

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of : DOCKET NO. 981042-EM
: :
Joint petition for :
determination of need for an :
electrical power plant in :
Volusia County by the :
Utilities Commission, City of :
New Smyrna Beach, Florida, and :
Duke Energy New Smyrna Beach :
Power Company Ltd., L.L.P. :

PROCEEDINGS: SPECIAL AGENDA CONFERENCE

BEFORE: CHAIRMAN JOE GARCIA
COMMISSIONER J. TERRY DEASON
COMMISSIONER SUSAN F. CLARK
COMMISSIONER JULIA L. JOHNSON
COMMISSIONER E. LEON JACOBS, JR.

DATE: Thursday, March 4, 1999

TIME: Commenced at 9:45 a.m.
Concluded at 2:00 p.m.

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

REPORTED BY: JOY KELLY, CSR, RPR
FPSC Chief, Bureau of Reporting

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PARTICIPATING:

LESLIE J. PAUGH and GRACE JAYE, FPSC

Division of Legal Services.

JOE JENKINS, Director, MARK FUTRELL, WAYNE

MAKIN, ROLAND FLOYD, JIM BREMAN and BOB TRAPP, FPSC

Division of Electric and Gas.

TARIK NORIEGA and EVA SAMAN, FPSC Division

of Auditing & Financial Analysis.

BILL TALBOTT, FPSC Executive Director.

MARY BANE, FPSC Deputy Executive Director,

Technical.

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

2 (Hearing convened at 9:45 a.m.)

3 **CHAIRMAN GARCIA:** Good morning. I'd like to
4 begin this special agenda conference.

5 Commissioner Deason made a very good point.
6 A lot of the people in this room are billing on a
7 hourly basis so we wanted to be as quick as possible
8 to make sure we move along on this issue.

9 **COMMISSIONER CLARK:** There are at least two
10 former Justices of the Supreme Court probably here to
11 make sure we interpret their decisions correctly.

12 **CHAIRMAN GARCIA:** I wish we could ask them
13 to comment, but that said (laughter) we'll be working
14 through it. I spoke with Mr. Jenkins and Leslie,
15 Commissioners, and if you don't mind I was going to
16 have them introduce the -- tee up the rec; go through
17 the rec from the beginning to the end; do the
18 dismissal and then all of the points of the rec. I
19 would just request that we try to stay as quick as
20 possible and then if Commissioners have questions,
21 that's fine. We just reserve them to the end and then
22 start the discussion. I also wanted to point out that
23 Roly Marante from the Governor's Office who handles
24 Central Florida issues and Hispanic Affairs for the
25 Governor is here.

1 **COMMISSIONER DEASON:** Mr. Chairman, would
2 you prefer that we kind of let Staff go through the
3 entire rec before we start asking questions, or do you
4 want questions as they go through?

5 **CHAIRMAN GARCIA:** Since this rec is pretty
6 substantive, and I assume that most of the people, and
7 our press, as diligent as they are, and I know
8 everyone in the audience has probably read it, but
9 there's a lot of people that are listening in that
10 probably don't understand some of the nuances here. I
11 just wanted a quick walk-through just so we know what
12 we're doing, and then we tee it up from there, if
13 that's all right with the --

14 **COMMISSIONER DEASON:** That's fine. I agree.
15 That's probably the best way.

16 **COMMISSIONER CLARK:** Mr. Chairman, I know I
17 heard you make a comment to Staff -- not up here --
18 about the quality of this recommendation, and it
19 certainly is very good. I also appreciated the fact
20 that when I had questions and asked for them to do
21 further looking they were very prompt and provided
22 that information. So they've done an excellent job.

23 **CHAIRMAN GARCIA:** I have to concur with
24 that. It was a fantastic rec. It was an enjoyable
25 read, although it was a long read. And I never say

1 that about recs. Okay. Very good. Leslie.

2 MS. PAUGH: Good morning, Commissioners. As
3 you know we're here on the Staff recommendation
4 posthearing of the joint petition for determination of
5 need of the Utilities Commission City of New Smyrna
6 Beach and Duke New Smyrna.

7 The Joint Petition was filed back in August.
8 We had four days of hearing and we had additional oral
9 argument. What you have in the recommendation is
10 Issue 1A, is the primary recommendation to deny
11 motions to dismiss. The alternative recommendation is
12 to grant motions to dismiss. The remainder of the
13 recommendation is on the merits of the case.

14 With respect to the primary recommendation
15 on the motions to dismiss, it can quite simply be
16 summed up as both the City and Duke New Smyrna are
17 proper applicants under the Power Plant Siting Act and
18 Section 403.519. That determination is arrived at by
19 analyzing the clear language of Section 403.503 which
20 is the definition of applicant, electric utility
21 regulated electric company. The City is one of the
22 enumerated entities for an electric utility,
23 therefore, an applicant. Duke New Smyrna is also one
24 of the seven entities enumerated in the statute as an
25 applicant in this situation.

1 It's Primary Staff's position that the
2 arguments made by Florida Power Corporation and
3 Florida Power and Light constructing the statutes and
4 going into statutory analysis and enactment are not --
5 do not have the greater weight of authority in this
6 instance. It is not necessary to go beyond the clear
7 statements of the statutes to find that they are
8 applicants.

9 In addition, Duke New Smyrna Primary Staff's
10 position is that the applicants are applicants
11 collectively and individually. In other words, it is
12 not necessary for Duke New Smyrna to be a part of the
13 contract with New Smyrna Beach to be an applicant on
14 its on. It is as an EWG an applicant under the Power
15 Plant Siting Act. In addition, the EWG comes within
16 the Commission's Grid Bill jurisdiction in Ten Year
17 Site Plan jurisdiction, so it is subject to the
18 Commission's jurisdiction in a number of ways.

19 Primary Staff's analysis of the dormant
20 Commerce Clause and preemption arguments are that
21 the -- they are important arguments, the Commission
22 can discuss them, but that is not necessary in this
23 instance to reach a decision on this. With that I'll
24 turn it over to Alternative Staff.

25 **MS. JAYE:** Good morning, Commissioners.

1 Alternative Staff recommendation on the motions to
2 dismiss has been provided to you in order to help
3 highlight the arguments of the two movants in this
4 case, that as Florida Power and Light Company and
5 Florida Power Corporation.

6 Alternative Staff's analysis summarizes the
7 main arguments of these movants and the arguments are
8 as follows: The first argument is that Duke New
9 Smyrna makes an assertion that is subject to the
10 Commission's Grid Bill authority at Footnote 8,
11 Page 14 of the Joint Petitioners' brief.

12 In the Joint Petition itself, the joint
13 petitioners assert that Duke New Smyrna comes under
14 Section 366.02(2) Florida Statutes. That is the
15 statutory definition of electric utility.

16 In the Alternative Staff recommendation
17 you'll find that Staff points out that under ejusdem
18 generis the construction of the statute makes the
19 conclusion inescapable that the list of utilities that
20 are found in 366.02(2) means utilities with some
21 obligation to serve.

22 Alternative Staff's second argument is that
23 by its own merchant nature, Duke New Smyrna cannot
24 provide the Commission with information required under
25 at least two subsections of Rule 25-22.081 Florida

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1 Administrative Code. Under (1) of this rule the
2 applicant is required to include a general description
3 of the utility or utilities primarily affected,
4 including load and electrical characteristics. This
5 cannot be provided for over 90% of the proposed power
6 plant.

7 Under (4) of the rule, the petitioners are
8 to provide a summary of major available generating
9 alternatives examined. This list cannot be provided
10 for 90% of the proposed power plant because there is
11 no need against which to balance the capacity and
12 energy which will be generated by the proposed power
13 plant.

14 Alternative Staff's third point is that the
15 Nassau cases, which have taken up so very much of our
16 time in this docket, define "applicant" as it is used
17 in 403.519. And as it is used in 403.519 under the
18 Nassau cases "applicant" means someone who has a need
19 for the energy and capacity that will be generated by
20 the proposed power plant. In other words, an
21 applicant has to be tied to some retail need, some
22 customer downstream who will need the capacity and
23 energy. Once again, for 90% of the plant there can be
24 no need shown because we don't know if there is or is
25 not a need; whether it can be mitigated by DSM, load

1 management, et cetera.

2 Alternative Staff also points out under .3
3 that in Order No. PSC 921210-FOF-EQ issued 10-26-92,
4 the Commission made it very clear that the entities
5 which are listed under 403.503 Florida Statutes, which
6 was mentioned by the Primary Staff, are all engaged or
7 authorized to engage in the business of generating,
8 transmitting or distributing electric energy. A lot
9 of discussion has been had that that is disjunctive.
10 In the order which is cited, however, the Commission
11 state unequivocally that, quote, "It is this need
12 resulting from a duty to serve customers which is the
13 need -- which the need determination proceeding is
14 designed to examine."

15 So once again, there's a tie in to customers
16 downstream. And that ties in also very well with the
17 need for presenting conservation measures which could
18 mitigate the need for the power plant. We've not seen
19 that for 90% of the proposed capacity and energy from
20 this plant.

21 Fourth and last argument for Alternative
22 Staff is the constitutional arguments. Alternative
23 Staff agrees with Primary Staff it is not necessary,
24 though the Commission may take these into
25 consideration, the Commission does not have to go

1 there in order to make the determination that the
2 motions to dismiss should be granted.

3 **CHAIRMAN GARCIA:** Commissioners, I was
4 hoping -- if you want to just take it there, but I was
5 hoping to simply walk over the 33 issues one by one
6 really quickly.

7 **COMMISSIONER CLARK:** Well, I really think
8 the first issue needs to be answered and then we'll
9 see whether we should be answering the others.

10 And I think we need to make that
11 determination as to whether it should be dismissed or
12 not. And I have a couple of questions regarding the
13 research on that. And I'm not sure whether the briefs
14 brought the issues that I have questions on out and I
15 just didn't pick up on them, or there is some
16 explanation that I have not understood.

17 **CHAIRMAN GARCIA:** Commissioner, we'll do it
18 at your pleasure. If you want to take the dismissal
19 first we'll take the dismissal and then we'll work
20 through the rest the rec.

21 **COMMISSIONER CLARK:** I think that would be
22 helpful.

23 Let me ask a question that has to do with
24 the definition of "applicant", Leslie, that you -- you
25 say we should look to 403.03.

1 **MS. PAUGH:** .503.

2 **COMMISSIONER CLARK:** Okay. Why do you think
3 that definition applies to 403.519?

4 **MS. PAUGH:** That position, on my part, is
5 based on the clear language of 403.519. What 403.519
6 says --

7 **COMMISSIONER CLARK:** Let me just stop you
8 there. Because I looked at the history of 403.519 and
9 I take it you are presuming that it is included within
10 the definition of "act"; that 403.519, the definition
11 of "applicant" applies because it is part of the Power
12 Plant Siting Act; is that correct?

13 **MS. PAUGH:** That's correct.

14 **COMMISSIONER CLARK:** Okay. Let me ask you
15 about the history of that, because when 403.519 was
16 first enacted it was not part of the Power Plant
17 Siting Act.

18 **MS. PAUGH:** That's correct.

19 **COMMISSIONER CLARK:** It was enacted
20 initially as Section 366-point something.

21 **MS. PAUGH:** .82. That's FEECA.

22 **COMMISSIONER CLARK:** Right. It was part of
23 FEECA, was it not?

24 **MS. PAUGH:** That's correct.

25 **COMMISSIONER CLARK:** How did it become part

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1 of the Power Plant Siting Act?

2 **MS. PAUGH:** It's not Primary Staff's
3 position that it is part of the Power Plant Siting
4 Act. It is clear under the statutory language of
5 366.82 that it is part of FEECA.

6 Primary Staff's point is that the definition
7 of "applicant" is governed by the Power Plant Siting
8 Act because 403.519 says so.

9 What it says is "On request by an applicant,
10 or on its own motion, the Commission shall begin a
11 proceeding to determine need for an electrical power
12 plant subject to the Florida Electrical Power Plant
13 Siting Act." Therefore, 519, for purposes of
14 definition, brings itself within the PPSA by its
15 express terms.

16 **COMMISSIONER CLARK:** Let me ask you this:
17 When 403.519 was initially enacted, it was 366-point
18 what?

19 **MS. PAUGH:** 82.

20 **COMMISSIONER CLARK:** 82. And then
21 apparently statutory revision decided to put it in the
22 power plant -- in 403. That's not something the
23 legislature did, statutory revision, did it? Is that
24 right?

25 **MS. PAUGH:** That was my understanding.

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1 **COMMISSIONER CLARK:** Is that how it showed
2 up?

3 But when it was originally enacted, it
4 didn't use the term "applicant", did it? It used the
5 term "utility."

6 **MS. PAUGH:** Yes, I believe it did.

7 **COMMISSIONER CLARK:** And how was utility
8 defined?

9 **MS. PAUGH:** I don't have that information
10 with me.

11 **COMMISSIONER CLARK:** Well, it is in 865.

12 Commissioners, I think this is important
13 because we need to understand the sequence of the
14 language. And there is a point -- it was changed to
15 "applicant" in 1990. And I could not find in that
16 statute what it meant by that change; whether it was
17 broadening it and changing the term "utility".

18 I have to say I was General Counsel then and
19 I cannot remember that it had any significance. And
20 the Nassau case came after it and certainly appeared
21 to adhere to the notion that it had to be a utility
22 with need to serve and use load.

23 But let me just indicate that the laws of
24 Florida 80-65, under Section 5 it has -- the short
25 title is -- I can just read it to you. It says

1 "Part 2 of Chapter 366, consisting of 366.80 through
2 366.86, is created to read." Then it says "The short
3 title is known as the Florida Energy Efficiency and
4 Conservation Act." And it says, under the definition
5 it says "For purposes of this part," which 366.86 is
6 part of.

7 It's clear from this that it is part of the
8 FEECA. And so it is clear, in my mind, that being
9 part of it, "utility" means what it said in this
10 definition, which means any person or entity of
11 whatever form, which provides electricity or natural
12 gas at retail to the public. And then when you go
13 back over to the Certificate of Need it says, "On the
14 request of a utility, or on its own motion." It seems
15 to me at that point it was clear that it had to be a
16 utility that served at retail. Do you disagree with
17 that?

18 **MS. PAUGH:** Yes, I do. What you're arguing
19 is Florida Power Corporation's interchangeable
20 definition argument.

21 **COMMISSIONER CLARK:** Let's just go back to
22 1980 when it was enacted. It says -- I'm willing to
23 give it to you -- but it says "as used in this part"
24 and that part includes that section.

25 **MS. PAUGH:** I disagree. It's an

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1 interchangeable definition argument that's been
2 brought forward. FEECA uses the word "retail." FPC
3 argues that retail, therefore, be inserted into the
4 statutory definition of 403.503. That's not what
5 403.503 says. And I think that the rules of statutory
6 construction weigh very heavily in favor of giving it,
7 the differences, the due deference, that apparently
8 the Legislature intended with the changes.

9 **COMMISSIONER CLARK:** You mean when they
10 changed it in 1990. But at the time this was enacted,
11 the only people that could apply were a utility, and
12 "utility" was described as a utility that serves at
13 retail.

14 Let me go on to point out that that same
15 section, further on, though, uses the term
16 "applicant." It says "The Commission shall also
17 expressly consider the conservation measures taken by
18 or reasonably available to the applicant." So they
19 used "applicant" down there. But when they said as to
20 who can do it, it was the Commission or a utility that
21 serves at retail.

22 Let me just put that aside for a minute.
23 That was the section that enacted -- and, clearly, at
24 that time it was part of FEECA, and I think was
25 evidence of a concern about balancing conservation

1 measures and the need for building a plant.

2 But, Commissioners, then what happened was
3 in 1990 it was amended. And Leslie is right, the term
4 was changed to "applicant." But still that section
5 was never brought within the term "act" as used in the
6 definitions. Because if you look at 403.503 it still
7 says "as used in this Act" and 403.519 is not part of
8 the Act. Acts aren't chapters. The Acts are laws of
9 Florida.

10 But the question is: In 1990 it got changed
11 and "utility" was changed to "applicant." And to me
12 the question becomes was it with the intent to broaden
13 it? And who knows? I mean, it doesn't appear from --
14 it appears that that bill was more of a reviser's
15 bill. But I think what is significant is after it was
16 changed, the Commission on at least two occasions said
17 that an applicant must be an applicant that shows need
18 to serve end use customers. And that is what Nassau
19 says, in my opinion.

20 I appreciate the fact that Leslie has made
21 the distinction that they were utilities that sought
22 to bind; they were entities which sought to bind the
23 incumbent utility. But if you look at the history --
24 and also I was on the losing end of Nassau to begin
25 with, I went back --

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1 **CHAIRMAN GARCIA:** You're dissent in that one
2 is marvelous, I may just point out.

3 **COMMISSIONER CLARK:** Is there a dissent --

4 **CHAIRMAN GARCIA:** Is it the Nassau or the
5 second one that you --

6 **COMMISSIONER CLARK:** Nassau II. Gosh, I
7 skipped over that. You know, maybe you better give it
8 to me before I go on. (Laughter)

9 But my point being that after it was
10 changed, the Commission adhered to the notion that you
11 cannot be an applicant without showing a need and I
12 need some advice from the legal Staff now.

13 I went back and looked at the transcript.
14 And, Leslie, you had indicated to me there may be a
15 concern -- I looked at the transcript of the agenda
16 conference that you gave to me. And you had pointed
17 out at that time it was not part of the record. And I
18 guess I'm a little unsure about -- I feel like I can
19 go back and recall and review what I said so that I am
20 at least consistent when I made my decisions. And at
21 that time I said I was of the view that "the
22 applicant" was a broad term. But that that applicant
23 still had to show need to serve at retail. And that
24 we should not dismiss the application, we may
25 nonetheless deny it because it was -- wait a minute --

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1 they were alleging need to serve, but they were not
2 the ones chosen by FPL in that case, and so they
3 couldn't show the need. And my point was, you know,
4 we may not dismiss it but we can deny it because they
5 didn't show the need to serve at retail.

6 While you have suggested we should interpret
7 that order as saying it was because they were binding
8 the utility, that was not the basis of the decision.
9 It was that they had to show a need, either by being a
10 utility or having a firm contract with that utility.
11 That was decided in the Nassau -- that was the
12 decision in the Nassau case and that's, I think, what
13 the Supreme Court also said.

14 My point being, once it got changed to
15 "applicant," the Commission interpreted that in no way
16 changing the notion that it still had to be a utility.
17 The only caveat that was put on there was self-service
18 wheeling. And I think Commissioner Deason pointed out
19 that self-service wheeling, you know, you can show
20 you, personally, have a need for service and,
21 therefore, would meet that standard.

22 **COMMISSIONER DEASON:** Speaking of Nassau, I
23 think it's important to keep in mind that that issue
24 was not before the Commission. The question as to
25 whether an entity which was not seeking to bind a

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1 retail utility to be obligated to make purchases, as
2 to whether they would or not be an applicant, that
3 issue was not before the Commission.

4 **COMMISSIONER CLARK:** I understand that. But
5 what was the basis of the decision was they could not
6 show a need because they could not show a need to
7 serve at retail. Let me see if I can find it.

8 **COMMISSIONER DEASON:** I think that's a good
9 decision. And I think that regardless of what we do
10 here today I think that is a good decision. That
11 decision needs to stand. And before I can support the
12 primary recommendation, I need to be assured that the
13 decision here today would not overturn what Nassau
14 stands for. And in my opinion what Nassau stands for
15 is that a QF, or another entity, cannot come forward,
16 on its own, without an agreement or contract with an
17 existing retail utility to come forward and say
18 "Retail utility ABC has the need and I want to feel
19 that need, and, therefore, I have applicant status to
20 meet the need of that retail utility."

21 **MS. PAUGH:** Commissioner Deason, that is
22 absolutely what Nassau says and that's very different
23 from what we have here. You're absolutely correct.
24 This is a case of first impression for this
25 Commission. Never before have we had an EWG come

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1 before the Commission that does not seek to bind the
2 retail ratepayers ultimately. That must be different
3 from what we had with qualifying facilities that can
4 force the utilities to buy their output. They can
5 force it if they qualify. To me there's a huge
6 difference in the case.

7 **CHAIRMAN GARCIA:** Let's not -- because I see
8 a vote for primary here if we can massage this.

9 **MS. PAUGH:** I'm trying, Commissioner.

10 (Laughter)

11 **CHAIRMAN GARCIA:** Let's not miss the point.
12 He's not that far.

13 What Commissioner Deason is saying -- and
14 let me tell you something, I can hold on to that
15 proposition because I certainly don't want primary's
16 recommendation to kick the door down on a process
17 that's been established in this state.

18 **MS. PAUGH:** It does not do that.

19 **CHAIRMAN GARCIA:** And maybe you should
20 address then specifically his point. Because I think
21 primary agrees with his commentary.

22 **MS. PAUGH:** It does. That's what I'm trying
23 to convey. This is the case of first impression.
24 This is different. Nassau will be utterly untouched
25 on its facts under the primary recommendation. That

1 law is good law. It was good law then. It's good law
2 today.

3 **COMMISSIONER DEASON:** Is the alternate
4 position consistent with that interpretation of the
5 impact on Nassau?

6 **MS. JAYE:** Yes, it is, Commissioner.

7 **COMMISSIONER CLARK:** I think I -- let me ask
8 you this: On the Nassau case, was there a
9 determination or was there a discussion that Ark and
10 Nassau couldn't show a need, and that's why they were
11 not granted the applicant status?

12 **MS. JAYE:** Commissioner, I'm going through
13 the Order right now trying to find that language, if I
14 could have just a moment.

15 **COMMISSIONER JACOBS:** While you're doing
16 that, could I ask a question of Primary Staff? Does
17 your distinction rest more so on the fact that there
18 is no requirement to purchase the output from the
19 plant or the fact that there is this contract with
20 utility -- with the New Smyrna Beach?

21 **MS. PAUGH:** With respect to the merchant
22 capacity, so I'm not talking about the contract at 430
23 megawatts --

24 **COMMISSIONER JACOBS:** Okay. So you're
25 speaking about the merchant capacity.

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1 **MS. PAUGH:** That's correct.

2 **CHAIRMAN GARCIA:** I'm sorry, what was the
3 question? I missed it completely. What was the
4 question?

5 **COMMISSIONER JACOBS:** I was asking what does
6 her distinction from this present case and the Nassau
7 case rely primarily on.

8 **CHAIRMAN GARCIA:** Got you. Okay.

9 **COMMISSIONER DEASON:** Let me ask a question.
10 It's right along these lines but it's a little bit
11 different in the sense that if we were to strictly
12 interpret Nassau to -- regardless of whether there was
13 an attempt to bind an existing retail utility to
14 purchase capacity or not, that any applicant has to
15 show a need at retail, how do we mesh that
16 interpretation of Nassau with previous decisions of
17 this Commission to determine need based upon other
18 than a strict retail need? And what I'm referring to
19 is oil backout capacity that has been built in this
20 state and was done for legitimate reasons but it was
21 not done to meet retail need. It was based upon other
22 factors; socioeconomic factors; trying to displace oil
23 for economic reasons.

24 **MS. PAUGH:** You're absolutely correct,
25 Commissioner. There's a long history of Commission

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1 precedent in approving need based on other than strict
2 need as the Nassau cases -- I'll let Mark address
3 that. He addresses it more in his portion of the
4 recommendation. But there's substantial Commission
5 precedent that need can be other their kilowatt need.

6 **MR. FUTRELL:** As she said, oil backout cases
7 in the early '80s, the Commission approved
8 approximately 2,000 megawatts of primarily coal
9 capacity to displace oil and was based upon no
10 reliability need; strictly economics. There would be
11 better -- lower rates for customers based on the then
12 projections of oil prices in the long term. And even
13 though some of those projections were not realized
14 fully, it still resulted in tremendous savings and
15 lower power cost for the ratepayers. The Commission
16 in the criteria of the need determination statute can
17 find need based on other strict reliability findings.

18 **MS. PAUGH:** In addition, Commissioner, if I
19 could interrupt Mark for a moment, we have a rule
20 basis for finding need other than on strict capacity
21 needs. And that is 25-22.0813, says that if a
22 determination is sought on some basis in addition to
23 or in lieu of capacity needs. So we even have this
24 ability by rule.

25 **COMMISSIONER CLARK:** Let me ask a question

1 with respect to the oil backout. Was it a replacement
2 of existing capacity?

3 **MR. FUTRELL:** Yes. It was to turn down oil
4 burning units.

5 **COMMISSIONER CLARK:** So we were substituting
6 one unit, we were not adding, right?

7 **MR. FUTRELL:** Right.

8 **COMMISSIONER CLARK:** And didn't we have a
9 statute that indicated we should engage in oil
10 backout?

11 **MR. FUTRELL:** It was encouraged, correct.

12 **COMMISSIONER CLARK:** So we were meeting
13 another legislatively articulated goal.

14 **MR. FUTRELL:** Absolutely.

15 **COMMISSIONER CLARK:** Let me ask you one
16 other thing, and Commissioner Garcia it's something I
17 forgot to ask, and Leslie and I talked about it and we
18 didn't see it in any of the briefs, and that is the
19 notion of the change that was made to the original
20 Power Plant Siting Act when it started referring to a
21 Certificate of Need. And the way that the statute was
22 originally enacted it said -- and this existed, I
23 think, up until 1990. It said -- when the board was
24 looking at what it was supposed to weigh or look at
25 when it was making a decision, it was to assure the

1 Citizens of Florida that operation safeguards are
2 technically sufficient for their welfare and
3 protection to effect a reasonable balance between the
4 need for the facility and economic impact. And
5 there's more to that section. But then there was to
6 provide abundant low cost electric energy. And that
7 got changed in 1990 the same time "applicant" got
8 changed. And, you know, if -- what did that mean? I
9 mean, I think if the statute was like that now, we
10 might have a, you know -- it might indicate there's
11 another way to show need.

12 Was there any discussion in the briefs as an
13 explanation of why that occurred? But it was later
14 changed to specifically say you need -- you have to
15 have a need, right? It references 403.519.

16 **MS. PAUGH:** Yes, it does use the word;
17 there's no question about that.

18 **COMMISSIONER JOHNSON:** I didn't follow that
19 last point you were making, Susan.

20 **COMMISSIONER CLARK:** Well, instead of --
21 what happened was originally the things to be weighed
22 by the Siting Board were -- among them was to provide
23 abundant low cost electric energy. In 1990 that was
24 changed and it was changed as part of the law then
25 enacted, FEECA, indicating, I think, that there was

1 going to be a balancing between building plants and
2 engaging in energy conservation. And there was to be
3 a weighing. That they were to pursue conservation.
4 And then when it was absolutely necessary, build a
5 plant to meet retail load. Then it would be a factor
6 to be considered by the board. When it was changed --
7 sorry. (Pause)

8 It was changed in 1990 to say "to meet the
9 need for electrical energy as established pursuant to
10 Section 503.519 (sic)." So it appeared to change it
11 from assuring adequate abundant low cost energy to
12 something different.

13 **MS. PAUGH:** Commissioner, one way I'd like
14 to respond to that point is to point out that the type
15 of facilities that -- the functional requirement is
16 what I called it in the primary, the type of entities
17 that are applicants is, in fact, stated in the
18 disjunctive. It can be transmission, generation or
19 distribution.

20 **COMMISSIONER CLARK:** Now, you're talking
21 about 403, the definitions for the Act --

22 **MS. PAUGH:** Right. That's correct.

23 **COMMISSIONER CLARK:** -- which we have a
24 dispute as to whether or not 403.519 is part of the
25 Act.

1 **MS. PAUGH:** All right. Assuming for a
2 moment that it is controlled -- I don't ever say that
3 it is part of the PPSA. Clearly it's not. But it is
4 controlled by the Power Plant Siting Act. That
5 disjunctive "or" indicates that the Legislature knew
6 that there were entities that may be doing one or two,
7 but not necessarily all three functions, and would
8 come under the Power Plant Siting Act.

9 The logical extension of that language is
10 that an entity that just engages in generation is, by
11 definition, only a wholesale provider. I think that a
12 very logical conclusion can be reached that the
13 Legislature thought about a wholesale provider being a
14 part of, and coming under, the Power Plant Siting Act.
15 That position is reenforced by the fact that the
16 Legislature also exempted certain types of providers;
17 that is to say solar providers and steam under 75
18 megawatts. They knew there was different kinds of
19 generation.

20 I will be the first to admit, and I highly
21 doubt, that the Legislature sat around and thought
22 about EWGs because they weren't even invented yet.
23 But the statute covers it. The statute clearly allows
24 for EWGs and forward-looking other type of entities
25 that we don't --

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1 **COMMISSIONER CLARK:** And that's because they
2 are a regulated utility?

3 **MS. PAUGH:** That's correct.

4 **COMMISSIONER CLARK:** Let me ask you about
5 that. You left me a note today that an IPP and QF are
6 also regulated utilities.

7 **MS. PAUGH:** That's correct.

8 **COMMISSIONER CLARK:** Is that right?

9 **MS. PAUGH:** That's correct.

10 **COMMISSIONER CLARK:** So then if that's
11 correct, then Nassau Power is wrong because they were
12 regulated utilities then.

13 **MS. PAUGH:** I don't think Nassau is wrong.
14 I don't think that the federal regulation of IPPs,
15 EWGs or QFs covers the whole field. I think there is
16 regulation retained to the states, and I think that
17 that is why we are here today. We do have
18 jurisdiction over this EWG. If we say that we don't
19 because they're not an applicant, we're actually
20 diminishing our jurisdiction as a Commission.

21 **COMMISSIONER CLARK:** I guess I'm not clear.
22 I thought you were saying they were an applicant
23 because they were a regulated -- a utility regulated
24 by FERC.

25 **MS. PAUGH:** That's correct.

1 **COMMISSIONER CLARK:** Okay. Is an IPP and a
2 QF a regulated utility, one regulated by FERC?

3 **MS. PAUGH:** That's correct.

4 **COMMISSIONER CLARK:** Then it seems to me
5 that in Nassau they were entitled to be an applicant.

6 **MS. PAUGH:** I disagree. The difference is
7 by being the retail ratepayers, being able to force an
8 IOU to buy the output. I believe --

9 **COMMISSIONER CLARK:** Where does Nassau say
10 that? And where does the argument that took place
11 prior to Nassau say that?

12 **MS. PAUGH:** Nassau itself, the Supreme Court
13 decisions are clearly limited to QFs by their
14 language. I've got that right here.

15 **COMMISSIONER CLARK:** Would you answer my
16 question? Where does the Order say that and where did
17 the discussion that led up to that say that?

18 **MS. PAUGH:** I don't know that it does.

19 **CHAIRMAN GARCIA:** Are you saying, Leslie,
20 then that -- I know you use the broad definition of
21 what a utility is. In other words, a regulated
22 utility is everyone by FERC. But even if Duke New
23 Smyrna is not a regulated utility, can they still be
24 an applicant?

25 **MS. PAUGH:** No, not if they are not

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1 regulated. Then they don't fall within one of the
2 seven enumerated entities.

3 **CHAIRMAN GARCIA:** Name those entities for
4 me.

5 **MS. PAUGH:** City, towns, counties, co-ops.
6 One moment.

7 **CHAIRMAN GARCIA:** Okay.

8 **COMMISSIONER CLARK:** You know, Mr. Chairman,
9 I know we're struggling with this. And I get
10 concerned to some extent that we're dealing, I think,
11 with what the law is and that's what our argument is;
12 our interpretation of the what the law is. And I'm
13 not sure that we would have much disagreement if we
14 discussed what we thought the law ought to be.

15 **CHAIRMAN GARCIA:** We haven't even discussed
16 it because she hasn't answered my question yet. But
17 if you could just walk through it real quick and then
18 we can make that discussion.

19 Cities, counties --

20 **MS. PAUGH:** Towns, public utility districts,
21 regulated electric companies, electric cooperatives,
22 joint operating agencies, or combinations thereof,
23 engaged in or authorized to engage in the business of
24 generating, transmitting or distributing electric
25 energy.

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1 **CHAIRMAN GARCIA:** I understand how you --

2 **MS. PAUGH:** That is an electric utility
3 under 403.503.

4 **CHAIRMAN GARCIA:** I understand.

5 **COMMISSIONER CLARK:** You know, when we went
6 through that hearing I wrote down a number of things
7 that I thought, and I think Staff does a good job in
8 the subsequent portions of their recommendation sort
9 of outlining the pluses of this kind of arrangement.

10 I just have a concern that I don't think the
11 law contemplated it, or the law, as it is written now,
12 provides for it.

13 You know, I did -- when I was up at NARUC,
14 naturally merchant plants and the whole issues of the
15 changing environment get discussed. And I know there
16 are states, and in this case I have a copy of the
17 Virginia law which makes the -- you have one
18 Certificate of Need for entities that are regulated
19 and would presume to put the facility in rate base.
20 And you have another means of pursuing it if you chose
21 to be a merchant plant. And I think they enacted that
22 last year, 1998. You know, so that I think there is
23 value to further looking at that. I don't think
24 whatever we decide here it stops here. I thought
25 there were a number of things that were brought out at

1 the hearing that compel us to look at it further.

2 But, you know, some of the concerns --

3 **CHAIRMAN GARCIA:** Absolutely, though,
4 before -- because I don't want to gloss over that. I
5 think that's a very important point. And maybe, Joe,
6 you can address that because obviously that's in the
7 body of this. But I believe that this recommendation
8 causes for opening several dockets on specific issues
9 which have to do with the merits of this and what
10 affect it has on the future.

11 **MR. JENKINS:** Yes, Chairman Garcia. In
12 Issue 33 whether Duke is approved or not, of course,
13 the docket should be closed. But if Duke is approved
14 there's a concern expressed during the hearing about
15 the floodgates being opened.

16 We would recommend, or we would like to open
17 a docket to pursue the idea of capping the percent
18 reserve of merchant plants in Peninsular Florida.

19 The FRCC utility group has adopted a 15%
20 reserve criterion. We're very concerned at the Staff
21 level that that is too low. It certainly has not been
22 tested because the methodology they use is brand new.

23 Merchant plants offer us a solution to
24 solving that reserve margin question. And the reserve
25 margin docket you opened up --

1 **CHAIRMAN GARCIA:** Which is a docket that is
2 currently opened.

3 **MR. JENKINS:** Currently opened, hearings
4 scheduled for September. I would like to meet with
5 you with the idea of not closing that docket, but
6 turning that docket into a rule docket, capping the
7 amount of merchant plants, and then selecting among
8 the people who come in and ask to build a merchant
9 plant among those who will build the most solar
10 photovoltaic renewable capacity.

11 **CHAIRMAN GARCIA:** If I'll not mistaken, also
12 in this order -- because I don't want to just leave it
13 on that, you also address the issue of the possibility
14 of opening a docket on stranded cost, if I'm not
15 mistaken; somewhere in there you touch on that fact.

16 **MR. JENKINS:** Only if you think stranded
17 cost is a concern. We, at the Staff level, do not
18 believe it is a concern. But if you have concerns
19 with stranded cost and you believe it's somehow in the
20 wholesale market --

21 **CHAIRMAN GARCIA:** But I think you discuss it
22 somewhere in the --

23 **MR. JENKINS:** Yes, we do. It's one of the
24 issues.

25 **COMMISSIONER CLARK:** Joe, which is more

1 efficient, a combined cycle or a combustion turbine?

2 **MR. JENKINS:** Combined cycle.

3 **COMMISSIONER CLARK:** And we currently don't
4 have any say over combustion turbine. Right?

5 **MR. JENKINS:** As far as siting goes.

6 **COMMISSIONER CLARK:** That's sort of a side
7 issue that concerns me in terms of the notion of a
8 broader look. That clearly requires a legislative
9 fix.

10 **CHAIRMAN GARCIA:** Perhaps you're very right,
11 Commissioner, that we should perhaps look at that
12 issue and make a suggestion to the Legislature that
13 maybe they should give us jurisdiction of that area
14 also. Clearly, it's something that's going forward in
15 our state. They were very nice to come and let us
16 know what they were doing. They also were very nice
17 to point out that we had nothing to do with what they
18 were doing in Florida.

19 **COMMISSIONER CLARK:** Well, and I would point
20 out that FPC has reached -- recently purchased two --
21 three, and they don't have to come before us.

22 Joe, I have another question. With respect
23 to this unit, are there any concerns with emissions?

24 **MR. JENKINS:** No. Well, it's just a clean
25 unit. It's much cleaner than most other units in the

1 state.

2 **COMMISSIONER CLARK:** You've misinterpreted
3 my question. Will they have to meet emissions
4 standards with regard to SO₂, NO_x and greenhouse --

5 **MR. JENKINS:** Oh, yes, they will.

6 **COMMISSIONER CLARK:** Okay. Now, shouldn't
7 we be looking at the possibility of the fact that
8 here's this merchant plant that comes in. It produces
9 those things. It has the potential for affecting, and
10 will affect the environment in that area. Suppose
11 then a utility wants to come in, and we find there is
12 a need; the margin reserve is low. But because that
13 merchant plant is there it affects whether or not they
14 can build it nearby because of the emissions and
15 non-attainment.

16 **MR. JENKINS:** I don't think the emissions
17 from a combined cycle natural gas plant are so
18 extensive, like in an oil, steam or coal plant, to
19 cover such a widespread area to seriously prevent any
20 other utility from building a power plant somewhere in
21 the state. There's a lot of vacant land interior to
22 the state that are good sites. These are small
23 plants. They are not the fire-eating dragons of the
24 1970s that pollute the air that we now have.

25 **COMMISSIONER CLARK:** My only point is that

1 it has an impact, and that kind of impact potential
2 merchant plants, I think is something that has to be
3 looked at.

4 **MR. JENKINS:** Under the purview of the DEP.
5 But I would suggest to you that the air impact of this
6 plant is minimal, and in all likelihood will displace
7 much dirtier plants elsewhere and free up land
8 elsewhere.

9 **COMMISSIONER CLARK:** I don't disagree with
10 you, Joe. But I think we have to be concerned. It is
11 not just this plant. We have to be concerned with the
12 repetition over and over again, and how that phenomena
13 affects the policy the state may want to pursue with
14 respect to building these plants and protecting the
15 environment.

16 **MR. JENKINS:** Then I would address that in
17 the recommended rule with the cap and the solar
18 energy.

19 **CHAIRMAN GARCIA:** I think that may be a
20 valid point, Commissioner. Certainly we may want to
21 set some of these plants next to the fire-eating
22 dragons, but that said -- that may be a very valid
23 point, and it's something we may need to look at. And
24 if -- clearly we're looking at certain areas and the
25 fallout from this decision today, absolutely.

1 And, clearly, I rely, I hope they can rely
2 on our expertise in that area to point out certain
3 issues that are, by the very nature of what we may do
4 here today, create all sorts of unexpected
5 consequences. That is why I believe, for example,
6 that the stranded cost issue important. I mean, I
7 know that Staff sort of dismisses it after it gives
8 it, I think, a thorough analysis but the truth is
9 that's with one plant. And if there was a possibility
10 and there were enough applicants that came before us,
11 and Staff's interpretation, and hopefully the
12 majorities' interpretation prevails on the primary,
13 clearly there are going to be other plants. And
14 Commissioner Clark's point may be very valid, and some
15 of the companies may have a valid point that they have
16 some old generation which is not paid off; which is
17 more expensive; which is being replaced by this much
18 cheaper generation. And if that is a key, if that is
19 an issue you believe we should have, I would strongly
20 urge we keep it as part of the whole study that the
21 Staff will do as a fallout of this.

22 **COMMISSIONER CLARK:** I guess to some extent
23 I was persuaded by Mr. Dolan's testimony; that
24 regardless of what we do here it does require a
25 comprehensive look, and it, in my mind, entails things

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1 that are beyond our jurisdiction to deal with, and
2 that being the balancing of the environmental impact
3 and economic consequences or nonconsequences. And I
4 am concerned that --

5 **CHAIRMAN GARCIA:** But you clearly would
6 agree that the Governor, sitting with the Cabinet as a
7 Siting Board, also has some of those very same or
8 similar concerns about these issues as well the
9 environmental agencies of the state.

10 **COMMISSIONER CLARK:** Right. But one thing
11 that concerns me is finding of need cannot be
12 revisited when it goes to the Siting Board. It is
13 presumed.

14 **CHAIRMAN GARCIA:** Absolutely.

15 **COMMISSIONER CLARK:** And I don't think the
16 Siting Board can reject a project because it doesn't
17 think -- it says, "Yeah, we need it but we don't like
18 the impact on the environment."

19 **MR. JENKINS:** They have.

20 **CHAIRMAN GARCIA:** They have. They've done
21 it with Orimulsion.

22 **COMMISSIONER CLARK:** No, they did not.

23 **MR. JENKINS:** Kathleen 500 kV.

24 **COMMISSIONER CLARK:** They didn't.

25 **MR. JENKINS:** They'd make it so tough that

1 the utility gave up.

2 **COMMISSIONER CLARK:** That is different than
3 the board rejecting it. The board approved that, Joe,
4 the Kathleen 500 line, right?

5 **MR. JENKINS:** They sent it back to DOAH for
6 the EMF study, and then they sent it back to further
7 hearing, to DOAH hearings. They made it so tough that
8 Florida Power said, "All right, enough is enough. We
9 give up."

10 **COMMISSIONER CLARK:** My point being is there
11 does not appear statutory authority to reject it
12 outright.

13 **MR. JENKINS:** Under a strict reading of the
14 law you're correct; under a practical application, it
15 has happened.

16 **COMMISSIONER CLARK:** My only point being
17 that I think when you have a merchant plant you might
18 want to have a different evaluation. That because
19 it's not absolutely needed to serve the customers, but
20 it does contribute to a robust wholesale market, that
21 how you weigh those different issues might be
22 different. And I think in the Virginia statute there
23 is the ability to outright reject it.

24 Commissioner, I'm going to be quiet because
25 I've monopolized this for quite a long time. I just

1 want to say that I believe that there are -- I think
2 Nassau compels this decision, and I appreciate the
3 distinction being made. And I might agree with that
4 but for the fact that that point was never discussed
5 as part of the -- am I wrong?

6 **MS. PAUGH:** Yes. I have found the
7 references in Nassau I. I will read them.

8 **COMMISSIONER CLARK:** Okay.

9 **MS. PAUGH:** This is the Supreme Court
10 decision and it addressed the issue of being forced to
11 purchase the power head on. "Under the cogeneration
12 regulation, Florida utilities are required to purchase
13 cogenerated power based on the utility's avoided cost;
14 that is, the cost that the utilities would incur to
15 produce the same amount of electricity if they did not
16 instead purchase the cogenerated power from a
17 qualifying facility." A few lines down they approach
18 it again. "Presuming need under the Siting Act by way
19 of the cogeneration regulations, however, presented
20 the awkward possibility that individual utilities
21 would be required to purchase electricity that neither
22 they nor their customers actually needed." It is in
23 here.

24 **COMMISSIONER CLARK:** Well, you will agree
25 with me it was not part of our discussion leading up

1 to the Nassau order. It was not in the Nassau order.
2 And, furthermore, it points out that a finding of
3 need, whether it's to build a utility plant or for a
4 QF to build it, isn't the final say. We could still
5 reject that when they came and asked us to put it in
6 the cost recovery clause or in rate base. And, in
7 fact, we've had instances, I think, where we've said
8 to the utility, you know, even though we said there
9 was a need, it doesn't look like that need is
10 materializing. You need to back off. Don't build
11 that plant or put it in later. I recall that. But
12 the point is the need doesn't put it in rate base. It
13 isn't a finding of prudence.

14 **CHAIRMAN GARCIA:** I hope you're going to
15 continue participating in the debate, but I want to
16 make sure that some of the issues that Commissioner
17 Clark has mentioned we could probably have come back
18 to internal affairs as soon as possible, Joe. She did
19 touch on, I think, some very significant points and I
20 think points that need to be made.

21 Clearly, if there are issues that are going
22 to be derived from this decision that this Commission
23 may make today, they may be moot at the end of the
24 day. But if we do move forward they may not be. And
25 they are significant issues, which you should open a

1 docket and have all of the players that are possibly
2 impacted participate.

3 **COMMISSIONER CLARK:** I don't know if it
4 should be internal affairs but I certainly think an
5 investigation into the merchant plant issue is
6 appropriate.

7 **CHAIRMAN GARCIA:** Exactly. But to get all
8 the -- because, Commissioner, I clearly -- I think
9 this Commission relies on your expertise on some of
10 these electric matters because of your national
11 leadership to get a fuller picture of what may come
12 in. And while -- again, I just stress the stranded
13 cost thing. I certainly am not an expert on that but
14 I know that Commissioner Deason may also have some
15 derivatives that occur because of a decision following
16 primary today.

17 **COMMISSIONER JOHNSON:** Let me follow up on a
18 couple of questions or issues raised by Commissioner
19 Clark.

20 One of them that you raised, I guess, the
21 environmental emissions and how that should factor
22 into our need determination process. And I concur,
23 those are things that should be analyzed.

24 My one fear, even though we said, both
25 primary and alternatives, that we don't have to deal

1 necessarily and answer the dormant Commerce Clause
2 question, I would think in that kind of analysis we
3 would have to look at that issue because when we start
4 framing issues in terms of, well, you know, there are
5 certainly environmental emission standards and we want
6 to ensure that our utilities that are here have the
7 opportunity to meet those. Because if they were to
8 come in later, they may have to build a plant
9 somewhere else and it may cost us more. I think
10 that's a relevant analysis to make. But I think when
11 we start going down that road, the dormant Commerce
12 Clause kind of arguments become more and more
13 relevant. It's like wait a minute. It looks somewhat
14 protectionist -- and maybe it is -- of the ratepayers,
15 or maybe that's okay as long as we have a clear record
16 and something that we can later defend. I would say
17 that that kind of an argument and that kind of an
18 analysis, we would need to do that in a real record
19 kind of way so that with a dormant Commerce Clause
20 there's a balancing of state interest analysis that
21 will later be done. But on its face, when you start
22 making those kind of propositions or setting them up,
23 you just have to be careful in the analysis.

24 One other point that you raised, it was with
25 respect to -- I guess Leslie, perhaps, provided you

1 with some information that stated that IPPs and QFs
2 were regulated utilities, so you're saying was Nassau
3 then wrong, because perhaps they should have been
4 applicants. And maybe that goes to a procedural
5 issue. Even if we had determined them to be proper
6 applicants, we could have said that -- I believe,
7 given the criteria that we have, we could have said
8 that but as it relates to QFs they must show a
9 fact-specific need because of the ratepayer issue.
10 And so we could have still reached the same ultimate
11 conclusion because we're going to tie it to
12 utility-specific as opposed to Peninsular Florida
13 because we had a ratepayer concern. In this instance
14 we don't have a direct ratepayers on the hook kind of
15 concern.

16 **MS. PAUGH:** That's exactly correct.

17 **COMMISSIONER JOHNSON:** And so I think we
18 could still reach the same conclusion and not
19 Nassau -- maybe your dissent where you said, "Well,
20 geez, can't they at least be applicants?" And I think
21 it was Commissioner Easley that kind of suggested
22 well, what are you talking about, a motion to dismiss
23 or a summary judgment? Maybe had we done a little
24 more thorough analysis, the procedural issue would
25 have been teed up in such a way that they would have

1 been applicants but that we would have still found
2 four QFs that can bound ratepayers that we find that
3 they must show a specific need as it relates to a
4 particular utility and that have not been
5 demonstrated.

6 **COMMISSIONER CLARK:** Yeah. At that point I
7 had said it seemed to me that they could be an
8 applicant. But it appeared to me that what was
9 advocated, and what was the ultimate basis on what it
10 was decided, was they couldn't show need, therefore,
11 they couldn't be an applicant because need was to
12 serve the retail ratepayers in Florida.

13 **MS. PAUGH:** The short answer is that that's
14 not the only kind of need that we have in the state of
15 Florida, as evidenced by the rule that I cited to you
16 in the oil backout cases that have been referenced.
17 In that instance it was different because of the
18 finding of the ratepayers.

19 **COMMISSIONER CLARK:** I would argue that oil
20 backout did have need in it because it was replacement
21 power. It was not additional power. So assuming that
22 the plant was running and providing electricity, you
23 can't just take it out of service without providing
24 other electricity.

25 **COMMISSIONER JOHNSON:** In this instance --

1 **CHAIRMAN GARCIA:** I'm sorry, you were going
2 to say something, Joe?

3 **MR. JENKINS:** I was just going to say the
4 oil backout units were not a utility-specific need.
5 It was a Peninsular need of 78 million barrels of
6 imported oil that was to be reduced by 25% to whatever
7 that is. There were no units taken out of rate base.
8 They were left in rate base. We're growing in this
9 state roughly 600 megawatts a year. Eventually we
10 need all of the plants we have.

11 **CHAIRMAN GARCIA:** I'm sorry, Commissioner.
12 I interrupted you.

13 **COMMISSIONER JOHNSON:** That's fine. Let Joe
14 finish up his response there.

15 In this instance, Primary Staff, you have
16 sort of a two-fold analysis as to how we can rule to
17 not dismiss. And in that instance you first go to
18 well, there is -- I guess under that need for power
19 analysis you're saying well, there is a need. There's
20 a demonstrated need. There's the 30 megawatts. And
21 certainly there's going to be 484 additional megawatts
22 but there is a tie to need for a utility. The City
23 does have a need. And if you want to tie them
24 together, you can tie them together and reach a
25 determination of need based on the joint application.

1 **MS. PAUGH:** That's correct.

2 **COMMISSIONER JOHNSON:** But you also say,
3 "But, Commissioners, you can go a little further than
4 that. You could unbundle these two things and
5 find --" even if the City had come forward with no
6 specific need, that that would have been sufficient to
7 go forward also.

8 **MS. PAUGH:** That's correct.

9 **COMMISSIONER JOHNSON:** But we don't have to
10 go that far.

11 **MS. PAUGH:** No, we don't.

12 **COMMISSIONER JOHNSON:** And if we were to
13 look at this case and state that the joint petitioners
14 have come forward and they've demonstrated need, and
15 certainly they are building overcapacity, there are --
16 I guess my question goes to -- let me ask the question
17 to where you go the most liberal interpretation; where
18 we don't have to have any demonstrated need. The
19 basis for that would be the oil backout, the
20 precedent. Is that what you all are using for the
21 basis of saying that we don't have to have specific
22 need or any stated need in order to approve these
23 particular petitions?

24 **MR. FUTRELL:** There is a need. It's just
25 the need is based upon cost-effectiveness and not

1 additional reliability; megawatts needed to meet some
2 reliability criterion. The need is for
3 cost-effectiveness and that's a criteria you can make
4 a finding upon. It's cost-effectiveness.

5 **COMMISSIONER JOHNSON:** And it could be the
6 sole criteria.

7 **MR. FUTRELL:** Correct.

8 **COMMISSIONER JOHNSON:** And that's what we
9 used, the oil backout.

10 **MR. FUTRELL:** You've done that before.

11 **MR. JENKINS:** That's correct. We also have
12 a plant site application before us scheduled for
13 hearing around April 1st, the City of Lakeland, which
14 appears to be in a very similar situation; just a
15 cost-effectiveness need.

16 **COMMISSIONER CLARK:** When you say it was
17 just a cost-effectiveness need, what were the cases
18 where we did that before?

19 **MR. JENKINS:** It was four or five oil
20 backout units and I think there's also one or two 500
21 kV transmission lines to Georgia.

22 **COMMISSIONER CLARK:** They were also coal by
23 wire.

24 **MR. JENKINS:** Coal by wire.

25 **COMMISSIONER CLARK:** What did the oil

1 backout statute say? Wasn't there another goal of
2 promoting oil backout? I mean, I think it's a
3 little -- you need to be more disclosive of the
4 background for that.

5 **MR. JENKINS:** Yes. But -- there very well
6 may be, but the Commission at that time would never
7 have approved an oil backout program solely for the
8 case of oil backout --

9 **COMMISSIONER CLARK:** That's right. It had
10 to be cost-effective.

11 **MR. JENKINS:** -- if it was not also
12 cost-effective. So cost-effectiveness was the guiding
13 criteria. And all those spread sheets I worked on for
14 Commissioner Cresse, the bottom line was
15 cost-effectiveness. Nothing else.

16 **COMMISSIONER JOHNSON:** But your -- I'm
17 sorry, Susan.

18 **COMMISSIONER CLARK:** The concern I had was
19 you had a clear legislative direction that this was an
20 objective to be accomplished.

21 **MR. JENKINS:** The legislative direction had
22 some vagueness to it. We adopted the rule of reducing
23 73 million barrels a year by 25%. That was us, not
24 the Legislature. The Legislature has words, which are
25 still in FEECA, called reducing scarce petroleum fuels

1 or something like that.

2 **COMMISSIONER JOHNSON:** But going back to
3 maybe the first part of the analysis where we're
4 saying there's a need here, there's at least a
5 30-megawatt need and that certainly there's going to
6 be 484 megawatts that aren't directly associated with
7 the City's need.

8 In my mind, I guess, this is kind of for
9 Alternative Staff, what in the law says that we can't
10 bundle those together? That there can't be more
11 generation than the City needs in an application? And
12 why do we even have to get to the secondary issue if,
13 indeed, they have demonstrated utility-specific need
14 but for not all of the megawatts. Why can't that be
15 sufficient for us to pass upon this application?

16 **MS. JAYE:** The position that is iterated in
17 Alternative Staff's recommendation is that the City is
18 undoubtedly an applicant as to the 30 megawatts. The
19 30 megawatts are needed and should definitely be
20 sited. It's very inexpensive power for the City.
21 However, the applicant -- the joint applicants, and
22 that includes Duke, cannot provide the information
23 necessary under the statute and the rule to form a
24 complete petition before the Commission in order for
25 the Commission to make a determination of need for the

1 entire plant as it is proposed. If it were a
2 30-megawatt plant, bless it and go. But as to the
3 size of it, for 90% of it we cannot perform our
4 statutory duty and our rule duty to determine that it
5 is, indeed, the best and least cost alternative.

6 **COMMISSIONER JOHNSON:** But you believe that
7 all 514 megawatts must be committed and that the law
8 requires that.

9 **MS. JAYE:** I do not believe that that is a
10 position that was taken in the Alternative Staff
11 recommendation. I believe that the Alternative Staff
12 recommendation went more to the fact that the
13 information needed was not provided.

14 **COMMISSIONER CLARK:** Didn't they say that --
15 they indicate there's a need for the 30 megawatts but
16 the rest of it is just consistent with the need for
17 Peninsular Florida. They never make the allegation
18 it's needed, do they?

19 **MR. FUTRELL:** They say it's needed to
20 improve reliability in the Peninsula.

21 **COMMISSIONER CLARK:** Did they say to
22 improve -- I thought they just said consistent with.

23 **MR. FUTRELL:** They do use the word
24 "consistent," that is used, but the effect is going to
25 be to improve reliability.

1 **COMMISSIONER CLARK:** My point being that
2 they never come out and say it's needed for
3 reliability and they didn't make that showing. What
4 they did show -- what they simply said was it was
5 consistent with the need statewide.

6 **MS. PAUGH:** For what it's worth, the phrase
7 "consistent with" is boilerplate in need determination
8 proceedings. And joint petitioners pointed out in
9 their brief or memoranda that FPL uses that phrase in
10 their past need determinations as well. So I wouldn't
11 get too hung up on the phrase "consistent with."

12 **COMMISSIONER CLARK:** Well, then go back
13 to -- I think it's the first Nassau case where the
14 Court affirmed the notion that it wasn't a statewide
15 need but it had to be utility-specific; unit- and
16 utility-specific.

17 I guess my question being that at one time
18 we said we'll look at statewide need and we settled
19 avoided costs on that basis. And then the Commission
20 determined that was not consistent with its statutory
21 mandate under the need determination, and that it had
22 to be unit- and utility-specific and avoided cost was
23 going to be set that way. And the Supreme Court said
24 you're right.

25 So now Duke New Smyrna is coming in saying

1 well, it's a statewide need. How do you reconcile
2 those notions?

3 **MS. PAUGH:** I don't think it's a great need
4 to reconcile it because, again, the Nassau cases were
5 related to QFs that could force the utilities to buy
6 and bind the ratepayers. So it was inappropriate, the
7 Commission felt, to base avoided costs on some
8 statewide amorphous number.

9 **CHAIRMAN GARCIA:** It would again force the
10 utility's hand and the ratepayers to pay the
11 difference.

12 **MS. PAUGH:** Yeah. Nassau is about
13 ratepayers. It's about ratepayers picking up the bill
14 for something that the utilities may or may not need.

15 **COMMISSIONER DEASON:** Let say I think it's
16 very critical that the purpose was to determine
17 avoided cost. And what was the purpose of determining
18 avoided cost was the very reason you just stated, it
19 was to determine what the price was going to be for
20 the capacity that the utility had an obligation to
21 purchase. And how did that affect retail customers?
22 Well, at the very best it made them indifferent. It
23 was not going to benefit them one bit. It was simply
24 avoided cost. And some could argue looking at history
25 now, that binding utilities, even in avoided cost,

1 with changes in economics is really detrimental to
2 customers. But even -- forsaking that argument for a
3 moment, at the very best retail customers were
4 indifferent. We have a very different situation here.
5 Retail customers are not at risk. We're not
6 determining avoided cost to require a utility to
7 purchase at that price. What we're doing is if this
8 is approved, we'd be allowing a merchant plant to sell
9 electricity if they can do it in the market. And they
10 can only sell it in the market if they are doing it in
11 a cost-effective manner, which means that if they are
12 doing it in a cost-effective manner, they are
13 displacing higher cost generation that otherwise would
14 produce energy and flow it through the grid; i.e. that
15 to me means there are benefits -- my mike keeps going
16 out -- there are benefits to retail customers --
17 actual benefits to retail customers; not a question of
18 retail customers being made whole or being unharmed.

19 **MS. PAUGH:** Very well said, Commissioner.
20 That's the Primary Staff -- or the Technical Staff
21 recommendation. There are benefits to the customers.

22 **COMMISSIONER CLARK:** I don't disagree that
23 how the law might should be. I'm just pointing out
24 what the history has been with respect to it and what
25 the decisions have held.

1 **COMMISSIONER DEASON:** Let me ask this
2 question: Under the law as it is right now and with
3 the alternative position on the interpretation of that
4 law -- and I guess I'll address this question to the
5 Alternative Staff -- could a retail investor-owned
6 utility come to this Commission and say, "We've got
7 adequate capacity but all our plants are old. They are
8 inefficient. We're having environmental problems with
9 them. We can build a state-of-the-art combined cycle
10 plant and it's going to be cost-effective to
11 customers." Can they demonstrate a need to this
12 Commission to build that plant? (Pause)

13 **MS. JAYE:** I believe that under the analysis
14 that is provided in the Alternative Staff
15 recommendation that an investor-owned utility would
16 not be able to do that because the old plant would
17 still have to be in rate base, would still be paid for
18 by the customers and the new plant would be paid for
19 by the customers as well. And even if the energy
20 produced would be cheaper, unless that utility could
21 prove that the difference between the price of the
22 energy and the amount for the two plants that would be
23 included in each customer's bill every month was going
24 to be a net gain and benefit for the customer, it
25 would not pass the cost-effectiveness test.

1 **COMMISSIONER DEASON:** I assumed that in the
2 question. I assumed that in the question.

3 **MS. JAYE:** If it's cost-effective and it
4 passes the cost-effectiveness tests, it would appear
5 to me should you accept the notion that there is no
6 need that needs to be shown, i.e. there is
7 absolutely --

8 **COMMISSIONER DEASON:** There's not a
9 reliability need; there's an economic need.

10 **MS. JAYE:** I believe Alternative Staff
11 stands for the position that economic need alone is
12 not a sufficient basis for siting power plant.

13 **COMMISSIONER DEASON:** See, Commissioners, I
14 think that's reason in and of itself to reject that
15 interpretation. If we're going to interpret the law
16 so strictly that we would be preventing our own retail
17 investor-owned utilities from coming forward and
18 demonstrating a need based upon good economics, I
19 think that is the incorrect interpretation.

20 Now, I understand Commissioner Clark's
21 argument that we're not in a position here of
22 determining what the law should say, we've got to
23 interpret the law as it is. And I've always tried to
24 abide by that. I'm a strict believer in that. But
25 there are so many different positions and ambiguities

1 in this law -- and that's not a criticism of the law.
2 It was written at a time that did not foresee the
3 situation that we're in at this time.

4 I think one of the questions we've got to
5 ask ourselves is does the current law, does it give
6 the Commission enough flexibility to do what we think
7 is right and is best for retail customers in this
8 state? I think that's going to be the ultimate
9 question.

10 **COMMISSIONER CLARK:** I don't disagree with
11 you, and I would indicate that I disagree with the
12 answer given with respect to the utilities. I think
13 they always have a obligation to continually look at
14 their fleet and update their fleet. And the
15 difference being is if they say they have an old
16 plant, that they can substitute and put a newer
17 facility in, they have an obligation to substitute
18 that. But the point is it's a substitution.

19 **MS. JAYE:** Commissioner, I would certainly
20 agree with that. If the inefficient older dinosaur
21 plant were to be retired, it would compel a different
22 answer. However, if it was just going to be
23 mothballed and held back, still on the fleet, used
24 occasionally, I don't see, given the Alternative Staff
25 recommendation, how it can --

1 **COMMISSIONER CLARK:** I think the point being
2 that your question was if it's economic and
3 cost-effective to do that. They always have that
4 obligation. But it has -- it can't be a plant that's
5 in addition to what they are running. And that's what
6 happened in oil backout. It was economic and cost
7 efficient to do. You have brought up the notion
8 that -- which I agree with, that they could not have
9 foreseen this at the time it was enacted. And I agree
10 with that. And it seems to me that it is important
11 that that context be kept in mind. And I think that
12 they are -- we have an obligation to say we think this
13 is right for the ratepayers. But it is not just
14 concerns about economics and what is right in terms of
15 the cost of electricity. There are other public
16 policy issues that are not within our jurisdiction
17 with respect to the environment and the general health
18 and welfare that I think it would be a mistake to
19 engage in a administrative adjudication that doesn't
20 also tee up this issue to the Legislature to give them
21 the opportunity; that there's a new context. There's
22 a new way of doing business. And here's what we
23 recommend that we change and here are the other issues
24 that have to be considered. We think it's a good idea
25 to go that way. We recommend it. Here's what would

1 need to be changed and here are the other
2 considerations you have to look at.

3 **COMMISSIONER DEASON:** Let me say that I
4 agree with you that I think it's -- regardless of what
5 interpretation we take here today, I think it should
6 be fundamental that utilities that we regulate have a
7 obligation to come forward to this Commission and
8 demonstrate need if there is a need for reliability or
9 if there's an economic need.

10 My caution is I don't want there to be any
11 decision today which would undermine or jeopardize
12 that interpretation. And as far as teeing this up for
13 the Legislature, I agree this is an area which
14 certainly this Commission could use guidance from the
15 ultimate policymakers in this area. But we also have
16 the obligation, I believe, to look at the current
17 situation. And if there are real benefits which are
18 going to be derived, and can be derived sooner, we
19 have to ask the question can we go forward? Do we
20 have the flexibility still abiding by the statute? Or
21 do we delay the real economic benefits which would
22 result from this project for the benefit of getting
23 guidance from the Legislature? And I think that's a
24 very difficult question too.

25 **COMMISSIONER JACOBS:** Do I take it from the

1 Primary Staff's argument that we could go with the
2 whole 584 as merchant capacity, and because there is
3 no requirement that a retail customer pay for that, we
4 could take them as a applicant.

5 **MS. PAUGH:** That's correct.

6 **CHAIRMAN GARCIA:** The entire generation or
7 does the applicant still need to meet some type of
8 need criteria?

9 **MS. PAUGH:** Well, they have to meet the
10 criteria of the statute. I apologize if that's how my
11 answer came across.

12 **CHAIRMAN GARCIA:** I think you leaped past
13 him because if I can rephrase your question -- because
14 it's something that struck me when I was reading
15 Staff.

16 If I knock on Florida's door tomorrow and
17 I've got a 500-megawatt combined cycle gas turbine
18 plant and I say I'm going to produce, this decision in
19 no way says go ahead. You've got to come in here with
20 some type of need that you're going to meet.

21 **MS. PAUGH:** Absolutely. I thought he was
22 referring to the definition of EWG as a regulated
23 electric company --

24 **CHAIRMAN GARCIA:** I almost thought I would
25 lose Deason. (Laughter)

1 **COMMISSIONER JACOBS:** Let me walk through
2 the second Nassau decision then. I'm reading that to
3 say that it didn't necessarily focus on whether or not
4 this was a QF or not, and whether or not ultimately
5 that QF could obligate the utility.

6 The discussion there seemed to focus on that
7 this was a nonutility generator.

8 **MS. PAUGH:** I disagree. I believe that
9 Nassau II is about QFs. If you look at the first page
10 of the decision, it uses the words sort of
11 interchangeably, but what it says, "Nonutility
12 electric cogenerators that propose to build a natural
13 gas-fired power plant that would be a qualifying
14 facility." I believe Nassau II is clearly limited to
15 QFs; it's not a broader term.

16 **COMMISSIONER JACOBS:** When the opinion gets
17 down to the holding where you want to be real clear
18 about the breadth of your holding, I don't see that
19 distinction at all. And even more so, I see the tone
20 of the discussion having to do with the idea -- I'll
21 just read from it here -- it says -- and I don't have
22 the printed version, I'm looking at the electronic
23 version. It says "The Commission determined that
24 because nonutility generators are not included in this
25 definition, Nassau is not a proper applicant. The

1 Commission reasoned that a need determination
2 proceeding is designed to examine the need resulting
3 from the electric utilities' duty to serve customers.
4 Nonutility generators such as Nassau have no similar
5 need because they are not required to serve
6 customers."

7 Now, help me understand how that logic goes
8 from what that language says to only QFs as nonutility
9 generators.

10 **MS. PAUGH:** Nassau was a QF. Nassau came to
11 the Commission with two petitions, a determination of
12 need. But they also came with a petition to approve a
13 contract with FPL. They didn't go to FPL to get the
14 contract signed. They came here first. They wanted
15 us to approve a contract that FPL did not want. And
16 then they wanted us to tell FPL that FPL had to buy
17 it. That's what Nassau was about on its fundamental
18 facts before the Commission. They didn't even have a
19 contract with the utility in that case. I think
20 that's significant.

21 **COMMISSIONER JACOBS:** Do you have a point,
22 Joe?

23 **COMMISSIONER CLARK:** I wanted to answer
24 Commissioner Johnson's question. We have authorized
25 plants that were bigger than the need and the most

1 recent one is Tallahassee. But it was -- in that
2 case, a good portion of it, in fact, was needed. It
3 wasn't an instance where one could argue it was the
4 tail wagging the dog. It was a case where it was
5 shown that this size unit was the most cost-effective
6 because it had the -- not only did it meet the need,
7 it also helped them backout another unit, and, in
8 effect, mothball it on a cost-effective basis and
9 they, in fact, showed the need on that basis.

10 I think at some point if you have only 1
11 megawatt, do you get to build 500? It's that sort of
12 thing.

13 **CHAIRMAN GARCIA:** I think that that's one of
14 the issues that I hope we'll be discussing also.
15 Because I think we need to also establish a criteria
16 there also. I think that may be a very significant
17 point.

18 I also point out how this decision goes also
19 opens the door to a lot of municipals to figure out
20 the problems that they are dealing on a daily basis
21 with in the new market. And it's not a market we
22 created. It's not at market that we lead here in
23 Florida, although we've done a very good job of
24 regulating for ratepayers, but it's a market that,
25 nonetheless, is coming. That said, if there are no

1 more questions --

2 **COMMISSIONER JACOBS:** We seem to have
3 drifted way into the merits. I thought we were on the
4 motion to dismiss?

5 **CHAIRMAN GARCIA:** I understand. But I
6 always cede to a former Commissioner's request we
7 limit our discussion. I assume that that would
8 happen. If you want to vote this out or --

9 **COMMISSIONER CLARK:** Former Commissioner?

10 **CHAIRMAN GARCIA:** I mean a former chairman.
11 I'm sorry. Jesus. (Laughter)

12 **COMMISSIONER CLARK:** Do you know something I
13 don't know?

14 **CHAIRMAN GARCIA:** No. No. We were just
15 recently celebrating your long and continued tenure at
16 this Commission. I certainly wouldn't be saying that.

17 Commissioner, if it's all right with you, I
18 know we've drifted into the merits but it would just,
19 I think -- since we've done this discussion, so we
20 don't have to go back to it, I'd like to entertain a
21 motion -- if someone has a motion.

22 **COMMISSIONER DEASON:** One quick question,
23 please.

24 **CHAIRMAN GARCIA:** Oh, my God.

25 **COMMISSIONER JACOBS:** Well, I -- go ahead,

1 I'm sorry.

2 **COMMISSIONER DEASON:** I want to make sure I
3 understand. Primary Staff's position is that Duke,
4 even without the -- there's not really a contract with
5 New Smyrna but without -- even with the agreement,
6 without their being co-applicants, they would have
7 standing to come forward as their status as a
8 regulated utility, i.e. an EWG; to come forward and to
9 demonstrate a need based upon economics and not a
10 utility-specific need for reliability.

11 **MS. PAUGH:** That's absolutely correct,
12 Commissioner.

13 **COMMISSIONER DEASON:** Okay. And also they
14 are a regulated utility not only as an EWG but they
15 would be subject to this Commission's regulation under
16 the Grid Bill. Is that also part of your
17 recommendation?

18 **MS. PAUGH:** That is absolutely correct. As
19 well as the Ten Year Site Plan provisions.

20 **COMMISSIONER DEASON:** Okay. So they are
21 regulated at the federal level as an EWG; they would
22 be regulated by this Commission under the Grid Bill,
23 Ten Year Site Plan, and obviously if we agree with
24 Staff, they would be regulated consistent with the
25 Power Plant Siting Act. I guess my question is would

1 there be any difference between our jurisdiction under
2 the Grid Bill for a traditional IOU retail utility and
3 a merchant plant utility?

4 **MS. PAUGH:** Not that I'm aware of but I will
5 turn that over to technical Staff.

6 **MR. JENKINS:** I don't know of any
7 difference.

8 **COMMISSIONER CLARK:** Would you ask that
9 question again and let me hear the answer?

10 **COMMISSIONER DEASON:** My question -- it's
11 been established under Staff's interpretation that
12 this company, Duke, if they build this plant, they
13 would be subject to the Commission's jurisdiction
14 under the Grid Bill. My question is would there be a
15 difference in that jurisdiction under the Grid Bill
16 for Duke versus the way we exercise that jurisdiction
17 traditionally for a retail investor-owned utility?

18 **MR. JENKINS:** There would be no difference,
19 just as there's no difference for a municipal or
20 cooperative utility engaged in generation.

21 **COMMISSIONER JACOBS:** We talked about that
22 and it was my understanding that that -- you came up
23 with legally binding language that says it's subject
24 to the Grid Bill, because they declared it but I
25 still -- where are we coming from with that?

1 **COMMISSIONER CLARK:** You can't agree to
2 jurisdiction. It's either there or it's not.

3 **COMMISSIONER JACOBS:** They agree to it but
4 we can't -- we can't move forward on that.

5 **COMMISSIONER CLARK:** I would be interested
6 in that too. How do they come in under the Grid Bill
7 and Ten Year Site Plan?

8 **MS. PAUGH:** It's Section 366.02 of the
9 Florida Statutes. It is quoted in the primary portion
10 of the recommendation on -- turn to Page 24, please,
11 you'll see the discussion regarding the Grid Bill and
12 Ten Year Site Plan. I quote 366.022 "Duke New Smyrna
13 has proven that they are as investor-owned electric
14 company which is what an electric utility is defined
15 as under the Grid Bill." And it is no stretch to
16 reach that definition. They are.

17 **COMMISSIONER DEASON:** Okay. Let me follow
18 up.

19 **COMMISSIONER JACOBS:** I'm sorry --

20 **COMMISSIONER DEASON:** Go ahead.

21 **COMMISSIONER JACOBS:** I remember now where I
22 lost it here. That's only if we approve this.

23 **MS. PAUGH:** That's correct.

24 **COMMISSIONER JACOBS:** If they never get
25 beyond this --

1 **MS. PAUGH:** What do they do?

2 **COMMISSIONER JACOBS:** Yeah.

3 **MS. PAUGH:** Is that your question? There's
4 an open question, in my opinion, that they could go to
5 Volusia County and build this plant anyway. As you
6 recall, they came to us for a declaratory statement
7 asking whether or not they had to come through the
8 Power Plant Siting Act. We correctly declined that
9 decision because it was a matter of policy applicable
10 statewide, so it was inappropriate for a declaratory
11 judgment action. But that is still an open question.
12 In that case we lose any jurisdiction over them.

13 **CHAIRMAN GARCIA:** That said --

14 **COMMISSIONER DEASON:** I have my follow-up.

15 Given the Grid Bill authority that you've
16 just stated, if there were a situation -- and this
17 hypothetical may not really bear any merit in reality,
18 but, nevertheless, I'll give it -- if we were in a
19 situation in the state where we were at a capacity
20 shortfall and we needed as much generation as
21 possible, and Duke New Smyrna plant somehow was
22 selling power north out of the state and it was
23 getting a higher price than what they get in the
24 state -- I know that's difficult to understand because
25 if we were in an emergency here, do you think the

1 prices would be higher here, but just for the sake of
2 this argument -- would we have authority under the
3 Grid Bill to require Duke New Smyrna to put that
4 energy into the grid -- or maybe they were saying
5 their prices weren't high enough and they weren't
6 willing to generate at all, and we're saying, "Well,
7 I'm sorry about the prices you're going to get. We
8 need it for reliability purposes. Generate from that
9 plant." Would we have authority to do that under the
10 Grid Bill?

11 **MR. FUTRELL:** We believe the Governor and
12 Cabinet would have the authority in a emergency to
13 issue an Executive Order requiring them to serve
14 Florida needs in that kind of a situation.

15 **CHAIRMAN GARCIA:** Great. That said --

16 **COMMISSIONER CLARK:** Let me just follow up
17 on a that bit. Are you saying that -- was the
18 question premised we would not have enough electricity
19 without it?

20 **MR. FUTRELL:** That's correct.

21 **COMMISSIONER CLARK:** We could tell them they
22 would have to generate for in Florida under the Grid
23 Bill. Where is the Grid Bill again?

24 **MS. PAUGH:** The citation for the Grid Bill
25 is also in the recommendation footnote that was --

1 those helpful footnotes.

2 **COMMISSIONER CLARK:** I've told her I didn't
3 like footnotes.

4 **CHAIRMAN GARCIA:** You know, sometimes I only
5 read the footnotes. Not in this case but --

6 **MS. PAUGH:** I'm going to defend my footnotes
7 to death. Page 16 recites the Grid Bill chapters.
8 They were Section 366.04(2), 366.04(5), 366.05(7) and
9 366.05(8).

10 **CHAIRMAN GARCIA:** Are you finished with that
11 answer?

12 **MS. PAUGH:** I was just going to say I happen
13 to have a handy copy of all of those various sections
14 with me, if you'd like to take a look at them.

15 **CHAIRMAN GARCIA:** While Commissioner Clark
16 reads through that, I want to go back to that question
17 because it was a question we sort of touched on at the
18 hearing but I think we didn't go on, but I think it
19 makes a lot of sense.

20 I know it was a complete hypothetical when
21 Commissioner Deason at one point was saying that is a
22 possibility. But if it were. However, I want to ask
23 you on real terms could that be a possibility? Or if
24 we were in a crisis state, do you not think that the
25 plant would not only be selling in Florida but would

1 be selling at the higher places that would be
2 available in Florida at that time?

3 **MR. JENKINS:** That's the more likely
4 scenario. The idea that Duke would be selling to
5 Georgia is possible but not very probable.

6 **CHAIRMAN GARCIA:** Okay.

7 **COMMISSIONER JOHNSON:** So under the -- if we
8 have jurisdiction, as it's stated in the primary, then
9 they would have -- or the transmission line loading
10 relief rules, all of those would apply to Duke.

11 **MR. JENKINS:** All of that would apply if
12 they are approved and defined to be an electric
13 utility. The real thrust, I think, of Commissioner
14 Deason's question was if we somehow find that they are
15 not an applicant and not an utility, and as Leslie
16 says, they go build anyway, which is an open question,
17 and then we have no jurisdiction under the Grid Bill,
18 I'm not sure what we can order them to do when. I'm
19 not sure we can require them to be part of the FRCC
20 and obey by all the transmission loading relief rules
21 or all of the relaying rules that the FRCC has that
22 may be unique to the state. It's just an open
23 question. If you go down the path of denying and
24 saying they are not a utility, I'm not 100% sure just
25 what happens.

1 **CHAIRMAN GARCIA:** Okay. All right, that
2 said, is there a motion?

3 **COMMISSIONER JOHNSON:** Mr. Chairman, I have
4 a motion to make. With respect to 1A I would move the
5 primary recommendation as stated.

6 **CHAIRMAN GARCIA:** Okay. Is there a second?

7 **COMMISSIONER JACOBS:** I'm uncomfortable with
8 the interpretation there. I can reach the result but
9 I don't follow the logic. I think it is a broad
10 interpretation to say that purely because there is no
11 obligation to retail customers, that we take that
12 interpretation away from those cases; say purely
13 because there's no obligation to retail customers then
14 we can make that leap to say this is the kind of an
15 applicant we can bring in wholesale.

16 **COMMISSIONER JOHNSON:** What would you like
17 to see changed?

18 **COMMISSIONER JACOBS:** I'm okay saying
19 because our -- we have to deal with the idea of what
20 kind of contract it is, I think, without question. I
21 think the Court in Nassau said if you come in with a
22 contract, nonutility generator, then you get to come
23 in the door. In my mind that's what 1A is about: Who
24 gets to come in the door.

25 Now, we have to deal with all of the other

1 issues after that, about the quality of that
2 application, and we, then as a matter of public
3 policy, will evaluate them. You merge everything --

4 **CHAIRMAN GARCIA:** So you're narrowing it
5 further.

6 **COMMISSIONER JACOBS:** Right.

7 **CHAIRMAN GARCIA:** And how would you narrow
8 it?

9 **COMMISSIONER JACOBS:** 1A says who gets to
10 come in the door. And I think it's a fair reading of
11 the statute and prior Commission interpretation of
12 that statute and the Nassau cases that a joint
13 applicant who comes in, particularly in this instance
14 with a municipality having demonstrated that this is a
15 cost-effective purchase for them, they can apply; they
16 can come in the door.

17 **CHAIRMAN GARCIA:** But we're squeezing that
18 on the motion to dismiss. You may not be agreeing
19 with all of the rationale, but you're just agreeing --
20 you're clearly seconding the motion in the sense we
21 dismiss this. Then you may want to address that as
22 part of the merits, is what you're saying?

23 **COMMISSIONER JACOBS:** Yeah. I think --

24 **COMMISSIONER JOHNSON:** I was thinking those
25 issues were brought up --

1 **CHAIRMAN GARCIA:** Those are in the merits.

2 **COMMISSIONER JACOBS:** Right. I was afraid
3 we were saying a bit much on 1A.

4 **COMMISSIONER JOHNSON:** Let's make sure.

5 **COMMISSIONER GARCIA:** No.

6 **COMMISSIONER JOHNSON:** Let's make sure.

7 **CHAIRMAN GARCIA:** Okay.

8 **COMMISSIONER CLARK:** That they have -- they
9 can't be an applicant on their own. They've got to
10 come in with New Smyrna and then the issue will become
11 is the entire amount needed.

12 **COMMISSIONER JOHNSON:** Right.

13 **CHAIRMAN GARCIA:** But the recommendation
14 says that.

15 **COMMISSIONER JACOBS:** That's why I asked
16 that question specifically. I was getting the
17 interpretation that that's just a coincidence of these
18 facts. They could have showed up with 580 megawatts
19 and under that interpretation they could have been an
20 applicant.

21 **CHAIRMAN GARCIA:** As long as they had a
22 contract, is what you're saying.

23 **COMMISSIONER JACOBS:** Well, yeah.

24 **CHAIRMAN GARCIA:** And I think Staff wouldn't
25 disagree with that.

1 **COMMISSIONER CLARK:** But they don't have a
2 contract here.

3 **MS. PAUGH:** The primary recommendation says
4 that they may be applicants individually and
5 collectively.

6 **COMMISSIONER CLARK:** And I think what
7 Commissioner Jacobs is saying is they have to come in
8 with -- they can't be an applicant in their own right.

9 **COMMISSIONER JACOBS:** Right.

10 **COMMISSIONER JOHNSON:** And that issue is
11 discussed in Issue 1 but -- I saw that as an Issue 1
12 when we get in and start refining some of the facts.
13 But if we need to refine it --

14 **COMMISSIONER CLARK:** But the point being, I
15 think the primary says -- if you buy into the
16 rationale is that they are an applicant in their own
17 right because they are a regulated utility. And what
18 Commissioner Jacobs is saying is he doesn't agree with
19 that. They must come in with an applicant that has a
20 need to serve it retail. They are a co-applicant as
21 long as there is that.

22 **CHAIRMAN GARCIA:** There's a need. What's
23 the distinction? Wait. Now I'm worried. What is
24 your distinction between what Commissioner Jacobs is
25 saying and what Staff wrote, because I'm not catching

1 it?

2 **COMMISSIONER JOHNSON:** Me either.

3 **COMMISSIONER JACOBS:** They're saying there's
4 a different type of need. Don't let me misstate you
5 but --

6 **CHAIRMAN GARCIA:** Because when you asked
7 that question the first time, Staff clarified it and I
8 think they ended up at the same place you're at. And,
9 again, this is the motion to dismiss. So it deals
10 with this in a much broader way than what we'll
11 finally deal with. This is whether we dismiss or not.
12 I ask you the question again: What's the difference
13 between what he's saying and what your rec said?

14 **MS. PAUGH:** If I understand it, what the
15 primary recommendation says is that New Smyrna Beach,
16 the City, could come in as an applicant for the whole
17 amount, the whole 514. The primary says that.

18 **CHAIRMAN GARCIA:** The City; not a merchant
19 plant. Just the City.

20 **MS. PAUGH:** Well, there would be 484
21 merchant. The primary says that.

22 **CHAIRMAN GARCIA:** Right.

23 **MS. PAUGH:** The primary also says that the
24 EWG alone could have come in for its portion with no
25 contract. And if I understand Commissioner Jacobs,

1 his objection is to the EWG alone coming in for a need
2 determination; it must be as a co-applicant with the
3 City.

4 **CHAIRMAN GARCIA:** I could have sworn when
5 Commissioner Deason asked that question -- correct me,
6 Commissioner Deason, if you -- that we defined it
7 exactly the opposite, or am I missing the point of
8 your question before?

9 **COMMISSIONER DEASON:** I'm not sure. Because
10 we've taken a turn here with this last round of
11 questions. I'm not sure where we are at this point.
12 And I've got some further questions to try to clarify
13 where we are.

14 **CHAIRMAN GARCIA:** That's fine.

15 **COMMISSIONER DEASON:** What I just heard you
16 say is that under Staff's primary recommendation New
17 Smyrna could have come in -- forget Duke for a
18 moment -- in and of themselves, as a utility, they
19 could come in and say, "We've got a need for 30. What
20 we want is economic to build this size plant and what
21 we're going to do with the excess is that we're just
22 going to sell it on the market." Are you saying that
23 they could have done that?

24 **MS. PAUGH:** I think I may have muffed it.

25 **COMMISSIONER DEASON:** I thought that's what

1 you said. And that's a new twist.

2 **MS. PAUGH:** It is. And I think I may have
3 muffed it.

4 **MR. JENKINS:** What she really has to put in
5 there is saying that it's cost-effective.

6 Let me make another statement, is that the
7 motions to dismiss do not deal with the situation of
8 it being cost-effective to New Smyrna Beach. The
9 motions to dismiss only deal with the merchant plant
10 portion of the application.

11 If you threw out -- if you approve the
12 motions to dismiss, you still have the open question
13 of can we certify or approve this plant based on the
14 cost-effectiveness to the retail serving utility, New
15 Smyrna Beach, because it is getting a bargain in the
16 deal. That's a totally separate question.

17 **CHAIRMAN GARCIA:** The distinction that
18 Leslie failed to make is about the efficiency of it.

19 **MR. JENKINS:** Because the efficiency --
20 because I think it's more because it's a loss leader.

21 **CHAIRMAN GARCIA:** Right.

22 **MR. JENKINS:** It's probably about a 50%
23 discount.

24 **COMMISSIONER DEASON:** I think we need to be
25 clear because here again, back to my concern, I don't

1 want to do anything here that jeopardizes my belief
2 that our regulated retail utilities, primarily the
3 IOUs which we have rate regulation over -- that
4 there's nothing there that would prohibit them,
5 prevent them coming forward to demonstrate a need
6 based upon economics. Let's reverse this for just a
7 second. I know this is a total hypothetical.

8 What if Florida Power and Light were coming
9 in and saying, "We only have the need for 30 megawatts
10 right now."

11 **MR. JENKINS:** But we've got a good deal --

12 **COMMISSIONER DEASON:** "But we can build this
13 size plant and the economics are such that we can sell
14 it on the market."

15 **MR. JENKINS:** If it passes the
16 cost-effectiveness test compared to all other
17 alternatives we would recommend approval.

18 **COMMISSIONER DEASON:** Another twist. What
19 if they were coming in and saying, "For that amount of
20 plant in excess of the 30 that we need, we don't want
21 to put it in rate base. We want to the sell it on the
22 market and let us keep whatever profits we make." Is
23 that something we could consider?

24 **MR. JENKINS:** Yeah. We'd recommend approval
25 of that. But the problem with that is you'd also have

1 to march up to FERC arm in arm and get FERC approval
2 for them to sell at market prices because they have
3 market power in the state.

4 **COMMISSIONER DEASON:** And there are certain
5 criteria within the federal act, which if we certify
6 to the federal authority that we can monitor it and
7 make the cost separations or whatever, then there
8 could be an exemption granted; is that correct?

9 **MR. JENKINS:** I think those exemptions go
10 more to can they construct a plant, not to whether
11 they can charge market prices.

12 We, in a sense, before the Policy Act was
13 passed in 1992, kind of did that with the Tampa
14 Electric Hardy plant, if you recall, around -- I don't
15 know what year, 1989 or '87. Remember Tampa Electric
16 Hardy is an affiliate of a transmission-owning
17 utility, so they would not qualify under FERC's
18 current rules for market power pricing.

19 But we went up there. We sent various
20 pleadings and FERC eventually approved -- albeit this
21 was before they came down much harder on this notion
22 of EWG and market pricing.

23 Yes, I think it can be done. I think if
24 Florida Power and Light were to come in and say they
25 wanted to build a merchant plant, we, Staff, would

1 recommend approval. And we'd also recommend marching
2 arm in arm up to Washington with FPL to see if we
3 could we get FERC approval of it.

4 **COMMISSIONER DEASON:** That would allow them
5 to sell at market rates as opposed to cost based?

6 **MR. JENKINS:** That's correct. And it's only
7 FERC policy. I don't believe it's federal law per se.

8 **COMMISSIONER CLARK:** Well, it is -- they are
9 implementing the federal law.

10 **MR. JENKINS:** In my opinion they've gone a
11 bit beyond it.

12 **COMMISSIONER CLARK:** Thank you. (Laughter)

13 **COMMISSIONER JOHNSON:** But with respect to
14 the proposition we would have the ability to go to
15 FERC to request that they be allowed to sell at market
16 price under the law.

17 **MR. JENKINS:** That's correct.

18 **COMMISSIONER CLARK:** We would have the
19 ability to do that?

20 **MR. JENKINS:** Of course we would. If
21 Florida Power and Light wanted to build just a pure,
22 raw merchant plant, and we wanted to certify it, we
23 thought it was a good deal and cost-effective to
24 Florida Power and Light's other customers or somehow
25 benefited the state, there's nothing to prevent us

1 from going to Washington and camping out on FERC's
2 door until they approve it.

3 **COMMISSIONER CLARK:** What would they
4 approve?

5 **CHAIRMAN GARCIA:** That would certainly get
6 them to approve it.

7 **COMMISSIONER CLARK:** What would they
8 approve?

9 **MR. JENKINS:** Approve the sales from that
10 plant to be at market prices.

11 **COMMISSIONER CLARK:** Well, I guess -- you
12 know, my point is they're either going to be market
13 prices or cost-based prices, or whatever it is, when
14 they consider that they have market power.

15 **MR. JENKINS:** That's correct.

16 **COMMISSIONER CLARK:** The point being -- it's
17 still up to us to determine -- what they can charge
18 with respect to what FERC allows has no bearing on
19 what we can do in terms of the power plant siting.

20 **MR. JENKINS:** That's correct. And my
21 recommendation would be that we go and make sure that
22 they can charge market prices for an FPL merchant
23 plant.

24 **COMMISSIONER CLARK:** Why would we care?

25 **MR. JENKINS:** Why would we care? Because we

1 have to think of all of the customers in the state,
2 not just FPL.

3 **COMMISSIONER CLARK:** Why would we care if
4 it's not in rate base and doesn't affect the
5 customers?

6 **MR. JENKINS:** Because other utilities would
7 be buying that power and be getting cheaper
8 electricity. Tampa Electric. Sebring.

9 **COMMISSIONER CLARK:** Not necessarily.
10 You're assuming that market price will be below cost.

11 **MR. JENKINS:** That's probably correct. But
12 I'd like to have the choice of being able to buy
13 instead of blacking out.

14 **COMMISSIONER CLARK:** Whether or not it is
15 market priced or cost based has no bearing on the
16 issue of Siting Act. I mean --

17 **MR. JENKINS:** I --

18 **COMMISSIONER DEASON:** It has no bearing on
19 the issue of us siting it. It has bearing on whether
20 a retail investor-owned utility would even consider
21 building a merchant plant. Because if they have to
22 build it and sell it at cost, there's no economic
23 incentive to do that.

24 **MR. JENKINS:** That's correct. That's better
25 said.

1 **COMMISSIONER CLARK:** Yeah. But I thought --
2 the notion of whether or not we would approve it would
3 be tied to whether or not we could assure that they
4 would have market prices. I don't think it is.

5 **MR. JENKINS:** No. We couldn't assure that.
6 We would have to do the camping out in Washington.

7 **CHAIRMAN GARCIA:** A prospect that sometimes
8 looks favorable.

9 We have a motion, and I think, Commissioner
10 Jacobs, we had a second, or are you taking back your
11 second? Or are you narrowing -- would you like to
12 propose an amendment to the motion? I just don't
13 think -- I think what you're saying, and narrowing it,
14 I think, goes to Issue 1, but I'm sure Commissioner
15 Clark could defend your position.

16 **COMMISSIONER JOHNSON:** See, to me it struck
17 me that this 1A went to the issue of whether or not
18 there were proper applicants. And we'll have an
19 opportunity in 1 to deal with the need and
20 cost-effectiveness analysis.

21 I like the analysis as it's written. I
22 believe that it's pursuant to and consistent with the
23 statute. We had all of the discussions about once we
24 do this, and understanding the analysis and how it has
25 been laid with respect to who is a regulated utility,

1 we'll have jurisdiction, grid jurisdiction. We'll
2 have jurisdiction to look at natural gas consumption.
3 Determine if there needs to be oil backup, extra
4 capacities. There's all sorts of things that are
5 provided in here that I think with respect to that
6 initial determination as to whether they are
7 applicants or not, that the recommendation is on all
8 fours.

9 **MR. JENKINS:** That's correct. By taking
10 jurisdiction we can impose those other requirements.
11 And if we don't take jurisdiction, it's up in the air
12 what we can do.

13 **COMMISSIONER CLARK:** But, Commissioner
14 Johnson, your motion is that Duke New Smyrna can be an
15 applicant in its own right.

16 **COMMISSIONER JOHNSON:** Uh-huh. The next
17 question -- they still have to do a need assessment.
18 Got to determine if it's cost-effective. They could
19 come in here -- a merchant could come in here and say,
20 "Look, we want to build a gazillion megawatt plant."
21 "Oh, you're an applicant. Come on in." Now, they
22 might have wasted their time because we will determine
23 that it wasn't cost-effective.

24 **CHAIRMAN GARCIA:** There was more criteria
25 involved.

1 **COMMISSIONER CLARK:** That's what I argued in
2 Nassau and I lost.

3 **COMMISSIONER JOHNSON:** And I agree with you.
4 I read that last night and I said Susan was on point.

5 **CHAIRMAN GARCIA:** You were right way back
6 then.

7 **COMMISSIONER JOHNSON:** But in that case
8 Commissioner Deason -- the point that made it
9 different, they might have been an applicant but I
10 think ultimately it should have been dismissed because
11 you were trying to tie them to Peninsular need when we
12 really were dealing with binding utility-specific
13 ratepayers.

14 **COMMISSIONER CLARK:** I think really what --

15 **CHAIRMAN GARCIA:** What you were saying
16 then --

17 **COMMISSIONER CLARK:** No. You know, I think
18 that the result was correct --

19 **COMMISSIONER JOHNSON:** The result was
20 correct.

21 **COMMISSIONER CLARK:** -- in that case. I
22 think what happened was that there was a sort of
23 recognition that because you had to show need and need
24 was tied to serve to the retail ratepayers of Florida,
25 there's no point in saying a person can be an

1 applicant if they don't have a contract or aren't a
2 utility. So it sort of married up those concepts when
3 it denied it. I thought you should just say -- when
4 it dismissed, I thought you should just deny the
5 application because they couldn't show need.

6 **COMMISSIONER JOHNSON:** Exactly. And this is
7 consistent with what you thought but --

8 **COMMISSIONER CLARK:** Right. But the end
9 result is the same and you're just taking two steps
10 where the Commission took one.

11 **COMMISSIONER JACOBS:** I see it very much
12 that way. My concern is that because you take it two
13 steps, undue weight can be given to this portion of it
14 more so than the latter discussion.

15 I'm concerned that undue weight can be given
16 to the idea that you get in the door with any caliber
17 of showing and then we look at that. In my view we
18 ought to narrow the scope of who gets in the door or
19 be very clear --

20 **CHAIRMAN GARCIA:** I think that's what they
21 did there.

22 **COMMISSIONER JACOBS:** Be very clear.

23 **CHAIRMAN GARCIA:** But that doesn't change
24 where we end up. In other words, the final product is
25 still creating the criterion, which this

1 recommendation does.

2 Let's remember where we are. We're on a
3 motion to dismiss. We have had a two-hour-plus
4 discussion on the motion to dismiss, which is fine.
5 And we can have another eight hours, although I'm
6 scheduled to leave at seven tonight, so we won't go
7 any further than that.

8 What I know is where we are now is at a
9 motion to dismiss. And this motion to dismiss
10 clearly -- at least in my opinion, but -- clearly
11 we're past that. Now, the criteria you're speaking
12 about, I think I might agree with the limitations that
13 you want to put on it, on the criteria. Because I
14 think that this motion almost follows Susan's former
15 reasoning when she dissented on this. They are an
16 applicant. There's no question about it. So can we
17 go on? I think that's the question that is posed by
18 the motion to dismiss. And then it's narrowed out in
19 the 30.

20 **COMMISSIONER CLARK:** But you see, if I was
21 wrong that time, then Nassau is saying -- I mean
22 if --.

23 **CHAIRMAN GARCIA:** I understand what you're
24 saying. I understanding what you're saying.

25 **COMMISSIONER JACOBS:** I'm uncomfortable.

1 **COMMISSIONER DEASON:** What Nassau was
2 saying -- we need to clarify this -- in my opinion --
3 and I didn't write the order or recommendation but I
4 did vote on it -- was that Nassau could not
5 demonstrate need. They were not coming forward
6 saying, "We want to build this plant based upon
7 economics," because they wanted to do it at avoided
8 cost, which was no benefit to the customer. The
9 customer was indifferent. So they were not doing it
10 for economic reasons. So the only way they could
11 demonstrate need was to say that it was needed for
12 reliability to serve customers of a specific utility.
13 And we were saying, no, you don't have retail
14 customers to do that so you don't have that need
15 either. You struck out on both. You're not doing it
16 for economic reasons and you don't have the retail
17 need to do it. You're not an applicant.

18 **COMMISSIONER JOHNSON:** Is that a second?

19 **COMMISSIONER JACOBS:** I was about to say
20 while I'll uncomfortable, I don't want to belabor --
21 we can proceed on. But I do have those reservations
22 and we can do it later.

23 **CHAIRMAN GARCIA:** We can address that in
24 Issue 1. Is there a second?

25 **COMMISSIONER DEASON:** I second the motion.

1 **CHAIRMAN GARCIA:** All right. All those in
2 favor signify by saying "aye." Aye.

3 **COMMISSIONER JOHNSON:** Aye.

4 **COMMISSIONER DEASON:** Aye.

5 **CHAIRMAN GARCIA:** All those opposed.

6 **COMMISSIONER CLARK:** Nay.

7 **COMMISSIONER JACOBS:** Nay.

8 **CHAIRMAN GARCIA:** Okay. We have a four-one
9 vote.

10 **COMMISSIONER CLARK:** No. No. He voted nay.

11 **CHAIRMAN GARCIA:** Oh, I'm sorry. I thought
12 he voted for it. Three-two. Thank you, Susan.

13 All right, Joe? I guess this is your -- let
14 me ask you a favor. We've gone a while and it just
15 strikes me that we'd probably be fresher if we take
16 ten minutes. And I'll ask you, Joe, I think Staff has
17 read this. I think -- I mean, the Commissioners have
18 read this. I'm sure most of the people in the
19 audience have read this. If I could ask you to simply
20 sum it up; walk through each issue, not too detailed
21 because I think Commissioner Deason may have some
22 points, and I'm certain Commissioner Jacobs is going
23 to have a few issues that he's going to want to
24 discuss. And that will make it easier. So let's do
25 this -- I'm sorry?

1 **MS. PAUGH:** Before we get to the merits of
2 this, we have two more legal issues. They are Issues
3 1B and 1C that will require a vote.

4 **CHAIRMAN GARCIA:** Do I have a motion on 1B
5 and 1C?

6 **COMMISSIONER JACOBS:** Move Staff.

7 **COMMISSIONER JOHNSON:** Second.

8 **CHAIRMAN GARCIA:** We've got a motion and
9 second. All those in favor signify by saying "aye."

10 **COMMISSIONER CLARK:** Which are those?

11 **MS. PAUGH:** 1B and 1C.

12 **COMMISSIONER CLARK:** Yes. But what is the
13 substance?

14 **MS. JAYE:** Commissioner, 1B is the Motion
15 for Reconsideration filed by Florida Wildlife
16 Federation.

17 **COMMISSIONER CLARK:** All right. And the
18 other one is?

19 **CHAIRMAN GARCIA:** Motion to Strike
20 Additional Authority Letter to be letter granted.

21 **COMMISSIONER CLARK:** Got you.

22 **CHAIRMAN GARCIA:** Okay. There's a motion
23 and second. All those in favor signify by saying
24 "aye." Aye.

25 **COMMISSIONER CLARK:** Aye.

1 **COMMISSIONER JOHNSON:** Aye.

2 **COMMISSIONER JACOBS:** Aye.

3 **COMMISSIONER DEASON:** Aye.

4 **CHAIRMAN GARCIA:** All opposed? Okay.

5 five-zero.

6 So we're going to take a ten-minute break.

7 Commissioners, if we can keep it at ten -- I know I'm
8 the greatest culprit there. But if we could keep it
9 to ten, and we'll be back and Joe will walk us through
10 it a sentence apiece. Let's get through the 33. And
11 then the Commissioners can add questions after we
12 finish.

13 (Brief recess is taken.)

14 - - - - -

15 **CHAIRMAN GARCIA:** All right, Commissioners,
16 we're going to get Joe to walk us through some of the
17 high points of the recommendation and we hope he will
18 be brief so then we can argue some of the --

19 **MR. JENKINS:** Thank you, Chairman.

20 I'm just going to touch on Issues 1, 24 and
21 33. Those are, I think, the main policy issues in the
22 case. In writing this up we put most of the matters
23 in Issue 1 because that's where it seemed to fit the
24 best.

25 In Issue 1, there are really two ways -- and

1 Commissioner Jacobs was suggesting this -- there are
2 two ways to certify the plant. The first way is a
3 more restrictive way or more traditional way. And
4 that is to certify it as cost-effective to the
5 applicant. In other words, much like an oil backout
6 unit where we certify 2,000 megawatts with zero
7 kilowatt need.

8 In this case here we have a retail serving
9 utility that needs 30 megawatts. It can get a deal, a
10 loss leader. Everyone is aware of why Duke is giving
11 them a loss leader, and we can certify it as
12 cost-effectiveness to the applicant.

13 Your second choice there is to certify the
14 remaining 484 megawatts as a raw, naked merchant
15 plant. Either one --

16 **CHAIRMAN GARCIA:** We can do either one but
17 we don't have to take both.

18 **MR. JENKINS:** That's correct.

19 **CHAIRMAN GARCIA:** Which, if I'm not
20 mistaken, was Commissioner Jacobs' issue, which I hope
21 he will realize he could be a fourth on the other
22 motion. But nonetheless, the distinction here, the
23 very specific distinction is that Staff here breaks
24 it. And Staff says that is why I'm -- because I want
25 to understand where we were. Because I think we

1 danced around the same issue, and I understand where
2 Commissioner Jacobs got stuck because I almost voted
3 against the motion when I started thinking about it.
4 You had to open it as wide as possible just to get in
5 to where we are now. Now we can narrow that scope.

6 **MR. JENKINS:** If you wish.

7 Issue 24 is the stranded cost issue. I
8 bring it up only because if there's interest in
9 opening a docket on this, I'd like to do that. I
10 don't think it's necessary, but if you want to I need
11 to be clear that that's what you want me to do.

12 And Issue 33 is the simple issue, close the
13 docket. There has been expressions that we opened the
14 floodgates. Again, I do recommend opening a docket, a
15 rule-type docket. Maybe converting our reserve margin
16 reliability docket into something where we don't force
17 the utilities to build higher reserves in this
18 questionable period of electric reliability but give
19 some credence to merchant plants filling at least a
20 10% reserve margin, and selecting from the
21 oversubscription by who will build the most solar
22 photovoltaic units.

23 **CHAIRMAN GARCIA:** But that's to be
24 decided --

25 **MR. JENKINS:** That's to be decided at a much

1 later date.

2 **CHAIRMAN GARCIA:** Right. Why do we have
3 that photovoltaic in there?

4 **MR. JENKINS:** We saw it in Duke and --

5 **CHAIRMAN GARCIA:** We thought it was a good
6 idea --

7 **MR. JENKINS:** We thought it was a good idea.
8 And FEECA has not generated much photovoltaic. We've
9 got 10 kilowatts from an FPL green pricing program,
10 but nothing of the magnitude of 150 kW, and we thought
11 it would be a nice way to jump-start it; create jobs
12 in Florida. Maybe even sell photovoltaics around the
13 world.

14 **CHAIRMAN GARCIA:** Okay. Let's see. You've
15 got authority now. Just elbow him when he goes too
16 far.

17 **COMMISSIONER JOHNSON:** Where is the
18 photovoltaic argument in -- is it in Issue 1?

19 **CHAIRMAN GARCIA:** No.

20 **MR. JENKINS:** No. It's in Issue 33.

21 **COMMISSIONER JOHNSON:** Not stand-alone, but
22 as you all discussed, the 150 megawatt photovoltaic --

23 **MR. JENKINS:** 150 kilowatt.

24 **COMMISSIONER JOHNSON:** Is that in issue.

25 **MR. JENKINS:** 33 --

1 **MR. FUTRELL:** It's in Issue 1, and it's also
2 in the conservation issue, which is, I believe --

3 **MR. JENKINS:** It's just mentioned. It's not
4 mentioned as a part of a comprehensive plan.

5 **COMMISSIONER JOHNSON:** I guess where I have
6 some questions, and you can tell me where it is.

7 **MR. JENKINS:** Page 119 and 120.

8 **COMMISSIONER JOHNSON:** It strikes me that
9 somewhere in the analysis you all talk about that and
10 like as if it were, as I think it should be, an
11 important part of the analysis and calculation when
12 we're looking at the need and cost-effectiveness. But
13 you also state that there's some uncertainty as to
14 whether or not the plant is really going to come on
15 line.

16 **MR. JENKINS:** That's correct.

17 **COMMISSIONER JOHNSON:** Where is that
18 discussed so --

19 **MR. FUTRELL:** Page 60.

20 **COMMISSIONER JOHNSON:** So that is in this
21 first analysis. Okay. Issue 1.

22 **MR. JENKINS:** Yes. Don't let me gloss over
23 that fact. We're not sure from the record if there's
24 any binding agreement that the 150 kW solar
25 photovoltaic will be built if this plant is approved.

1 **CHAIRMAN GARCIA:** Commissioners, I guess we
2 can just tee it up. I was just going to just since --
3 I guess I'm going to try to sort of narrow it. We can
4 take it issue-by-issue or maybe we can make a broad
5 description of what issues we think are important and
6 then go down the row.

7 I think Issue 1 is clearly by far the most
8 important one. And I guess I'll start it off. I
9 think we should limit it. I believe we should use the
10 more standard criteria that this Commission has used
11 in the past. I believe it speaks to some of what
12 Commissioner Deason stated: That to play you need
13 some type arrangement, some type of commitment to sell
14 power to a particular person, and that's part of the
15 entry or the fee.

16 **COMMISSIONER DEASON:** You're putting words
17 in my mouth. At the appropriate time I'll respond.

18 **CHAIRMAN GARCIA:** No. All I'm saying is
19 that it just strikes me that it keeps the format of
20 this Commission and the issues that we're going to be
21 discussing at this Commission -- I think it keeps them
22 in a much more direct manner. And I guess -- I open
23 Issue 1. I know some of you may have questions and
24 the like.

25 **COMMISSIONER DEASON:** Well, I believe in the

1 previous vote, and I'm not wanting to reconsider that,
2 but in the previous vote, on a three-to-two vote we
3 approved Staff's primary which indicated that an
4 applicant -- and this could have been Duke by itself
5 without the City. Of course, that's not the factual
6 situation here. We have them coming hand in hand. I
7 would note, though, that there's not a contract
8 between the two. I would also note that this plan is
9 being planned, financed, built and operated and is
10 going to be priced and everything by Duke, not by New
11 Smyrna.

12 So for us to put a limitation, which could
13 be interpreted that we would only consider a merchant
14 plant is if there is an agreement of some megawatts to
15 provide at some preferable rate, I think is bad
16 policy. We shouldn't do that.

17 Now, New Smyrna, obviously that's the facts
18 of this case. And if this gets approved obviously I
19 would feel that Duke would have to abide by the
20 agreement and do what they are going to do for New
21 Smyrna. And those facts stand on those facts. But I
22 wouldn't want -- now this is just one Commissioner
23 speaking -- I wouldn't want it to be interpreted that
24 the only way this Commissioner would ever consider a
25 merchant plant if there is a retail utility that's

1 getting some megawatt-hour commitment from it at some
2 preferable rate.

3 **CHAIRMAN GARCIA:** I wouldn't go that far
4 either and that's not my position. But what is my
5 position is there has to be a need of some sort in
6 Florida. And that I'm sorry, I probably narrowed it
7 too much. What we're doing is there has to be some
8 need, is what I think that Staff says in its first --

9 **MR. JENKINS:** A co-applicant need. See,
10 that flies in the face of what Commissioner Deason
11 just said.

12 **COMMISSIONER CLARK:** It gets back to the
13 issue on the first one.

14 **COMMISSIONER DEASON:** Either you can
15 demonstrate need on economics or you can demonstrate
16 it on reliability; one or the other.

17 **MR. JENKINS:** Okay.

18 **CHAIRMAN GARCIA:** Right.

19 **COMMISSIONER CLARK:** But I do think the
20 Nassau Power case stood -- and my argument there was
21 that you need to show need to serve retail ratepayers.
22 So, you know, what is needed? Is it the 30 megawatts
23 or is it the whole plant?

24 **COMMISSIONER DEASON:** For the whole plant to
25 be built I think you're going to find there's a need

1 for the entire amount of capacity.

2 I think you cannot say there's a need for 30
3 so go build 400, 500 or whatever.

4 **COMMISSIONER CLARK:** I agree with that.

5 **COMMISSIONER JACOBS:** How do we sit this --
6 if we follow this rationale, how do you stand this
7 decision beside those decisions where we deny portions
8 of needs that have been applied for?

9 **MR. FUTRELL:** I know Florida Power
10 Corporation several years ago applied for four units
11 to come on line in the late 1990s. And the Commission
12 decided that two units were needed but that the other
13 remaining two, there was some question as to whether
14 the actual megawatt need would develop, and,
15 therefore, it was decided to hold off at that time.
16 So only two of the units way approved.

17 **COMMISSIONER CLARK:** And what was the need
18 that had to develop?

19 **MR. FUTRELL:** It was a megawatt need.

20 **COMMISSIONER CLARK:** A need to serve what?
21 To do what?

22 **MR. FUTRELL:** Florida Power's customers.

23 **MR. JENKINS:** That case is distinguishable
24 because it was a need way, way out into the future.

25 **COMMISSIONER JACOBS:** Without any

1 distinction I guarantee you're going to see a
2 800-megawatt unit show up. So that will be a criteria
3 that will enter into that evaluation or that analysis
4 there? Whether or not.

5 **MR. JENKINS:** That's the question before
6 you. Do you want to restrict it to having a
7 co-applicant utility getting a discount price, loss
8 leader?

9 **COMMISSIONER JACOBS:** No. That's not the
10 issue necessarily.

11 **MR. JENKINS:** Or do you want to say that we
12 accept applications for raw, naked merchant plants.
13 And there doesn't seem to be any middle ground in
14 there.

15 **COMMISSIONER JACOBS:** What I understood you
16 to say is that we would consider some cap as to
17 reserve margin.

18 **MR. JENKINS:** Oh, yes. The cap tends to go
19 with the more raw, naked merchant plants of having a
20 roughly 4,000-megawatt merchant plant cap or eight
21 Duke equivalents.

22 **COMMISSIONER JACOBS:** Who gets the build at
23 4,000?

24 **MR. JENKINS:** We would select from the
25 4,000, or the eight Duke equivalents as to who would

1 build the most solar photovoltaic capacity.

2 **COMMISSIONER JACOBS:** But that's yet to be
3 decided.

4 **MR. JENKINS:** That's yet to be decided.

5 **CHAIRMAN GARCIA:** That's a proceeding in
6 which this Commission is going to open a rule docket
7 and we will figure out rules to do that.

8 **MR. JENKINS:** Precisely.

9 **COMMISSIONER CLARK:** Rules to do what?

10 **MR. JENKINS:** What cap to set. Would it
11 have a cap, what cap to set, and how to select from
12 any oversubscription.

13 **COMMISSIONER DEASON:** That's certainly an
14 issue for another day.

15 **MR. JENKINS:** Hopefully.

16 **COMMISSIONER JACOBS:** I may be wrong here
17 but in the City of Kissimmee, did -- did we have a
18 instance there where we also did not approve all of
19 the requests? Maybe it was FMPA, a FMPA facility.
20 But seems like I remember something where the City of
21 Kissimmee had this site where they had asked to build
22 all of the units but they had not built all of them
23 and we just approved them now to build the last unit
24 there. Was that the case?

25 **MR. JENKINS:** No.

1 **COMMISSIONER JACOBS:** That's not the case.

2 **COMMISSIONER CLARK:** What, again, is the
3 need that is being met by the entire unit?

4 **MR. JENKINS:** The entire unit makes the 30
5 megawatts cost-effective to the City applicant as a
6 loss leader. In other words, it's just like Wal-Mart
7 pricing something real cheap --

8 **COMMISSIONER CLARK:** I understand that.

9 **MR. JENKINS:** Okay.

10 **COMMISSIONER CLARK:** I understand that. But
11 I'm still trying to tie it to the statute. Where does
12 the statute --

13 **MR. JENKINS:** Oh. Cost-effectiveness to the
14 applicant utility.

15 **COMMISSIONER CLARK:** Where does it say that?

16 **MR. JENKINS:** It's in one of the criteria in
17 the Plant Siting Act in the disjunctive.

18 **MR. FUTRELL:** Page 61, the third criteria is
19 whether -- "The Commission is take into account
20 whether the proposed plant is the most cost-effective
21 alternative available." Also in two, "The Commission
22 is take into account the need for adequate electricity
23 at reasonable cost." So cost-effectiveness and costs
24 are twice cited in the statute.

25 **COMMISSIONER JOHNSON:** And then in your

1 analysis, I guess Section 5 where it says "other
2 matters within the jurisdiction to which it deems
3 relevant," is that where you all are pulling the FEECA
4 statutes and the goals there with respect to
5 photovoltaic?

6 **MR. JENKINS:** That's probably going to be
7 correct, although we really haven't gone to any great
8 detail on that. But, again, that's a future date.
9 But you're quite correct.

10 **COMMISSIONER JOHNSON:** Is that something
11 that was factored into Staff's analysis today as to
12 need?

13 **MR. JENKINS:** Not to the in-depth of the
14 question you just asked.

15 **COMMISSIONER CLARK:** Joe, let me ask you a
16 question about this. Now, if a utility -- if we had a
17 similar situation and the particular -- I guess I'm a
18 little confused. You seem to say that the need is 30
19 megawatts.

20 **MR. JENKINS:** That's correct.

21 **COMMISSIONER JACOBS:** But it is the 500 that
22 makes its cost-effective because it comes out --

23 **MR. JENKINS:** That's correct. The two are
24 inseparable.

25 **COMMISSIONER CLARK:** The two are

1 inseparable.

2 **MR. JENKINS:** But for the 484, low cost 30
3 megawatts would not exist.

4 **COMMISSIONER CLARK:** So if we had a
5 situation where we had a number of applicants come in
6 willing to provide 10 megawatts out of a 500 plant,
7 and suppose they provided it at zero cost, could we
8 deny that application?

9 **MR. JENKINS:** I'm sure you could deny it. I
10 probably wouldn't recommend it. But I would also make
11 it subject to this cap provision that we're going to
12 have, discuss at a later date.

13 Frankly, the cap, in my mind, does lend
14 itself much better to the raw merchant plant
15 application.

16 **COMMISSIONER CLARK:** But you would lose
17 control over the number of megawatts built in the
18 state if you didn't tie it that way.

19 **MR. JENKINS:** No. It would still be 4,000.
20 Your question really goes to the more raw, naked
21 merchant plant.

22 The issue you really pose is we have a
23 different first-in-line type problem, and that is, the
24 first eight cities have to come in hand-in-hand with a
25 cost-effective application and we would be denying the

1 other 10 or 20 cities.

2 **COMMISSIONER CLARK:** Well, then why is it --
3 why wouldn't it be determined to be arbitrary and
4 capricious with respect to the latter ones because
5 they are denied the same deal that was given to the
6 first one?

7 **MR. JENKINS:** The only criteria we would
8 select among -- if there are 20 cities under the first
9 scenario, if 20 cities came in and only eight could be
10 built the Duke 500-megawatt size, we would select from
11 them who would get built the most solar photovoltaic,
12 so it would be kind of a bidding.

13 **COMMISSIONER CLARK:** That is your suggestion
14 as to what we should do.

15 **MR. JENKINS:** Yes, it is. And that's for a
16 future date.

17 **COMMISSIONER CLARK:** So you're saying that
18 because the 30 megawatts are needed, and it's being
19 provided at less than cost to the City --

20 **MR. JENKINS:** Right.

21 **COMMISSIONER CLARK:** -- that we should
22 approve the whole amount.

23 **MR. JENKINS:** That's correct.

24 **COMMISSIONER CLARK:** We should find there's
25 a need for the whole amount even though there is not a

1 need to serve demand.

2 **MR. JENKINS:** That's correct. Just like the
3 oil backout units.

4 **COMMISSIONER JACOBS:** Issue 8 we deal with
5 the cost-effectiveness issue. Are we making a
6 determination on Issue 1 on that by virtue of this
7 decision on Issue 8? Are we going to make the final
8 determination as to cost-effectiveness? Which is the
9 final statement on that?

10 **MR. JENKINS:** Well, I have no problem in
11 doing it all in Issue 1. But remember these issues
12 were strung out by the intervenors for whatever reason
13 you can surmise, much more detailed than we, Staff,
14 would have written.

15 **COMMISSIONER JACOBS:** Well --

16 **MR. JENKINS:** I mean, if you vote for
17 Issue 1, Issue 8 is in a sense moot, but --

18 **COMMISSIONER JACOBS:** That kind of was a
19 concern of mine.

20 Let me just explore some questions here
21 about the concern I have.

22 I went and looked at some other need orders,
23 and we've looked at the issue of cost-effectiveness.
24 It has historically entailed a fairly comprehensive
25 and involved analysis. In particular I looked at the

1 City of Tallahassee. And a very sophisticated study
2 was done there to look at all of the elements that
3 were a factor in the cost-effectiveness of that plant.

4 **MR. JENKINS:** That was among competing
5 generation technologies where there was really no
6 clear winner because a lot of the competing generation
7 technologies had similar costs. And when you present
8 worth them for over 20 or 30 years, demagnify the
9 differences, the differences were only a few percent;
10 not a vary large number like we have here. This
11 number, \$18.50 a megawatt-hour, I would estimate in
12 the Tallahassee case -- well, the former director of
13 Tallahassee is here and I can't ask him. I think it
14 was about \$35 a megawatt-hour.

15 **COMMISSIONER JACOBS:** You referenced the
16 \$18.50 price that --

17 **MR. JENKINS:** Right.

18 **COMMISSIONER JACOBS:** That brings me to the
19 crux of my concern. That amount, I question whether
20 or not we can make the full assessment of
21 cost-effectiveness by looking at that amount. I think
22 it's been -- the record, while it may not absolutely
23 make this as conclusion, I think it's pretty clear
24 that that's a very favorable rate that was given to
25 the City of New Smyrna Beach pretty much as you

1 characterized it a loss leader.

2 **MR. JENKINS:** Right.

3 **COMMISSIONER JACOBS:** And, at best, will
4 probably only cover the entitlement of New Smyrna
5 Beach. The 31st unit of production out of this unit
6 would --

7 **MR. JENKINS:** Be much more.

8 **COMMISSIONER JACOBS:** -- very likely be
9 more.

10 The point that I came to is, we've
11 historically engaged in this very elaborate, up-front
12 analysis of cost-effectiveness when we've made a
13 determination of need. And what I see happening here
14 is essentially deferring that analysis to two things.
15 One is the operation of the wholesale market, and two,
16 to the actions that will be required of our users that
17 buy from this plant.

18 **MR. JENKINS:** Okay. I think what you're
19 getting to is the fact that the agreement for
20 New Smyrna Beach to obtain the \$18.50 per
21 megawatt-hour is not a fully signed agreement.

22 **COMMISSIONER JACOBS:** No. I'm sorry.

23 **MR. JENKINS:** You're not getting to that.

24 **COMMISSIONER JACOBS:** Where I'm going is
25 over in Issue 8 and Page 81. The issue there is, is

1 this plant the most cost-effective alternative
2 available. Now, as to the 30 for New Smyrna Beach,
3 that's probably not an argument there, particularly at
4 the prices stated.

5 **MR. JENKINS:** That's correct.

6 **COMMISSIONER JACOBS:** Okay. And if we make
7 our decision on that set of facts, and on only that
8 relationship, I think, perhaps this argument is moot.
9 But we're making a decision on the 500-plus megawatt
10 plant.

11 **MR. JENKINS:** Well, as to pricing you're
12 only making a decision on the \$18.50. We have no idea
13 what the pricing will be of the remainder.

14 **COMMISSIONER JACOBS:** Exactly. Now -- and
15 now you understand exactly what -- where we have
16 historically devoted extensive thought, care and
17 concern to that very issue.

18 **CHAIRMAN GARCIA:** But we voted that
19 extensive thought, concern and everything else because
20 those that are going to be paying for that are the
21 ratepayers of Florida. And we have -- the ratepayers
22 of Florida are on the hook; the ratepayers of Florida
23 are going to pay for it and the company that we
24 regulate is working in a monopoly environment that we
25 have to be aware because they can build more and still

1 the ratepayers pay.

2 **COMMISSIONER JACOBS:** I agree. It was going
3 into rate base. That was the scenario that would
4 happen there. I don't have any problem with that.
5 Here's a paradigm shift. We're now saying that it
6 won't go into rate base, I agree. Ratepayers aren't
7 immediately on the hook.

8 **CHAIRMAN GARCIA:** No, ratepayers are not on
9 the hook. How are ratepayers on the hook?

10 **COMMISSIONER JACOBS:** The only way -- well,
11 the way they are on the hook is if this power ever
12 shows up in the wholesale market.

13 **CHAIRMAN GARCIA:** It's still not on the
14 hook. They're only going to be on the hook if the
15 power that's on the wholesale market -- excuse me.
16 They're never on the hook. They're never on the hook
17 for this power. How do they become on the hook?

18 **MR. JENKINS:** Commissioner Garcia, the way
19 they can get on the hook is if some utility like
20 Florida Power and Light signs a 20- or 30-year
21 contract.

22 **CHAIRMAN GARCIA:** Which has to come through
23 this Commission.

24 **MR. JENKINS:** No, they would not, because --

25 **CHAIRMAN GARCIA:** FPL doesn't have to sign a

1 30-year agreement? FPL can sign to purchase power
2 without checking with this Commission? What if we
3 don't allow --

4 **COMMISSIONER CLARK:** It would come before us
5 when they were in the rate case; came in a rate case.

6 **MR. JENKINS:** Precisely.

7 **COMMISSIONER JACOBS:** Listen to my point.
8 Understand my point. I don't doubt that. I think
9 when IOUs buy power from this plant, we'll probably
10 get to see it. And we would then -- we're going to
11 rely at that point to make some determination as to
12 cost-effectiveness.

13 **MR. JENKINS:** At that time.

14 **COMMISSIONER JACOBS:** I'm citing the shift
15 of policy here, whereas, up-front, we would have done
16 this up-front and now at the determination of need
17 process we are now changing. We are now saying we
18 will defer and we'll do that when the IOU comes to us
19 suggesting to buy power. Now, there's a whole nother
20 question when --

21 **COMMISSIONER DEASON:** But Commissioner, this
22 scenario makes our job so much easier because we've
23 got a market to rely upon. When we're up-front
24 approving a contract, a 30-year contract, we're trying
25 to put on, you know, our binoculars and look 30 years

1 down the road and try to determine what the economics
2 are going to be. This situation is -- the market is
3 going to determine it. And if you have faith in the
4 market, that's fine. The only thing that we have to
5 guard against is if there's some under-the-table
6 agreement to buy it when it's really above market, and
7 we've got auditors and things, and that's never been a
8 problem before with Florida utilities.

9 **COMMISSIONER JACOBS:** Now we reached my
10 ultimate concern. We are expressing an absolute faith
11 in operation of the wholesale market.

12 **CHAIRMAN GARCIA:** A faith that we already
13 have in Florida. A faith that these utilities have
14 gone before the Florida legislature and said they
15 believe in competition. They're engaged in
16 competition. The wholesale market is competitive in
17 Florida. All of them did that. At one point or
18 another they've marched up to the legislature and
19 talked to our legislature said that.

20 **COMMISSIONER JACOBS:** I don't doubt it.

21 **CHAIRMAN GARCIA:** And we, in Florida,
22 benefit from that.

23 **COMMISSIONER JACOBS:** Don't doubt it.

24 **CHAIRMAN GARCIA:** And it's a process that
25 this Commission was in the forefront of doing.

1 **COMMISSIONER JACOBS:** Don't doubt it. Don't
2 dispute it. I'm simply raising this as saying this is
3 a paradigm shift, first of all. And I note that.
4 Second of all --

5 **CHAIRMAN GARCIA:** But you do realize this
6 distinction here, because it's an important
7 distinction that we have to make. This isn't like
8 those cogen contracts came in on the front end which
9 we had to do the impossible. And Commissioner Deason
10 is absolutely correct. Here they come with the
11 contract. We've got to dissect this. Figure out if
12 it's good for ratepayers and we're on the hook. And
13 you're talking to someone who has been in the minority
14 and the majority, depending on the cases, because I
15 believe that in the end we are on the hook. We, by
16 our participation, sort of obligated Florida
17 ratepayers in one form or another because the company
18 didn't come in and say, "Hey, this is a good idea."

19 **COMMISSIONER JACOBS:** Understand I'm not
20 trying --

21 **CHAIRMAN GARCIA:** We forced them into that.

22 **COMMISSIONER CLARK:** No. No. Wait a
23 minute. We didn't force them. The federal government
24 did.

25 **CHAIRMAN GARCIA:** The federal government.

1 But Commissioner, when I say "we," they came before
2 this Commission. They laid out their case and we said
3 go forth and do it.

4 **COMMISSIONER JACOBS:** My point here --
5 understand. My point here is not necessarily to
6 uphold the present process as a model of perfection.
7 I'm not here at all to do that. I recognize -- and
8 probably -- and I accede to all of the experience
9 here -- that there are real flaws in how that's done.
10 And I think the processes demonstrate that.

11 **CHAIRMAN GARCIA:** Because let me -- before
12 you go on, because I don't want to be critical of
13 Staff. I think we've done a great job in Florida
14 about controlling rates. I think we've done probably
15 as good a job, perhaps, as the market could have done.
16 I think we've done a good job in Florida. Now, that
17 said, there are new realities. It used to be that Joe
18 would have to come in here with the utility and say,
19 these guys got to build one of these, as you called
20 it, fire-breathing dragons. To pay off one of these
21 things took a very long time. We built it into the
22 rate base. It was a decision we made for the best
23 interests of everyone involved and we did it.

24 **MR. JENKINS:** Based on projections at the
25 time.

1 **CHAIRMAN GARCIA:** At the time. And the
2 realities that were before us. Now the market is
3 completely different. Now the market is such that
4 these guys can pop up one of these plants in four
5 years, and based on how these plants are built and
6 efficiencies that are built into these plants, they
7 don't need that. They don't need the utility's
8 long-term commitment to build these. The market is
9 going to take care of it.

10 Commissioners, what strikes me about this
11 decision is we're discussing whether the sun is going
12 to rise tomorrow. We can vote anyway we want here.
13 But tomorrow the sun will rise and tomorrow
14 competition on the wholesale market -- well, I can
15 tell you it's already going on. Just like the sun
16 rose today. Tomorrow it will rise again.

17 What we are doing here, and I think it's
18 important to distinguish this because I don't -- we're
19 not jumping off the cliff. We have done a good job
20 regulating -- and let me not even say "we" because I
21 just got here -- in the history of this Commission of
22 regulating rates has been good. It's been good.
23 We've served the residential ratepayer of this state
24 and we should feel proud of our history to do that.
25 But there are new realities out there.

1 One of those realities is that this
2 Commission, again with foresight, tried to figure out
3 a way to open up that wholesale market to some degree,
4 figure out efficiency -- and they found it. And that
5 has been producing benefit for Florida ratepayers.

6 And now what we're doing is saying, well,
7 we're opening that up a little bit more because the
8 realities out there are such that the consumer can
9 benefit from competition. We can decide today to vote
10 against this. We can decide that the sun won't rise
11 tomorrow. But the sun will rise tomorrow. This
12 project is good for Florida ratepayers.

13 Let me even go further. If this were
14 anything else but a power plant, if this was a widget
15 manufacturer that showed up to Florida and they said,
16 "Ladies and gentlemen, I'm coming to Florida," and
17 goes visits John Anderson over in Enterprise, Florida.
18 Says, "I'm going to Brevard and I'm going to build a
19 widget plant and I'm going to sink \$160 million into
20 Florida. I'm going to hire 40 people at an average of
21 \$40,000. I'm going to pay \$7.5 million dollars into
22 the ad valorem tax. And, by the way, I'm not going to
23 take any loans that are going to incumber any of the
24 people of New Smyrna Beach or the state of Florida."

25 I contend to you that not only would John

1 Anderson be writing a check to them, the Governor
2 would be at the ribbon cutting with another check and
3 someone would have called the Chairman of this
4 Commission, whoever that might have been or might be,
5 and say, "Commissioner, isn't there something we can
6 do? Work with FPL to figure out a way to give them
7 some incentives to come to Florida because this widget
8 maker is good for Florida."

9 And the issue is, here we are with a major
10 investment coming to our state and we're piecemealing.
11 What is the essence? The essence is this is
12 competitive. The Florida ratepayers are not on the
13 hook for it, and in the end we will all benefit from
14 this. All of us. All of the Florida ratepayers.
15 Because it's doing what we're supposed to do. We are
16 supposed to imitate competition, when we can, to
17 produce the efficiencies that we wish for the people
18 of Florida. And the truth of is that we've done a
19 good job of it. But now, why imitate what can happen
20 on its own and produce those benefits on its own
21 without regulatory oversight? The oversight is still
22 there. There are still -- the customers of Florida
23 aren't going to be able to buy it directly from them,
24 but these companies are going to be able to derive a
25 tremendous benefit and the ratepayers through them.

1 **COMMISSIONER JACOBS:** Now --

2 **COMMISSIONER DEASON:** The only thing we need
3 now is to have a flag waved and hear the Star Spangled
4 Banner in the background.

5 **CHAIRMAN GARCIA:** Because, Commissioner
6 Jacobs, you would almost seem --

7 **COMMISSIONER JACOBS:** I appreciate the
8 insight.

9 **CHAIRMAN GARCIA:** Because it almost seems
10 that you're questioning. You're questioning
11 capitalism.

12 **COMMISSIONER JACOBS:** I am.

13 **CHAIRMAN GARCIA:** It works.

14 **COMMISSIONER JACOBS:** I am.

15 **CHAIRMAN GARCIA:** This process works.
16 Competition works.

17 **COMMISSIONER JACOBS:** To the extent that we
18 are changing -- if I want to take the extreme, I would
19 argue we are decoupling the whole analysis and
20 assessment of cost-effectiveness from the
21 determination of need and we're placing it on the
22 market.

23 Now, I don't have the expertise, the
24 background or the depth of knowledge to question all
25 of the exact details of how you make that conclusion;

1 what conclusion you reached there.

2 **MR. JENKINS:** I agree with you.

3 **COMMISSIONER JACOBS:** But I am absolutely
4 concerned that as we do that, as we -- if we do chose
5 to transition from that, that there's no diminution of
6 the concerns that were there originally when we set
7 out to determine cost-effectiveness at the beginning
8 of the time that a plant is brought into the state.

9 If we're going to say that anybody that
10 wants to build a plant at any cost in this state, and
11 then charge for what the market will bear, and make
12 that cost-effective, then that's one thing. But I
13 don't take that as the concern of the law. The law as
14 originally written said we will allow new generation
15 in this state on the premise that it shows up-front to
16 be cost-effective.

17 **MR. JENKINS:** I don't know where that is.
18 It just says cost-effectiveness. It's up to the
19 Commission.

20 **COMMISSIONER JACOBS:** Counsel, is that not
21 one of the premises of the statute?

22 **MR. JENKINS:** Not up-front.

23 **COMMISSIONER DEASON:** Let me say something.
24 I understand the point you're making. Let me say
25 this. While I have the greatest amount of respect for

1 this process and our Staff and their abilities and
2 their analytical abilities and the thoroughness of
3 their reviews, when you start looking at
4 cost-effectiveness and start making 30-year
5 assumptions, it's a very difficult thing to do.

6 I have a lot more comfort that if someone is
7 willing to come in and sink \$160 million and make a
8 profit or not based upon whether they can construct it
9 cost-effectively and produce it cost-effectively at a
10 market rate, that speaks a whole lot more about the
11 cost-effectiveness as opposed to a bunch -- you know,
12 I mean this with the most respect -- of state
13 bureaucrats sitting and looking at all these cost
14 projections and someone making those projections
15 realizing that if they win, they're going to have a
16 30-year contract and pretty much be guaranteed cost
17 recovery.

18 **MR. JENKINS:** I couldn't have said it
19 better.

20 **COMMISSIONER JACOBS:** I don't think I have
21 anything to refute that except --

22 **CHAIRMAN GARCIA:** Yeah, you do. You have
23 five-year plans in the Soviet Union. They were a
24 great idea. (Laughter)

25 **COMMISSIONER CLARK:** His point is simply

1 that that is the way the statute was set up. That is
2 the legislative thinking on it. And if we're going to
3 change, it requires a legislative change.

4 **COMMISSIONER JACOBS:** If we're going to
5 change that premise. But if we're going to say now --
6 whether I want to or not, whether I would like to or
7 not, it has been a fundamental tenant that
8 cost-effectiveness is a matter of question when we
9 determine a need.

10 **CHAIRMAN GARCIA:** When ratepayers --
11 Commissioner Jacobs, when ratepayers are put at risk.
12 And that's the key element.

13 **COMMISSIONER JACOBS:** Okay. Then --

14 **CHAIRMAN GARCIA:** It would be as if we would
15 question --

16 **COMMISSIONER JACOBS:** To bow from this then,
17 there has to be a filter before it. And what you
18 argued in your recommendation is that that filter
19 exists, at least with respect to IOUs in the bid
20 process.

21 **CHAIRMAN GARCIA:** I'd go further. You're
22 absolutely right. If IOUs come into this
23 Commission -- we had a very similar example the other
24 day without getting to it. FPC came in and said, "I'm
25 going to build this plant. I won't put it into rates

1 for five years." Joe agreed with them. Joe said,
2 hey, that's great. Five years. It will be all over
3 by then. We'll be in another scenario by then. They
4 came in and we said, "Hey, wait a minute." I won't
5 use that specific words that might have been used at
6 that time. But no. Either you are or you aren't.

7 Now, if FPC came in here and said,
8 "Commissioners, we need to build a plant." And FPC
9 came in here and said, "We're not going to pass it on
10 to ratepayers," you know, I would tend to think, we've
11 got to determine certain issues. In other words, is
12 there a need and all of the criteria that we may
13 establish here. But the truth is, if they wanted to
14 do it and ratepayers weren't put at risk, and I know
15 they're dispatching that plant on a cost-effective
16 efficiency basis -- in other words, they are not
17 saying, all right we dispatch us first; duke gets in
18 the back of the line. If they're dispatching that
19 power on an efficiency basis, I have no problem with
20 it. I think that's good for ratepayers.

21 **COMMISSIONER JACOBS:** Those factors, those
22 merits stand alone. I don't think anybody could
23 question that.

24 **CHAIRMAN GARCIA:** So then why would you want
25 to -- the question is then, why do you want to

1 determine what is cost-effective when you have no
2 investment in it?

3 **COMMISSIONER JACOBS:** Because ultimately
4 my -- I'll just have to say it. Ultimately the
5 ratepayers in Florida will see the output from this
6 plant. And when they see --

7 **MR. JENKINS:** Chairman Garcia, what he's
8 saying is, think through this scenario. Florida Power
9 comes in. They want to build their own plant.

10 **CHAIRMAN GARCIA:** I don't think that's what
11 he's saying.

12 **MR. JENKINS:** Wait a minute. Duke comes out
13 with a real low cost bid. I mean, they're losing
14 money on this deal. They want to just recover some
15 money. When they recover that -- Florida Power
16 accepts the Duke bid. They issued an RFP for power
17 and they got this low cost Duke bid or lower cost than
18 what they could build. When do we get to analyze
19 whether they build the plant or buy from Duke? If
20 they select to build the plant they have to come here
21 from certification. When they elect to buy from Duke,
22 we don't see it until after the fact when it goes
23 through the cost recovery clause. Is that what you're
24 saying?

25 **COMMISSIONER JACOBS:** Yeah.

1 **CHAIRMAN GARCIA:** You're right. And what's
2 was the problem with that?

3 **MR. JENKINS:** I don't see a problem with it
4 at all.

5 **COMMISSIONER JACOBS:** We're going to see
6 stuff in the cost recovery clause from all across the
7 map. It will not be just about -- at that point it
8 would not be just about whether or not that merchant
9 plant was cost-effective. We're going to see --

10 **CHAIRMAN GARCIA:** Yes, it will be. Yes, it
11 will be. It will be segregated where --

12 **COMMISSIONER JACOBS:** Can we do that? Can
13 we segregate on a cost?

14 **CHAIRMAN GARCIA:** Yeah.

15 **MR. JENKINS:** We do that now. There's all
16 kinds of capacity purchases in the fuel clause.

17 **COMMISSIONER JACOBS:** I misunderstood our
18 discussion. I was under the impression that we
19 couldn't do that in the cost recovery clause.

20 **MR. JENKINS:** But remember, I think your
21 point is that we don't do it before they signed a
22 contract. What we see in the cost recovery clause --

23 **COMMISSIONER JACOBS:** I still have a concern
24 about --

25 **MR. JENKINS:** -- after we sign the contract

1 we do it.

2 **COMMISSIONER JACOBS:** I'm beyond my concern
3 that we don't do it. I'm trying to figure out how we
4 get to the point of some comfort if we move to this
5 new paradigm.

6 **MR. JENKINS:** We only get to it after the
7 fact in the cost recovery clause hearing.

8 **CHAIRMAN GARCIA:** You're right. Then we've
9 have the whole game before us. We know exactly what
10 happened. It's not -- as Commissioner Deason says,
11 you put on your binoculars and you look into the
12 future with all of the expertise we have and we figure
13 out. We get to the look back and see what actually
14 happened. We get to Monday morning quarterback this
15 thing. And as long as we're fair and we're within the
16 rules, that's going to be what's best for ratepayers.

17 **COMMISSIONER JACOBS:** And as a very short
18 veteran of Monday morning quarterbacking, particular
19 when it regards these kind of issues -- let me not say
20 that. I don't want to demean Staff. I think you guys
21 do a great job and you've done a great job with this.

22 My concern is more a matter of principle
23 here. We're trading in something -- and I'll be
24 honest with you. I'm uncomfortable with what we're
25 getting on the back side. I accept your arguments and

1 I admire your convictions. I'm uncomfortable with
2 what we're getting -- what we're trading on the back
3 side.

4 **COMMISSIONER CLARK:** I think what --

5 **COMMISSIONER JACOBS:** But not to belabor the
6 issue. I don't want to belabor it too far.

7 **CHAIRMAN GARCIA:** That's fine. This is what
8 it's about. The truth is that this is the bottom
9 line. The issue is whether you believe government can
10 determine the price of an object over a 30-year period
11 better than the market can.

12 And let me tell you something. Ten years
13 ago I would have thought you were probably absolutely
14 right. I'm not saying we did it perfect, but we did
15 it because of the cost of building these things, the
16 way we structured them out. The fact is we didn't
17 want ratepayers to have to pay for the whole plan on
18 the front end. There was nobody to finance these
19 things. This is a whole new ballgame. It's not that
20 we created the new ballgame. It's happening
21 everywhere else.

22 **COMMISSIONER JACOBS:** If I believed there
23 were perfect markets out there, I would be right in
24 your boat.

25 **CHAIRMAN GARCIA:** If I believed there were

1 perfect Commissions, I'd be with you. If I believed
2 that we were better than the real market.

3 **COMMISSIONER JACOBS:** Right. So we find
4 ourselves here where we are. If there were perfect
5 markets out there, I would be on that boat in a
6 moment. And here's --

7 **CHAIRMAN GARCIA:** We know markets aren't
8 perfect. We know markets aren't perfect.

9 **COMMISSIONER JACOBS:** But I begin to see
10 evidence without -- without drifting too far afield --
11 but what I begin to see are markets that are moving
12 well in advance of us, and where the promise of price
13 signals to consumers were bold; that consumers would
14 see prices that would be moderated to their benefit as
15 a result of the operation of the markets.

16 **CHAIRMAN GARCIA:** Here's the benefit we have
17 here.

18 **COMMISSIONER JACOBS:** And I don't see the
19 evidence.

20 **CHAIRMAN GARCIA:** You've got me arguing like
21 a free marketer and I'm not. But let me tell you that
22 the distinction is -- the distinction is very clear.
23 This is not a situation where we're saying all right,
24 here's it is. The door is open. Let's go out there.
25 Because you know what happens when you do that? Duke

1 isn't going to sell to FPC. Duke's going to find the
2 biggest client that it can find nearest --

3 **COMMISSIONER JACOBS:** Exactly.

4 **CHAIRMAN GARCIA:** -- and start selling. But
5 you can't do that now. That's a retail customer and
6 it can't do that. And so that is significant because
7 it speaks to where we go from.

8 I don't believe -- you're talking to someone
9 who doesn't believe right now, as the world exists,
10 that retail competition in electricity is the best
11 thing for the ratepayer. Let me make this comment. I
12 don't believe it. And if the Legislature came and
13 told us to do it, we'd do it. If the companies came
14 in here and said, "This works for us," I would have a
15 question with it. I agree with you there. I don't
16 know if the market works that well in that case
17 because there are certain ways that the market
18 functions. No grandmother is going to purchase power
19 on an hourly basis that she's not going to wheel
20 across the country. But you know what, there are big
21 purchasers who can do that. And those are realities
22 that are built in. And what I'm saying to you is that
23 under our law they can't do that.

24 **COMMISSIONER JACOBS:** You just brought up a
25 great point.

1 **CHAIRMAN GARCIA:** Thank you.

2 **COMMISSIONER JACOBS:** On the law today Duke
3 can't sell to customers in the state?

4 **MR. JENKINS:** Not to retail customers.

5 **COMMISSIONER JACOBS:** Exactly. Are they
6 going to sell to retail customers from this plant?

7 **MR. JENKINS:** Not unless the law is changed.

8 **COMMISSIONER JACOBS:** So they could do
9 everything that they're anticipating doing with this
10 plant and never be here, right?

11 **MR. JENKINS:** They never --

12 **COMMISSIONER JACOBS:** They'd never be here,
13 right?

14 **CHAIRMAN GARCIA:** What do you mean never be
15 here?

16 **COMMISSIONER JACOBS:** They could sell to
17 wholesale customers in this state and never exist in
18 Florida; is that correct?

19 **CHAIRMAN GARCIA:** Oh, better yet,
20 Commissioners, they could invest, probably,
21 \$160 million on the Georgia --

22 **COMMISSIONER JACOBS:** Right, on the Georgia
23 line --

24 **CHAIRMAN GARCIA:** -- Florida boarder. They
25 get the tax benefits, and under federal law you can't

1 stop them from wheeling into our state.

2 **COMMISSIONER JACOBS:** Right. It would be
3 absolutely heresy for that law to be on the books in
4 that whole scenario. This law that says that they
5 should prove to be cost-effective would be absolutely
6 ridiculous.

7 **CHAIRMAN GARCIA:** No, Commissioner, no.
8 Because that is when FPC, FPL, Gulf and TECO come in
9 here. When they come in here -- when they come in
10 here they are not coming in here to say, "I'm going to
11 build a power plant. I'm going to sell to --." No.
12 They are coming in here and they're saying, "Here's
13 what I'm doing."

14 **COMMISSIONER JACOBS:** I understand.

15 **CHAIRMAN GARCIA:** And the ratepayers are on
16 the hook. And we all agree to this. And we take a
17 plant that may have a life of 25 years, we figure it
18 out and we work it into rates and we pay for the
19 plant.

20 **COMMISSIONER JACOBS:** I understand. And I
21 don't want to belabor this. And so we go to the
22 argument that if that's not the case, that the market
23 will take care of it. Let me not belabor it any
24 further. Let me say this --

25 **CHAIRMAN GARCIA:** I'd like to address your

1 concerns. This is not a question of belaboring. It's
2 beyond philosophy.

3 I'd like to ask, how are Florida ratepayers
4 hurt under this scenario that Staff --

5 **COMMISSIONER JACOBS:** I don't know that they
6 are.

7 **CHAIRMAN GARCIA:** Can they be hurt?

8 **COMMISSIONER JACOBS:** I don't know that they
9 are. And the only evidence I have is that the market
10 will operate effectively to protect the ratepayers
11 when I see evidence, troubling evidence.

12 **CHAIRMAN GARCIA:** Okay. Give me an example
13 because we need to know. Because if there's troubling
14 evidence that these companies aren't working properly
15 in the wholesale market, then we need to open up an
16 investigation.

17 **COMMISSIONER JACOBS:** The evidence that I'm
18 speaking of is outside of the record and I would be
19 uncomfortable saying that I'm resting my decision --
20 the evidence I'm speaking of is what is happening in
21 other states.

22 **CHAIRMAN GARCIA:** Okay.

23 **COMMISSIONER JACOBS:** Where you see price
24 signals to consumers that were supposed to respond to
25 restructuring and they're not.

1 **CHAIRMAN GARCIA:** Absolutely.

2 **COMMISSIONER CLARK:** But I think the point
3 that he's bringing up bears a discussion, and it kind
4 of goes back to the concern I have, in that the law
5 has been construed, up to this point, to provide a
6 bright line as to when you allow it and when you
7 don't. And it limits the construction of power
8 plants.

9 Do not interrupt me. I will take a breath
10 and you can --

11 **CHAIRMAN GARCIA:** Okay.

12 **COMMISSIONER CLARK:** And it was -- the need
13 was to ensure the supply and reliability of
14 electricity to customers. And it seems to me that
15 what we're making is a big change in how we determine
16 need and what we are going to look at when we
17 determine need. And the question is the consequences
18 of that.

19 And one of the things that was discussed --
20 I'm not sure if it was resolved -- was why were there
21 those price spikes in the Midwest? Some people
22 attribute it to what they call a thin market, meaning
23 there's not enough players in the wholesale market to
24 make a market, in effect. And people don't benefit if
25 there isn't a good market. And that goes -- that is

1 one of the considerations, I think, we have to
2 determine is when we look at the cap.

3 **MR. JENKINS:** That's correct. That's an
4 issue in the reserve margin docket. At what price --

5 **COMMISSIONER CLARK:** My point is, there are
6 a number of other things that are implicated that
7 require a comprehensive look; not just by us, but by
8 the Legislature. And I think that's what your point
9 is going to. Yes, we can buy into the notion that
10 competition is good. And regardless of what happens
11 in this docket I think we should go forward because it
12 certainly appears to me that a very strong case was
13 made that this particular plant, or merchant plants,
14 can be beneficial. But the point being, we don't know
15 what the other consequences are. We ought to look at
16 it on conservation. What happens -- what kind of cap
17 do you want on the amount, and those -- and what --
18 how much are we going to allow given environmental
19 concerns? And do we give preference to a combined
20 cycle or do we let combustion turbines -- or what
21 about another plant? And what does that do in terms
22 of what can be released into the atmosphere and its
23 impact?

24 **MR. JENKINS:** I can answer all of those
25 questions. They are pretty clear.

1 **COMMISSIONER CLARK:** But that's you're
2 opinion. That's you're opinion and it is --

3 (Simultaneous conversation.)

4 **CHAIRMAN GARCIA:** Those are things that we
5 need to -- Susan is absolutely right. I agree with
6 everything she just said. Those are things that --
7 obviously you have an opinion and those are things
8 that we should have a docket on and figure it out and
9 maybe have a rule on it. And we should go to the
10 Legislature and say do you also have an opinion on
11 this? And they may have.

12 **COMMISSIONER CLARK:** And these are the
13 things you should consider. You should treat a
14 merchant plant different than you're going to treat
15 one that is in rate base. Maybe you give -- you know,
16 you give the right of absolute rejection of a merchant
17 plant, but if you do that, you affect whether that
18 market is robust or not and then it does come back to
19 hit the ratepayers.

20 My point being, there are a whole lot of
21 other issues that are beyond what we're charged with
22 looking at that need to be examined when you change
23 the paradigm. And it seems to me it is up to the
24 Legislature to change the paradigm, because the way
25 the statute was written, and the way it's been

1 interpreted by us, you have to show a need to serve
2 the retail customers.

3 **CHAIRMAN GARCIA:** I will say, Susan --
4 because it's something that occurred to me -- the
5 reality didn't contemplate what we're doing. You're
6 absolutely right.

7 **COMMISSIONER CLARK:** Which is another
8 argument, in my mind, is the Legislature could not
9 have contemplated this and did not allow it.

10 **CHAIRMAN GARCIA:** And the Legislature also,
11 when it wrote our statute, knew that it couldn't
12 contemplate all the things that come before us. I
13 mean, our statute says that it has to be liberally
14 construed because there are so many things we do in
15 this Commission all the time that the Legislature
16 never cubbyholed those things. I mean, they gave us
17 all this broad latitude because they want us to figure
18 it out because they don't want to be having these
19 committee meetings. Because we're the supposed
20 experts with the agency that deals with these issues,
21 so it would be impossible for them to predict that --

22 **COMMISSIONER CLARK:** I realize our
23 disagreement is how you go about doing it.

24 **CHAIRMAN GARCIA:** Right.

25 **COMMISSIONER JOHNSON:** Let me ask a question

1 of Commissioner Jacobs and, perhaps, Commissioner
2 Clark too. Well, Commissioner Jacobs, because I
3 couldn't really understand necessarily where your
4 argument was going.

5 Is your concern that the law doesn't allow
6 us to do what we're attempting to do here? And if so,
7 maybe that was the three-two vote. Or is your concern
8 that even if it did allow it, this isn't a good thing.
9 This wouldn't be the way that you would wish that we
10 would proceed.

11 **COMMISSIONER JACOBS:** I am -- let me be very
12 clear. My focus is that we are changing our whole
13 analysis of cost-effectiveness. I don't know that the
14 law precludes that. It's fairly general in the way it
15 does that, I guess, and so, I guess, my answer is
16 option 2. I don't know if we should proceed at that.
17 And quite frankly, I'm persuaded to the way
18 Commissioner Clark described it. I guess I can say
19 that I also am persuaded that this docket should
20 probably move forward. But this is a fundamental
21 concern that I have.

22 **COMMISSIONER JOHNSON:** And it's one that
23 when -- if it goes to, then, the mechanics, whether or
24 not this is something we should be doing, I know you
25 raised ratepayer impact and ratepayer concerns, and I

1 think I remember through the hearings -- I'm somewhat
2 sensitive to what you're saying because I think it was
3 in the hearings that you started talking about, well,
4 if it's just Duke, maybe they have market power, and
5 oh, what are they going to do? And, you know, will
6 the market really work for us here? As I discussed
7 this -- the issue with Staff, there is still a process
8 in place. And I don't know if we had sufficient
9 conversation on that point.

10 It's not just that we're turning this over
11 to the market. We'll have the opportunity, to the
12 extent that utilities that do have captive ratepayers
13 purchase from these particular plants, to look at the
14 issue in the context of a cost recovery docket and
15 through the cost recovery clause, and do our own
16 analysis at that point. And to me that's still a
17 before-the-fact analysis. Before the ratepayers are
18 impacted we still have the ability to analyze and to
19 make decisions.

20 Now, to the extent the wholesale market
21 doesn't work, that's not about Duke being in Florida.
22 That's about the whole nation and whether or not the
23 wholesale market is working. That's why I kind of
24 bifurcate the issues because that's not limited or
25 specific to Duke.

1 If a utility -- if Florida Power Corp or
2 Florida Power and Light, if they have that problem,
3 they're going to have that problem and Duke isn't
4 going to cause that to occur.

5 **COMMISSIONER JACOBS:** But the distinction is
6 we're relying on that as a real factor in our
7 acceptance of Duke.

8 **COMMISSIONER JOHNSON:** We're relying on?

9 **COMMISSIONER JACOBS:** On the operation, the
10 effective operation of that marketplace. That is a
11 real factor when we assess the need. We're saying we
12 expect that market to operate effectively.

13 **COMMISSIONER JOHNSON:** And our choice is
14 either -- let's assume, because I believe the law is
15 clear and we are allowed to do this, but let's assume
16 we go to the next step if we had the discretion to do
17 either. And maybe this is just where we disagree
18 philosophically. Because I guess you're stating you'd
19 rather us do some sort of up-front cost-effectiveness
20 analysis and bind the ratepayers up-front as opposed
21 to allowing the market to work and then looking at the
22 issue through the cost recovery mechanism.

23 **COMMISSIONER JACOBS:** Let me be real clear
24 on that. No.

25 **COMMISSIONER JOHNSON:** Okay.

1 **COMMISSIONER JACOBS:** I'm not suggesting
2 that we wholesale retain what we do now. I accept all
3 of the arguments that were given that this is a new
4 day, things have changed. There are opportunities for
5 efficiency improvements. I accept all of that. No.
6 I'm not saying we stay status quo and just let the sun
7 come up tomorrow. I'm saying we move into tomorrow in
8 a guided and effective and orderly manner.

9 **CHAIRMAN GARCIA:** Commissioner, I totally
10 agree with you. I could not agree with you more.

11 **COMMISSIONER JOHNSON:** Can we do that? I'd
12 like to hear the rest of your comments. Can we do
13 that in the context of this docket and moving forward
14 if we allow --

15 **COMMISSIONER JACOBS:** I was trying to get to
16 that a few minutes ago.

17 **COMMISSIONER JOHNSON:** Okay.

18 **COMMISSIONER JACOBS:** And quite frankly, I
19 basically would endorse the comments Commission Clark
20 made; that if we move forward, I think this is
21 something -- those broader considerations, we ought to
22 figure out a way how to deal with them in the context
23 of this.

24 I tossed around whether or not to move
25 forward and isolate, make a clear statement that this

1 decision is purely isolated on these facts, to isolate
2 this decision in its precedential value and then have
3 a study that goes to the Legislature and seek some
4 comment back from the Legislature. That is a matter
5 of process. I don't care how we do that. I could not
6 state it more eloquently than she stated it how. And
7 how it would be done, I would be very open as to how
8 that is done.

9 The bottom line is I think this docket
10 should move forward. I think it should be done so,
11 however, with a very important opportunity to address
12 those issues and with the opportunity for the
13 Legislature to make -- to have a voice, and then we'll
14 come to some real, I think, good, positive decisions
15 for Florida.

16 **CHAIRMAN GARCIA:** Commissioner, I could not
17 agree with you more.

18 **COMMISSIONER JACOBS:** Good.

19 **CHAIRMAN GARCIA:** I believe that is why I
20 think throughout this process I've stated about -- I
21 think Joe did it in here. And while Joe has a lot of
22 opinions, we can't simply rely on Joe to sort of
23 decide how our market figures itself out on a lot of
24 these issues. While he is an expert, we may have
25 different opinions. I know Commissioner Clark and Joe

1 don't see eye to eye, and I trust both of their
2 opinions and sometimes I side with one or the other.
3 But I will tell you this; I think we need to open this
4 up. I'd love to put it on the next --

5 **COMMISSIONER CLARK:** I would remind you, I
6 went to law school. He didn't.

7 **CHAIRMAN GARCIA:** Yeah, well.

8 **COMMISSIONER CLARK:** And so he is an
9 electrical engineer and I'm not. (Laughter)

10 **CHAIRMAN GARCIA:** What I would like to do,
11 if it's all right with the rest of the Commission, is,
12 you know, have an internal affairs where we at least
13 scope out the things that we want to discuss, and
14 maybe we'll have a specific internal affairs on those
15 matters alone. So that, Joe, you can throw out all of
16 your ideas. We can have the company say, "Well, if
17 we're going to do this, Commissioners, now that we're
18 doing this, here's how the limits should be." Because
19 I guarantee you -- Commissioner Jacobs, I guarantee
20 you the companies that are out there are going to be
21 among the first that file to build merchant plants in
22 our state.

23 **COMMISSIONER CLARK:** That just -- I was just
24 going to say that I think that probably it can be a
25 workshop. Workshops don't have to be docketed. But I

1 don't think you're going to get all of the interested
2 parties in the internal affairs room.

3 **CHAIRMAN GARCIA:** You're right. You're
4 right. You're absolutely right. Thank you,
5 Commissioner.

6 **MR. JENKINS:** I'll set up a Commission
7 workshop and every issue under the sun, we'll have it
8 then.

9 **CHAIRMAN GARCIA:** Absolutely. Absolutely.
10 Let's make sure we invite the Legislature if -- you
11 know, those that are interested in this issue because
12 I know many of them have a great interest.

13 **COMMISSIONER DEASON:** Back to Issue 1. I
14 have a question. Does Staff disagree with the
15 position stated by the Florida Electric Cooperatives
16 Association? Other than they are starting it off with
17 "no" and that they're saying alternative -- the second
18 part of their position, alternatively.

19 **MR. JENKINS:** I can't see any disagreement
20 with that. Except for the "no," I can't see any --

21 **COMMISSIONER DEASON:** Issue 1, you know, is
22 a very specific issue. It's based upon the
23 application that is before us. I know there is a
24 debate as to whether these entities, at least one of
25 the entities, is a proper applicant but that was

1 resolved on a three-two vote. So we have an
2 applicant. The question is, is there a need for the
3 plant that's been proposed by these applicants and is
4 based upon the facts of this case?

5 I would move that we approve Staff.

6 **COMMISSIONER JOHNSON:** Second.

7 **CHAIRMAN GARCIA:** There's a motion and
8 second for Issue 1. All those in favor signify by
9 saying "aye."

10 **COMMISSIONER JOHNSON:** Aye.

11 **COMMISSIONER DEASON:** Aye.

12 **COMMISSIONER JACOBS:** Are we going to put
13 language in there about the provisions of the workshop
14 and all of that other stuff?

15 **CHAIRMAN GARCIA:** Yes.

16 **MR. JENKINS:** We don't need to put that in
17 an Order, do we, Leslie?

18 **MS. PAUGH:** No, but we can.

19 **COMMISSIONER JACOBS:** Aye.

20 **CHAIRMAN GARCIA:** Does that mean you're
21 voting for it?

22 **COMMISSIONER JACOBS:** Yes. Aye.

23 **CHAIRMAN GARCIA:** Okay. So it's four-one
24 and we're going to put some language that we're going
25 to go to --

1 **COMMISSIONER CLARK:** I guess I don't have
2 the opportunity so say it? You're just assuming?

3 **CHAIRMAN GARCIA:** No. You did vote "no," I
4 thought.

5 **COMMISSIONER CLARK:** Have we taken a vote?

6 **CHAIRMAN GARCIA:** Yes. I'm sorry.

7 **COMMISSIONER CLARK:** Did we take a vote?

8 **COMMISSIONER JOHNSON:** We started down that
9 road.

10 **CHAIRMAN GARCIA:** I thought we did. I heard
11 the vote. Let me try it again. We have a motion and
12 a second. In the motion, we're including to have a
13 workshop on all related issues with this move and this
14 case to see if we need to go to rulemaking and to
15 inform the Legislature of any consequences from this
16 decision. Anything else that we should add, Susan?

17 **COMMISSIONER CLARK:** No. I would just like
18 the opportunity to comment why I'm going to vote no.

19 **CHAIRMAN GARCIA:** Absolutely.

20 **COMMISSIONER CLARK:** I think a need for 30
21 megawatts has been shown. I don't think the need for
22 the entire plant has been shown. And it seems to me
23 that the Nassau case stands for the proposition that
24 it's a need to serve utility-specific need. It is not
25 a Peninsular-wide need. And that's -- you know,

1 regardless of the fact the motion to dismiss was
2 not -- went the other way, it appears to me that that
3 case still stands for the proposition that you have to
4 show need, and that need was not shown.

5 **CHAIRMAN GARCIA:** I think Commissioner
6 Jacobs was also in favor of the motion, so all those
7 in favor signify by saying "aye." Aye.

8 **COMMISSIONER DEASON:** Aye.

9 **COMMISSIONER JOHNSON:** Aye.

10 **COMMISSIONER JACOBS:** Aye.

11 **CHAIRMAN GARCIA:** All opposed.

12 **COMMISSIONER CLARK:** Nay.

13 **CHAIRMAN GARCIA:** Passes on a four-one vote.

14 Issue 2.

15 **COMMISSIONER JOHNSON:** Move Staff.

16 **CHAIRMAN GARCIA:** Is there a second?

17 **COMMISSIONER JOHNSON:** Second.

18 **CHAIRMAN GARCIA:** Does anybody want to make
19 a comment? There being no comment, all those in favor
20 signify by saying "aye." Aye.

21 **COMMISSIONER DEASON:** Aye.

22 **COMMISSIONER CLARK:** I'm trying to decide
23 now that I've lost the other things -- I mean, you
24 know, do I decide on --

25 **COMMISSIONER JACOBS:** I'm sorry.

1 **CHAIRMAN GARCIA:** We're going to take that
2 back. We haven't voted it out and Commissioner Jacobs
3 has an issue.

4 **COMMISSIONER JACOBS:** I'm real concerned
5 that -- well, I guess this is my point, again. Back
6 there I thought we should have had a contract. And I
7 guess I lost that on the other --

8 **MR. JENKINS:** I think this is the time to
9 make that decision.

10 **COMMISSIONER JACOBS:** Okay. Let me
11 reiterate. I think there ought to be a contract and I
12 think if we do accept that as a criteria, this sets a
13 very low standard of what that contract should be.

14 **COMMISSIONER CLARK:** There's no guarantee
15 that it will be built.

16 **COMMISSIONER JACOBS:** Right. I mean I have
17 a copy of it, an agreement here.

18 **MR. JENKINS:** What I hear is we could
19 probably make approval of this plant contingent upon a
20 firm binding contract for the 30 megawatts being
21 executed.

22 **COMMISSIONER JACOBS:** Benefits flowing both
23 ways. As I read this agreement here, it says that
24 it's initially -- that the condition of providing the
25 power is that there be producing at electronic energy

1 at a cost that results in a reasonable profit and cash
2 flow to the owner of the facility. If they don't make
3 a profit, they don't have to provide the power.

4 **MR. JENKINS:** Right. A binding contract
5 would negate all that language, and we would make this
6 approval contingent upon -- someone needs to guide me
7 here.

8 **COMMISSIONER CLARK:** Joe, if you don't have
9 a binding contract, how can you show that it meets the
10 need?

11 **MR. JENKINS:** Well, see, I believe
12 entitlement is sufficient. Commissioner Jacobs wants
13 binding contract.

14 **COMMISSIONER CLARK:** Maybe your legal Staff
15 needs to answer that.

16 **MR. JENKINS:** I would ask them to.

17 **COMMISSIONER JACOBS:** Let me say this: I
18 have to admit, I was somewhat persuaded by
19 Commissioner Deason's comments, that we not steer too
20 far to the other side and we impose very rigorous
21 requirements here that don't really apply to everybody
22 else. I want to look at what happens in the normal
23 course of conduct in these transactions and make this
24 similar. I don't want to impose anything undue on
25 them that the IOUs don't have to do when they enter

1 contracts with cities or counties -- I mean, cities
2 and other utilities. But I want it to be on par.

3 **MR. JENKINS:** I can't really help you too
4 much there. Because I've seen entitlements, I've seen
5 contracts, to me they are almost synonymous, but I
6 can't guarantee that.

7 **COMMISSIONER JACOBS:** So these provisions
8 here, this is like a general course of conduct in
9 these kind of contracts?

10 **MR. JENKINS:** That's my belief, but I
11 can't --

12 **COMMISSIONER JACOBS:** Okay. Let's just
13 address that in the rule --

14 **MR. JENKINS:** The rule workshop?

15 **COMMISSIONER JACOBS:** -- and let's figure
16 that out.

17 **COMMISSIONER CLARK:** Ms. Paugh, do you have
18 a binding contract here?

19 **MS. PAUGH:** In my opinion we do. I will be
20 the first to admit that the contract is squirrely
21 because of the --

22 **COMMISSIONER CLARK:** Is what?

23 **MS. PAUGH:** Squirrely. That's my word for
24 loose, if you will, because of the out-ability of Duke
25 if it's not profitable, but I believe it's a binding

1 agreement.

2 **COMMISSIONER CLARK:** And who determines if
3 it's profitable?

4 **MS. PAUGH:** Duke does, under the terms of
5 the entitlement.

6 **COMMISSIONER CLARK:** Sounds like -- how does
7 it bind them to build the plant then?

8 **MS. PAUGH:** Well, I suppose it binds them to
9 make the determination that it's not profitable.

10 **CHAIRMAN GARCIA:** That has to do with the
11 building of the plant, correct?

12 **MS. PAUGH:** The ongoing sales.

13 **MR. FUTRELL:** It has to do with the
14 operation, the ongoing operation of the plant once
15 it's constructed, After it's in the ground and
16 operating. They can look at their bottom line from
17 time to time, and if they determine it's not adequate
18 profit, they can close things down. Again, this goes
19 to the cost-effectiveness to Duke New Symrna Beach --
20 to New Symrna Beach. If it's cost-effective to them,
21 it's needed on a cost-effective basis. Therefore,
22 they've made a decision that this is a more economic
23 choice. They've taken that risk. It appears that if
24 this plant goes away, there's going to be -- they can
25 still meet their needs, except they are going to lose

1 this lower priced capacity. They're going to have to
2 pay more to keep the lights on if it does go away.

3 They've made that leap.

4 **CHAIRMAN GARCIA:** All right. But Susan
5 points out a good point, and I have certain worries
6 now.

7 Can Duke come in here, ask this Commission
8 to make a determination, walks in hand in hand with
9 New Symrna. Three, four years from now the plant is
10 operating and they decide this is not -- these 30
11 megawatts are no good for our interest and
12 then continue to operate and sell power on the
13 wholesale market, and what they did was use New Smyrna
14 to get into our wholesale market? Is that what you're
15 saying that this contract says?

16 **COMMISSIONER CLARK:** It appears that to the
17 extent they run the plant --

18 **MR. FUTRELL:** Well, it has to go to the
19 operation. It doesn't have to go to the agreement
20 between -- to sell the power.

21 **CHAIRMAN GARCIA:** So that's a requirement
22 anyway, then?

23 **MR. FUTRELL:** Correct.

24 **COMMISSIONER CLARK:** But the point being
25 there's no binding contract that they can rely on,

1 that if they continue to have the need, Duke continues
2 to have the obligation to supply; that is not the
3 basis. It's -- the basis is is it profitable to Duke
4 then they will continue to supply. If it's not, they
5 have no obligation to provide. Therefore, is it a
6 binding contract? Ms. Paugh, you're the one who's
7 advocating it is a binding contract.

8 **COMMISSIONER DEASON:** What happens if our
9 utilities right now we regulate, they have contracts
10 to buy, you know, power from other entities. What if
11 they go bankrupt? I mean, sure it's a binding
12 contract. Because I know that --

13 **COMMISSIONER CLARK:** They have recourse.

14 **COMMISSIONER DEASON:** I'm sorry.

15 **COMMISSIONER CLARK:** The point is they have
16 recourse. They have a remedy. There's no remedy
17 here.

18 **COMMISSIONER DEASON:** Okay. Legal says
19 there's a recourse here.

20 **MR. FUTRELL:** New Smyrna has a recourse. If
21 it goes away, they will have to contract with another
22 provider.

23 **COMMISSIONER CLARK:** They don't have
24 recourse against Duke for failure to perform on the
25 contract. It is their sole discretion to perform or

1 not depending on whether they believe it's profitable
2 to them. Would that be a fair assessment?

3 **COMMISSIONER JACOBS:** Right. I don't even
4 see any criteria as to what profitability is. It
5 seems like it's a unilateral determination of them.

6 **CHAIRMAN GARCIA:** But if they are running
7 the plant, they still have to sell to Duke.

8 **MS. PAUGH:** That's correct.

9 **COMMISSIONER JACOBS:** That's true, if it's
10 profitable under their determination.

11 **CHAIRMAN GARCIA:** So Duke could walk into
12 Florida, as it did, with New Smyrna and then five
13 years from now say this is not profitable and then
14 take the entire 500-plus megawatts and sell them on
15 the wholesale market and not sell them to the City.

16 **MS. PAUGH:** That's a possible scenario, yes.

17 **COMMISSIONER DEASON:** The City can turn off
18 the water to them too. (Laughter)

19 **COMMISSIONER JACOBS:** That's a good
20 recourse.

21 **MR. JENKINS:** That's the recourse.

22 **COMMISSIONER CLARK:** Well, I think, you
23 know, all kidding aside, that is a point, as to
24 whether or not they have a binding agreement.

25 Would it be your opinion that for purposes

1 of the Ten-Year Site Plan, with this kind of
2 agreement, can they rely on the power in determining
3 the amount of power they have to serve their load,
4 would you consider this could be firm capacity?

5 **MR. JENKINS:** Yes, I would. The 30
6 megawatts.

7 **COMMISSIONER CLARK:** Why would you consider
8 it to be firm?

9 **MR. JENKINS:** Because it's as loosey-goosey
10 or squirrely as some of the other capacity additions
11 I've seen in the Ten Year Site Plan.

12 **MS. JAYE:** Commissioners, might I add that
13 it is a contract. There has been offer, acceptance
14 and consideration. So there is no question that there
15 is a contract here. And whether the parties have
16 chosen to have equitable terms where there's equal
17 giving on both sides is not really the issue. There
18 is a contract.

19 **COMMISSIONER CLARK:** So you're saying there
20 is a binding contract.

21 **MS. JAYE:** There is a contract. Now, the
22 terms of the contract may be, as Ms. Paugh says,
23 squirrely, but there is contract. There has been
24 offer, acceptance and consideration.

25 **CHAIRMAN GARCIA:** Leslie, could we require a

1 contract at this point?

2 **MS. PAUGH:** I believe --

3 **CHAIRMAN GARCIA:** Could we approve this
4 contingent on Duke having a firm contract for 30
5 megawatts at that price with the City of New Smyrna?

6 **MS. PAUGH:** Commissioner, I'd like to
7 preface my answer by stating that I believe we do have
8 a contract, and I said that a few minutes ago, and I
9 do believe it's a binding contract. Yes, it's got
10 some loopholes in it, but --

11 (Simultaneous conversation.)

12 **COMMISSIONER JOHNSON:** Can we take out this
13 term?

14 **COMMISSIONER JACOBS:** We can reform the
15 contract, can't we?

16 **COMMISSIONER JOHNSON:** But the issue is can
17 we take out this term? Can we change that term?

18 **MS. PAUGH:** Well, there was a comma in my
19 statement. So having said that, I can also say that
20 the Commissioners have the discretion, in my opinion,
21 to add a condition to their approval other conditions
22 to the contract. Make it firm. Take out the
23 profitability.

24 **CHAIRMAN GARCIA:** Hang on one second.
25 Commissioner Clark, do you feel we can do that on

1 this? I'm asking you, you know, as a legal expert.

2 **COMMISSIONER CLARK:** Conditional approval?

3 **MS. PAUGH:** Yes, we have that ability.

4 **CHAIRMAN GARCIA:** Okay. Because I certainly
5 -- I certainly -- you know, I think Commissioner
6 Deason made a very good point. But it just strikes me
7 that -- I mean, we do have a contract. I don't know
8 if we need to go any further than that. Staff is
9 saying we have a contract.

10 **COMMISSIONER DEASON:** Well, whether we have
11 the legal authority to do it is one question. Now,
12 the next question is should we?

13 And the City of New Smyrna has entered into
14 an agreement. They have the obligation to provide
15 service to their customers. They are comfortable with
16 this. I'm not so sure it's our position to
17 second-guess them in their contract negotiations.

18 And then, further -- I know there's
19 disagreement on this point -- but further it's my
20 belief that Duke has applicant status whether they are
21 walking hand in hand with New Smyrna or not. And that
22 there is a need, an economic need, for whether if it's
23 480 or 500 or 530, whatever it is, that approval of
24 this is not contingent upon there being 30 megawatts
25 sold to the City at 18.50 per megawatt regardless of

1 whether it's profitable or not. I don't think --
2 that, in my opinion, is not critical. So I don't see
3 any need to make it contingent upon the contract.

4 **CHAIRMAN GARCIA:** A point well-taken.

5 **COMMISSIONER CLARK:** Just so I'm sure, is
6 that if a utility comes in and it's -- with a binding
7 contract with a -- is this the same criteria we're
8 going to apply to our utility that serves at retail?
9 Have we set up two different criteria: If it's a
10 merchant plant, it's one way of looking at it; and if
11 it's a plant proposed by a retail utility or someone
12 they contracted with, it's another way of looking at
13 it?

14 **COMMISSIONER DEASON:** I think there are
15 numerous issues that follow which address that. And a
16 lot of these issues which I think restate the same
17 question several times over. And I think that's
18 probably something we're going to get to.

19 This very narrow issue is, if you read it
20 very carefully, is just a question: Is there an
21 agreement? And, of course, now, it goes on to whether
22 it meets --

23 **COMMISSIONER CLARK:** Yes, but the Staff says
24 -- it's a legal binding agreement.

25 **COMMISSIONER DEASON:** -- the needs according

1 to the statute.

2 **COMMISSIONER CLARK:** The Staff says it's a
3 legally binding agreement. Okay. Maybe it's just a
4 point that I disagree with.

5 **CHAIRMAN GARCIA:** We had a motion, I think.

6 **COMMISSIONER JOHNSON:** I second.

7 **CHAIRMAN GARCIA:** And a second. All those
8 in favor signify by saying "aye."

9 **COMMISSIONER DEASON:** Aye.

10 **CHAIRMAN GARCIA:** Aye.

11 **COMMISSIONER JOHNSON:** Aye.

12 **CHAIRMAN GARCIA:** All those opposed?

13 **COMMISSIONER CLARK:** Nay.

14 **COMMISSIONER JACOBS:** Nay.

15 **CHAIRMAN GARCIA:** Okay. It passes on a
16 three-two vote.

17 Issue No. 3.

18 **COMMISSIONER JOHNSON:** Move it.

19 **CHAIRMAN GARCIA:** There's a motion. Is
20 there a second?

21 **COMMISSIONER DEASON:** Well, I've got a
22 question.

23 **CHAIRMAN GARCIA:** Sure.

24 **COMMISSIONER DEASON:** And I'm looking at the
25 last paragraph on Page 72. Second sentence in that

1 paragraph says that the 514-megawatt project is needed
2 because 30 megawatts are needed by the City.

3 **MR. JENKINS:** You need to insert the phrase
4 "cost-effective" someplace in that sentence.

5 **COMMISSIONER DEASON:** Well, even making that
6 change, I guess the essence of my question is, is
7 Staff saying that the only way that this project is
8 needed is because there are 30 megawatts that are
9 being provided to the City? That's what makes this
10 project needed.

11 **MR. JENKINS:** Well, that was your vote on
12 Issue 1 that it can be either.

13 **COMMISSIONER DEASON:** That's what I'm just
14 trying clarify trying because -- I mean, I'm trying to
15 be consistent.

16 **MR. JENKINS:** I interpret your vote on
17 Issue 1 that the approval can be either the
18 cost-effectiveness basis to the retail serving utility
19 or as the raw merchant plant.

20 **COMMISSIONER DEASON:** But I don't want that
21 language to be interpreted that that's the only reason
22 this plant is needed is because it's providing 30. I
23 mean, it may be an additional reason that the facts
24 support here, that we are recognizing that 30
25 megawatts are being provided, and that there has been

1 an established need determined by that entity, which,
2 I think, is no question in an applicant. So if you're
3 just providing that as additional factual information,
4 that's fine. But if you're saying this project is
5 needed only because 30 megawatts of it is being
6 provided to the City.

7 **MR. JENKINS:** Right.

8 **COMMISSIONER DEASON:** What is this, the
9 former?

10 **MR. JENKINS:** This is like you said,
11 additional information based on your vote in Issue 1.

12 **COMMISSIONER DEASON:** I would move Staff.

13 **CHAIRMAN GARCIA:** Because there's a motion
14 and a second on Issue No. 3.

15 Commissioner, did you want to add the word
16 "cost-effective" there in that paragraph? I mean, I
17 don't think it --

18 **COMMISSIONER DEASON:** I'll never vote
19 against being cost-effective.

20 **CHAIRMAN GARCIA:** So we'll add
21 "cost-effectiveness" as a phrase in that second
22 sentence.

23 All right. We have a motion and a second.
24 Commissioner Jacobs, do you have a comment?

25 **COMMISSIONER JACOBS:** Read that for me now

1 with that change. I'm sorry, I wasn't listening
2 closely. This change you just did.

3 **CHAIRMAN GARCIA:** Oh, it is there. It's
4 cost-effective. Is that what you -- it's in the third
5 sentence. We don't have to add it. It's in the third
6 sentence.

7 **COMMISSIONER JACOBS:** That -- given my -- I
8 won't go back into all of this, but I think I'm
9 persuaded on the whole to go along with this. But
10 that sentence goes against all of the stuff we talked
11 about before. And I'll just say that -- I may write
12 something on here just to bring that out, but I won't
13 belabor it anyway.

14 **COMMISSIONER GARCIA:** Okay. There's a
15 motion and a second. All those in favor, signify by
16 saying "aye."

17 **COMMISSIONER DEASON:** Aye.

18 **COMMISSIONER GARCIA:** Aye.

19 **COMMISSIONER JACOBS:** Aye.

20 **COMMISSIONER JOHNSON:** Aye.

21 **COMMISSIONER GARCIA:** All opposed?

22 **COMMISSIONER CLARK:** Nay.

23 **CHAIRMAN GARCIA:** It passes four-one.

24 Issue No. 4.

25 **COMMISSIONER CLARK:** We're bootstrapping

1 this here, right? There's no need for that unless you
2 find the need for the 30 megawatts, right?

3 **MR. JENKINS:** Right. But, again, this is
4 just the additional information based on the vote in
5 Issue 1.

6 **COMMISSIONER JOHNSON:** Why do we need to
7 address this issue?

8 **MR. JENKINS:** We don't need to.

9 **CHAIRMAN GARCIA:** Commissioner, that's my
10 fault. Clearly, all the parties had a lot of issues.
11 I tried to remove as many of them, but this was a
12 complex, huge docket and I -- you know, it's in
13 there.

14 We don't necessarily need to address it
15 after what we've already done, but in an effort to
16 make sure that we had as whole and complete a record
17 and discussion on this issue, I allowed -- better that
18 it be in and we don't rule on it than it not be here
19 at all.

20 **COMMISSIONER DEASON:** Well, see, I think the
21 real determination on Issue 4 has already been
22 determined. And what it's saying is that it doesn't
23 matter. For Duke New Smyrna to be an applicant, we've
24 not determined that they've got to show a need in and
25 of themselves for the 484. So, you know, at this

1 point I think it's a moot issue.

2 **COMMISSIONER CLARK:** Let me ask you a
3 question, though. As we get further out and we have
4 more and more merchant plants, what it seems we're
5 deciding here is there is a right to build a merchant
6 power plant. If you don't affect the ratepayers by
7 moving it into rate base, you are free to build a
8 power plant.

9 **COMMISSIONER DEASON:** No, not at all,
10 because we're just the first step in that process.
11 There are numerous steps they have to go through
12 before plant can actually be built.

13 **COMMISSIONER CLARK:** What you're essentially
14 saying is there is no necessity of showing any need
15 here, and we ought to be bypassed completely.

16 **MR. JENKINS:** I don't think so. We have the
17 subsequent docket we're going to open up and the
18 workshop dealing with the caps.

19 **COMMISSIONER CLARK:** Yes. But the argument
20 being advanced here is because it doesn't go into rate
21 base, it is cost-effective to the ratepayers because
22 they will not bear any of the cost except when they
23 buy the power. So you're really making no
24 determination of need. You're letting the market make
25 that determination completely.

1 **MR. JENKINS:** Not with caps. We're going
2 part way here; we're not going --

3 **COMMISSIONER CLARK:** Joe, just let me finish
4 my thought.

5 What you're saying is the market should
6 determine it. By this decision here you're saying you
7 don't have to show a need.

8 **MR. JENKINS:** I disagree with that.

9 **COMMISSIONER JACOBS:** There was no criteria
10 with stop building. There will be a decision about
11 purchasing.

12 **MR. JENKINS:** There will be a decision about
13 purchasing.

14 **COMMISSIONER JACOBS:** There's nothing here
15 that's going to stop building.

16 **MR. JENKINS:** The cap will stop them from
17 building. We can't open the floodgates.

18 **CHAIRMAN GARCIA:** Yes, Joe, but Susan is
19 right, there's no cap right now.

20 **MR. JENKINS:** There is no cap right now.
21 You're right.

22 **COMMISSIONER CLARK:** We would not be able to
23 impose a cap on the basis of it's not cost-effective.
24 Because you're just saying -- what you've said here,
25 as long as the ratepayers don't have to bear it, it's

1 cost-effective to them.

2 **MR. JENKINS:** Wait a minute. What we're
3 saying here -- remember, Issue 4 was written up in the
4 context of a co-applicant utility. See, this
5 recommendation is moot, should I strike it? And then
6 your question --

7 **COMMISSIONER CLARK:** Joe, that doesn't
8 obviate the need to answer the question. The question
9 is --

10 **MR. JENKINS:** But your question goes are we
11 opening the floodgates? And my answer is the only way
12 you can stop the floodgates is with the subsequent
13 workshop and docket.

14 **COMMISSIONER CLARK:** But then your rationale
15 is going to be that we don't need it; is that right?

16 **MR. JENKINS:** That we don't need a cap?

17 **COMMISSIONER CLARK:** No. We have a cap,
18 therefore -- yeah, therefore, we don't need the next
19 unit. When you have made the determination that it's
20 needed here because it isn't -- the costs are not
21 going possible to be borne by the ratepayers. It
22 seems to me it's an inconsistent position.

23 **MR. JENKINS:** I don't sense that at all.
24 With the subsequent docket.

25 **CHAIRMAN GARCIA:** Let's forget about the

1 subsequent. We're here, Joe. We're here where there
2 is no docket. We may not come to an agreement on the
3 rule. We may not be able to get a majority. Susan's
4 point is, is there a need for a determination of need
5 by a utility that's not going to put it into its rate
6 base; Is there a need for a determination of need
7 hearing before this Commission?

8 **COMMISSIONER CLARK:** That's right. Thank
9 you.

10 **CHAIRMAN GARCIA:** It's the first time I've
11 ever been able to restate Susan's position here.

12 **COMMISSIONER CLARK:** The point being, if
13 that is your determination of need, we are not
14 determining anything here. We're saying let the
15 market determine it. And there's no reason for them
16 to come to us first. But the fact of the matter is
17 the Legislature says they have to come back to us
18 first. So what are we doing? We need to determine --
19 Mr. Chairman, I'm going to go back to my other
20 argument which argues why the majority is wrong, but
21 you can understand that --

22 **CHAIRMAN GARCIA:** Do you agree with that
23 argument, Leslie? Is that legally what we've done
24 here?

25 **COMMISSIONER CLARK:** What is the basis of

1 finding need for the 400-and-some-odd megawatts? Why
2 is it needed?

3 **MS. PAUGH:** It is the cost-effectiveness of
4 the plant.

5 **COMMISSIONER CLARK:** Why is it
6 cost-effective?

7 **MS. PAUGH:** There was evidence in the record
8 regarding the reserve margins and overall Peninsular
9 reliability problems, and that is an analysis that has
10 been made in prior Commission decisions.

11 **COMMISSIONER CLARK:** And then was rejected
12 in the Duke -- in the New Smyrna -- in the Nassau
13 cases.

14 **MS. PAUGH:** Portions of it, not all of it.
15 The statewide need presumption was overruled.

16 **COMMISSIONER CLARK:** So that is the need;
17 that it was needed on a statewide basis. Now, how do
18 we determine that this is the most cost-effective,
19 then, if we don't do a comparative analysis? If our
20 determination is based solely on the fact that we're
21 not going to put it in rate base, how do we know that
22 this is -- we don't make a determination that this is
23 the most cost-effective?

24 **MS. PAUGH:** It was the presumption of
25 statewide need that was overruled, not the ability to

1 determine whether or not there was statewide or, in
2 this case, Peninsular need.

3 **CHAIRMAN GARCIA:** All right, Leslie. Let me
4 ask the question, then. Let me go another step.
5 Tomorrow -- in the next few weeks I know the companies
6 all have one or another dockets about building more
7 generation. Duke shows up with another plant. This
8 time they are not with New Smyrna. They just got a
9 550-megawatt plant and they show up. Why do we do a
10 determination of need? What is the issue? What is
11 the criteria for a need determination after this
12 decision?

13 **MS. PAUGH:** In my opinion --

14 **COMMISSIONER GARCIA:** And they're not going
15 to charge the ratepayers. Let me begin with that,
16 because it's important.

17 **MS. PAUGH:** In my opinion, the criteria are
18 not affected. We still have the same 403.519
19 criteria. That is not altered. We review it on that
20 basis.

21 **CHAIRMAN GARCIA:** And you would then -- they
22 would have to come in and determine that there was a
23 need, whether it be with a local municipality as their
24 partner or whether it be simply that they come in and
25 say, "There's a need in Peninsular Florida, and I want

1 to serve it."

2 **MS. PAUGH:** Yes.

3 **COMMISSIONER CLARK:** And how do they show
4 that need?

5 **MR. FUTRELL:** You'd have to get into
6 viability of the plant. You'd have to make some
7 assessment of the viability of the plant.

8 **CHAIRMAN GARCIA:** Viability in what sense?
9 Viability financially?

10 **MR. FUTRELL:** Is it a real project? Is it
11 really going to come on line and provide potential
12 benefits to the ratepayers and not just something on
13 paper? Not some back-of-the-envelope proposal.

14 **CHAIRMAN GARCIA:** Yes, but why do we --
15 Susan makes a very good point. Why do we care? And
16 let me tell you something, I'm not far on either
17 position. I'm just saying if the ratepayers aren't on
18 the hook, why do I care if they want to build a power
19 plant? Because there are other steps that they still
20 have to go through. They have to go before the siting
21 board. They still have to meet the DEP requirements.
22 And they may have to meet some other criteria that
23 we're going to determine into the need process. But
24 after this decision, what do they need to show? They
25 just need to show a statewide need, and they need to

1 show that it's a serious project. Why would they need
2 to show it's a serious project?

3 **MR. FUTRELL:** I think we just need to have
4 some comfort before passing that it is going to
5 potentially be there.

6 **CHAIRMAN GARCIA:** Why?

7 **COMMISSIONER CLARK:** We're not counting it
8 in the margin reserve. So we don't.

9 **MR. FUTRELL:** Right.

10 **CHAIRMAN GARCIA:** Joe? You've turned
11 yourself off.

12 **MR. JENKINS:** Oh, I'm sorry.

13 It's a very good question, is what do we
14 determine -- what is the basis to determine the need
15 in future merchant plant applications. Of course, my
16 answer originally was the cap. But that doesn't seem
17 to be acceptable.

18 **CHAIRMAN GARCIA:** Well, because it doesn't
19 exist right now.

20 **MR. JENKINS:** It doesn't exist right now.

21 **COMMISSIONER CLARK:** It's not consistent
22 with your logic.

23 **MR. JENKINS:** Well, you know --

24 **CHAIRMAN GARCIA:** I wouldn't go that far. I
25 think you could make that argument. I think there

1 could be a cap.

2 **MR. JENKINS:** I think the next argument you
3 could make is that it will lower wholesale prices
4 either on the broker or just on the wholesale market.
5 And that is in here. We have that as one of the
6 issues someplace.

7 **CHAIRMAN GARCIA:** I'm convinced that the
8 market works. But Susan makes a very valid point. If
9 FPC comes into this Commission and asks to build a
10 plant, like they may very soon, and they come in and
11 they say, "Commissioners, I'm going to put this into
12 rates." Then we need to open a determination of need
13 docket, and we investigate it. But if FPC comes in
14 here and says, "Commissioners, I'm just building a
15 merchant plant. What need do I need to determine?
16 The ratepayers aren't on the hook."

17 **MR. JENKINS:** Right.

18 **COMMISSIONER GARCIA:** "What viability do I
19 need to demonstrate? The only viability that I
20 need --" and I'm trying to figure it out, too. Maybe
21 for reliability's sake -- we may say something
22 different with FPC because there are other criteria
23 that guide them before us. But the truth is they can
24 build a plant, or FPL can come in here and build a
25 merchant plant after this decision is in place.

1 **COMMISSIONER CLARK:** What it boils down to
2 me is that we are saying there is a right to build a
3 merchant plant. And I'm concerned about that. I
4 think it was clear in the statutes that have been
5 enacted and the sequence in which they have been
6 enacted, there was never an --

7 **COMMISSIONER JACOBS:** I don't think so.

8 **COMMISSIONER CLARK:** -- an idea that it
9 should be a right. It should be a privilege. And it
10 should go through this process and there should be
11 some determination of need. And by the recommendation
12 today you're saying that we do not make a
13 determination of need when it's a merchant power
14 plant.

15 **MR. JENKINS:** I don't think so. If a
16 merchant plant owner came in here with a high-cost
17 plant, say a coal plant that had very high cost, an
18 average operating cost of, say, \$60 per megawatt-hour,
19 I think we would turn it down.

20 **COMMISSIONER CLARK:** How do you know that
21 this isn't a high-cost plant? You didn't get that
22 information here. You only looked at how much it was
23 going to cost New Smyrna. You said that's a good
24 deal, and you never looked at the parameters because
25 they didn't provide it, as I recall.

1 **COMMISSIONER DEASON:** We had extensive
2 testimony on the cost-effectiveness of the plant. And
3 even there was testimony provided concerning the
4 dispatch of units in Florida, and we had to continue
5 them --

6 **MR. JENKINS:** Very detailed testimony.

7 **COMMISSIONER DEASON:** -- and where it would
8 fit on that continuum, and the --

9 **MR. JENKINS:** Precisely.

10 **COMMISSIONER DEASON:** So I think that there
11 is a requirement to show cost-effectiveness in that
12 sense, but not to the degree that we get involved when
13 we're approving the contract, a binding contract on a
14 30-year horizon. I think we have a responsibility to
15 make sure that the project is viable.

16 **MR. JENKINS:** Right.

17 **COMMISSIONER DEASON:** We also have
18 responsibilities to look at fuel diversities, where
19 it's being built or whether it's going to be a problem
20 with the transmission systems. But in all -- in
21 reality, though, before someone has the sophistication
22 of Duke who is willing to invest \$160 million, you're
23 pretty well assured that they've looked at all of
24 those things. But that doesn't relieve them of the
25 obligation just because they say, "I want to build a

1 merchant plant," you know, "Stamp my approval card," I
2 don't think we're there yet. But I think to answer
3 the question, I think, yes, there is a different
4 standard from the way we've done things before.

5 **MR. JENKINS:** And we would test those
6 parameters as we did in this case.

7 **COMMISSIONER CLARK:** Wait a minute. Is
8 there a different standard for a merchant plant than a
9 plant that's going to go into rate base? Or a plant
10 being built by a utility -- and their proposal is that
11 it go into rate base -- because I would reiterate that
12 a finding of need does not make it automatically
13 prudent.

14 **MR. JENKINS:** I don't know if there's a
15 different standard, but we would probably look at it a
16 lot harder when we're binding customers.

17 **COMMISSIONER CLARK:** You would, in fact,
18 look at all of the parameters of it and the cost of
19 it, and you'd require them to go through the bidding
20 rule to determine that this was --

21 **MR. JENKINS:** If it was an investor-owned,
22 that's correct.

23 **COMMISSIONER CLARK:** So it as a different
24 standard. The standard you appear to use here -- and
25 I could be wrong -- is that it -- as long as the

1 ratepayers aren't going to bear this cost and it's a
2 pure merchant plant, then it is cost-effective.

3 **MR. JENKINS:** Again, if someone came in with
4 a high-cost coal plant.

5 **COMMISSIONER CLARK:** Just this
6 recommendation. Where have you caveated it in that
7 way? You haven't. The analysis with respect to
8 whether or not it is cost-effective is simply that it
9 won't be borne by the ratepayers. Have I misread
10 that?

11 **MR. JENKINS:** No.

12 **CHAIRMAN GARCIA:** You have. Because it also
13 premises the 30-megawatt need and that that is
14 definitely cost-effective for the ratepayers.

15 **COMMISSIONER CLARK:** Okay. Well, let's
16 assume the next merchant plant comes in without -- you
17 said that they don't have to be tied to --

18 **MR. JENKINS:** Let's say another identical
19 Duke comes in; is not a high-cost one, a low-cost one.
20 In reality, it would be hard to distinguish between an
21 identical Duke-type plant and this coming in.

22 **COMMISSIONER JACOBS:** What about 2,000?

23 **MR. JENKINS:** 2,000? Well, I was going to
24 suggest a cap of 4,000. But, again, we're getting
25 into that cap talk again, and we don't want to do

1 that.

2 **CHAIRMAN GARCIA:** Let's say somebody shows
3 up tomorrow with a 2,000-megawatt plant. What do we
4 do?

5 **MR. JENKINS:** I'm not sure what we would do.

6 **CHAIRMAN GARCIA:** Susan makes a valid point
7 that what criteria have you left here that we can rely
8 on? I mean, try to understand, I'm not berating you,
9 because I can argue the free market side, that Duke is
10 not going to build a 2,000-megawatt plant. There's
11 not a need for it in Florida. And Wall Street is not
12 going to bankroll an unnecessary plant in Florida.
13 But let's say Duke came in here to build a
14 2,000-megawatt plant. What criteria could we use to
15 tell them to go away?

16 **MR. JENKINS:** Commissioners, I have some
17 ideas. They are not in the record. What I would do
18 is I would like to, perhaps in this subsequent docket,
19 require a diversity of ownership so we dilute market
20 power on the wholesale market.

21 **CHAIRMAN GARCIA:** These are all sorts of --
22 these are all sorts of issues that aren't before us
23 here.

24 **MR. JENKINS:** That's correct.

25 **CHAIRMAN GARCIA:** Clearly, when we finish

1 here today -- when we finish here today, it may be
2 Duke, it may be FPL, it may be some of the people who
3 are listening in on the phone, are going to show up in
4 Florida. And they're going to say, "I want to build a
5 merchant plant. I've studied your margin reserves in
6 Florida. I think they are low. I think I can pop up
7 a plant in year-and-a-half and make money."

8 **MR. JENKINS:** And make money.

9 **CHAIRMAN GARCIA:** So it begs the question.
10 We have a determination of need proceeding in the law
11 of this state that we're required to conduct. Now, we
12 can do that as wide or as narrow as we want. Susan
13 seems to think that it's a very narrow determination
14 on certain points. That's fine. I respect her
15 position. We believe that we have a certain amount of
16 discretion in that. So my question then goes to what
17 discretion are we leaving ourselves on these projects?

18 Now, on an economic basis you're absolutely
19 right. No market is going to build a power plant. I
20 don't even know why you're talking about an expensive
21 coal plant, because the truth is if an expensive coal
22 plant came to Florida, what do I care? I mean, what
23 if Duke showed up next week -- I mean, I understand
24 DEP will care. I understand the residents will care.
25 I understand the siting board will care. But what if

1 tomorrow they come in -- Duke decides that they want
2 to build a 2,000-megawatt coal-fired plant in Florida.
3 How does that affect our determination of need issues?

4 **MR. JENKINS:** I can't give you a good answer
5 right now.

6 **CHAIRMAN GARCIA:** Leslie, do you have any
7 criteria there? Do we have anything to do here or
8 will we just wave them on in, as long as ratepayers
9 aren't at risk?

10 **MS. PAUGH:** My opinion is that the criteria
11 403.519 are intact, and they are. Let's refresh our
12 memories. "The Commission shall take into account the
13 need for electric system reliability and integrity,
14 the need for adequate electric at a reasonable cost
15 and whether the proposed plant is the most
16 cost-effective alternative available." All of those
17 criteria operate in this instance, and they will
18 operate in future cases. I can't predict how without
19 a fact situation before me, but I do not see them as
20 having been negated in any fashion.

21 **CHAIRMAN GARCIA:** Can we make sure that
22 we -- I mean, obviously it's the law. We don't have
23 to restate the law. But, clearly, that gives me some
24 comfort level in moving forward because we can decide
25 certain issues. I just don't know if we would.

1 **COMMISSIONER JACOBS:** There's a nice legal
2 term called collateral estopple that I guarantee there
3 are some lawyers listening right now who are
4 absolutely watering their mouths over about how we
5 will defend the issue of cost-effectiveness against
6 another plant when we've made this decision today.

7 **COMMISSIONER DEASON:** I think we have
8 subjected this project to a very close scrutiny on
9 cost-effectiveness. The record is replete and
10 complete in that regard.

11 **COMMISSIONER CLARK:** Yeah, but the
12 recommendation, I thought, was it's cost-effective
13 because it's not being borne by the ratepayers.

14 **COMMISSIONER DEASON:** No, I think the
15 recommendation goes much further than that.

16 **COMMISSIONER CLARK:** Okay. Where is that?

17 **COMMISSIONER DEASON:** Well, there's a
18 recommendation that it enhances reliability, for one
19 thing. And, of course, there is a recommendation that
20 the ratepayers are not at risk.

21 **MR. JENKINS:** And it lowers prices on the
22 wholesale market, which directly flows through the
23 fuel cost recovery clause for all investor-owned
24 utilities.

25 **COMMISSIONER CLARK:** Well, does that

1 reliability go to cost-effectiveness? I mean, the
2 issue of it being cost-effective, that deals with
3 reliability. Does it deal with cost-effective? Any
4 merchant power plant is going to increase the
5 reliability by being more power.

6 **COMMISSIONER DEASON:** It's not if it's never
7 going to be dispatched, and it's not going to be
8 dispatched unless it's cost-effective.

9 **MR. JENKINS:** That's correct.

10 **COMMISSIONER DEASON:** And we're not going to
11 approve the building of a plant -- even if there were
12 someone willing to bankroll \$160 million for
13 non-cost-effective plant, if they tried to come and
14 get approval it, and we looked at the economics of it
15 and said, "It's never going to be dispatched. You're
16 never even going to sell a megawatt-hour. Go away."

17 **MR. JENKINS:** That's right. Eventually you
18 will climb up the dispatch to where the prices
19 equalize out and the next plant will not be able to be
20 dispatched because on the margin it won't be able to
21 compete. You've got the answer.

22 **COMMISSIONER JACOBS:** I've not seen one
23 finding in this docket that will describe when the
24 Duke plant will be dispatched.

25 **MR. JENKINS:** Oh, yes. What was that

1 witness? Nesbitt.

2 **COMMISSIONER CLARK:** Now, you're confusing
3 with what the witnesses said and what you're basing
4 your opinion on.

5 **COMMISSIONER JACOBS:** Exactly.

6 **COMMISSIONER GARCIA:** It has to be
7 economically dispatched. That's required by the FERC
8 and required by this Commission. They can't not
9 economically dispatch.

10 **COMMISSIONER JACOBS:** Then let's say that.
11 Let's say that. They have to abide and be consistent
12 with --

13 **CHAIRMAN GARCIA:** What do you mean if they
14 decide -- I'm sorry. We had a question.

15 **COMMISSIONER CLARK:** I'm just saying they
16 can run the plant based on any criteria they want to.
17 We don't have any control over that.

18 **COMMISSIONER JACOBS:** And they can make the
19 determination as to whether or not they sell as to
20 whether or not they are profitable, not whether or not
21 they economically dispatch.

22 **COMMISSIONER CLARK:** Mr. Chairman, I think
23 -- we're getting back sort of into an argument about,
24 you know, the previous issues. I still think that
25 effectively what we have done is say all you have to

1 show is it doesn't go into the rate base. That it is
2 a merchant plant; and, therefore, it is
3 cost-effective, and we've really done no analysis. So
4 if that's the case, why do we determine any need? Why
5 is there any reason for them to come here?

6 **COMMISSIONER DEASON:** I don't think that's
7 Staff's recommendation.

8 **MR. JENKINS:** No.

9 **COMMISSIONER CLARK:** Well, show me where it
10 isn't.

11 **MR. JENKINS:** Yeah, I keep getting -- I keep
12 saying and I keep getting rebutted, but in my mind all
13 of these issues are for the subsequent docket for
14 another day. We only have one plant before us at this
15 time. And I apologize that we didn't address issues
16 that you're going to another docket.

17 **COMMISSIONER CLARK:** It goes to the heart of
18 what we're doing and whether it's consistent with the
19 statute.

20 **COMMISSIONER DEASON:** I think it's Staff's
21 recommendation that the economics of this plant are
22 such that it is state-of-the-art; it is going to be
23 efficiently -- it's an efficient plant. We've looked
24 at the dispatch such that we know it's going to be
25 dispatched a great deal of the time. It's only going

1 to be dispatched when it's cost-effective to do so,
2 which means that it's going to have a downward effect
3 upon the wholesale market which flows through to
4 customers in retail rates through the fuel adjustment
5 clause.

6 **MR. JENKINS:** Right.

7 **COMMISSIONER DEASON:** Staff has recommended
8 that it enhances reliability because it is going to be
9 dispatched.

10 **MR. JENKINS:** Right.

11 **COMMISSIONER DEASON:** And there is capacity
12 there that can be relied upon in case of an emergency.

13 **MR. JENKINS:** And the next plant, or some
14 subsequent plant, will not have all of those
15 attributes as we rise up to dispatch or minimize the
16 wholesale cost. Eventually they will not be able to
17 compete with the wholesale prices, and we will not
18 certify them. But, again, that doesn't --

19 **COMMISSIONER JACOBS:** If we're willing to
20 make those findings here, and then hold that those
21 would guide future proceedings to determine the
22 absolute criteria, rule, or whatever else is going to
23 guide this, I think we need to move on. But I didn't
24 hear those as findings.

25 **MR. JENKINS:** I didn't think we were going

1 to make those in this docket because we only have one
2 plant before us.

3 **COMMISSIONER JACOBS:** Here's what I'm
4 saying. If we're willing to make those as findings,
5 and then understand that going forward we will be
6 exploring the absolute criteria that would guide,
7 based on those criteria, then I think we can move.

8 **MR. JENKINS:** We'll be going forward in a
9 subsequent docket looking at those criteria and many,
10 many more criteria that you all have mentioned.

11 **COMMISSIONER JACOBS:** But are we willing to
12 make those findings? Is there evidence in this
13 record, and are we prepared to make those findings
14 with regard to this application?

15 **CHAIRMAN GARCIA:** We have.

16 **COMMISSIONER JACOBS:** I just want to get
17 clarified, because I didn't think so. I want to be
18 clear about that.

19 **CHAIRMAN GARCIA:** Well, then, tell me what
20 you want to say. Do you want us to say that we found
21 that this plant --

22 **COMMISSIONER JACOBS:** No, no. What
23 Commissioner Deason said was right on point. I think
24 the way he described it was right on point. All I'm
25 saying is I did not understand that those were

1 findings.

2 **CHAIRMAN GARCIA:** Leslie, you can get that
3 from the record, from the transcript of the hearing,
4 Commissioner Deason's statement, and it incorporates
5 what you talked about, which is the statutory --

6 **MR. JENKINS:** I think a lot of what
7 Commissioner Deason said is in Issue 1 about the
8 short-term dispatch.

9 **CHAIRMAN GARCIA:** I agree. I agree. But if
10 it gives a comfort level to Commissioner Jacobs, I
11 just want to make sure we state it in the final order,
12 okay?

13 **MR. JENKINS:** All right.

14 **CHAIRMAN GARCIA:** That said, Commissioner
15 Deason, I believe you stated that we don't need to
16 consider Issue No. 4. We don't need to vote it out.

17 **COMMISSIONER DEASON:** I don't think we do,
18 but I'm open to a suggestion that we do.

19 **COMMISSIONER CLARK:** I think it's been
20 decided, really.

21 **CHAIRMAN GARCIA:** Okay. It doesn't --
22 decided, so we -- I guess if there's anybody who
23 disagrees -- no one disagrees? It's moot.

24 Issue 5.

25 **COMMISSIONER DEASON:** Move Staff.

1 **COMMISSIONER GARCIA:** Is there a second?

2 **COMMISSIONER JOHNSON:** Second.

3 **CHAIRMAN GARCIA:** Is there any discussion?

4 There being no discussion, all those in favor signify
5 by voting "aye."

6 **COMMISSIONER DEASON:** Aye.

7 **COMMISSIONER JACOBS:** Aye.

8 **COMMISSIONER GARCIA:** Aye.

9 **COMMISSIONER JOHNSON:** Aye.

10 **COMMISSIONER GARCIA:** All those opposed?

11 **COMMISSIONER CLARK:** Nay.

12 **CHAIRMAN GARCIA:** Leon, I'm sorry, I didn't
13 hear you.

14 **COMMISSIONER JACOBS:** I said aye.

15 **CHAIRMAN GARCIA:** 4-1 on Issue 5.

16 Issue 6.

17 **COMMISSIONER DEASON:** I have a question on
18 Issue 6. I'm looking at Page 77 of the
19 recommendation, the last two paragraphs. The next to
20 the last paragraph on Page 77 in the middle part, it
21 indicates that it has not been determined whether
22 Duke-New Symrna will pay for these costs entirely or
23 will pay only a portion. And then in the next
24 paragraph, in the middle of that paragraph, it says,
25 "Witness Rib, however, stated that Duke New Symrna

1 would pay for any transmission upgrades required as a
2 result of long-term sales pursuant to FERC rules."
3 Are you talking about different costs in the next to
4 the last paragraph other than transmission upgrades?

5 **MR. FUTRELL:** Yes, sir.

6 **COMMISSIONER DEASON:** What costs are those?

7 **MR. FUTRELL:** In the next to the last are
8 those associated with connecting the plant and then
9 the lines to the grid.

10 **COMMISSIONER DEASON:** The actual connecting,
11 not the transmission upgrades, but the actual --
12 interconnection.

13 **MR. FUTRELL:** Connecting, and any upgrades
14 associated, required of the existing substation that
15 New Smyrna Beach owns.

16 **COMMISSIONER DEASON:** How much capital is
17 involved in doing that?

18 **MR. FUTRELL:** They're estimating
19 approximately 6.7 million.

20 **COMMISSIONER DEASON:** 6.7 million. And if
21 Duke's New Smyrna is not the entity to pay for that,
22 who would pay for it?

23 **MR. FUTRELL:** It's unclear. It looks like
24 New Smyrna may participating in those costs, the City
25 of New Smyrna Beach.

1 **COMMISSIONER DEASON:** But it's either the
2 City or Duke. We're not imposing costs on the other
3 utility if it's going to be passed through to the
4 retail customers?

5 **MR. FUTRELL:** That's correct.

6 **COMMISSIONER DEASON:** Okay.

7 **COMMISSIONER CLARK:** I think that should be
8 stated clearly, that nothing should be required to be
9 borne by the other entities --

10 **CHAIRMAN GARCIA:** Good point.

11 **COMMISSIONER CLARK:** -- relative to this
12 transmission. Are you sure Order 888 doesn't require
13 upgrades and requires --

14 **COMMISSIONER GARCIA:** Joe, you turned
15 yourself off again.

16 **MR. JENKINS:** Order 888 goes to the
17 transmission upgrades, not the connection. And 888
18 requires that the parties negotiate a price for any
19 transmission improvements.

20 **COMMISSIONER CLARK:** Can Duke New Smyrna
21 require whoever is providing the transmission in that
22 area to upgrade?

23 **MR. JENKINS:** No. Not at -- only at Duke's
24 cost. If there are upgrades required, they have to
25 negotiate with FPL or FPC and pay for what is

1 negotiated.

2 **COMMISSIONER CLARK:** I think we should make
3 that clear as part of this decision.

4 **COMMISSIONER GARCIA:** Very good. And,
5 Leslie, you got that, right? Very good.

6 **COMMISSIONER DEASON:** Move Staff with that
7 clarification.

8 **CHAIRMAN GARCIA:** Is there a second?

9 **COMMISSIONER JOHNSON:** Second.

10 **CHAIRMAN GARCIA:** All those in favor signify
11 by saying "aye."

12 **COMMISSIONER CLARK:** Aye.

13 **COMMISSIONER GARCIA:** Aye.

14 **COMMISSIONER DEASON:** Aye.

15 **COMMISSIONER JOHNSON:** Aye.

16 **COMMISSIONER JACOBS:** Aye.

17 **CHAIRMAN GARCIA:** Show it approved
18 unanimously.

19 Issue 7.

20 **COMMISSIONER DEASON:** Move Staff.

21 **CHAIRMAN GARCIA:** Is there a second?

22 **COMMISSIONER JOHNSON:** Second.

23 **CHAIRMAN GARCIA:** Is there any discussion?

24 There being no discussion, all those in favor signify
25 by saying "aye."

1 **COMMISSIONER DEASON:** Aye.

2 **COMMISSIONER GARCIA:** Aye.

3 **COMMISSIONER JOHNSON:** Aye.

4 **COMMISSIONER GARCIA:** All those opposed?

5 **COMMISSIONER CLARK:** Nay.

6 **COMMISSIONER JACOBS:** Nay.

7 **CHAIRMAN GARCIA:** Show that, Item 7,

8 approved on a three-two vote.

9 Issue 8.

10 **COMMISSIONER JOHNSON:** Move it.

11 **COMMISSIONER CLARK:** I think this makes my

12 point again. The sole criteria for it being

13 cost-effective was the basis that we don't have to

14 reach a decision as to whether it's cost-effective.

15 If they are going to bear the burden, then it is.

16 **CHAIRMAN GARCIA:** And we, of course, are
17 going to include in the discussion the criteria that
18 Commissioner Deason restated, which is from Issue 1.
19 In fact, do we even need to vote this one out, because
20 it's part of Issue 1, is it not?

21 **MR. FUTRELL:** Correct.

22 **COMMISSIONER CLARK:** I think you're right.

23 **CHAIRMAN GARCIA:** So that said, if everyone
24 is in agreement, we'll drop Issue No. 8. Issue No. 8
25 is moot.

1 Issue 9.

2 **COMMISSIONER DEASON:** This is an issue that
3 gives me a problem.

4 **MR. JENKINS:** This is another generic docket
5 issue. Our concern here was that Duke does not have
6 backup oil supplies in case of a natural gas
7 interruption, but we didn't think it fair to single
8 out Duke because neither does Florida Power and Light
9 nor Florida Power or some of the municipals at their
10 plants. So we would recommend opening a rule-type or
11 generic docket, with a possibility of requiring all
12 natural gas-fired plants to have backup oil.

13 **COMMISSIONER DEASON:** So you're saying that
14 this a generic concern and we should have a rulemaking
15 on it, and since Duke New Smyrna is a regulated
16 utility, they would be required to comply with
17 whatever is the result of that?

18 **MR. JENKINS:** Precisely.

19 **COMMISSIONER CLARK:** Why do you care about
20 this, whether they have adequate assurances of primary
21 and secondary fuel if they're going to be a merchant
22 plant?

23 **MR. JENKINS:** Well, frankly, we made --
24 Staff made a recommendation in the '80s that a lot of
25 the power plants did not have backup fuel. That

1 recommendation was rejected in the '80s, and I hate to
2 say it, but this is another shot, you know. We're
3 trying again.

4 **COMMISSIONER CLARK:** Well, I guess my point
5 is that this is a merchant power plant; no obligation
6 to serve. We would assume the market would dictate
7 the parameters of that, and why would we want to
8 dictate they have primary or secondary fuel?

9 **MR. JENKINS:** Of course, at someplace
10 down -- well, we have the 30 megawatts to New Smyrna
11 Beach. And someplace down the line you would think
12 they're going to sign a short-term contract for, you
13 know, one, two, three years or a few months over a
14 peak period. And if there's a natural gas
15 interruption, we would like for them to have an
16 on-site light oil supply.

17 **COMMISSIONER CLARK:** For what reason?

18 **MR. JENKINS:** To ensure reliability when
19 they do sign a contract.

20 **COMMISSIONER DEASON:** But that would be an
21 issue at the time that it came up for a contract
22 approval, would it not?

23 **MR. JENKINS:** It would for an investor-owned
24 utility in the fuel clause. It would not for a
25 municipal or co-op as a buyer.

1 **COMMISSIONER DEASON:** But at some point, to
2 rely upon a plant for reliability purposes, you have
3 to have confidence that it's going to be dispatchable,
4 even during emergency situations, that is, perhaps a
5 natural gas interruption. And at least some portion
6 of a large diverse utility's generation probably is
7 going to be different fuel mixes anyway, and all of
8 those things have to be evaluated.

9 **MR. JENKINS:** That's right. My concern is
10 like last summer, if we had had the explosion in the
11 FGT pipeline in July, a month earlier, instead of
12 August when it was slightly cooler, I don't think we
13 would have been able to, in the state, serve firm
14 load. So this is making generating capacity more
15 firmer.

16 **COMMISSIONER DEASON:** I guess I go back to
17 Commissioner Clark's question. If we're not approving
18 this plant based upon reliability purposes -- I know
19 it's reliability enhancement.

20 **MR. JENKINS:** Right.

21 **COMMISSIONER GARCIA:** But not because it's
22 needed to meet a 15% reserve margin. What difference
23 does it make?

24 **MR. JENKINS:** A portion or all of that 484
25 megawatts of merchant capacity will eventually wind up

1 being part of a firm contract that we would include in
2 the reserve margin. And when they include it, we'd
3 like to -- at least we think we'd like to have it with
4 a backup oil supply. That plant, as well as any
5 other.

6 **COMMISSIONER DEASON:** Assuming that is the
7 correct thing to do, and I'm not sure it is, don't you
8 correct that problem by just basically telling our
9 utilities we're not going to approve a contract for
10 your 15% reserve margin if it doesn't have dual fuel
11 capability. So, therefore, they would either not
12 sign with Duke, or else before they did they'd say,
13 "Duke, you've got to put in a secondary fuel source
14 before I can purchase this capacity, because if I
15 purchase it, it's not going to be applied to my 15%
16 reserve margin."

17 **MR. JENKINS:** If I do that, I want to do
18 that for the Martin plant as well. And what is
19 Martin, 2,000 megawatts?

20 **COMMISSIONER DEASON:** Under current
21 regulations, when do we look at those type issues?
22 Just ignore merchant plants?

23 **MR. JENKINS:** Again, Staff recommended
24 backup oil in all plants in the '80s. it was turned
25 down. And this is not an FPL issue. This is a Staff

1 issue. This is another shot, another bite at the
2 apple, I'll be up-front on that.

3 **CHAIRMAN GARCIA:** What do you mean?

4 **COMMISSIONER DEASON:** He lost once. He
5 wants to relitigate it.

6 **MR. JENKINS:** That's basically true.

7 **CHAIRMAN GARCIA:** So we can drop it then.

8 Let me ask a question, because it puts us in an
9 interesting spot.

10 Can the Commissioners point out which items
11 they have questions on, and then what I'm going to do
12 is let's have a discussion on those remaining items.
13 And I'd like Staff -- I'd like to then take a
14 five-minute break and have Staff come back to us and
15 say which issues we don't have to decide. Because I
16 -- you know, I agree with Commissioner Deason and
17 Commissioner Johnson and Commissioner Clark, most of
18 the meat is already on Issue 1. These were -- and
19 again, I fought myself as hearing officer, I allowed a
20 lot of things into this, hoping to get the fullest
21 possible debate that we could get. But maybe --
22 Commissioner Deason, if you have any questions, or
23 Commissioner Clark, I don't think you had any
24 additional ones aside from the ones you had asked.

25 **COMMISSIONER DEASON:** I'm not saying all of

1 these issues need to be determined, but I can tell you
2 the issues I have questions on if we are going to have
3 a vote on them.

4 **COMMISSIONER CLARK:** I think it would be a
5 useful exercise to take a break and let Staff go
6 through them, because I think there are a number of
7 ones that don't require a decision.

8 **MR. JENKINS:** Okay.

9 **CHAIRMAN GARCIA:** Okay. We'll do that then.
10 Let's take a -- Commissioners, let's take a -- we can
11 take lunch, but I think that just pulls us further
12 back. Let's take ten minutes, and then we'll be right
13 back.

14 (Brief recess taken.)

15 - - - - -

16 **COMMISSIONER DEASON:** Mr. Chairman, I just
17 would like to make one observation in that you've done
18 very poorly today on your campaign promise that we
19 were going to have lunch breaks.

20 **CHAIRMAN GARCIA:** Commissioner, you're
21 absolutely right. I'm sorry. And it is my fault
22 because I'm scheduled to meet with several people in
23 the Legislature this afternoon, and I'm sorry. And
24 then, of course, Commissioner Johnson is going ahead
25 and having lunch as she always did anyway, secretly.

1 (Laughter)

2 Okay. We broke. Staff gave me their
3 criteria -- what they felt had to be addressed. That
4 is, they want to go back to 8 because they feel that
5 it's delineates the statutory criteria very clearly
6 for them and makes it easier for them. Then we can
7 skip everything and then go to 13. Skip everything in
8 between and do 32 and 33.

9 **MS. PAUGH:** That's correct, Mr. Chairman.

10 **CHAIRMAN GARCIA:** That said --

11 **COMMISSIONER DEASON:** Let me say one thing.
12 Depending on how we handle 8 -- you know, I thought
13 that 29 was a real key issue that kind of summed
14 everything up, and that would be a good opportunity to
15 kind of clarify in one place all of the criteria we
16 were applying and why we felt this was a good project.
17 If it's going to be done somewhere else, fine. But I
18 just think somewhere -- I mean, I think during this
19 whole long discourse we have been trying to identify
20 reasons that we think this project should be approved,
21 but I think it needs to be capsulized somewhere.

22 **CHAIRMAN GARCIA:** That was 27?

23 **COMMISSIONER JOHNSON:** 29.

24 **COMMISSIONER DEASON:** 29, I thought.

25 **CHAIRMAN GARCIA:** I'm sorry, 29.

1 **COMMISSIONER DEASON:** Well, maybe Staff is
2 going to do that in Issue 8. I don't know what they
3 plan to do with Issue 8.

4 **CHAIRMAN GARCIA:** So the Staff analysis on
5 29. Hold on. For the press release alone it has
6 great value since it's that short.

7 **COMMISSIONER DEASON:** Whatever Staff thinks
8 on 29. My point is that somewhere we need to
9 capulize the criteria we have adopted for approval of
10 this project.

11 **MS. PAUGH:** I absolutely agree,
12 Commissioner.

13 **CHAIRMAN GARCIA:** Okay. Can I ask someone
14 to reconsider their vote on Item 8, so we can just
15 vote it out again.

16 **COMMISSIONER DEASON:** We said it was moot.

17 **CHAIRMAN GARCIA:** We said it was moot, so we
18 didn't vote on it. So we don't have to reconsider.

19 **MS. PAUGH:** That's correct.

20 **COMMISSIONER GARCIA:** Does anyone have a
21 motion on Item No. 8? Or Issue No. 8?

22 **COMMISSIONER DEASON:** Does Staff have
23 something to add to Issue 8?

24 **MR. JENKINS:** We just want to say that this
25 issue is -- this item is covered in Issue 1.

1 **COMMISSIONER DEASON:** Oh, that was all you
2 wanted to indicate?

3 **MR. JENKINS:** Instead of, you know, no vote
4 move.

5 **CHAIRMAN GARCIA:** You'd rather just restate
6 it in Issue 8.

7 **MR. JENKINS:** Right.

8 **CHAIRMAN GARCIA:** Is there a motion?

9 **COMMISSIONER JOHNSON:** Move it.

10 **COMMISSIONER DEASON:** Second.

11 **COMMISSIONER GARCIA:** A second.

12 **COMMISSIONER JACOBS:** Please forgive me.

13 Issue 8 now simply -- the recommendation is that it's
14 covered in Issue 1?

15 **MR. JENKINS:** That's correct.

16 **COMMISSIONER JACOBS:** Okay.

17 **CHAIRMAN GARCIA:** All right. All those in
18 favor signify by saying "aye."

19 **COMMISSIONER DEASON:** Aye.

20 **COMMISSIONER GARCIA:** Aye.

21 **COMMISSIONER JOHNSON:** Aye.

22 **COMMISSIONER JACOBS:** Aye.

23 **COMMISSIONER GARCIA:** All those opposed?

24 **COMMISSIONER CLARK:** No.

25 **CHAIRMAN GARCIA:** All right. That passes

1 four-one.

2 We now go to Issue 13. Commissioners, does
3 anyone have questions on Issue 13?

4 **COMMISSIONER DEASON:** No, I have no
5 questions on 13.

6 **COMMISSIONER CLARK:** You know, I would only
7 point out, doesn't under 403.519 require the applicant
8 to do this?

9 **COMMISSIONER DEASON:** It requires the
10 Commission to consider it. It's just one of the
11 numerous things we can consider.

12 **MS. PAUGH:** That's correct.

13 **COMMISSIONER DEASON:** And I would point out
14 that one of the strongest environmental advocates in
15 this state has indicated that, in the least position,
16 they recognize the wholesale nature of this and think
17 it's not applicable. Now, you know, I'm not saying
18 that's what Staff's position is, but I think that
19 bears on this issue.

20 Let me say this, that I don't have a problem
21 with Staff's recommendation. You've made note of the
22 fact that there is solar photovoltaic installation and
23 that is, at least, described as a possibility. I
24 don't think it's a guarantee. I'll just leave it at
25 that.

1 **COMMISSIONER JACOBS:** Okay. Going forward
2 -- on whose side of the ledger will we base the
3 conservation requirement? Here we base it on the
4 City's, right? And that 30-megawatt need; is that
5 correct? Going forward is that going to continue to
6 be the case? Let's say if -- let me ask the question
7 this way: If a merchant plant comes in alone without
8 anybody else, there is no conservation requirement.
9 Is that a correct statement?

10 **MR. JENKINS:** That's probably correct until
11 we get to the end of this subsequent docket.

12 **COMMISSIONER JACOBS:** That will be one of
13 the issues we'll consider, whether or not to impose?

14 **MR. JENKINS:** That's correct.

15 **COMMISSIONER JACOBS:** Okay.

16 **CHAIRMAN GARCIA:** Okay. Is there a motion
17 on Issue 13?

18 **COMMISSIONER DEASON:** Move Staff.

19 **COMMISSIONER GARCIA:** Is there a second?

20 **COMMISSIONER JOHNSON:** Second.

21 **CHAIRMAN GARCIA:** There's a second. All of
22 those in favor signify by saying "aye."

23 **COMMISSIONER DEASON:** Aye.

24 **COMMISSIONER GARCIA:** Aye.

25 **COMMISSIONER JACOBS:** Aye.

1 **COMMISSIONER JOHNSON:** Aye.

2 **COMMISSIONER GARCIA:** All those opposed?

3 **COMMISSIONER CLARK:** Nay.

4 **CHAIRMAN GARCIA:** It passes on a four-one
5 vote.

6 We then go to Issue 29.

7 **COMMISSIONER DEASON:** Let me ask a question.
8 I'm not trying to prolong this, but we have a negative
9 vote on Issue 13, so, Commissioner, are you saying
10 there are conservation measures that could have been
11 taken and that they were not?

12 **COMMISSIONER CLARK:** My vote is consistent
13 with the notion that I think they need to provide
14 retail and we need to look at that.

15 **COMMISSIONER DEASON:** Okay. You're just --
16 you're still voting on Issue 1, then. So you're
17 being consistent.

18 **COMMISSIONER CLARK:** That's right.

19 **COMMISSIONER DEASON:** Okay. Issue No. 29.
20 I think it's relatively simple and straightforward.
21 I'll entertain a motion. There's a motion.

22 **COMMISSIONER JOHNSON:** Move it.

23 **COMMISSIONER GARCIA:** Is there a second?

24 **COMMISSIONER DEASON:** Let me say that -- I
25 mean, I agree with Staff's recommendation on Issue 29,

1 but I think this is a very broad issue. I think that
2 there are criteria that we have applied to the review
3 of this application. And I would not want there to be
4 misrepresentation that simply because this is a
5 merchant plant that that in and of itself is the
6 reason that this plant is being approved. I think
7 there are criteria that have to be evaluated. We have
8 our statutory responsibilities, and I think that we
9 have met those in this case. And there are a number
10 of benefits to be derived from this project. And I
11 think that they are found in various places throughout
12 this recommendation and in the record. And I think I
13 probably enumerated some of those earlier, and I just
14 -- I guess my focus is that I want to make sure that
15 gets capsulized somewhere in the Order.

16 **MR. JENKINS:** We will probably extract most,
17 if not all, of that from the writeup in Issue 1.

18 **COMMISSIONER DEASON:** I move --

19 **COMMISSIONER GARCIA:** OKay. There's a
20 second -- a motion and a second. All those in favor
21 signify by saying "aye." Aye.

22 **COMMISSIONER DEASON:** Aye.

23 **COMMISSIONER JOHNSON:** Aye.

24 **COMMISSIONER GARCIA:** All those opposed?

25 **COMMISSIONER JACOBS:** I'm sorry. The vote

1 is already in. I was going to add a comment.

2 **COMMISSIONER GARCIA:** Go right ahead.

3 **COMMISSIONER CLARK:** Yeah. This is a
4 difficult question because my view was based on what I
5 think the law was, and the need to change the law.
6 But I do believe that we need to go forward. Because
7 I think very credible information was provided with
8 respect to the cost/benefit and the fact that these
9 plants can be in the public interest and can be
10 beneficial to Florida. That doesn't mean that the law
11 authorizes the determination of need. And I have
12 difficulty -- you know, I don't want to vote nay on
13 this, but it is implicit with granting the
14 determination of need.

15 Maybe I should just make it clear that I
16 think that there clearly were benefits that were
17 proposed and a way of incorporating merchant plants
18 into the generating fleet in Florida. There are other
19 public interest things that I think need to be
20 weighed, and I think that is and was for the
21 Legislature to make some of those determinations
22 guided by our advice.

23 So I guess what I'll do is vote nay on this,
24 but I want it to be made clear that in dissent that
25 it's based on the legal interpretation and the

1 statutory framework, but that there can be benefits to
2 this kind of plant. And that we need to look at a
3 scheme that would allow for that, and we need to
4 pursue it in the Legislature.

5 **COMMISSIONER GARCIA:** Commissioner Jacobs?

6 **COMMISSIONER JACOBS:** I largely concur in
7 those comments.

8 **CHAIRMAN GARCIA:** Okay.

9 **COMMISSIONER JACOBS:** I don't know that it's
10 purely something that -- that I'm absolutely of the
11 opinion that the Legislature's involvement is the
12 linchpin of that, but all of the other comments are
13 exactly my sentiments. I think that it is not yet
14 clear what all the public interest ramifications of
15 this are.

16 **COMMISSIONER CLARK:** I would agree with
17 that.

18 **COMMISSIONER JACOBS:** So an unqualified yes
19 is a bit premature for me.

20 **CHAIRMAN GARCIA:** Okay. All those in favor
21 signify by saying "aye." Aye.

22 **COMMISSIONER DEASON:** Aye.

23 **COMMISSIONER JOHNSON:** Aye.

24 **COMMISSIONER GARCIA:** All those opposed?

25 **COMMISSIONER CLARK:** Nay.

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1 **COMMISSIONER JACOBS:** Nay.

2 **CHAIRMAN GARCIA:** Okay. It passes on a
3 three-two vote.

4 We go to Issue 32.

5 **COMMISSIONER DEASON:** I will move Staff.

6 **COMMISSIONER GARCIA:** Is there a second?

7 **COMMISSIONER JOHNSON:** Second.

8 **CHAIRMAN GARCIA:** All those in favor signify
9 by saying "aye." Aye.

10 **COMMISSIONER DEASON:** Aye.

11 **COMMISSIONER JOHNSON:** Aye.

12 **COMMISSIONER JACOBS:** Aye.

13 **COMMISSIONER GARCIA:** All those opposed?

14 **COMMISSIONER CLARK:** Nay.

15 **CHAIRMAN GARCIA:** Okay. It passes on a
16 four-one vote.

17 Issue 33.

18 **COMMISSIONER CLARK:** I move Staff.

19 **CHAIRMAN GARCIA:** That's wonderful. That --
20 does Issue 33 -- should we use Issue 33 to incorporate
21 all the other discussion that Commissioner Jacobs
22 wanted included in this discussion, the workshop and
23 everything or should we --

24 **COMMISSIONER CLARK:** Before we close the
25 agenda, I think there should be some general

1 discussion of what we should do next, because even --
2 you know, ultimately, I'm not sure that -- there's
3 still more work to be done. I think that's what I
4 want to say.

5 **COMMISSIONER JACOBS:** Right. When do they
6 turn dirt?

7 **COMMISSIONER GARCIA:** I'm sorry?

8 **COMMISSIONER JACOBS:** When do they turn
9 dirt?

10 **COMMISSIONER CLARK:** When do they start
11 building?

12 **COMMISSIONER JACOBS:** No, actually, the real
13 question is do they proceed right from here to --

14 **MR. JENKINS:** No, they have to go through
15 environmental certification and approval.

16 **COMMISSIONER JACOBS:** Right. I think I see
17 right from here to --

18 **MR. JENKINS:** Eight more months.

19 **MR. FUTRELL:** They made their filing back in
20 October with DEP and there's a nine-month process, so
21 probably in the summer.

22 **CHAIRMAN GARCIA:** Does this Commission have
23 to make any representation before the siting board or
24 DEP?

25 **MR. FUTRELL:** File the Order. The Order

1 will be filed.

2 **CHAIRMAN GARCIA:** All right. With that
3 said, I would like you to add to 33 all of the issues
4 we discussed. That we are going to open a workshop
5 and this is done for Commissioner Jacobs' concerns and
6 my concerns, quite honestly. And I think Commissioner
7 Clark led the way on some of those, so we're going to
8 set up a workshop. I would assume, Joe, that you'll
9 count on all of us, but please rely on Susan, I guess,
10 to help lead us through this.

11 **MR. JENKINS:** I'll draw up a list of issues
12 and come see all of you.

13 **COMMISSIONER GARCIA:** Great.

14 **COMMISSIONER CLARK:** I personally think you
15 can open a workshop and send out a request for issues.

16 **MR. JENKINS:** I could do that.

17 **COMMISSIONER GARCIA:** That would be great.

18 **COMMISSIONER CLARK:** I think that's probably
19 the best way to start it.

20 **MR. JENKINS:** Before I come to see you.

21 **COMMISSIONER CLARK:** Yes. That would be
22 great.

23 **CHAIRMAN GARCIA:** That's fantastic. With
24 that said, we've got to vote it out. There being a
25 motion, is there a second?

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