at Issue 4. As I understand, Staff's position is that
5 we perhaps may consolidate this with the Revised
6 Issue 2.

7 **MR. VACCARO:** Yes.

8 **MR. SEIDMAN:** How would you word that?

9 **COMMISSIONER JACOBS:** Could you restate the
10 Issue 2 now?

11 **MR. VACCARO:** I don't know that Issue 2
12 needs to be restated. What concerns me is Issue 4
13 looks an awful lot like Issue 1. And, again, it's
14 asking were the rates and charges approved the same
15 rates and charges that were approved in the Crescent
16 Bay territory. That's essentially what it sounds like
17 to me.

18 **MR. SEIDMAN:** It goes a step further. It
19 takes it back to when the rates were initially
20 designed in the Order in 1988.

21 **COMMISSIONER JACOBS:** That's kind of what
22 I -- help me to understand this. Are you saying were
23 AFPI charges in existence in the territory before it
24 was granted to LUSI?

25 **MR. SEIDMAN:** Yes, that's part of it.

1 Because Order 92-1369 didn't give any rates. It
2 merely.

3 COMMISSIONER JACOBS: Granted new territory.

4 MR. SEIDMAN: It's the statement of the
5 Commission to allow rates that were in effect already
6 to --

7 COMMISSIONER JACOBS: Is that --

8 MR. SEIDMAN: -- apply to the additional
9 territory. And this relates it to the Order from
10 which those rates were determined. It's a big part of
11 the case because of the circumstances that were
12 covered.

13 COMMISSIONER JACOBS: Hold up. I'm sorry.
14 We're giving Ruthe over here a heart attack. Let's
15 try and talk one at a time. Let Mr. Seidman finish.
16 Were you done?

17 MR. SEIDMAN: Yes.

18 MR. VACCARO: What I might suggest then
19 would be to say were the AFPI charges developed for
20 LUSI in Order No. 19962 approved for the additional
21 territory in Order 92-1369. So basically take the
22 order number portion of Issue 4 and incorporate that
23 into Issue 2. Would that work?

24 MR. GIRTMAN: I think so.

25 COMMISSIONER JACOBS: So that is a further

1 restatement of Issue 2.

2 MR. VACCARO: Yes.

3 COMMISSIONER JACOBS: And we strike Issue 4.

4 MR. GIRTMAN: (Nodding head.)

5 COMMISSIONER JACOBS: Issue 5.

6 MR. VACCARO: The concern that Staff has
7 regarding this issue, and this flows into about the
8 next four or five issues, is it appears what the
9 Utility is doing here, within these issues, setting
10 forth the arguments that go to other issues regarding
11 the design capacity, and whether or not the AFPI
12 charges were intended for the design capacity and for
13 the entire area, and whether or not that area and
14 design capacity grew as the territory was amended by
15 the subsequent order. That seems to be when we go
16 down the line what issues -- basically Issues 5
17 through 8 and 10 and 11 are getting at. And that
18 seems to go to the issue of whether or not the Utility
19 was limited in collecting 106 ERCs. And also, of
20 course, whether or not the subsequent amendment order
21 approved the AFPI considering that the service area
22 grew.

23 So it really seems to me that Issues 5
24 through 8 and 10 and 11 are really more or less
25 argument that can be included within Issue 12, and to

1 a lesser extent Issue 2.

2 COMMISSIONER JACOBS: Mr. Girtman.

3 MR. GIRTMAN: Again, Commissioner, this is
4 the type of ultimate issue that requires the
5 consideration of several components. And to say that
6 you can incorporate all that in one issue, it
7 eliminates the need to consider the components and the
8 components are critically important to, I think, a
9 determination of what the Order said. Essentially
10 they're saying does this Order do this, does it do
11 this and does it do this? And when you put all those
12 issues, the decisions on those issues together it
13 tells you the ultimate conclusion.

14 And so we prefer to have a very clear
15 concise narrow set of issues so that you can say yes
16 or no to each question without a lot of discussion and
17 a lot of narrative. You know you can say yes or no,
18 it is or it isn't. And when you get your yes's
19 together and your no's together you've got a nice
20 picture and that gives you an ultimate conclusion. So
21 we would argue for the preservation of the issues.

22 COMMISSIONER JACOBS: Okay. Why don't we do
23 this: Can we agree that Issue 12 -- let me think for
24 a moment. Are we in agreement as to what Issue 12 is
25 intended to address; i.e., that does the ERC

1 limitation in the original tariff sheets, which I
2 assume came from the prior order -- apply to the
3 additional territory approved in Order No. 19962? I'm
4 sorry. Is that the order, correct order?

5 MR. VACCARO: I think you're talking about
6 the amendment order. Right, I think it's 92-1369.

7 COMMISSIONER JACOBS: Are we in agreement
8 that that's what Issue 12 is intended to address?

9 MR. VACCARO: Yes.

10 MR. GIRTMAN: (Nodding head.)

11 COMMISSIONER JACOBS: I would like to use
12 that as sort of a baseline and let us see what else we
13 need to determine through these other issues. Okay.

14 Issue 5. Is this your issue, Mr. Girtman?

15 MR. GIRTMAN: Yes, sir.

16 COMMISSIONER JACOBS: Walk me through that
17 and that help me understand what you're trying to
18 address here.

19 MR. GIRTMAN: Let me have just a moment to
20 read it. (Pause)

21 Again, this really addresses an essential
22 element of determining what limitations were
23 applicable. Whether it's 106 or 1600 or whatever the
24 other build-out number is. And it goes back to the
25 Order 19962 when they developed these charges.

1 The question is whether it was based on the
2 estimated build out of, quote, "the entire LUSI
3 service area." At that time that's what it was. In
4 fact, there was nothing built out there when they
5 originally got the certificate. They estimated what
6 the build out was going to be. And it eventually
7 developed and became known. But that's the way it
8 developed. But it was aimed -- the question is aimed
9 at the process of determining the AFPI charge and it
10 was for the entire service area. It was built out for
11 the entire service area.

12 We have an order that expands the service
13 territory, the additional territory outside the
14 original Crescent Bay subdivision. The question then
15 is AFPI applicable to the entire service area? And we
16 say it is; the entire service area. Those are key
17 words, "the entire service area." And when you expand
18 the service territory, then the concept -- I'm talking
19 about stepping back from the specific order -- but the
20 general concept of the AFPI is to apply to the entire
21 service territory, and that's what those orders have
22 said. And the question we want a yes or no on is did
23 it do that? And we say emphatically yes, that it did
24 that.

25 And before you get to the question of the

1 ultimate decision, the ultimate question, did the 106
2 ERC limitation apply? There's some preliminary
3 issues -- not legal arguments -- but preliminary
4 issues that have to be decided. If we don't get the
5 issue in the prehearing order, then essentially the
6 Staff doesn't have to address it and the Commissioners
7 really don't have to decide it. You have to decide
8 the ultimate issue. But what we're asking is that you
9 please consider each one of these parts. It can be
10 broken down. It can be much more easily understood if
11 you have it in its component parts in the separate
12 issues that you could decide yes, it was or -- that's
13 what we tried to do. The ultimate goal was to get the
14 issue worded in the way that it can be answered yes or
15 no. And it's much more clearly understood that way.

16 **COMMISSIONER JACOBS:** It would appear to
17 me -- and help me understand this -- it would appear
18 to me that the answer to Issue No. 12 -- first of all,
19 let me make sure I understand this. The original
20 tariff sheet which contains the 106 ERC limitation was
21 filed as a result of the Crescent Bay. That was filed
22 as a result of the Crescent Bay order; is that
23 correct?

24 **MR. GIRTMAN:** Yes, sir.

25 **COMMISSIONER JACOBS:** And it stated what the

1 territory of LUSI was.

2 MR. GIRTMAN: Yes.

3 COMMISSIONER JACOBS: Okay. And AFPI
4 applied to this entire territory?

5 MR. GIRTMAN: (Nodding head.)

6 COMMISSIONER JACOBS: Now, historically --
7 well, according to law, when a territory is modified,
8 what happens to that? Are we in agreement on that?
9 Is the law clear --

10 MR. VACCARO: I'm sorry to interrupt you. I
11 don't think we are clear on that in the sense that
12 that's part of the dispute that comes out in the
13 testimony of the parties.

14 COMMISSIONER JACOBS: Let me suggest this
15 then. Let me suggest -- let me not put words in your
16 mouth. Let me suggest that Issue 5 really has to do
17 with that; is the unclarity in the law as to what
18 happens when the territory changes when these apply
19 already -- which I think probably is addressed in
20 Issue 12, but I can accede that there may be something
21 that you may want to add to that. Because if the law
22 is clear as to what happens when you amend a
23 territory, then I think Issue 12 becomes pretty
24 straightforward.

25 If you look -- Commissioner, if you look at

1 the Utility answer to Issue No. 5, I think that gets
2 to the essence of that question. And it says that the
3 monthly rates, the service availability charges and
4 the AFPI charges were developed all together based on
5 the cost of serving the, quote, "entire utility
6 service area." And at that time the entire utility
7 service area was Crescent Bay subdivision, 106 ERCs.
8 But it was based upon the entire service area, and we
9 don't want to lose the phrase "the entire service
10 area." Because that's the issue. That is an issue.
11 It's not a question of whether 106 ERCs applies.

12 In this case the question really focuses on
13 the fact that it wasn't half of Crescent Bay they
14 applied the rates to, it was the entire build-out
15 total rates, total charges, everything all in one
16 package for the entire service area as was approved in
17 the Crescent Bay Order.

18 **COMMISSIONER JACOBS:** Let me ask this: Is
19 there a disagreement as to correctness of your
20 statement given what the territory was at the time the
21 Order was issued? Does everything disagree that this
22 statement is true at the time the Order is issued
23 proven those rates and charges?

24 **MR. VACCARO:** Staff would want that wording
25 in here because Staff's disagreement would be that at

1 the time that Order was issued that it only applied to
2 106 ERCs, and that was the entire --

3 **COMMISSIONER JACOBS:** I'm a step back. I'm
4 not there yet. What I'm saying is that at the time
5 the Crescent Bay Order was issued, okay, those charges
6 applied to the entire service territory --

7 **MR. GIRTMAN:** Yes, sir.

8 **COMMISSIONER JACOBS:** -- of LUSI.

9 **MR. GIRTMAN:** Which just happened to be 106.

10 **COMMISSIONER JACOBS:** Which happened to be
11 106. So we don't have any disagreement with that.
12 The disagreement is what became of the entire
13 territory --

14 **MR. GIRTMAN:** Yes, sir.

15 **COMMISSIONER JACOBS:** -- when the new
16 territory was added. Okay. And that's what I'm
17 suggesting that Issue 5 ought to be focused on.

18 **MR. VACCARO:** Can I make a suggestion? And
19 this might go to the issues that the Utility has
20 addressed that get us to this point. Because you have
21 Issues 5 through 8 and 11 which basically take you
22 down the line and get you to the point of saying that
23 when the service area grew to 1600 ERCs from 106, that
24 the AFPI was meant to apply to that. Because when you
25 go back to the original Order 11962, it made it

1 applicable to the entire service area as amended. I
2 think that's what the Utility is getting at. And I'm
3 wondering if it might be possible to frame just one
4 issue that basically says something to the effect of
5 were the rates and charges which were developed in
6 Order No. 19952 applicable to the entire service area
7 and design capacity as amended by Order 92-1369.
8 Could we do something like that? And would that take
9 care of the Utility's concern without having all of
10 those issues because I think it gets to what they want
11 to argue.

12 MR. GIRTMAN: Give me just a moment, please,
13 sir. (Pause)

14 Would you restate that, please, sir?

15 MR. VACCARO: I'll try it.

16 MR. GIRTMAN: Have the court reporter read
17 back maybe.

18 MR. VACCARO: "Were the rates and charges
19 developed in Order No. 19962 intended to apply to
20 LUSI's entire service area and its design capacity as
21 amended by Order No. 921369?"

22 COMMISSIONER JACOBS: Let me suggest this --
23 because I think that may skirt over what I think you
24 really want to get at.

25 Your wording, I think, is okay. But I would

1 say "in that territory from 1962, and in addition to
2 any subsequent territory --" what I want to say is was
3 it intended to apply to the territory from the 1962
4 plus additional territories; any additional territory.
5 Because that's what you want to argue, is it not? You
6 want to argue that when the Commission comes in and
7 doesn't address this, that that prior order applies
8 and the term "full service territory" as stated in
9 that prior Order still applies. Is that not what you
10 want to argue? And don't let me --

11 **MR. GIRTMAN:** I don't think that's quite the
12 point. The original Order, when it was issued,
13 applied only to Crescent Bay. And I think everybody
14 agrees to that.

15 **COMMISSIONER JACOBS:** Right. But we're
16 getting into particular geographic demarcations.

17 **MR. GIRTMAN:** Right, but the -- it's a
18 different Order I'm talking about, is what I'm trying
19 to get to.

20 **COMMISSIONER JACOBS:** But the essence of
21 your argument is that this later order went back and
22 added geography but did not change the term "full
23 service territory," therefore, all of the terms and
24 conditions that applied in that prior order, which
25 applied to the full service territory, still apply.

1 This new order simply added logistics.

2 **MR. GIRTMAN:** The difference is that it
3 didn't apply the 106 ERCs. See, that's the point.
4 Some of the issues in here deal with what was design
5 capacity? What would have been design capacity for
6 Crescent Bay was 106. And then when you add that
7 additional territory you've got -- what was it, 1200
8 or something?

9 Commissioner, I think you've got the essence
10 of it stated in your question. The concern I've got
11 there is the distinction that Crescent Bay, in the
12 geographic territory that was set there, was 106 ERCs.
13 And if that were -- question were interpreted to mean
14 the additional territory -- the subsequent Order
15 carried all provisions with it, that's not exactly
16 what that Order did. It carried the rates and
17 charges. It essentially said all rates and charges
18 and it didn't say limited to 106 ERCs. And, in fact,
19 the ERC number changed from 106 to over 1,000.

20 So the question needs to be changed a little
21 bit in that it didn't, in fact, apply the 106 ERC
22 limitation. I think that's the essence of the
23 difference that we've got.

24 **MR. VACCARO:** I think I can simplify this.
25 First of all, Staff is willing to stipulate to Issue

1 No. 7.

2 COMMISSIONER JACOBS: Okay. So we can --

3 MR. VACCARO: We'd be willing to stipulate
4 to that but we want to make a clarification to Issues
5 5, 6 and 8. And that clarification would simply be
6 that at the end of each issue, 5, 6 and 8, that we
7 simply add the words "at the time Order No. 19962 was
8 issued."

9 MR. GIRTMAN: Issue No. 5 contains it
10 already in the first line. I think it would be
11 repetitive if we put it at the end again, but think
12 about that one. (Pause)

13 In Issue 6 we're talking about not just what
14 Order 19962 required. Yes, it -- I believe that was
15 the one, the 106 ERC capacity, wasn't it? That the
16 charge that was set there was intended to be in effect
17 until the Utility reached capacity, whatever that
18 capacity was, and it just happened to be 106 ERCs.

19 MR. SEIDMAN: I don't know that that phrase
20 adds anything. Nobody is saying that at the time
21 19962 was issued anyone was looking forward and saying
22 that they knew something was going to change or not
23 going to change. I mean I think it's kind of obvious
24 that an order applies to whatever has happened at the
25 time the order applies.

1 I think we got it a little backwards. The
2 real question is when -- the thing we're trying to
3 frame there, and I think Commissioner Jacobs has it,
4 is when 19962 was issued and the rates were developed
5 and the charges were developed in that order, were
6 they meant to apply to the entire territory?

7 COMMISSIONER JACOBS: Even as amended?

8 MR. GIRTMAN: They never got to that
9 question then.

10 COMMISSIONER JACOBS: I know. But my point
11 is when that order was issued, when 19962 was issued,
12 were those as they developed -- the charges, were they
13 developed for the entire territory even if
14 subsequently that territory was amended?

15 MR. GIRTMAN: I don't think that Order
16 addressed that question, Commissioner. It was left to
17 subsequent orders to make some determination of that.
18 But what we're trying --

19 COMMISSIONER JACOBS: I'm sorry, go ahead.
20 I cut you off.

21 MR. GIRTMAN: The point -- the first Order
22 19962, it made a determination based upon the facts in
23 effect and known at the time it was issued.

24 Now, when you take a subsequent order which
25 adds territory, and you say we're going to apply --

1 we're not going to have a rate case now. We're not
2 going to put the customers through that. We're not
3 going to put the Utility to the expense, the rate case
4 expense and all of those kinds of things, for now.
5 And historically it's been done by the Commission,
6 we're going to take the existing rates in the existing
7 territory and make those apply in the new territory
8 until we get to a rate case. And when the appropriate
9 time for a rate case comes along, then we'll do all of
10 the numbers.

11 It's a unique issue that we have here.
12 Applying all the rates and charges is one thing. The
13 question that the Staff -- their position, as I
14 understand it, is that even though it makes -- in our
15 response to Issue No. 12, the two alternatives, it
16 makes no sense -- in our position it makes no sense to
17 argue the 106 ERC limitation applies to that entire
18 service area because the subsequent Order made all
19 rates and charges effective in the new territory.
20 That's basically the essence of that aspect of it.
21 Does the 106 limitation apply?

22 And in the Order that originally set the 106
23 ERC limitation I don't think we can say that the
24 Commissioners considered at that time what they were
25 going to do to it. They had a given boundry, they had

1 Crescent Bay subdivision, and they said there's 106
2 ERCs there, and that's what we're approving because
3 build-out capacity is 106 ERCs. And I don't know that
4 we can read into that Order that the Commissioners
5 looked to an expansion of territory.

6 **COMMISSIONER JACOBS:** Now, if you accept
7 that logic, then the only issue -- well, let me not
8 say that. If you accept that logic how can there be
9 another issue other than Issue 12? Because if I
10 understand what you said, Order No. 19962 was issued,
11 it did not speak to what would be the case when the
12 full service territory was amended. Such that if a
13 subsequent Order comes and does that, and is silent to
14 it, okay --

15 **MR. GIRTMAN:** Apparently I misunderstood
16 your question earlier. I think I see where you are
17 going with this.

18 The earlier Order, in fact, said entire
19 service territory. That's what it looked at. And
20 that's how APPI charges are determined. And that's
21 what the order did. It didn't say the new territory
22 is going to do anything because they didn't know about
23 any new territory at the time. But it implemented the
24 method of computing APPI charges for the whole
25 territory. It covers the whole territory. And if the

1 AFPI charge was built based on 106 ERCs right here,
2 the subsequent Order made the charge applicable to the
3 new service area, but it would have made -- this is
4 the essence of where we're getting to --

5 COMMISSIONER JACOBS: I understand that.

6 MR. GIRTMAN: It granted that prior
7 determination of entire service territory, because --
8 I think you see where I'm coming from.

9 COMMISSIONER JACOBS: Let's try this. The
10 concept that Staff came up with is one that I'd like
11 to explore.

12 First of all, it sounds like Issue 7 we can
13 stipulate so we can leave that out. What I'd like to
14 try is an issue stated -- it doesn't have to be exact
15 but similar to this -- in the instance where rates and
16 charges were established for the full service
17 territory of LUSI in Order No. 19962, were those same
18 rates and charges intended to apply to subsequent
19 modifications of the full territory. Does that get to
20 it?

21 MR. GIRTMAN: No, I don't think so,
22 Commissioner.

23 MR. SEIDMAN: I think you're reading
24 something into it that we can't.

25 COMMISSIONER JACOBS: Okay.

1 MR. SEIDMAN: Because it's really the other
2 way around if you look at it. I mean, Order 19962,
3 the point is it was done for the entire territory.

4 COMMISSIONER JACOBS: Right.

5 MR. SEIDMAN: The amending order, 92-1369,
6 is the one that says apply those rates again to the
7 entire territory.

8 COMMISSIONER JACOBS: Okay.

9 MR. SEIDMAN: And that's the argument we're
10 trying to show. It started with the entire territory.
11 It's continuing in the entire territory. And the gist
12 of the questions, really 5 through 8, I guess, was to
13 develop the fact was -- is that really what 19962
14 said? Did it really say "entire territory" and did it
15 really say "design capacity."

16 COMMISSIONER JACOBS: Okay. So I understand
17 you want to focus on what the new order did more so
18 than -- I see the distinction.

19 MR. SEIDMAN: This is -- for what was in
20 there.

21 MR. VACCARO: May I interrupt for just one
22 second?

23 Staff and I have -- we've conferred on this.
24 We're still willing to stipulate to Issue 7. And we
25 would go ahead and suggest that we just go ahead and

1 leave issues 5, 6 and 8 the way they are in here. And
2 we're comfortable that these will be fully addressed
3 by what's in the record and that we'll be able to deal
4 with this when it comes time for the final
5 recommendation.

6 COMMISSIONER JACOBS: Okay. And Issue 9
7 we've dealt with, right?

8 MR. VACCARO: Yes. That became Issue 3.

9 COMMISSIONER JACOBS: Issue 10. Isn't it
10 the same as Issue 5?

11 MR. VACCARO: I think it's basically the
12 same as Issue 3 as reworded. Issue 3 as reworded is
13 "Did the Third Revised Sheet 27.3 make the AFPI
14 charges applicable to the additional territory?"

15 And we could add by reference to Original
16 Sheet No. 25.1 and First Revised Sheet 25.1-A. We
17 could add that to Issue 3.

18 MR. GIRTMAN: There may be some possibility
19 -- I was trying to address what these two exactly try
20 to do. The new 3, which was the old 9, the question
21 really addresses whether or not those tariff sheets
22 included the tariff sheets which made the AFPI charge
23 applicable to the additional territory. We say it
24 did. You all said neither yes nor no, but it was
25 inadvertently approved.

1 **MR. VACCARO:** Correct.

2 **MR. GIRTMAN:** Which is a little hard for --
3 well, anyway. Issue 10 asks what the impact of those
4 tariff sheets were in that it, you say, made the AFPI
5 charges in the additional territory effective until
6 the Utility reached design capacity. So if you want
7 to say both things in one question, I think it clouds
8 the issue.

9 The first issue is did it make it
10 applicable. The second issue, what was the impact of
11 it? If you'll stipulate that it made it applicable,
12 then we can just have the one issue and then they can
13 have their reservation that I think their position --
14 their position now is it made it applicable but the
15 106 ERC limitation also applied.

16 **COMMISSIONER JACOBS:** Help me understand
17 this, if it made it applicable, isn't that what the
18 impact is?

19 **MR. GIRTMAN:** That's what we say it is. But
20 what they are saying is -- I think what they are
21 saying is that the charge was made applicable to the
22 new territory. But the question remains, the
23 difference is what's the impact? What we say is until
24 it reached its design capacity for the entire area,
25 what they are saying is design capacity only for

1 Crescent Bay. And that's the difference.

2 MR. VACCARO: I think, though, when you make
3 it applicable to the additional territory, the
4 argument is that the APPI charge became applicable to
5 the additional territory, that you could argue in
6 there that that included the design capacity.

7 MR. GIRTMAN: That's obviously your
8 argument.

9 COMMISSIONER JACOBS: What this issue is --
10 help me understand, because I think I'm a bit lost
11 here -- is this saying that even if you accept the
12 idea that the amendment carried these charges over --
13 whether or not the apply is still affected by whether
14 or not there was a basis upon which -- the basis upon
15 which they were originally instituted still is in
16 effect. In other words, the basis about whether or
17 not there remains some plant out there that is still
18 not in use, is that still a relevant question?

19 MR. GIRTMAN: In essence, as far as these
20 two issues are concerned, the first question which
21 Staff has not answered a yes or no, they just said it
22 was inadvertently approved. If they said yes to that
23 question it made the tariff applicable, but it also
24 carried the 106 ERC limitation. Then the second issue
25 addresses what's the controlling factor, 106 or design

1 capacity for the entire service area. That's really
2 the essential point there. They are saying is the
3 controlling factor the 106 that was originally
4 determined or is it design capacity --

5 COMMISSIONER JACOBS: For the new territory.

6 MR. GIRTMAN: Yes, sir.

7 COMMISSIONER JACOBS: Do you agree that
8 that's the issue?

9 MR. VACCARO: I believe that's the issue. I
10 think, though, as far as the design capacity goes, I
11 think you get to that in Issue 12, though, because in
12 your position you even talk about the design capacity
13 as referenced on the tariff sheets.

14 MR. GIRTMAN: Issue 12 doesn't talk about
15 design capacity.

16 MR. VACCARO: Well, it gets to whether or
17 not there are 106 ERC limitations. And if you are
18 saying that the design capacity is -- that the APPI is
19 appropriate for the increased design capacity, then
20 you certainly go over 106 ERCS. I think you've noted
21 that in your position.

22 COMMISSIONER JACOBS: Let me ask you this.
23 If Issue 12 is answered in the negative, is it the
24 natural result will be then that the limitation will
25 be the design capacity?

1 **MR. VACCARO:** Give us just one moment,
2 please.

3 **COMMISSIONER JACOBS:** Issue 12 presently
4 says "Does the 106 limitation also apply to the
5 additional territory?" And if that's answered no,
6 would the: the limitation be the design capacity?

7 **MR. GIRTMAN:** It may help clarify the
8 thinking if you turn that question around, the
9 limitation is designed capacity, which makes the 106
10 ERC limitation not applicable to the new territory.
11 It's not the other way.

12 **COMMISSIONER JACOBS:** Okay.

13 **MR. GIRTMAN:** What we're saying is design
14 capacity here, design capacity here, therefore, 106
15 doesn't apply here.

16 **MR. VACCARO:** I think that could be argued
17 under Issue 12.

18 **MR. GIRTMAN:** We could argue the whole case
19 under Issue 12. But our point is what are the
20 relevant issues? What are the steps we need to take
21 to get to a final conclusion?

22 **MR. SEIDMAN:** If you're going to combine the
23 10 part with 9, now 3, what else are you suggesting
24 will be happening with 11 and anything else? Is there
25 more you're going to cut?

1 MR. VACCARO: I'm sorry?

2 MR. SEIDMAN: Are there more issues you're
3 going to suggest be removed?

4 MR. VACCARO: No, I don't believe so.
5 Because I guess I just would leave -- after we get
6 through up to 12 that leaves 13 through 15.

7 MR. SEIDMAN: What happened to 11?

8 MR. VACCARO: Just one second, please.

9 (Pause)

10 COMMISSIONER JACOBS: Let me ask you this,
11 while you all are discussing this. What's the
12 distinction in your minds -- speaking to Mr. Girtman
13 -- what's the distinction between 10 and 11?

14 MR. SEIDMAN: One's a refinement of the
15 other. One is a specific question and one puts
16 numbers to it.

17 COMMISSIONER JACOBS: Okay.

18 MR. VACCARO: I'm kind of at a loss at this
19 point.

20 COMMISSIONER JACOBS: Okay. I'd like to
21 wrap this up. Here's what I'd like to do. I think I
22 understand what -- I have a much clearer understanding
23 of where you all are.

24 I'm of the opinion that Issue 12 could,
25 indeed, cover Issues 10 and 11. I'm concerned I do

1 understand -- I give some merit to your statement,
2 Mr. Girtman, that if you -- answer to Issue 12 is
3 one-way, then you don't have an answer as to, okay,
4 what basis should the AFPI going forward -- given that
5 you prevailed on that issue -- going forward then,
6 what would be the basis. Is it, indeed, design
7 capacity?

8 **MR. GIRTMAN:** Yes, sir. How would it fit
9 into the concept here of consolidating 10 and 11?
10 Because as Mr. Seidman pointed out, 11 is a refinement
11 of 10. If we consolidate those, and it keeps the
12 concept of the design capacity there, the question
13 specifically does the 106 ERC limitation apply?

14 **COMMISSIONER JACOBS:** I think that's a good
15 point. Quite frankly, I'd like to see about
16 consolidating all three of them 10, 11 and 12. And
17 I'm thinking what could happen is you would add a
18 statement to Issue 12 which says "Does the ERC
19 limitation contained in the original sheet" and leave
20 it as presently stated, "apply to the additional
21 territory? If not, what should the design capacity be
22 for purposes of calculating AFPI?"

23 **MR. SEIDMAN:** Maybe we can even simplify it
24 and not even need that. Can we go back to your
25 suggestion that we combine 9 and 10, or new 3 and 10.

1 MR. VACCARO: Okay.

2 MR. SEIDMAN: Then that would make that
3 issue refer to the specific tariff page, and bring in
4 the reference pages from 10. And if we could include
5 that last phrase there, about additional territory
6 effective until the utility reached design capacity,
7 just include that all in that one issue.

8 MR. VACCARO: And then drop 11.

9 MR. SEIDMAN: Drop 11. Leave 12 alone.

10 MR. VACCARO: Okay.

11 COMMISSIONER JACOBS: Rewording 10, dropping
12 11.

13 MR. VACCARO: I thought that was a revised
14 3, which was going to combine, and then we drop 11.
15 So we would take out 10 and 11 --

16 MR. SEIDMAN: Use part of 10 and 3.

17 MR. VACCARO: So it would be "Did Third
18 Revised Sheet 27.3 by reference to Original Sheet
19 25.1, and First Revised Sheet 25.1-A, make the APPI
20 charges applicable to the additional territory
21 effective until the utility reached design capacity.
22 Was that it?

23 MR. SEIDMAN: That was the suggestion, yes.

24 MR. GIRTMAN: I want to see that in writing,
25 but that sounds about right.

1 MR. VACCARO: Okay. And we'll have a
2 revised position for that. I have a feeling that both
3 sides will have a number of revised positions. Then
4 we leave 12 the way it is, correct.

5 MR. GIRTMAN: Right.

6 COMMISSIONER JACOBS: All right. 13. Any
7 questions or corrections here.

8 MR. VACCARO: No.

9 MR. GIRTMAN: Fine.

10 COMMISSIONER JACOBS: 14.

11 MR. GIRTMAN: In 14, the issue we were
12 wanting to raise is the fact the Company provided
13 correspondence to the Commission Staff at the time of
14 the Oelsen investigation, he complained about what he
15 was served. And the essence of it was that the
16 Company provided notice to the Commission Staff that
17 they were charging this AFPI charge in the additional
18 territory and got no complaint, no response, no
19 objection, no nothing. And I understand the
20 difficulty of having one Staff witness or one Staff
21 person or a group of Staff testify yes or no, that
22 nobody in the Commission Staff responded to it because
23 they don't have that in their personal knowledge. We
24 can accept the representation within their knowledge,
25 the best of their knowledge no.

1 We also raised in the issue the question of
2 whether the Commissioners -- by Commission we meant
3 the Commissioners -- if by an order or by a directive,
4 a Notice, a Show Cause Order or anything like that.
5 What we wanted to address is did anybody here say you
6 guys are doing wrong when the Utility notified the
7 Commission Staff what they were doing. And we're not
8 wedded to any particular language in that issue even,
9 but what we're trying to say is we notified the
10 Commission and nobody complained.

11 **COMMISSIONER JACOBS:** You have evidence that
12 you notified the Commission.

13 **MR. GIRTMAN:** Yes, sir. Letter.
14 Correspondence.

15 **COMMISSIONER JACOBS:** Is there any legal
16 relevance that the Commission didn't respond?

17 **MR. GIRTMAN:** Yes, sir.

18 **COMMISSIONER JACOBS:** How so? I guess --

19 **MR. GIRTMAN:** Show Cause Order. You know,
20 we talk in legal terms of latches and those kinds of
21 things. But if they were doing something wrong and
22 somebody thought it was wrong at the time they were
23 doing it -- I mean, we have been jumped on like the
24 white on rice, pardon my colloquialism, but they would
25 have been objected to if somebody had thought it was

1 wrong.

2 **COMMISSIONER JACOBS:** I see that as a pretty
3 argumentative issue, and I think you can go around
4 that. The bottom line is that I think you can make
5 that point which is with Staff on the stand.

6 **MR. GIRTMAN:** Oak. So strike Issue 14.
7 Issue 15, any questions or revisions there?
8 Issue 15?

9 On to Mixed Issues of Fact and Law. And
10 Issue 1 there. I guess this would be what -- should
11 we do subsection -- so we have a Section 8 here, so we
12 have a Section 8, then a Subsection 8 will be factual
13 issues, and the subsection will be the mixed issues of
14 fact and law. Is that the way we should do it?

15 **MR. VACCARO:** I think the way we've got it
16 is okay.

17 We've set them forth separately. We have
18 got different headings for each so I think we're okay.

19 **COMMISSIONER JACOBS:** Okay. Issue 1 here.
20 My concern is that should we make this Issue 16
21 instead of Issue 17

22 **MR. VACCARO:** We can make that Issue 16.
23 That's fine.

24 **COMMISSIONER JACOBS:** Okay.

25 **MR. VACCARO:** Whatever the order will become

1 after we revise the other numbers. I'll just make a
2 note to put this in a sequential order.

3 **COMMISSIONER JACOBS:** Right. Okay. Any
4 questions or modifications to Issue 1 there?

5 **MR. VACCARO:** We have none.

6 **COMMISSIONER JACOBS:** Issue 2.

7 **MR. VACCARO:** None.

8 **MR. GIRTMAN:** None.

9 **COMMISSIONER JACOBS:** Issue 3.

10 **MR. GIRTMAN:** None.

11 **MR. VACCARO:** Staff's only concern is
12 Issue 3 and 4. They really could be handled under
13 Issue 2 which simply says what is the appropriate
14 action. That would take into account the refund and
15 whether or not any of it should be designated as CIAC.

16 **MR. GIRTMAN:** We have no objection to
17 handling it that way. The only reason we put it in
18 there was because the PAA Order ordered that money to
19 be treated as CIAC and we thought we'd bring it out as
20 a separate issue. But we have no objection to do it
21 the other. Either way is fine.

22 **MR. VACCARO:** I think 1 and 2 would be
23 sufficient then, if you want to bring it under there.
24 That would be fine.

25 **COMMISSIONER JACOBS:** Okay. Strike 3 and 4.

1 Is that agreeable?

2 MR. VACCARO: Yes.

3 MR. GIRTMAN: Yes.

4 COMMISSIONER JACOBS: Great. That takes

5 care of Section 8. Section 9, that's the exhibit.

6 Okay. We had a supplemental list here. This is going

7 to come under Mr. Wenz, correct?

8 MR. VACCARO: Yes, sir.

9 COMMISSIONER JACOBS: This would be CW-4.

10 MR. GIRTMAN: Yes, sir.

11 COMMISSIONER JACOBS: How would we describe

12 this?

13 MR. GIRTMAN: Just response -- excuse me.

14 Response to request for documents. We might want to

15 call that Staff response.

16 COMMISSIONER JACOBS: Request for documents.

17 All right.

18 MR. GIRTMAN: The other potential exhibit

19 for Mr. Wenz would be merely identifying for purposes

20 of the record the correspondence of December 23rd,

21 1998, to Mr. Vaccaro raising the question of case

22 background discussion. All I want to do is put it in

23 the record. I don't know that anybody is going to

24 spend any time on this.

25 COMMISSIONER JACOBS: Okay.

1 MR. GIRTMAN: I've got to build a record.

2 COMMISSIONER JACOBS: Say 12-3-98

3 correspondence from LUSI to Tim.

4 MR. VACCARO: It's actually December 23rd.

5 COMMISSIONER JACOBS: December 23.

6 MR. GIRTMAN: Yes, sir.

7 MR. VACCARO: Is that going to be CW-5, is
8 that my understanding?

9 MR. GIRTMAN: Yes. Let's make it CW-5. And
10 that was -- if you could please give me the title on
11 that again I'd appreciate it.

12 COMMISSIONER JACOBS: 12-3-98 correspondence
13 from LUSI to Staff. Do we need to say from
14 Mr. Girtman to Mr. Vaccaro?

15 MR. VACCARO: "LUSI to Staff" I think is
16 fine.

17 COMMISSIONER JACOBS: Okay. All right.
18 Anything else on Section 9.

19 Section 10? Well, we have a stipulation on
20 7, though, Issue 7?

21 MR. VACCARO: Yes. Just one other change.
22 Regarding the exhibits stipulated, what I propose we
23 do here is at the very beginning of this we add "with
24 the exception of LUSI Exhibit CW-5, Staff and LUSI
25 propose that the other exhibits" et cetera, et cetera.

1 **MR. GIRTMAN:** I'm going to then have to
2 spend some time with it. I really don't intend or
3 don't expect to spend a lot of time as far as the
4 hearing is concerned on this. I just want it as part
5 of the record is all. If it's not stipulated to as
6 being put in the record for whatever value it may
7 have, then I've got to spend some time with it. And I
8 don't think -- I really don't want to have to do that.
9 I'm not sure I understand the reason for the Staff's
10 not willing to stipulate that the letter says -- or it
11 says what the says. They are not stipulating to the
12 facts.

13 **MR. VACCARO:** What I would suggest is we
14 could indicate we would stipulate to the exhibits
15 being entered into the record, just add a sentence
16 that Staff reserves the right to cross examine on that
17 exhibit. We might want to ask some questions but we
18 won't keep you from bringing it into the record.

19 **MR. GIRTMAN:** Well, what we can do is
20 clarify this just to say the parties don't stipulate
21 to the facts of the documents. We might stipulate to
22 the admission into evidence of the documents and leave
23 it for argument, and include this one. And if you
24 want to say we reserve the right to cross examine,
25 everybody has that right anyway. But just say both

1 parties reserve the right to cross examination on all
2 documents.

3 MR. VACCARO: I'm sorry, if we could have
4 one minute, please. (Pause)

5 We just wanted to confer real quick. That
6 will be fine. Just add a sentence at the end that
7 says that the parties reserve the right to cross
8 examination on these documents.

9 COMMISSIONER JACOBS: So we'll stipulate as
10 to its admission into the record and the parties
11 reserve the right to cross.

12 MR. VACCARO: Correct.

13 MR. GIRTMAN: As to all documents.

14 MR. VACCARO: As to all documents.

15 COMMISSIONER JACOBS: Okay. Very well.

16 MR. GIRTMAN: Commissioner, I want to
17 specifically thank you for being willing to change the
18 prehearing date, which was on the 4th of January, and
19 it was crazy for everybody. I think even Staff
20 appreciated moving it to this date. It puts it a
21 little close to the hearing on the 15th. And Staff
22 counsel and I are going to be spending some time
23 working out finalizing this thing real quickly. But I
24 wanted to thank you for be willing to push that up a
25 little bit.

1 **COMMISSIONER JACOBS:** Sure. Sure. We're
2 always happy to accommodate.

3 That is the exhibit list, stipulations, no
4 motions, right?

5 **MR. VACCARO:** Correct.

6 **COMMISSIONER JACOBS:** That takes care of it.

7 **MR. VACCARO:** I've taken notes on the
8 rulings. Basically we're going to do a letter to the
9 customers indicating they were excused, and that
10 Mr. Seidman was made a qualified representative.

11 **COMMISSIONER JACOBS:** Okay. Very well.
12 Anything else to come before us today?

13 **MR. VACCARO:** The only other thing I can
14 think of is I want to confer with Staff just real
15 quick -- because I know there was concern about
16 whether or not we had testimony, and the witnesses for
17 each of these positions because I know that was a
18 concern Mr. Girtman had. I don't think we ought to
19 leave until we get that rectified. So if I could have
20 one minute, please.

21 **COMMISSIONER JACOBS:** Very well. (Pause)

22 **MR. VACCARO:** Commissioner, we've looked
23 through this very quickly and our testimony covers all
24 but two of the issues, and those are Issues 13 and 15.
25 And what I would say is I believe that the positions

1 we have here are what Staff's positions are. I don't
2 know -- we don't have a witness we could put on for
3 these. Again, it's Staff's position we don't need to
4 put on a witness just to sponsor a position.

5 COMMISSIONER JACOBS: I'm going to rule that
6 that language in Staff's position can remain, and
7 Staff would under the understanding that Staff's other
8 positions will come in after the record is completed.
9 Is that correct? Is that a fair statement?

10 MR. VACCARO: Correct.

11 MR. GIRTMAN: Just a moment, please.

12 COMMISSIONER JACOBS: Are you with me?

13 MR. GIRTMAN: This is -- well, I'm not sure
14 which script -- I've got two copies of the Prehearing
15 Order. Issue number --

16 COMMISSIONER JACOBS: Staff basic position,
17 those two last sentences that you were concerned
18 about.

19 MR. GIRTMAN: Is the issue did LUSI inform
20 the Commission, is that the one?

21 MR. VACCARO: Yes. I think, Commissioner,
22 you're talking about the basic position at the moment;
23 is that correct?

24 COMMISSIONER JACOBS: Right. His concern is
25 what impact that has. And what I'm --

1 **MR. GIRTMAN:** I don't think we have a
2 problem on 13. I'm not sure -- let me be sure I
3 understand. The issue was did LUSI inform the
4 Commission it was applying AFPI, right? And they say
5 they are not going to have a witness on that. That's
6 fine. I have no objection.

7 **COMMISSIONER JACOBS:** So the language that's
8 in the basic position will remain with the
9 understanding that Staff's ultimate position will be
10 formed after the record has been completed and with
11 the benefit of the full record.

12 **MR. GIRTMAN:** We have no objection. They
13 are not sponsoring a witness on that but it's a
14 difficult thing to testify what everybody else knows,
15 I understand that. On 15 -- let's see, 15 was has
16 LUSI applied the AFPI charge to new customers and you
17 say you're not going to have a witness on that.

18 **MR. VACCARO:** Correct.

19 **MR. GIRTMAN:** I want to be sure that we
20 understand what we're doing here. You don't want to
21 waive the position and we have no objection to their
22 not waiving. Normally you don't testify to something;
23 it's waived. But we can accept the fact they are not
24 going to have a witness. Just accept their Staff
25 position. I have no objection to doing that.

1 **COMMISSIONER JACOBS:** Very well. If that's
2 it, then we stand adjourned.

3 (Thereupon, the hearing concluded at
4 3:38 p.m.)

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1 STATE OF FLORIDA)
2 COUNTY OF LEON)

CERTIFICATE OF REPORTER

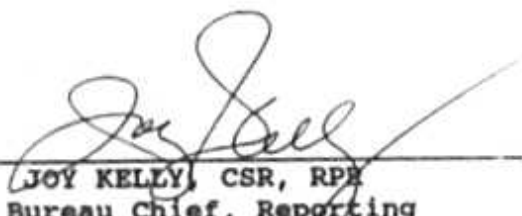
3 I, JOY KELLY, CSR, RPR, Bureau Chief,
4 Reporting, Florida Public Service Commission,

5 DO HEREBY CERTIFY that the Prehearing
6 Conference in Docket No. 980483-WU was heard by the
7 Prehearing Officer at the time and place herein
8 stated; it is further

9 CERTIFIED that the said proceedings were
10 reported by H. Ruthe Potami, RPR, CSR, and that the
11 same has been transcribed and proofed by me; and that
12 this transcript, consisting of 81 pages, constitutes a
13 true transcription of the said notes of said
14 proceedings.

15 DATED this 20th day of January, 1999.

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14 JOY KELLY, CSR, RPR
15 Bureau Chief, Reporting
16 Florida Public Service Commission Reporter
17 (904) 413-6732

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