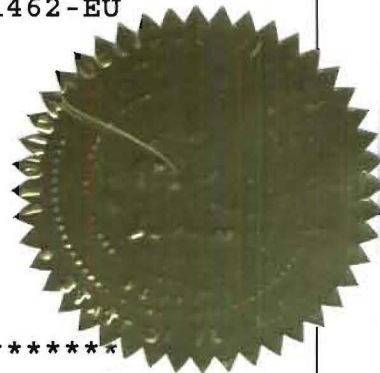


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of :
Petition for determination of :
Certificate of need for an :
electrical power plant in :
Okeechobee County by :
Okeechobee Generating :
Company, L.L.C. :

DOCKET NO. 991462-EU



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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 54

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

DATE: Tuesday, November 16, 1999

TIME: Commenced at 9:30 a.m.

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

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

1 **PARTICIPATING:**

2 **COCHRAN KEATING and TIFFANY COLLINS, FPSC**

3 Division of Legal Services.

4 **MIKE HAFF, JIM BREMAN, REESE GOAD, WAYNE**

5 **MAKIN, FPSC Division of Electric & Gas.**

6 **CATHERINE BEDELL, FPSC Acting General Counsel**

7 **DAVID SMITH, FPSC Division of Appeals**

8 **ROBERT SCHEFFEL WRIGHT, OGC**

9 **JON MOYLE, OGC**

10 **GARY SASSO, Florida Power**

11 **MATTHEW CHILDS, Florida Power & Light**

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P R O C E E D I N G S

(Hearing convened at 9:30 a.m.)

CHAIRMAN GARCIA: 54. We are discussing --
and an I'll ask Cathy to come up on 54.

COMMISSIONER DEASON: We voted to refer to
DOAH.

CHAIRMAN GARCIA: I'm not walking out
anymore. I'm Nikita Khrushchev here.

MS. BEDELL: We recommended that you bring
Item 54 up out of the panel items for the full
Commission to review the petition for this to be
assigned to the full Commission. But we're only doing
the first part of 54, not the motions to dismiss. And
Susan had a question. She asked me a question.

COMMISSIONER CLARK: Are we doing 54 now?

MS. BEDELL: Issue 1 in Item 54 -- if the
Commission approves Staff to move forward with this
assigned to the panel, then we will take up the
remaining issues in 54 in its regular order, and Staff
will then have time to issue an order which is
required by the statute if we are denying the petition
to assign it to the full Commission.

CHAIRMAN GARCIA: Procedurally there's no
requirement that we wait for another agenda so that
they are informed of that decision or we're fine doing

1 it all in one --

2 **MS. BEDELL:** I would hope they are here to
3 be informed.

4 **CHAIRMAN GARCIA:** We may have just given
5 them an idea. They'll run out of the room.

6 **MR. KEATING:** The statute simply states that
7 the Commission, if they decide to assign this matter
8 to less than a full Commission, that you must render a
9 written decision prior to proceeding on in this
10 particular proceeding. So we prepared an Order in
11 anticipation that you may vote to keep the current
12 panel on this item. And we can have that issued in
13 the interim when we return to the remaining issues in
14 the regular Order.

15 **CHAIRMAN GARCIA:** Very good. So we are
16 discussing --

17 **COMMISSIONER CLARK:** Mr. Chairman, you had
18 asked me on 43A if I had any questions.

19 **CHAIRMAN GARCIA:** I think Terry, did you
20 have any on 43?

21 **COMMISSIONER DEASON:** 43A or 43 --

22 **CHAIRMAN GARCIA:** 43A.

23 **COMMISSIONER DEASON:** Yeah. I had a
24 question on 43A.

25 **CHAIRMAN GARCIA:** I'm sorry. I didn't know.

1 Okay. Therefore, we are on Item 54,
2 Issue 1, correct?

3 **MR. KEATING:** Correct.

4 **CHAIRMAN GARCIA:** Okay. Who do we take --
5 it's your motion or it's FPL's motion.

6 **MS. BROWN:** Mr. Chairman, we both filed a
7 request.

8 **MR. MOYLE:** Mr. Chairman, I just had a
9 procedural question before we get started.

10 On all of these issues today there was a
11 request for oral argument made only with respect to
12 the motions to dismiss, so I guess I would question
13 whether this is something that needs argument.

14 **CHAIRMAN GARCIA:** It's a good question. We
15 will limit the discussion because I think it's a well
16 understood topic. So if you could be brief, we're not
17 discussing the full issue to dismiss. We're simply
18 discussing the Issue 1, which is whether we assign to
19 a full panel or a panel of three.

20 Mr. Childs.

21 **MR. CHILDS:** Commissioners, my name is
22 Matthew Childs --

23 **COMMISSIONER DEASON:** Before you begin --
24 I'm sorry, I didn't mean to interrupt your
25 introduction, but I do have a question for you.

1 Identify yourself for the record, then I have a
2 question for you.

3 **MR. CHILDS:** Maybe I should remain
4 anonymous. (Laughter)

5 My name is Matthew M. Childs. I'm appearing
6 on behalf of Florida Power & Light Company.

7 **COMMISSIONER DEASON:** Thank you.

8 Mr. Childs, before you begin, I need an answer to a
9 simple question. As much as it would be desirable to
10 have this matter decided by the full Commission, it's
11 obvious that we only have four Commissioners. How do
12 we prevent the possibility of a split vote, which just
13 happened in the previous item?

14 **MR. CHILDS:** Well, I think there are several
15 ways for you to do that, and some Commissioners may
16 remember days in the past when the Commission would
17 engage in alternate motions to address matters with
18 the intent of attempting to achieve consensus from the
19 Commission about how a matter would be addressed by
20 the Commission.

21 There was the recognition at times that the
22 matter needed to be addressed, needed to be decided,
23 and the Commission was, I think, somewhat dogged in
24 attempting to achieve that objective. And on the
25 other hand, I think that -- and I'm not sure if this

1 is responsive but it's something I intended to say
2 anyway in my argument -- I read the recommendation
3 which brings up the possibility of a tie vote. And I
4 asked the question rhetorically: What's wrong with
5 that? If this truly is a matter of policy and it
6 truly is a matter that the full Commission ought to be
7 looking at, then I would say that's the consequence.
8 I think it's the worst time to say that what we want
9 to do is have a decision when there's a substantial
10 agreement of that magnitude.

11 **COMMISSIONER DEASON:** What happens in a tie
12 vote based upon this petition? The petition fails
13 because of a tie vote?

14 **MR. CHILDS:** If this particular request
15 fails, I think this request would fail.

16 **COMMISSIONER DEASON:** No. I'm talking about
17 if -- right now you're requesting it be assigned to
18 the full Commission, which right now means four
19 Commissioners.

20 **MR. CHILDS:** That's right.

21 **COMMISSIONER DEASON:** If that motion is
22 granted by a majority of the Commissioners today, we
23 go to the hearing. Four Commissioners sit on that
24 hearing, listen to all of the evidence and make a
25 vote, and that vote is two to two. Does the petition

1 for determination of need fail because there is a
2 split vote?

3 **MR. CHILDS:** I think it would. I think
4 absolutely it would. And I think that -- and I would
5 urge this Commission not to be afraid of that
6 consequence because I think that's precisely what the
7 Commission should be doing. If there is a
8 Commissioner who, given the opportunity to hear the
9 full case, would vote in a particular way, I think
10 they ought to have that opportunity to vote in that
11 way. And that's -- in my view that was the role of
12 the Commission. The role of the Commission is not, in
13 my view, with all due respect, to say, "Well, we want
14 to have the matter cleared so that a decision --"

15 **CHAIRMAN GARCIA:** So why didn't the
16 Legislature give us an even number then if that was
17 the point? If this Commission was there to make the
18 fullest decision possible, they could have given us
19 six or four and that way every time we come to a
20 difficult question, we stall and wait until some type
21 of enlightenment.

22 **MR. CHILDS:** Well, I think the Legislature
23 didn't preclude this because that's why we're here.
24 We're here right now with four Commissioners sitting,
25 and under the statute it is perfectly permissible for

1 this result to occur. I don't think anyone has
2 suggested it's not appropriate under the statute for
3 there to be a four-member Commissioner panel.

4 **CHAIRMAN GARCIA:** You would agree with me
5 that the Legislature contemplated a decision being
6 made; that's why they had five Commissioners?

7 **MR. CHILDS:** Yes, I would agree, that the
8 Legislature contemplated that the Commission's
9 business would be done in the most easy way on a
10 day-to-day basis. By the same token, Commissioner, I
11 don't believe that the Legislature viewed it that you
12 should never have a circumstance where there's a
13 potential for a tie vote. And I have a few
14 comments -- and I intend to be brief.

15 I think this case is significant. This case
16 is significant. It's been alleged to be significant.
17 It's alleged by the petitioner to be significant in
18 terms of the number of customers in the state of
19 Florida that are affected. Virtually all of them in
20 Peninsular Florida. It's significant in terms of
21 dollars. They allege that it's in excess of
22 \$170 million a year for at least ten years. It's
23 significant because it relates to the question this
24 Commission has been attempting to address as to the
25 extent of competition in the state of Florida. And

1 once again, I think the petitioners have one view on
2 that issue and we have another. But I don't think
3 that because they have a particular view that that
4 means it's a settled matter. I think it very
5 definitely is an issue of policy.

6 And sort of by way of illustrating what this
7 Commission has done with this sort of matter in the
8 past, I remember just -- I think it was last week when
9 we were at a prehearing conference on fuel adjustment
10 and one of the issues had to do with the
11 interpretation of a contract with a qualifying
12 facility. And the Staff recommendation was that that
13 ought not be addressed by the panel; that ought to go
14 to the full Commission.

15 Well, to me -- I mean, that's a matter of
16 the way this Commission in the past has looked at
17 certain matters. They say, well, this is a matter
18 where it's important for us to have the expertise and
19 knowledge of all of the Commissioners. Let's do it
20 that way. I urge you to do this. Thank you.

21 **CHAIRMAN GARCIA:** Mr. Sasso.

22 **MR. SASSO:** I have very little else to add.
23 I certainly concur in all of Mr. Childs' remarks.

24 I guess the contention has been made that
25 this case, unlike the Duke case, does not present

1 serious matters of policy because all of those issues
2 were confronted and resolved in the Duke case, and,
3 therefore, this is just like any other need case.

4 We would vehemently disagree with that
5 characterization. I don't think it's a realistic
6 characterization. It's evident that even if Duke
7 becomes the law of the state, that it has only begun
8 the discussion about merchants. It hasn't resolved
9 all of the policy issues about merchants. There are
10 very serious issues that remain to be resolved. That
11 was recognized at the agenda conference in the Duke
12 case. A number of issues came up and the Commission
13 recognized they'd have to be confronted down the road.
14 In fact, the Commission commenced and then abated a
15 workshop to address some of these issues.

16 And let me just mention that we've given
17 consideration to the issue of a tie, too, and we
18 certainly concur in Mr. Child's remarks, but from a
19 public policy point of view the question is: Is it
20 better to proceed in the face of a tie, in the face of
21 knowing with a full participation of four
22 Commissioners there would be a tie? Is it better from
23 a public policy standpoint to proceed with a
24 significant step like this case requires the
25 Commission to proceed or is it better to wait?

1 Yes, as Mr. Childs mentioned, there are a
2 number of steps that even four Commissioners can take
3 to resolve the matter through alternative motions,
4 through working out the differences, but there are a
5 couple of other things that can occur, too, if it
6 occurs there's a standoff after a full hearing by four
7 Commissioners. Perhaps the pendency of the appeal has
8 something to do with that. Perhaps the four
9 Commissioners would decide that the decision would be
10 better addressed after the Florida Supreme Court shed
11 some light on it.

12 **CHAIRMAN GARCIA:** Mr. Sasso, don't we have,
13 though, a specific statutory time limit that we have
14 to meet with these determination of needs?

15 **COMMISSIONER CLARK:** Not this one. As I
16 understood Staff's recommendation, not this one.

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

18 **CHAIRMAN GARCIA:** Why?

19 **MR. SASSO:** Well, the Commission has the
20 discretion -- the Commission has the discretion to
21 waive the procedural rules setting time limits in this
22 case because the only statutory basis for the time
23 limits derives out of the Siting Act, which basically
24 provides that this Commission must provide a final
25 report to the Department of Environmental Protection

1 so many days after a complete site certification
2 application has been filed. No such application has
3 been filed by the petitioner. In fact, they have
4 indicated affirmatively that they don't intend to do
5 so until the summer of next year. So the Commission
6 is under no imperative to decide the case at this
7 time.

8 And so the four Commissioners might well
9 decide that public policy would be better served by
10 waiting for the appointment of a fifth Commissioner,
11 waiting for the outcome of the Duke decision -- in
12 fact, I don't want to slip over into the stay issue at
13 this point, but the fact is that even the Duke case
14 hasn't gone forward. Even though the site
15 certification application had been filed, the parties
16 to that case have agreed that it's better to wait the
17 outcome of the Duke decision.

18 So there are steps that the Commission can
19 take, and we would submit should take, better to serve
20 the public interest in this case with the
21 participation by four Commissioners.

22 **CHAIRMAN GARCIA:** Thank you, Mr. Sasso.
23 Mr. Moyle.

24 **MR. MOYLE:** Thank you, Mr. Chairman.

25 For the record, I'm Jon Moyle of Moyle

1 Flanigan, representing the petitioner, OGC. With me
2 is Schef Wright and Sean Finnerty, who is the project
3 manager.

4 The request by Florida Power & Light and
5 Florida Power Corp to have this case assigned to a
6 full Commission should be denied for a whole host of
7 reasons. And if I could just take a minute, I'll go
8 through those.

9 Number one, the action of the Chairman to
10 assign this case to a panel is wholly within his
11 discretion and is authorized by law. I would point
12 you to Section 350.015. It gives him his authority,
13 he exercised his authority properly and that decision
14 should not be upset.

15 Number two. There's discussion about well,
16 this case really ought to be considered by the full
17 panel because it involves a host of significant
18 issues. Well, yes, they are significant to the
19 client. But if you read the statute, the statute says
20 that in order for a petition to be granted, the
21 petition has to have an impact on regulatory policies.

22 Your Staff has found, and I would say
23 correctly, that this case will not have an impact on
24 regulatory policies. That it does not require the
25 Commission to extend its decision reached in Duke.

1 And it determined that Duke was individually a proper
2 applicant; that there's no new ground being broken in
3 this case. So legally I would argue that the petition
4 is defective because there is no new impact on
5 regulatory policy.

6 **COMMISSIONER CLARK:** Mr. Moyle, let me ask
7 you a question. If the Duke decision comes down and
8 says Duke was not a proper applicant, is your client,
9 then, a proper applicant?

10 **MR. MOYLE:** I don't think that's how that
11 case is going to come down, with all due respect,
12 Madam Chairman.

13 **COMMISSIONER CLARK:** I said "if." I said
14 "if."

15 **MR. MOYLE:** I think the Court is going to
16 affirm it and do that.

17 I think if the Duke case came down, which I
18 don't think it will -- that would be something we'd
19 have to go back and reevaluate and it would cause us
20 some difficulty.

21 **COMMISSIONER CLARK:** Would you please answer
22 my question. If Duke is not a proper applicant, is
23 your client a proper applicant?

24 **MR. MOYLE:** If they rule on the EWG issue
25 and say EWG is not a proper applicant, then that would

1 present serious problems for us. So the answer is we
2 would not be a proper applicant, no, ma'am, on that
3 point.

4 **COMMISSIONER CLARK:** Thank you.

5 **MR. MOYLE:** But, again, to remind the
6 Commission, they have decided that EWG is a proper
7 applicant. That case is in front of the Supreme
8 Court. And I feel confident that the Commission's
9 decision will be affirmed.

10 **COMMISSIONER CLARK:** May I ask you another
11 question? Why haven't you filed with DEP? Is it DEP?

12 **MR. MOYLE:** With respect to the site
13 certificate?

14 **COMMISSIONER CLARK:** Yes.

15 **MR. MOYLE:** My understanding of the law is
16 that as a condition precedent to going forward with
17 the site certification, you have to file a Petition
18 for Need here at the Public Service Commission.
19 That's what we've done; filed a Petition of Need.

20 We are in the process of working on the site
21 certification. There's a lot of stuff, as the
22 utilities know, that go into preparing that, gathering
23 that. We're on a time frame that we need to move
24 forward with this case to allow us to meet our
25 commitment that we have made in our petition to bring

1 this plant on line, in the spring of '03.

2 **COMMISSIONER JACOBS:** That was a question I
3 had. The time line is in 2003 but it's my
4 understanding that you're not anticipating filing
5 your -- at DEP until the middle of next year?

6 **MR. MOYLE:** We've indicated that we would
7 like to bring this plant on line in the spring of '03.
8 And our time frame, we're working on the site
9 certification information now; in the process of
10 preparing that. We're going to file it subsequently.

11 I would remind you that there's no legal
12 requirement that we have to file the site
13 certification before -- and you can't file it
14 before -- and there's no requirement that says you
15 have to file it simultaneously. We are wholly within
16 our rights to do it the way we've done it, and we
17 think it makes sense, prudently, in a deregulated
18 market or a nonratepayer-based market to allow us to
19 go ahead, and with prudent business decisions, come in
20 and file the need determination first and then seek
21 the site certification subsequently. And we're in the
22 process of preparing that now. We're working on it
23 and we will have it filed in the summer, if not
24 before.

25 We've gotten into a lot of questions which I

1 think probably are more appropriately addressed in
2 FPC's petition for a waiver of the rule and a motion
3 for a stay. I'd like to bring the focus back to the
4 petition for a full Commission, if I could.

5 The point I wanted to make, that this is not
6 breaking precedent to assign the case to a panel. I
7 would point out that four of the last six need
8 determination cases have been assigned to a panel.
9 So, indeed, you have done that previously and you
10 ought to go ahead and do it in this case.

11 Commissioner Deason, I believe
12 Commissioner Garcia raised questions about the public
13 policy. The relief requested by Florida Power Corp
14 and Florida Power & Light simply is not available.
15 The law says assignment to a full Commission. A full
16 Commission contemplates five, not four. I would argue
17 that legally the relief is not available given the
18 factual circumstances.

19 Additionally, I would argue it's against
20 public policy. And you can point to countless boards
21 that the Legislature has created; the Board of
22 Regents, Water Management Districts, County
23 Commissions. All those are composed of odd-numbered
24 entities, and it's against the Legislature's policy to
25 have even-number members decide things.

1 Florida Power & Light and Florida Power says
2 that you could have a series of alternative motions;
3 that that would be a way to resolve it. Mr. Childs'
4 has been here practicing before you a lot longer than
5 I have, but in the matter that was just before you, I
6 only heard one motion, and there were not a series of
7 alternative motions that decided that matter, and it
8 failed on a two-to-two vote.

9 So for those reasons I would urge you to
10 follow the Staff recommendation and to deny the
11 petition, to refer it to a full panel, and to support
12 the Commission's decision in this respect. Thank you.

13 **COMMISSIONER DEASON:** It's hard to find the
14 middle ground when the question is do you or do you
15 not have jurisdiction? I mean, that was the vote
16 before us and I assume that ultimately, in this case,
17 may determine whether there's a proper applicant,
18 which in my terms kind of equates to the question of
19 do you or do you not have jurisdiction?

20 **MR. MOYLE:** And a similar position will be
21 presented for you, which is have you demonstrated a
22 need or have you not?

23 **MR. CHILDS:** Commissioner, could I make a
24 brief rely?

25 **CHAIRMAN GARCIA:** Mr. Wright, you weren't

1 going to add anything?

2 **MR. WRIGHT:** No.

3 **CHAIRMAN GARCIA:** All right. Go ahead,
4 Mr. Childs.

5 **MR. CHILDS:** Several points. One is the
6 suggestion to you was that you couldn't grant the
7 request unless it affected regulatory policies. I'm
8 not aware of that being the posture of the Staff, but
9 I would suggest to you we set out in full the section
10 on -- or Section 350.01(6), which is the basis for
11 this request.

12 Regulatory policies is one of many of the
13 items that the statute directs be considered. Not the
14 only one.

15 Secondly, I think rhetorically the reference
16 is four of six of the last were assigned to a panel.
17 I don't have any reason to disagree, but I'm not aware
18 of any of them where there was a request that it be
19 assigned to the full panel and that was denied. This
20 is what we're asking you to do is to assign it.

21 And, Chairman, we're not suggesting, as the
22 argument might imply by OGC -- we're not suggesting
23 that you did anything improper at all. We recognized
24 you have full authority to assign to a panel as you
25 deem is appropriate. And all we're doing is saying

1 under the statute, after that assignment has been
2 made, it is appropriate to be permitted to make the
3 request pursuant to the statute. It's not an
4 indication of any disrespect at all.

5 **CHAIRMAN GARCIA:** Thank you. Staff, do you
6 have --

7 **COMMISSIONER DEASON:** I have a question for
8 Mr. Childs.

9 Mr. Moyle raised the possibility that the
10 relief you requested cannot be granted because the
11 relief you're requesting is to assign this matter to
12 the full Commission, which I think is the -- perhaps
13 the language used in the statute and there is not a
14 full Commission available.

15 **MR. CHILDS:** I think there is a full
16 Commission available. I think the full Commission is
17 available. There is a -- there are five members that
18 can be on the Commission. And at this point I
19 believe -- I believe at this point you have four. I'm
20 not sure whether right today you have four or five
21 today. I don't know.

22 **CHAIRMAN GARCIA:** We have four.

23 **MR. CHILDS:** Okay. To me, that's the full
24 Commission. That's all there are.

25 **COMMISSIONER DEASON:** So you think that the

1 statute, when it used the term "full Commission" meant
2 whatever number of seated Commissioners existed at the
3 time, that is the full Commission. It doesn't mean
4 five sitting Commissioners.

5 **MR. CHILDS:** No, I don't think so at all. I
6 really, with all due respect, I think that's
7 ridiculous to say, "Well, you can ask for a full
8 Commission but if any other time -- if there's -- if
9 it's assigned to a panel and you wanted to implement
10 your request pursuant to the statute, you can't make
11 that request because we're going to interpret "full"
12 as being all five." I just don't think that makes
13 sense.

14 **MR. SASSO:** May I add briefly to that?

15 **CHAIRMAN GARCIA:** Go ahead.

16 **MR. SASSO:** I think the test of that
17 argument is we look at the reason for this provision,
18 which is basically to entrust to all members of the
19 Commission matters of important public policy. The
20 idea being we shouldn't have a subset of the
21 Commission dealing with the most important matters of
22 public policy. All available members should
23 participate.

24 **CHAIRMAN GARCIA:** Do you think the
25 Legislature would contemplate me, then, as Chairman,

1 assigning into panels of two all the time, and only on
2 important issues do we have --

3 **COMMISSIONER CLARK:** Two isn't a problem,
4 because if there's a tie you break it.

5 **CHAIRMAN GARCIA:** Right.

6 **COMMISSIONER CLARK:** So it's a problem when
7 it's four.

8 **CHAIRMAN GARCIA:** Exactly. I worry about
9 the concept that you're saying that a full panel --
10 that Mr. Childs is alluding to that a full panel is
11 four. I think we're put here to make decisions; tough
12 decisions, easy decisions. I would rather have a full
13 panel. We don't have five.

14 **COMMISSIONER CLARK:** Well, we will have
15 five. I don't think that there would be anything
16 wrong to assigning this to a full panel and postponing
17 it. I don't think the time lines that are set out in
18 the rule -- they were designed, as Staff indicated, to
19 meet the time lines in the statute when the applicant
20 has filed with DEP. And we have to meet those time
21 lines.

22 **COMMISSIONER DEASON:** We may ultimately get
23 to that, that, I think, is Issue 6 --

24 **COMMISSIONER CLARK:** Well, but my point --

25 **COMMISSIONER DEASON:** -- is before us today.

1 **COMMISSIONER CLARK:** -- my point being is I
2 think if we grant the motion to assign it to the full
3 panel, it can be postponed until we have five members.

4 **COMMISSIONER DEASON:** If that's a motion,
5 I'll second it.

6 **COMMISSIONER JACOBS:** I have a question.
7 Mr. Sasso, earlier you indicated that you disagreed
8 with the statement that there are no new issues. What
9 do you see as the issues to be addressed in this
10 docket that will require consideration by the full
11 Commission?

12 **MR. SASSO:** There are a variety of them,
13 Commissioner Jacobs. In fact, your separate opinion
14 raises a new legal issue to be addressed in this case.
15 Your separate opinion in Duke indicated that you were
16 satisfied that the Duke petition facially satisfied
17 the requirements of the Nassau decisions because
18 Nassau required that there be a contract between the
19 IPP and a retail utility. And you indicated that that
20 condition was satisfied in Duke. And now the issue
21 was to test the sufficiency of that contract. That
22 condition is not satisfied in this case.

23 So if the Commission adhered to your
24 distinction and your separate opinion in the Duke
25 case, there would be a brand-new legal issue to be

1 confronted as a threshold matter in this case.

2 Beyond that, I think it's fair to say that
3 all of the parties before, during and after the
4 hearing in Duke were emphasizing the threshold legal
5 issue: Is Duke an applicant? And our attack was
6 focussed on that issue, both in terms of legal
7 argument and in terms of the record we made.

8 In this case, even if Duke turns out to be
9 the law, we need to move the debate to the next level.
10 We would intend, for example, to test Dr. Nesbitt's
11 assumptions. He's filed prefiled testimony in this
12 proceeding. And in this case, we will move the debate
13 to the next level and the Commission will have the
14 benefit of that. And we would submit, it will be a
15 different discussion.

16 And so as I said, the Duke case basically
17 opened the discussion or the debate on merchants. I
18 think we all recognize that. It's a very pressing
19 matter both in Florida and outside the state. It's
20 been -- the public interest in it is demonstrated by
21 the attendance at the workshop, the interest in the
22 Duke case, the interest in this case. And I think it
23 is fair to say, and I suspect there would be agreement
24 on this, that there are many more policy issues to be
25 resolved regarding merchants, and that the Duke case

1 just began and scratched the surface.

2 **COMMISSIONER CLARK:** Let me --

3 **MR. WRIGHT:** Mr. Chairman --

4 **COMMISSIONER CLARK:** Let me indicate that I
5 think they are beyond just the notion of having five
6 Commissioners, which I think would be of benefit,
7 because by having the five Commissioners on a
8 going-forward basis you will know that there is a
9 majority that support the policy or you don't have a
10 majority. If you have three and it's decided on that
11 basis, you don't know if you have a majority.

12 But I want to point out that Duke has
13 postponed pursuing it until the Court decision comes
14 out. And I think in the interest of judicial economy,
15 we can postpone it, hopefully, and I would suggest
16 that we need to again file a motion with the Supreme
17 Court indicating we have yet another applicant. And
18 we would appreciate -- I know its scheduled for
19 January 4th but we could indicate we would appreciate
20 a speedy decision on this, and it will hopefully
21 clarify where we need to go in the future. And I
22 don't think it will do violence to what the applicant
23 has stated its intention with respect to filing with
24 DEP. They can still meet the deadlines they have set
25 out.

1 **CHAIRMAN GARCIA:** Commissioner Deason, you
2 had something.

3 **COMMISSIONER DEASON:** Yeah. Let me --
4 before I make my comments, I certainly would be -- if
5 you're willing to let --

6 **CHAIRMAN GARCIA:** No. I had heard you say
7 something.

8 **COMMISSIONER DEASON:** Yeah. Well, I was
9 just going to indicate the reason I was seconding the
10 motion.

11 **CHAIRMAN GARCIA:** Okay. Go ahead.

12 **COMMISSIONER DEASON:** Okay. As I understand
13 the motion, the motion is to grant the petitions by
14 Florida Power & Light and Florida Power Corporation to
15 have the proceeding assigned and heard by the full
16 Commission, which at this time means four
17 Commissioners.

18 First of all, let me say I certainly respect
19 the Chairman's decision to assign it as he did, and
20 given the assumption that we were probably going to
21 have to be operating under a 90-day clock, which is
22 the assumption you normally make when you get a
23 determination of need. And after having understood,
24 as Staff explained in the recommendation, that we're
25 not laboring under that 90-day clock because the site

1 certification has not yet been filed with DEP, that we
2 do have some additional time.

3 I think this is a matter of extreme
4 importance and that it would be preferable to be heard
5 by five Commissioners if there is to be a fifth
6 Commissioner appointed in time. And if not, it would
7 still be preferable even to have it heard by four
8 Commissioners as opposed to a panel of three
9 Commissioners. And the reason for that is that
10 there's no -- when you select three Commissioners, you
11 have to select three out of the four. And there's
12 always a question as to whether, well, what if this
13 Commissioner were on, how would they have voted? And
14 if this Commissioner were off -- it just presents
15 questions I think that we can avoid. I think to avoid
16 that is more important than to have the risk of a
17 split vote. And that's the reason I would go along
18 with the motion. And who knows, perhaps the Supreme
19 Court will make a rapid decision which would be
20 helpful in the outcome.

21 **CHAIRMAN GARCIA:** Commissioners -- and Schef
22 I know you wanted to speak -- I worry about this
23 decision if we go with this motion. I think we --
24 with all due respect, I think we're allowing the
25 system to be gamed here.

1 Clearly, this is an issue of tremendous
2 importance to the state and to the citizens of the
3 state of Florida. We are placed in our position to
4 make decisions; sometimes good, sometimes bad. And
5 sometimes we have to make those types of decisions
6 which require that because of the circumstances wholly
7 beyond our control we don't have a sitting
8 Commissioner, so we have to make a decision. By doing
9 what we do today, if the motion succeeds is we're
10 simply saying we're not going to make a decision.
11 We're going to put on this until the Court decides.
12 And with that I think we hurt the system. Likewise, I
13 would assume that then we won't make any determination
14 of need decisions at this Commission until this matter
15 is resolved.

16 I've seen a lot of issues that are tough
17 decided by panels. Clearly, this is one of those
18 circumstances which is a little bit tougher but I
19 think it's better to decide something and move forward
20 than to leave us in limbo, and in particular, to allow
21 the system to be gamed. And to some degree I think
22 that what this motion does today is game the system.
23 It keeps this Commission from making a decision.

24 **COMMISSIONER CLARK:** No, it doesn't. I
25 disagree with that. It doesn't keep us from making a

1 decision and it doesn't promote gaming the system. We
2 find ourself in this dilemma because we don't have a
3 fifth Commissioner. I mean, I would assume you would
4 have assigned it to the full panel if we had that
5 opportunity.

6 **CHAIRMAN GARCIA:** Absolutely. Absolutely.

7 **COMMISSIONER CLARK:** So I don't think it's
8 fair to say it allows for gaming the system. And we
9 will make a decision. And, quite frankly, I think the
10 Duke decision will have an impact. Even if it comes
11 out that Duke is a proper applicant, that there may
12 be -- there are a lot of issues that have -- that will
13 affect, I think, the outcome of this and affect how we
14 might develop our policy. And I really don't think
15 we're losing anything by doing it.

16 **CHAIRMAN GARCIA:** I do. I think a market
17 requires that people are responsive to a market.

18 **COMMISSIONER CLARK:** I agree with that. But
19 the point being, as I understand it, the parties who
20 are -- the merchant plants who want to come in are
21 holding up because they want that affirmative decision
22 from the Court, and it's that which puts it in limbo.

23 **CHAIRMAN GARCIA:** Commissioner Clark, having
24 studied this a little bit in Florida, and clearly not
25 being the expert you are on a national basis, what is

1 holding us up is precisely lack of decision by
2 governmental bodies, whether you're for it or against
3 it. One of the reasons, at least if I understand the
4 documents I've read, that the Duke project has been
5 postponed a year is that they have to wait for the
6 court decision because these are take-or-pay
7 contracts. And clearly they're not going to expose
8 their shareholders to hundred of millions of financial
9 risk because we don't make a decision. But
10 nonetheless, by not deciding that case you were
11 talking about, the Court not expediting this issue.
12 But in our issue we're doing precisely the same thing.
13 We're not deciding something to wait on the Court to
14 decide something.

15 **COMMISSIONER CLARK:** Because we recognize
16 the Court decision has a substantial impact on this
17 decision.

18 **CHAIRMAN GARCIA:** Absolutely. Absolutely.
19 Because we recognize that the appeal to the Court has
20 a substantial -- I'm sorry, Schef.

21 **MR. WRIGHT:** You don't have to apologize to
22 me, Mr. Chairman. Did you want to say something,
23 Commissioner Jacobs?

24 **COMMISSIONER JACOBS:** No. Go right ahead.

25 **CHAIRMAN GARCIA:** Let me keep controlling

1 this. Schef, why don't you --

2 **MR. WRIGHT:** Yes, sir.

3 First off, I'd like to address a couple of
4 things Commissioner Clark said and then explain to you
5 why I think postponement is bad and why it's
6 prejudicial to Okeechobee Generating Company.

7 As regards the Duke case, it is true that
8 Duke New Symrna agreed to a stipulated deferral of the
9 decision by the Governor and Cabinet on its site
10 certification application. That was really made to
11 accommodate the wishes of some cabinet members who
12 were concerned about making a decision that could have
13 been construed as a policy decision while the Supreme
14 Court case was pending. It wasn't -- we weren't wild
15 about it but that's how it came out.

16 Secondly, I want to agree strongly with
17 Commissioner Clark's suggestion that you all send
18 something over to the court asking for speedy
19 resolution of the Duke case. We are confident it's
20 going to come out in favor of the -- upholding the
21 Commission's decision. And the sooner that happens
22 the better.

23 Postponment. First off, procedurally, it
24 sounds to me like you all have rolled Issue 1 and
25 Issue 6 together.

1 **COMMISSIONER DEASON:** No. Let's make that
2 perfectly clear. That was not part of my second
3 whatsoever. We're strictly on Issue 11, and we'll
4 deal with Issue 6 but if Issue 1 is successful, the
5 motion will have four Commissioners dealing with Issue
6 6.

7 **MR. WRIGHT:** I heard Commissioner Clark's
8 motion to be full Commission and postpone it.

9 **COMMISSIONER DEASON:** Well, that was not my
10 second then. I may need to get clarification on the
11 motion then after you conclude your remarks.

12 **MR. WRIGHT:** Okay. I want to say a couple
13 other things. Obviously, I'm prohibited from
14 divulging certain attorney-client privileged
15 information, but I can tell you that not all merchant
16 developers are holding up waiting for the Supreme
17 Court to rule. There are others who are actively
18 prosecuting their -- preparing their applications for
19 site certification applications. And if given
20 Commissioner Deason's clarifications, I'm not going to
21 talk about postponement now. I just want to agree with
22 Chairman Garcia's comments that this would be a
23 decision that would send a chilling message to the
24 hopeful participants in the robust competitive
25 wholesale power market that everybody in this room

1 professes to want.

2 **COMMISSIONER JACOBS:** If I may, it seems to
3 me we've kind of strayed a bit from what I thought
4 Issue 1 was about. Issue 1 says are there issues
5 here, which given the precedence of assignment to full
6 Commissions warrant or merit a full Commission in this
7 docket? And if I understand what the history is, is
8 to what extent there are issues of public policy that
9 are either of first impression or of such substance
10 that a full Commission should make a statement on
11 that. That is my understanding of it.

12 **MR. KEATING:** I don't think that's
13 inaccurate. I think all the statute says is the
14 Commission shall consider, among other things -- find
15 the exact language -- just says regulatory policies.

16 **COMMISSIONER JACOBS:** Now, given all things
17 being equal, I think the Chairman's action in
18 assigning ought to be the driving force. However,
19 parties who have rights in this proceeding have asked
20 that we assess -- make that assessment in this docket.
21 And I think we're required to respond to that in a
22 reasonable manner.

23 My personal feeling is -- and I think, you
24 know, I don't want to go too far astray here, but I
25 think my position on what the merits are on this

1 particular issue -- I've stated already -- and for
2 those reasons I believe that there are issues here
3 that require -- that are of merit and of substance
4 that require a statement by a full Commission. And
5 for that reason, and not because of how we can get a
6 full panel to vote on this, is what I'm driven to in
7 my conclusions on this. Now -- and I think we would
8 be in error if we delayed this process in this
9 proceeding in order to achieve some status quo with
10 regard to the people who make the decision. We ought
11 to proceed posthaste in making this decision.

12 I do think, quite frankly, we're looking at
13 Issue 6, but I understand the decision that
14 Commissioner Deason made and I agree with that. We're
15 looking essentially at the merits of that. But the
16 merits ought to be when can we -- can this Commission,
17 as it is now established, or it is -- or as it would
18 be on the date we chose -- and I emphasize that. This
19 docket is still under the control of this Commission.
20 If we chose to say we want to wait for the decision of
21 the Supreme Court, that's the decision we make. If we
22 say that we would move forward, allow that decision to
23 come down and then figure out how it applies to the
24 decision we make, that also is, I believe, an option
25 available to us.

1 Whatever outside parties want to interpret
2 from those actions they are free to do so. I think
3 these parties are very intelligent, very astute, very
4 schooled about what they should do. My fear is that
5 there's an attempt here to guide this Commission down
6 a path, which I think we ought to strongly resist;
7 whether or not there's an attempt to get a four-member
8 Commission that would tie; whether or not -- you know,
9 all of the other options that are out there. Those
10 are things that may happen or may not be happen. We
11 can't be forced to look at that. But we ought to make
12 a determination is this, in this docket -- are the
13 facts and allegations such that the parties' request
14 for a full Commission ought to be granted. And if
15 they are not, then we don't grant it.

16 Now, in terms of -- in my view I think that
17 the facts and circumstances in this case are such that
18 the parties' petition should be granted.

19 **CHAIRMAN GARCIA:** All right.

20 **COMMISSIONER CLARK:** Mr. Chairman, let me be
21 clear on something.

22 My view is that this should go to a full
23 panel and it should only be postponed long enough for
24 five members. I don't -- I think an argument can be
25 made that you might postpone it until the Duke

1 decision, but I think going ahead of that is not a
2 wrong decision. But I would not support assigning it
3 to a full panel if it is a four-member panel because I
4 think you do need to have a decision in the case.

5 **CHAIRMAN GARCIA:** Commissioners, we have a
6 motion and a second, I think in essence --

7 **COMMISSIONER DEASON:** Well --

8 **COMMISSIONER CLARK:** You want clarification.

9 **COMMISSIONER DEASON:** -- on the motion. I
10 understood the motion would be simply to grant the
11 petitions in Issue 1, which was not presupposing any
12 particular outcome as to a fifth Commissioner or
13 deferring the matter as contained within Issue 6. It
14 was simply either yes or no, we're going to assign to
15 full Commission or not. And the other issues would
16 just be decided by four Commissioners that are listed
17 out on today's agenda. And that was what I thought I
18 was seconding.

19 So you're saying no, your motion is
20 contingent upon the matter being delayed until the
21 fifth Commissioner is assigned?

22 **COMMISSIONER CLARK:** From what I understand,
23 the time limits were established by the rule, you've
24 addressed the fact that we need to get it over to the
25 DEP in order to comply with those time limits. That

1 filing has not been made with the DEP. It strikes me
2 that it can be assigned to the full panel and it can
3 be a five-member panel.

4 **CHAIRMAN GARCIA:** What if Mr. Moyle walks
5 out of here and files with the DEP. That gives us
6 ninety days.

7 **COMMISSIONER CLARK:** That's right.

8 **CHAIRMAN GARCIA:** From my understanding of
9 the process of sitting someone in one of these chairs,
10 it's going to take approximately ninety days since the
11 vacancy began yesterday for someone to sit in this
12 chair. Therefore, we will not have a full panel --
13 and this is just almost as theoretical as the question
14 you asked Mr. Moyle -- the ninety days is concluded,
15 we will not have a full panel, then we don't make a
16 decision?

17 **COMMISSIONER CLARK:** I don't agree -- I
18 think we could at that time decide to reassign it to a
19 panel.

20 I'm going to move Staff -- I'm going to move
21 we deny Staff on --

22 **CHAIRMAN GARCIA:** But you don't have a
23 second yet. All I want to try to do is understand
24 what your motion is because --

25 **COMMISSIONER JACOBS:** I'm just moving we

1 deny Staff on Issue 1.

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

3 **MS. BEDELL:** I just want to point out --

4 **CHAIRMAN GARCIA:** You need to get on the
5 mike. We can't hear you. Get to the mike.

6 **MS. BEDELL:** I tried.

7 In terms of having four Commissioners sit as
8 the hearing is currently scheduled -- Commissioner
9 Deason you were thinking of going forward with no
10 postponement -- of this vote having no postponement
11 involved.

12 **COMMISSIONER DEASON:** I haven't gotten to to
13 that issue. That's Issue 6.

14 **MS. BEDELL:** Yes, I understand. But the
15 effect of your vote, the full panel may not be
16 available for the date the hearing is currently
17 scheduled and I just wanted to point that out to you.

18 **COMMISSIONER DEASON:** That happens all the
19 time.

20 **CHAIRMAN GARCIA:** The reason I think we
21 initially -- I think I initially ended up on the panel
22 was a time frame where I ended up on the panel and,
23 therefore, we went forward from there because
24 Commissioner Clark was conflicted out.

25 **COMMISSIONER DEASON:** And the reason that I

1 think earlier I stated I was willing to second the
2 motions we were not under a strict 90-day clock, and
3 possible repercussions from having to go to a full
4 Commission would possibly mean that we would have to
5 find another hearing date somewhere. And since we
6 weren't under a 90-day clock, that's something I
7 wasn't considered about, trying to find another
8 hearing date.

9 **MR. KEATING:** Commissioner Deason, I think
10 to clarify, I think we are under the 90-day clock
11 absent a waiver of the rule that said 90-day clock --
12 that requires us to follow that 90-day clock. I think
13 what our recommendation on Issue 6 on the waiver and
14 stay request, what we stated is that granting the
15 waiver wouldn't, in our opinion, frustrate the
16 purposes of the underlying statute, and that is the
17 statute that sets the clock once the site
18 certification application is filed with DEP.

19 **CHAIRMAN GARCIA:** But we are under a 90-day
20 clock.

21 **MR. KEATING:** Right now we are.

22 **COMMISSIONER DEASON:** Because there's not
23 been a waiver of our rule. And our rule contemplates
24 that normal procedure is that there would be a site
25 certification pending at the time we get the need

1 determination, and that the 90-day clock would have
2 been initiated.

3 **MR. KEATING:** Right. I think our rule was
4 designed to help us to meet that statutory clock once
5 the site certification application is completed and
6 that's why I think that's -- if the application of the
7 rule here, or the waiver of the rule here wouldn't
8 necessarily frustrate the purposes of the statute.

9 **COMMISSIONER DEASON:** Perhaps Commissioner
10 Clark will be available for the hearing we already
11 have, we can go to hearing, but that's an issue that
12 we can decide later on.

13 **CHAIRMAN GARCIA:** As a matter of fact, she's
14 not, at least because I think that's why I ended up --

15 **COMMISSIONER CLARK:** What are the dates?

16 **CHAIRMAN GARCIA:** Do we have the dates?

17 **COMMISSIONER CLARK:** What?

18 (Inaudible response from staff.)

19 **CHAIRMAN GARCIA:** December 6, 7th and 8th.

20 **COMMISSIONER DEASON:** Is there a motion?
21 Maybe she'll make herself available. I'm just
22 kidding. I'm sure there's other matters somewhere that
23 need to be addressed.

24 **COMMISSIONER CLARK:** I've got to go hunting.

25 (Laughter)

1 **COMMISSIONER DEASON:** Hey, listen that's a
2 good priority.

3 **COMMISSIONER CLARK:** I know you wouldn't ask
4 me to change that. (Laughter)

5 **CHAIRMAN GARCIA:** Well, Commissioners, we
6 have a motion. You seconded that motion. That's only
7 on the specific motion on Issue 1. I guess it's clear
8 for the record that I'm opposed to that motion.
9 Commissioner Jacobs, it's your call.

10 **COMMISSIONER JACOBS:** I'm going to stick by
11 my original reasoning. I think normally the decision
12 of the Chair in making assignments is the driving
13 force. But, again, parties have made assertions
14 regarding their rights in this docket. And I think we
15 need to address that. And we make decisions, is
16 exactly the deal. We make decisions. Hard decisions.
17 It would be the easiest thing in the world, I think,
18 to fall back on -- and just let the docket go forward
19 with a panel. But I think in good conscience I really
20 believe that there are issues here which would be
21 better settled by a full Commission.

22 **MR. MOYLE:** Mr. Chairman, just one quick
23 comment. Commissioner Jacobs earlier had indicated
24 about the regulatory policies, I think, as being
25 something of significant concern to him. You know, it

1 might be helpful to hear from your Staff which, I
2 think, has concluded that there are no regulatory
3 policies different from the Duke case.

4 **CHAIRMAN GARCIA:** I think it's clear from
5 the rec, if you read the entire rec, and I think
6 you're on the panel as well the full -- on this, is
7 that there's no distinction here.

8 Commissioner, the only thing I point out is
9 that -- I think you stated it earlier in your
10 comments; you arrived at a different decision. But
11 you stated earlier that to some degree here's where we
12 are and we have to make decisions. And I respect
13 Commissioner Clark's position in this as well as
14 Commissioner Deason's. I just think that precisely by
15 voting on this motion what we are doing is avoiding
16 making that decision. And the truth is that this will
17 put a pall into a growing wholesale market in this
18 state. Whether we like it or not, any more insecurity
19 we feed that system, there will be less investment.
20 And there will be less investment and less if that is
21 the way we're going to go. Now, that said, if the
22 Commission feels that way, then I understand.

23 **COMMISSIONER JACOBS:** I fail to understand
24 how it disrupts a marketplace by our making a
25 decision. Any future applicant will have to deal with

1 five Commissioners however they look at it. This
2 docket going forward, under these pretenses -- I mean
3 somebody is dreaming somewhere. The issue is are we
4 going to look at this docket and make a determination
5 whether or not it should be before four Commissioners
6 or other circumstances? And my -- step back. That
7 has been the issue that's discussed. But the issue I
8 want to focus on is whether or not a full Commission
9 should look at the issues in this docket, and that
10 will continue to be my focus.

11 I've read the recommendation of Staff. I
12 understand the rationale by which they arrive at the
13 conclusion that there are no distinctions from the
14 Duke decision and in this docket. I obviously
15 disagree with Staff's conclusion on that point. And I
16 would not support -- step back. Let me not make that
17 public statement. Let me say this, that I obviously
18 disagreed with that rationale in the recommendation.
19 Irregardless, I still hold firm to the original point
20 I made. In this docket, based on these petitions, I
21 believe that it would be best for the full Commission
22 to render a decision.

23 **MR. MOYLE:** And for clarification, is the
24 motion on a full Commission four or five?

25 **CHAIRMAN GARCIA:** The motion on the full

1 Commission, the one that Commissioner Deason has
2 seconded, is that only we hear this under the present
3 schedule that --

4 **COMMISSIONER CLARK:** I think you have a
5 motion for the full Commission at this point.

6 **CHAIRMAN GARCIA:** But --

7 **COMMISSIONER CLARK:** Without specification
8 of what that is.

9 **CHAIRMAN GARCIA:** Mr. Childs is very
10 specific, and I assume he's reiterating what he's
11 filed with this Commission. A full Commission means
12 the four sitting here, correct, Mr. Childs?

13 **MR. CHILDS:** Correct. If there are four at
14 the time.

15 **COMMISSIONER CLARK:** Your motion is full
16 Commission however that is numbered at the time the
17 hearing is held.

18 **CHAIRMAN GARCIA:** Commissioner Clark is
19 changing your filing. I just wanted to make sure you
20 agree with her.

21 **MR. CHILDS:** I don't think I anticipated it
22 being one way or the other. I anticipated simply
23 making a motion. If that's the way it works out and
24 that's what is there at the time, then I think that's
25 the consequence.

1 **CHAIRMAN GARCIA:** Your motion, Commissioner
2 Clark, if you'll restate it.

3 **COMMISSIONER CLARK:** I move we deny Staff on
4 Issue 1.

5 **CHAIRMAN GARCIA:** Okay.

6 **COMMISSIONER DEASON:** It would then be
7 granting the petition as filed.

8 **COMMISSIONER CLARK:** Right.

9 **COMMISSIONER DEASON:** I would second the
10 motion.

11 **CHAIRMAN GARCIA:** Okay. All those in favor
12 signify by saying "aye."

13 **COMMISSIONER DEASON:** Aye.

14 **COMMISSIONER CLARK:** Aye.

15 **COMMISSIONER JACOBS:** Aye.

16 **CHAIRMAN GARCIA:** Opposed, "nay." Nay.

17 All right. We're going to then, since it's a
18 full panel, I guess we should go ahead and take up the
19 rest of the items now.

20 **COMMISSIONER JACOBS:** Might I suggest we
21 take up Issue 6.

22 **MR. KEATING:** Let me first say the reasons
23 the issues were numbered in this matter, the Staff
24 felt if the motions to dismiss were granted, then it
25 would make a decision on Issue 6 unnecessary.

1 **COMMISSIONER CLARK:** Say that again.

2 **MR. KEATING:** If the motions to dismiss are
3 granted, a decision on Issue 6 would be unnecessary,
4 and Staff would recommend or suggest that the
5 Commission take up the issues in the order that they
6 are listed in the recommendation.

7 **CHAIRMAN GARCIA:** Let me state that it is
8 listed as a panel item and I don't know if
9 Commissioner Clark --

10 **COMMISSIONER CLARK:** I've read them.

11 **CHAIRMAN GARCIA:** Okay. Good.

12 **MR. KEATING:** Well, there are five issues
13 remaining. The first issue.

14 **COMMISSIONER JACOBS:** You can go forward.

15 **COMMISSIONER DEASON:** We're going to take
16 Issue 2. I move Staff on Issue 2.

17 **CHAIRMAN GARCIA:** I think the parties were
18 allowed to discuss these issues, if I'm not mistaken,
19 or no?

20 **MR. KEATING:** You can allow them discussion.

21 **CHAIRMAN GARCIA:** I think we've heard these
22 but the problem is Commissioner Jacobs' disagreed with
23 one of them. Commissioners, it's your choice. Do you
24 want to hear from the parties or not? Address them
25 all at once? Give them five minutes a side?

1 **COMMISSIONER CLARK:** Issue 3, move Staff.

2 **COMMISSIONER DEASON:** I move Staff on Issue
3 2, which I don't think should be the subject of an
4 oral argument. Now, perhaps Issues 3 and 4 should be
5 argued and 5, I don't have a problem with hearing
6 argument. But I was just trying to move this along.
7 But if they are going to argue Issue 2, that's fine
8 too, I will hear argument on Issue 2.

9 **MR. KEATING:** Issue 2 is Florida Power &
10 Light Company's motion for leave to file a reply to
11 Okeechobee's response.

12 **CHAIRMAN GARCIA:** We have no disagreement.
13 We're fine. Hang on one second. We're fine. He's
14 making a motion and that's fine.

15 **COMMISSIONER CLARK:** I'll second the motion.

16 **CHAIRMAN GARCIA:** All those in favor signify
17 by saying "aye." Aye.

18 **COMMISSIONER DEASON:** Aye.

19 **COMMISSIONER CLARK:** Aye.

20 **COMMISSIONER JACOBS:** Aye.

21 **CHAIRMAN GARCIA:** Issue 3.

22 **COMMISSIONER CLARK:** Move Staff.

23 **COMMISSIONER JACOBS:** Second.

24 **CHAIRMAN GARCIA:** No discussion. Show Issue
25 3 approved. Issue 4.

1 **COMMISSIONER DEASON:** We need to have oral
2 argument.

3 **CHAIRMAN GARCIA:** Okay.

4 **COMMISSIONER CLARK:** I think it should be
5 limited, oral argument.

6 **CHAIRMAN GARCIA:** Is five minutes a side
7 sufficient?

8 **MR. CHILDS:** It's really not. It's not.
9 You know, we went through -- it's an extensive matter,
10 and I'll try to be as rapid as possible but I don't
11 think I can do it in five minutes.

12 Commissioner, I have a handout to try to
13 facilitate focussing in on what I think are issues,
14 and I'd like to proceed with that and I'll try to do
15 it as fast as I can.

16 **CHAIRMAN GARCIA:** Okay. You'll try to do it
17 under ten minutes and then we'll go with that.

18 **MR. CHILDS:** Commissioners, we don't waive
19 all of the -- or any of the grounds that we've
20 presented in support of our motion to dismiss, but I'm
21 going to focus my arguments on just several of those,
22 or a few of those.

23 I have a chart that I will address in the
24 argument, and I also have a handout, which includes
25 various rules and statutes that I think are

1 applicable.

2 Pardon me for a moment, but I believe it's
3 fundamental that we remind ourselves of the purpose of
4 a motion to dismiss.

5 A motion to dismiss raises a question of
6 law, that is whether the petition alleges sufficient
7 facts to state a cause of action. The standard for
8 disposing of motions to dismiss is whether with all
9 allegations of the petition assumed to be true, does
10 the petition state a cause of action on which relief
11 must be granted? When making this determination the
12 tribunal must consider only the petition. And I
13 emphasize that. You must consider only the petition.
14 But all reasonable inferences drawn from the petition
15 must be made in favor of the petitioner.

16 In order to determine whether the petition
17 states a cause of action upon which relief may be
18 granted, it is necessary to examine the elements
19 needed to be alleged under the substantive law on that
20 matter. Emphasize, however, that all of the elements
21 of the cause of action must be properly alleged in the
22 pleading that seeks the affirmative relief. If they
23 are not alleged, then the pleading must be dismissed.
24 That does not mean, however -- dismissal does not mean
25 that the petitioner cannot come back and attempt to

1 allege the necessary elements.

2 Therefore, it is critical, I think, to keep
3 in mind that an essential fact in a petition, if it is
4 essential, must be alleged. If it is not alleged, the
5 petition is simply deficient as a matter of law and
6 must be dismissed.

7 There are two essential facts that are
8 absent from this petition. The first essential fact
9 is the competitive bidding rule. The second is the
10 filing of a Ten Year Site Plan.

11 I've included the Rule 25-22.082, which is
12 the bidding rule, and 25-22.071(1)(b) in the packet of
13 material that I gave you. Let's look at the language
14 of 25-22.082. This rule sets forth an express
15 mandatory requirement which is precondition for
16 petitioning for determination of need. It states,
17 quoting (2) the handout, "Prior to filing a petition
18 for determination of need for an electrical power
19 plant pursuant to 340-519, each investor-owned
20 electric utility shall evaluate supply-side
21 alternatives to its next plant generating unit by
22 issuing a request for proposals." That's mandatory.

23 Note particularly the words, "each
24 investor-owned utility." This is clear and plain.
25 It's not given to any ambiguity at all. Moreover, OGC

1 doesn't allege to the contrary. Note the words,
2 "shall evaluate by issuing a RFP." It's likewise no
3 vagueness as to this clear and expressed mandate.
4 Moreover, OGC does not assert the contrary. Finally,
5 note the words "prior to filing a petition for
6 determination of need."

7 Commissioners, taking the steps called for
8 by this rule, complying with it is an essential fact
9 which must be alleged in the petition. It wasn't
10 alleged. It wasn't mentioned. The rule wasn't
11 mentioned. No excuse for noncompliance was presented.
12 Thus on its face we believe the petition is defective.

13 Now, what does the OGC say in response?
14 Now, this is not in the petition. And remember I
15 started, I said the essential allegation must be in
16 the pleading. It's not in the pleading. But what
17 does OGC say in response? What they say is you should
18 engage in a interpretation foray. And I'll read what
19 they say. "Because the fundamental purpose of
20 Commission Rule 25-22.082 is to protect captive
21 ratepayers of retail serving investor-owned utilities,
22 that rule, the one we're talking about, should not be
23 construed to apply to merchant utilities like OGC.

24 Then, of course, OGC constructs what I
25 consider to be a self-serving argument about the

1 purpose of the rule. I would remind you of an
2 argument as to the purpose of the rule is not even
3 appropriate when you have the plain language of the
4 rule before you, and it's not vague or subject to that
5 interpretation.

6 One thing, too, is important. This is not
7 the proper time to talk about the purpose of the rule.
8 It's supposed to be in the petition so that
9 intervenors who are affected can challenge that
10 petition and see whether it's legally sufficient. You
11 shouldn't wait until you're found out and then argue,
12 "Well, I have an interpretation for you that would
13 excuse my compliance with the expressed provisions of
14 the rule."

15 **CHAIRMAN GARCIA:** Mr. Childs, could you give
16 me -- just so I understand -- what purpose you can see
17 in that, in that provision of the rule?

18 **MR. CHILDS:** First of all, I think that an
19 engagement and discussion of "purpose" is
20 inappropriate at this time. It's totally
21 inappropriate. However, if it is the purpose, then I
22 would go to this chart right now. This is the issue
23 that was framed for the Commission to consider at the
24 time that it was considering this rule. You'll see
25 that the issue was if the Commission adopts the rule

1 that requires bidding, should a process be required
2 for municipal and cooperative utilities as well as
3 investor-owned utilities? And the recommendation from
4 your Staff was yes, but it also -- note the wording,
5 "each electric utility subject to the provisions of
6 the Power Plant Siting Act." So if I would draw a
7 conclusion as to the purpose, I would say the purpose
8 was to make sure that each entity, subject to the
9 Power Plant Siting Act, was subject to this
10 requirement. When the Commission voted on it, and I
11 think as to purpose this is also instructive -- when
12 the Commission voted on it -- and you'll see I put
13 down there from the vote sheet "denied," munis and
14 co-ops are excepted from this rule. Commissioner
15 Laredo dissented. Those are the notes. And you look
16 at the rule and it's now worded that investor-owned
17 utilities that are covered or subject to the
18 provisions of the Act. And that's our point. And I
19 think that's the purpose, Commissioner. The purpose
20 is that an investor-owned utility will make that --
21 will make that evaluation.

22 You did discuss it, this Commission did
23 discuss it as well, that it was imperative that this
24 be done in order for the Commission to have evidence
25 on the most cost-effective alternative. That you

1 could not make that determination of the most
2 cost-effective alternative without this evaluation.

3 Now, this was addressed as early as 1988 by
4 the Commission. And in 1988 the Staff moved to
5 implead Florida Power & Light Company as an
6 indispensable party in a need determination
7 proceeding, pointing out to the Commission that it had
8 considered several -- at that time they were
9 qualifying facility petitions where there was not a
10 contract to sell. And Staff pointed out to the
11 Commission that the Commission had not carried out its
12 regulatory responsibility in evaluating the most
13 cost-effective alternative under the Act. And they
14 said you should do that. This rule, I think, goes the
15 next step and says in evaluating the most
16 cost-effective alternative you have to have this
17 information.

18 But I want to make the point that in terms
19 of what you have before you, which is a petition which
20 did not comply with the expressed requirements of your
21 rule, each investor-owned utility, subject to the Act,
22 shall do something. They didn't do it and they didn't
23 allege anything about it. They waited until the
24 response.

25 I think this relates as well, Commissioner,

1 to the discussion of the intent. If we were talking
2 about intent -- and I want to divide the issue -- but
3 if we were talking about intent and purpose of an Act,
4 then I would suggest that the statement of the Florida
5 Supreme Court in 1992 in the case of Forsyth versus
6 Long Boat Key -- and, incidentally, these cases are
7 not unique. They are sighted in the Staff's
8 recommendation on the Seminole matter that came before
9 you -- that docket came before you earlier today. And
10 I'm going to read from that. "The Court is without
11 power to construe an unambiguous statute." Then it
12 says, "As this court has said, where the statute is
13 clear, then the Court won't attempt to divine intent."
14 And I suggest you should look to the crystal clear
15 language of the rule. But the Court went on. The
16 Court went on and said "Looking at a decision we made
17 seventy years ago, there it was stated," and they set
18 out this as part of the quote, "even where a Court is
19 convinced that the Legislature really meant and
20 intended something not expressed, the Court will not
21 deem itself authorized to depart from the plain
22 meaning of the language which is free from ambiguity."

23 Now, let's consider the invitation to this
24 Commission to divine intent for purpose. There's a
25 new statute, it's not all that new, but it's 120.542.

1 And I refer to this in connection with the Staff's
2 maxim that is in their recommendation to the effect
3 that "the law should not be interpreted in a matter
4 that creates an absurd result." That's at Page 14 of
5 the Recommendation.

6 I would suggest that we're not there yet.
7 This shouldn't be. This should have been pled. This
8 should have been covered in the pleading, the
9 petition. And moreover, if they were going to seek
10 this kind of a result, that is that you interpret,
11 then they should have done it by rule waiver. That's
12 precisely what 120.542 says.

13 I handed this out to you, Section 120.542,
14 and I look and ask you to look at subsection 1 and the
15 first two sentences. It says "Strict application of
16 uniformly applicable rule requirements can lead to
17 unreasonable, unfair and unintended results. The
18 Legislature finds it is appropriate in such cases to
19 adopt a procedure for agencies to provide relief to
20 persons subject to its regulation."

21 So, I submit that what you're being asked to
22 do here is to grant a waiver but they don't have to
23 ask for it. I also submit that this is the procedure
24 that the Legislature says is to be followed even if
25 someone says there's an absurd result.

1 **CHAIRMAN GARCIA:** Mr. Childs, I don't know
2 if you're answering me or you're working on -- I just
3 asked you a very simple question.

4 **MR. CHILDS:** I was continuing with my
5 argument and I thought I had answered it.

6 **CHAIRMAN GARCIA:** Maybe you could sort of --
7 perhaps I'm not as quick as you are. Could you give
8 me the reason behind this. And I understand you're
9 making the argument this isn't what we should make it.
10 I just want to understand it.

11 **MR. CHILDS:** Okay. I'll try. I'll try.

12 The predicate for this rule -- the predicate
13 for this rule involved a need determination by
14 Seminole Electric Cooperative, which you may recall is
15 a cooperative that does not have retail customers.
16 And when they filed their petition for determination
17 of need, they had not gone through an RFP process.
18 They had not gone through one. They had one underway
19 but they hadn't completed it. There was no rule. And
20 the Commission and the Court said "You cannot address
21 for us the statutorily required issue of is this the
22 most cost-effective alternative until you go through
23 competitive bidding. Because it's not just a question
24 of whether it's the right unit, it's the question --
25 and there are all kinds of questions -- should you

1 have a -- should you build a facility yourself?
2 Should you have a turnkey project? It may be you're
3 going to own it but you ask somebody else to build it,
4 which is precisely applicable to OGC in this case,
5 even with their theory they don't have a retail
6 Commissioner. The issue is could somebody else build
7 it more cheaply? Well, they don't know because they
8 didn't go through a competitive bidding. That's
9 exactly the question that this Commission addressed
10 there and that's the purpose.

11 Because after that ruling in Seminole, after
12 that was addressed, then the Commission ultimately
13 came back when it struggled with another case and said
14 what we want is a clear point of entry and a clear
15 closure. And we want to be able to address this issue
16 of most cost-effective alternative in doing so. We
17 don't want to have multiple participants in need
18 determination proceedings coming forward saying "I can
19 do it more cheaply." We want clear point of entry,
20 clear closure, but we want to be able to address most
21 cost-effective alternative.

22 So, Commissioner, what I'm trying to say is
23 the most cost-effective alternative requirement of the
24 statute is, in my view, the reason for this
25 requirement. It is necessary for the Commission to

1 have that information in order to carry out that
2 mandate.

3 **COMMISSIONER DEASON:** Mr. Childs, wasn't
4 this addressed in the Duke proceeding?

5 **MR. CHILDS:** No.

6 **COMMISSIONER DEASON:** It was not addressed
7 at all?

8 **MR. CHILDS:** No. In fact, that's one of the
9 misleading points about the quote in the Staff
10 recommendation and in the OGC response. They quote a
11 section of your Order -- it's also in the Staff
12 recommendation in that case.

13 What was being discussed was, given the
14 circumstance of a merchant plant having been built,
15 given that occurring, then how must an investor-owned
16 utility that had retail customers deal with that
17 plant? It didn't deal with the question that's now
18 before you. In fact, in Duke, there was no allegation
19 by Duke that they were an electric utility. They
20 didn't allege that. You know, that's one of the
21 things that sort of evolved in the case. So there
22 wasn't a motion to dismiss on that point.

23 The language talks about a different issue.
24 And the Staff in the recommendation supports it by
25 saying perhaps -- or you can draw an inference from

1 that. Maybe you can. I don't think so. But if you
2 can, my point is it can only be done in the context of
3 a request for a waiver of a rule. You can't be silent
4 in your petition and then if you're caught come
5 forward and say, "I've got a different
6 interpretation."

7 **COMMISSIONER DEASON:** Let me ask you this:
8 You say the Order didn't address it, and I guess we'll
9 pursue that a little bit later. But assuming for the
10 sake of this question that the Duke Order did not
11 address this rule requirement to issue an RFP -- I've
12 lost my train of thought. Let's assume that the Order
13 did -- that the Order did address the rule requirement
14 to issue an RFP. Would that, the fact that the Duke
15 Order addressed that, and it was found that it was not
16 necessary to go forward and grant the determination of
17 need for there to be an RFP issued, would that in and
18 of itself be reason enough for the current applicant
19 not to have addressed the need for an RFP because it
20 was addressed in the Duke proceeding and not
21 necessary?

22 **MR. CHILDS:** No. No Commissioner. Clearly
23 no.

24 First of all, let me clarify one point. You
25 made -- there is a waiver provision as well in the

1 rule on RFPs. In addressing that earlier this year in
2 connection with Florida Power Corporation, the
3 Commission undertook to both address that waiver
4 provision and the waiver provision under 125.42 and it
5 said the statutory provision prevailed.

6 However, the ruling of the -- on a waiver
7 request is not -- doesn't change the rule. In fact,
8 the statute -- I'm looking for the statute right
9 now -- but the statute says that -- in one of the
10 concluding paragraphs -- it says that the agency that
11 grants waivers is supposed to keep a record of them
12 and report them.

13 Also, you know, we had an argument earlier
14 this year about whether the Commission ought to
15 eliminate its rule provisions that independently
16 permitted waivers. And as your Staff pointed out to
17 you, one of the purposes of 120.542 was to avoid just
18 that result, of ad hoc kinds of decisions as to the
19 application of a rule.

20 And I would go back, Commissioner, and quote
21 that language that I referenced out of the statute.
22 It's quit clear. That if it produces unintended
23 results, unreasonable results, then that's the basis
24 to seek a waiver. And it can similarly -- if the
25 Commission concluded that it believed that the

1 application of the rule in connection with its
2 consideration of a request for waiver, if it believed
3 that something was inappropriate, it ought to change
4 the rule. And that's what I think the rule -- excuse
5 me, the section of the statute on waivers, Section
6 120.542.

7 **COMMISSIONER DEASON:** So we should either
8 change the rule if we don't think it's applicable to
9 merchant plants, or else the applicant had an
10 affirmative burden -- or needed to come forward and
11 seek a waiver at the beginning and have that as a part
12 of the initial filing.

13 **MR. CHILDS:** Absolutely. And incidentally,
14 that's what Florida Power Corporation did. Item
15 No. 4. Florida Power Corporation was a matter that
16 you considered earlier this year. And Florida Power
17 Corporation sought a waiver. Look at it, the case
18 background, it quotes the statute and it says "Section
19 403.519," the same statute they are relying upon, OGC,
20 "commonly called a need termination statute, requires
21 that the Commission consider," "whether the proposed
22 plant is the most cost-effective alternative available
23 in the context of a need termination proceeding."

24 Next sentence, "Pursuant to this rule,
25 25-22.082, prior to filing a petition for need, each

1 investor-owned utility must evaluate supply-side
2 alternatives." That's precisely the application they
3 gave to the Florida Power Corporation and you denied
4 it. They had a theory and you said, "Well, we deny
5 it." And I think that that's the point. Is that you
6 can't be silent on an essential fact. An essential
7 fact is did you comply with the law? It states that
8 it's a precondition and they didn't say anything about
9 it.

10 I would like to move on briefly on the Rule
11 25-22.071, which calls for the filing of a Ten Year
12 Site Plan.

13 Now, the language has alternatives, it
14 says -- is the filing, it says -- that at least three
15 years prior to the application for site certification,
16 or as OGC points out, in the year the decision to
17 construct is made, if a utility -- that does not
18 otherwise file Ten Year Site Plans must file one if it
19 intends to build a power plant.

20 We pointed out that that's what your rule
21 said. And that also that the petition by OGC is
22 completely silent once again on this. They have no
23 explanation, no excuse, no discussion that the rule
24 does or doesn't apply to them. They are just silent.
25 They wait until the motion to dismiss and they say

1 first of all, "First of all, you didn't quote the full
2 rule." We didn't. Because I think it's quite clear
3 that the words "at least three years prior" is the
4 limiting factor as opposed to in the year the decision
5 is made to construct. If that means you have to alter
6 the date by which you file your petition for need
7 determination, then I think that's what the statute
8 calls for.

9 So they want to read out that requirement
10 and say, "Well, couldn't be, shouldn't be any sooner
11 than in the year you make your decision." Then what
12 do they do next? Well, they say, "Well, we haven't
13 really made a decision yet. We haven't made a final
14 decision to build because that would require an
15 affirmative order granting OGC's need determination.
16 Well, so that puts it totally within their discretion
17 to ignore your rule and say, "Well, I haven't made a
18 decision." I think that it's also kind of strained,
19 particularly under the circumstances that they filed a
20 petition that says they are going to own a facility --
21 they have sought status from the FERC as an exempt
22 wholesale generator. They filed a tariff as an exempt
23 wholesale generator with the FERC, and now they say
24 they haven't really decided to build a facility. I
25 think that's a constructed way to avoid the clear

1 language. And I think it is clear as to what they are
2 supposed to do.

3 I submit to you that they have to comply
4 with this. This information -- the reason it is filed
5 is so that there are warnings, so it's known what's
6 being reviewed, so that there's some opportunity for
7 that to be factored in, both in terms of location of a
8 power plant and the review of the site, where it's
9 going to be located, but also as to the impact of that
10 plant.

11 **COMMISSIONER CLARK:** Mr. Childs, I just want
12 to be clear. You're saying every entity that wants to
13 file for a determination of need three years prior has
14 to have filed a Ten Year Site Plan? There's no
15 alternative? They have to meet that three-year limit?

16 **MR. CHILDS:** If you are not covered -- if
17 you are not covered by having filed one under
18 subsection A of that rule. 1A talks about all
19 electric utilities in the state with the capacity of a
20 certain level will file annually. Then it talks about
21 those that do not file annually. And, yes, it is.
22 That's the way I think the statute reads expressly
23 when it says at least three years prior, I think
24 that's the limiting factor.

25 **COMMISSIONER CLARK:** Now, clarify for me,

1 are you talking about the statute or the rule?

2 MR. CHILDS: I'm talking about the rule.

3 COMMISSIONER CLARK: Does the statute say
4 anything about a time limit?

5 MR. CHILDS: I don't recall any limitation
6 there.

7 COMMISSIONER CLARK: Okay.

8 MR. CHILDS: But I would submit -- in fact,
9 that brings up another point, is that OGC has argued
10 that because your rule on filing for approval for
11 determination of need does not expressly incorporate
12 this rule, then I guess they don't have to comply with
13 it.

14 And my point is, is that independent of
15 whether it's three years, they haven't alleged that
16 they filed at all. And in response, I think they make
17 it clear that they haven't filed because ultimately
18 what they say is -- they say, "You should treat the
19 filing of this petition as substantial compliance with
20 the requirement to file." And that is an alternative
21 contention but I think that illustrates the point.
22 They haven't filed at all. And whether it's three
23 years or the year the decision is made, the filing
24 should precede the filing for a determination of need.
25 Moreover, it should be alleged. And they didn't

1 allege it.

2 I want to come back very briefly. It sounds
3 like at times, you know, that, well, you have an
4 argument but can't we take that up at hearing? Can't
5 we address that as we go forward? And my reaction is
6 no, you shouldn't and you can't. This is a matter, as
7 what I have pointed out to you at the beginning -- if
8 it's an essential fact, it must be alleged, so
9 everyone is on notice as what is -- is on notice of
10 what's there. It is required. They didn't do it.
11 They did not file a petition for waiver. They didn't
12 have a petition for waiver pending at the time they
13 filed their petition for determination of need, which
14 potentially they could have done. They just totally
15 ignored your rules.

16 It is, I think, of great importance that the
17 integrity of your rules and the integrity of the
18 application of those rules be maintained. And we urge
19 you to dismiss the petition. Thank you.

20 **CHAIRMAN GARCIA:** We're going to -- we have
21 a time certain that we're going to take up a group
22 that's at 12, and that is Item 53, Commissioners. And
23 we haven't taken a break and I need one. So what
24 we're going to do is we're going to cut it there.
25 Mr. Sasso, you will continue when we finish Item 53

1 and we're going to take a break until five after.

2 **MR. KEATING:** Chairman, as far as Mr. Sasso
3 continuing when we get back, I think we're still just
4 on Issue 4, which is solely Florida Power & Light's
5 motion to dismiss so maybe Okeechobee should continue
6 at that point.

7 **CHAIRMAN GARCIA:** Right.

8 (Brief recess taken.)

9 - - - - -

10 **CHAIRMAN GARCIA:** Okay.

11 **COMMISSIONER CLARK:** If the Staff said yes.
12 The recommendation is yes, there should be an
13 acquisition adjustment and it was a tie vote, then
14 what happens?

15 **MR. KEATING:** Under the rules, we have 30
16 days in which to grant or to deny an emergency waiver
17 petition. The companies had waived that time clock
18 once before. We are actually on the 32nd day right
19 now due to the timing of their petition and the fact
20 we didn't have an agenda for a month.

21 If you determine that this is not -- they do
22 not meet the standard for an emergency waiver of
23 petition, you can treat this as a nonemergency
24 petition and hear it within the time limits provided
25 by statute for a regular waiver petition.

1 **COMMISSIONER DEASON:** It's Staff's position
2 it does not meet the requirements as an emergency; is
3 that correct?

4 **MR. KEATING:** That's correct.

5 **COMMISSIONER JACOBS:** If I recall, some of
6 the rationale originally had to do with the fact they
7 had got party status and that discovery was moving
8 fast.

9 **MR. KEATING:** I think the basis that Florida
10 Power Corporation has given for emergency treatment is
11 that under the 90-day time clock for a typical rule
12 waiver, the Commission would not be required to rule
13 on their waiver request prior to the hearing. And
14 that's why, although we feel it's not an emergency as
15 contemplated by the rule, we felt that the Commission
16 needed to go ahead and hear this waiver petition at
17 least prior to the hearing.

18 **COMMISSIONER DEASON:** When would it heard --

19 **CHAIRMAN GARCIA:** Next agenda.

20 **COMMISSIONER DEASON:** Which is the 30th of
21 November?

22 **MR. KEATING:** Correct. I think it would
23 have to be -- in fairness, it should be heard by that
24 agenda.

25 **COMMISSIONER CLARK:** Mr. Chairman, I guess

1 possible to go to issue No. 6, which is a request for
2 waiver and stay, because I think that has immediate
3 due process significance and it's very important to us
4 to have that addressed. And if you would, we'd like
5 to go to that.

6 **CHAIRMAN GARCIA:** Right. Well, why don't we
7 just finish yours since we had had an argument on it
8 and -- I think Mr. Sasso isn't on that issue, that was
9 just your, right, Issue 2? Issue 3 is Sasso's.

10 **MR. KEATING:** We're on Issue 4.

11 **CHAIRMAN GARCIA:** All right. Here we go.
12 I'm sorry. We're on Issue 4. I don't have my notes.
13 Issue 4.

14 **MR. WRIGHT:** Mr. Chairman, we'll do whatever
15 you all say as usual. It, frankly, might make more
16 sense to go ahead and let Mr. Sasso present his
17 argument on Issue 5. Basically, FPC's motion to
18 dismiss incorporates and renews FPL's on the same
19 rule-based grounds that FPL set forth, plus they make
20 an argument on the applicant issue in the Nassau
21 cases. I was sort of hoping Mr. Sasso wouldn't have a
22 whole lot of time that he intended to speak, and we
23 could just do it all at once.

24 **CHAIRMAN GARCIA:** Mr. Sasso -- as long as
25 you don't try to double their time, Schef, we're fine.

1 We'll give you a discount.

2 **MR. WRIGHT:** Thank you.

3 **MR. SASSO:** I'm happy to go ahead if the
4 Commission wishes. I do want to reiterate our concern
5 that today the Commission addressed the emergency
6 petition for a rule waiver and a stay.

7 **CHAIRMAN GARCIA:** That's 6, right?

8 **MR. SASSO:** Yes, sir.

9 **CHAIRMAN GARCIA:** Go ahead, Mr. Sasso.

10 **MR. SASSO:** The threshold issue is the
11 timeliness of our motion. The petitioner has
12 challenged our motion to dismiss as untimely.

13 The facts are these. The petition was filed
14 on September 24th. It was not served on Florida Power
15 Corporation. The rule concerning the time for filing
16 a motion to dismiss says, "Motions to dismiss the
17 petition shall be filed no later than 20 days after
18 service of the petition on the party." The petition
19 was never served on Florida Power Corporation. Also,
20 we were not granted party status until November 4th.
21 We were not untimely in filing our motion to dismiss,
22 which was filed 21 days after the petition was
23 initially filed.

24 If the petition had been served on Florida
25 Power Corporation in a reasonable manner, say

1 overnight delivery or by mail, we clearly would have
2 been timely in filing our motion to dismiss when we
3 did. And so if the intervenor is going to be faulted
4 on the basis of a technical rule, we believe we ought
5 to be given the benefit of the letter of that rule
6 which requires service upon us to trigger the time for
7 filing. So we would submit that the Motion to Dismiss
8 was timely filed.

9 In addition, since we challenge,
10 fundamentally, the jurisdiction of the Commission, a
11 lack of statutory authority to rule favorably on the
12 petition, we would submit that that challenge does not
13 go away, it cannot be waived, it can and should be
14 raised at any time in the proceeding. And there's
15 ample authority by this Commission and the courts in
16 that respect.

17 Proceeding to the merits of our motion, we
18 have adopted the grounds argued by FPL. And in
19 addition, we have argued that OGC is not a proper
20 applicant under the Florida Supreme Court's decisions
21 in the Nassau cases.

22 We stand by our view that the Duke decision
23 was not correctly decided, and, of course, that will
24 be addressed on appeal by the Florida Supreme Court.
25 And we would renew our arguments there but we won't

1 belabor that, obviously, today with the Commission.
2 But we do point out that in the view of at least one
3 Commissioner, the Prehearing Officer in this case,
4 even if Duke were correctly decided, the decision
5 should not be extended to this Case. I'll quote from
6 Commissioner Jacobs' separate opinion in Duke where he
7 said "I would restrict the determination of standing
8 to the petition as filed, a request by the partnership
9 to certify need of the full plant capacity. To the
10 extent that the issues are addressed by the majority,
11 however, I believe the holding of the Florida Supreme
12 Court in Nassau Power Corporation versus Beard, cited
13 herein as Nassau 2 controls. Thus, to be a proper
14 applicant, an EWG must be tied by contract to a
15 co-applicant who is a utility. In the instant docket,
16 Duke New Smyrna is a proper applicant only because of
17 the relationship between the parties to the
18 partnership."

19 If this view were to prevail, it is a basis
20 not to extend Duke to the circumstances of this case.
21 Of course, we have a broader construction of Nassau
22 and don't believe that even the Duke decision can be
23 justified under that rationale. But at a minimum,
24 whereas in this case, there is no arguable compliance
25 with Nassau, there's no contract presented to this

1 Commission whatsoever between this IPP and a retail
2 utility, Nassau cannot be said to have been complied
3 with, and a dismissal would be appropriate.

4 **CHAIRMAN GARCIA:** All right. Thank you,
5 Mr. Sasso. Schef.

6 **MR. WRIGHT:** Thank you, Mr. Chairman.

7 Mr. Chairman, the Commission Staff are
8 right again. The motions to dismiss should be denied.
9 I'm going to try to focus on the points discussed in
10 argument by Mr. Childs and Mr. Sasso, but want to make
11 it clear that we don't think that any of their grounds
12 for dismissal are valid.

13 As regards the bidding rule, a strict
14 literal interpretation of the bidding rule does appear
15 to bring entities like OGC within its ambit. However,
16 the intent of the bidding rule is clearly to apply it
17 to investor-owned public utilities, entities with the
18 capacity or the capability to bind captive ratepayers.

19 The Public Service Commission exempted
20 municipal and cooperative utilities over which the
21 Commission has similar, except for rate structure,
22 jurisdiction as it has over Okeechobee Generating
23 Company.

24 **COMMISSIONER DEASON:** Mr. Wright, let me ask
25 you a question. Even if that were the intent of the

1 rule, was there an obligation to -- in the original
2 application, to identify that and seek a waiver, or at
3 least put parties on notice what your position on that
4 issue is?

5 **MR. WRIGHT:** Well, we don't think so,
6 Commissioner Deason, and that's why we didn't do that.
7 We don't think we're obliged to make some kind of
8 affirmative or negative allegation regarding every
9 rule that might possibly apply to us not applying to
10 us. We, in good faith, believe that the bidding rule
11 does not apply to Okeechobee Generating or any
12 similarly situated entity without the capability to
13 bind ratepayers. And for that, while the specific
14 issue was not addressed and decided in the Duke New
15 Smyrna case, the Commission --

16 **CHAIRMAN GARCIA:** I thought it was.

17 **MR. WRIGHT:** Well, not in --

18 **CHAIRMAN GARCIA:** In the Duke New Smyrna --
19 on a reading of the Duke New Smyrna, I would find that
20 if I were an applicant in your position, I would
21 realize I don't need that. Is that not --

22 **MR. WRIGHT:** Well, that's certainly the
23 conclusion that I come from, that I reach reading the
24 Duke New Smyrna Order.

25 The point I was, making Mr. Chairman, is

1 simply that I don't think that very issue, whether
2 Duke New Smyrna was required to seek a waiver, was
3 voted on or whether Duke New Smyrna was required to
4 have gone through an RFP process was voted on.
5 However, the Commission did articulate very clearly a
6 vision of the role that merchant plants would play
7 within the overall regime created by the bidding rule.
8 Where you said the bidding rule -- and I'm going to
9 ally certain short references -- the bidding rule
10 requires that an investor-owned utility evaluate
11 supply-side alternatives in order to determine that a
12 proposed unit, subject to the Siting Act, is the most
13 cost-effective alternative available. If Duke New
14 Smyrna were to construct the project, it could propose
15 to meet a utility's need pursuant to the bidding rule.
16 But the IOU, clearly referring to an investor-owned
17 public utility, would have the final decision on how
18 it would meet its needs. An IOU, or any other utility
19 in Florida, should prudently seek out the most
20 cost-effective means of meeting its needs. The Duke
21 New Smyrna project simply presents another generation
22 supply alternative for existing retail utilities.
23 Florida ratepayers would not be at risk for the cost
24 to the facility unless it were proven to be the lowest
25 cost alternative at the time a contract is entered.

1 From this discussion, discussing
2 specifically the regime created by the bidding rule
3 with respect to investor-owned public utilities and
4 with respect to a merchant power plant, the Duke
5 Energy New Smyrna Beach Power Company, it's clear to
6 us, anyway, that the vision that the Commission
7 articulated therein was that the wholesale competitive
8 merchant utilities, like OGC, like Duke New Smyrna,
9 fit just fine into the framework of the bidding rule
10 by being available to participate in bids to
11 investor-owned public utilities. And that's -- well,
12 not voted on, it seems very clear that that's the way
13 you all envisioned this working.

14 **COMMISSIONER DEASON:** Well, let me ask a
15 question. What you're saying makes a lot of intuitive
16 sense; that the bidding rule would not apply to a
17 entity which is not seeking to place a unit in rate
18 base and put retail customers at risk for the recovery
19 of the cost associated therewith. But the rule says
20 what the rule says. And as I understand the argument,
21 that you should have acknowledged that and sought a
22 waiver of that rule up front in the original
23 determination of need. And you're saying no, that
24 that is not an obligation which you had.

25 **MR. WRIGHT:** Yes, sir.

1 **COMMISSIONER DEASON:** And because of the
2 language --

3 **MR. WRIGHT:** To directly articulate the
4 argument -- and it's our belief, and we proceeded on
5 that belief, we think, as reflected in the language I
6 just read to you all from the Duke New Smyrna Order,
7 that the rule does not apply to us, was never intended
8 to apply to us and cannot reasonably be construed as
9 applying to us. And with regard to Mr. Childs'
10 eloquent exposition of courts interpreting statutes,
11 that's a very different situation. Where a court
12 interprets a statute, you have one branch of
13 government, in that instance the judiciary,
14 interpreting the act of another branch of government,
15 the legislature. Here we're dealing with a commission
16 promulgated rule which the Commission must apply from
17 time to time.

18 **COMMISSIONER DEASON:** Are you saying the
19 court is going to give us more deference in the
20 interpretation of our own rule?

21 **MR. WRIGHT:** Absolutely. And we just submit
22 to you that whenever you're faced with something
23 that's not exactly clear, you can interpret your rule.
24 Mr. Childs is arguing for an interpretation of the
25 rule that would bring us under it. We believe, and as

1 I said, in good faith, based on your previous
2 pronouncements, that it just doesn't apply to us.

3 **COMMISSIONER JACOBS:** If we take that logic
4 just a step further, if you follow the holding in
5 Duke, every company that meets the definition of a
6 utility under FERC, okay, can come establish a site
7 and have no requirement to do bidding or any other
8 process to determine whether or not it's
9 cost-effective. Is that a reasonable --

10 **MR. WRIGHT:** I'd point out that I think that
11 the holding in Duke recognizes that the entities we're
12 talking about are -- excuse me, I'm just a little
13 dry -- are not only the public utilities under the
14 Federal Power Act, they are also electric utilities
15 under Chapter 366, Commissioner Jacobs.

16 But having said that, yes, sir. I think
17 that the rule was intended to apply to entities with
18 the capability of binding captive retail customers.
19 It is quite clear that that was the intent of the
20 rule. I could cite to you from the hearing transcript
21 and the agenda conference transcript. It is
22 abundantly clear that that was the intent of the rule.

23 And I'd like to point out that the reason
24 you have the rule in the first place is to try to get
25 the best deal for the ratepayers. It's what

1 Mr. Ballinger said in the hearing, it is what the
2 Commissioners said in the hearing. I will assure you
3 that nobody has a greater incentive to build this
4 plant as cost-effectively as possible, or any other
5 competitive merchant wholesale power plant, as
6 cost-effective as possible than the developer. We
7 don't have a opportunity to come to the Commission and
8 seek recovery for any of our costs. We have to build
9 the plant cost-effectively, compete in the
10 marketplace, sell it when it's cost-effective and
11 watch it sit idle when it's not cost-effective.

12 Following along the Staff's analysis, we
13 agree that the requirement that wholesale competitive
14 utilities, like Okeechobee Generating Company, would
15 have to -- have to go through this rule process is an
16 absurd result. It would erect an additional barrier
17 and an obstacle completely unnecessarily, because
18 there's no extra ratepayer protection gained, because
19 nobody ever has to buy from us in the first place. We
20 think it's inconsistent with the Commission's vision
21 of the rule -- vision of the role of merchant plants
22 in the overall regime created by the bidding rule.
23 And it would not further the rule's fundamental
24 purpose at all. There's no point in applying the rule
25 or requiring somebody to comply with it unless

1 ratepayers are going to be protected. We've already
2 got more than ample incentive, certainly greater
3 incentive than the municipal utility systems and
4 co-ops have to build a plant cost-effectively, and you
5 exempted them because you thought their city
6 commissions would take care of them.

7 With respect to the -- if you have more
8 questions on the bidding rule, I would be delighted to
9 answer. Otherwise, I'll talk about the Ten Year Site
10 Plan and then address Mr. Sasso's comments briefly.

11 With respect to the Ten Year Site Plan rule,
12 there's no allegation requirement that an entity have
13 filed a Ten Year Site Plan, or even allege that it has
14 filed a Ten Year Site Plan, in the rules governing the
15 contents of power plant need determination petitions.

16 Okeechobee Generating Company was not even
17 incorporated on April 1st of this year. It was
18 incorporated in May. I'm not sure whether the date
19 was the 13th or the 24th, but it was in that general
20 time frame.

21 Okeechobee is not, as alleged by my
22 counterparts, trying to avoid the Ten Year Site Plan
23 rule. We have alleged two things: One, that we
24 intend to comply with it in answering their challenge,
25 and furthermore, when you consider -- if you even want

1 to look at the underlying substance and say, "Well,
2 what we really want to go is what's going on out there
3 in the world," look at what we filed. Most of what we
4 filed, most of what would wind up in a Ten Year Site
5 Plan, probably nearly all of it, is information that
6 we have already filed in our petition and exhibits.
7 And we suggest to you that that's in substantial
8 compliance with what we would have filed had we filed
9 something with a Ten Year Site Plan label on it and
10 certainly in compliance with the Commission's needs.

11 And I'd further point out that the filing of
12 a site certification application automatically amends
13 any Ten Year Site Plan, such that overnight a Ten Year
14 Site Plan of anyone can be rendered moot merely by
15 filing a complete site certification application. And
16 I will aver to you that there have been more than a
17 couple of instances where power plants have been
18 proposed either by utilities, or by utilities in
19 partnership with nonutility entities, QFs or other,
20 where they haven't been in their Ten Year Site Plans
21 three years in advance. The whole site -- the whole
22 Ten Year Site Plan statute allows them to be amended
23 overnight by the filing of a site certification
24 application. This is not a defect in our petition.

25 Finally, as regards --

1 **COMMISSIONER CLARK:** Mr. Wright, let me ask
2 you a question. Look at Rule 25-22.071, which is the
3 requirement that the Ten Year Site Plans be filed.

4 **MR. WRIGHT:** Yes, ma'am. I don't have it in
5 front of me.

6 **COMMISSIONER CLARK:** Mr. Childs probably has
7 a copy he could give you.

8 **MR. WRIGHT:** I know the rule pretty well.

9 **COMMISSIONER CLARK:** All right. Do you fall
10 under A or B?

11 **MR. WRIGHT:** I think B. But we don't
12 already have generating facilities.

13 **COMMISSIONER CLARK:** Okay. So under --

14 **MR. WRIGHT:** Under B it says either three
15 years in advance or in the year in which the decision
16 to construct is made we have to file one. Have we
17 made a final decision to construct at this time? No.
18 How can we make a final decision to construct and
19 place final orders for this multimillion dollar
20 hardware until we have an order from you all saying it
21 is needed? But notwithstanding that, we've told you,
22 and we aver to you today, we will file a Ten Year Site
23 Plan next April 1st.

24 **COMMISSIONER CLARK:** But it's your view that
25 it's an either/or proposition. You can do it three

1 years in advance or in the year you make a decision to
2 do that.

3 **MR. WRIGHT:** Absolutely. Yes, ma'am.

4 **COMMISSIONER CLARK:** Okay.

5 **MR. WRIGHT:** Kind of like that conversation
6 we had in that wonderful first day of oral argument
7 last December the 2nd in which Commissioner Deason
8 asked me why Duke New Smyrna hadn't filed a Ten Year
9 Site Plan. I told him that I had talked to
10 Mr. Jenkins, and Mr. Jenkins told me, "Well, you
11 weren't a utility as of April 1st. File one next
12 year." Which we did.

13 As regards the timeliness of Florida Power
14 Corporation's Motion to Dismiss, I just point out to
15 you that the Commission in its -- in decisions, in
16 reported decisions, has treated filing the same as
17 service with respect to motions to dismiss. In fact,
18 in the petition by Tampa Electric for approval of cost
19 recovery for a new environmental program,
20 98-FPSC-9-323 and 327, the Motion to Dismiss was
21 denied when it was filed more than 20 days after the
22 petition was, quote, "initially filed/served."

23 Moreover, I would point out to you, as we
24 pointed out in our memorandum in response to Florida
25 Power Corporation, that the day before we filed, on

1 September 23rd, my co-counsel advised Florida Power
2 Corporation's chief lobbyist, chief registered
3 lobbyist, that is, that we would be filing it the next
4 day. We didn't technically serve them, but they knew
5 it was coming a day ahead.

6 **COMMISSIONER CLARK:** Mr. Wright, let me ask
7 you about the decision you cited. It said,
8 "filed/served."

9 **MR. WRIGHT:** Filed/served. Yes, ma'am.

10 **COMMISSIONER CLARK:** Does it indicate that
11 it was served?

12 **MR. WRIGHT:** My understanding is that it
13 indicates it was filed and not served. That's what --

14 **COMMISSIONER CLARK:** That's what the
15 filed/served meant?

16 **MR. WRIGHT:** That's what I'm told by my
17 partner who did the research on this, yes, ma'am.

18 **COMMISSIONER CLARK:** What year was that?

19 **MR. WRIGHT:** '98.

20 **COMMISSIONER CLARK:** Have we ever
21 affirmatively discussed the notion of filing and
22 service being the same on a motion to dismiss?

23 **MS. JAYE:** I'm unaware of any time when we
24 have addressed that particular issue, but I do have
25 before me what I believe to be the first order of the

1 Commission in which we did address that rule.

2 **COMMISSIONER CLARK:** What did it say?

3 **MS. JAYE:** It doesn't go to filed/served
4 unfortunately, Commissioner, but we did in this
5 particular order, the Commission's order did, indeed,
6 apply the rule to parties, and we had a comment within
7 the section --

8 **COMMISSIONER CLARK:** But we don't know in
9 that particular case if it was served at the same time
10 it was filed, do we?

11 **MS. JAYE:** No, ma'am, we don't.

12 **COMMISSIONER CLARK:** What do the model rules
13 provide? Do they help at all? Or is this the model
14 rule?

15 **MR. KEATING:** Are you referring to the
16 uniform rules?

17 **MS. JAYE:** Chapter 28.

18 **COMMISSIONER CLARK:** I'm referring to what
19 we have to follow.

20 **MR. KEATING:** Let me turn to that particular
21 section. The uniform rules state that, "Unless
22 otherwise provided by law, motions to dismiss the
23 petition shall be filed no later than 20 days after
24 service of the petition on the party." And I think
25 part of the problem we're having here is --

1 **COMMISSIONER CLARK:** They weren't a party.

2 **MR. KEATING:** They weren't a party, and I
3 don't even know if service is required at that point.

4 **MS. JAYE:** I certainly don't mean to
5 interrupt my colleague here, but intervenors do take
6 the case as they find it.

7 **COMMISSIONER CLARK:** You know what, we need
8 to clarify that. But let me ask another question.
9 What about the argument -- well, Mr. Wright maybe you
10 want to answer it. What about the argument that a
11 Motion to Dismiss, on the basis of jurisdiction, is
12 always timely; can be raised at any time?

13 **MR. WRIGHT:** Jurisdiction can be raised at
14 any time. I'm not so sure that it can be raised in a
15 Motion to Dismiss at any time. It can be raised on
16 appeal. It can be raised as a legal issue in the
17 case, but I don't know that it can be raised in a
18 Motion to Dismiss.

19 **COMMISSIONER CLARK:** Well, if you don't have
20 jurisdiction, what would you do? If you don't have
21 jurisdiction, what is the only remedy available? If
22 you raise it some other way --

23 **MR. WRIGHT:** Yeah.

24 **COMMISSIONER CLARK:** -- and you find you
25 don't have jurisdiction, what do you do?

1 **MR. WRIGHT:** You dismiss the cause.

2 **COMMISSIONER CLARK:** So then it would appear
3 you can raise in a Motion to Dismiss a jurisdictional
4 issue at any time?

5 **MR. WRIGHT:** I'm not sure -- I don't know,
6 Commissioner Clark. I'm not sure that that's correct.
7 I think you can raise the jurisdictional issue at any
8 time, but whether you can raise it in a Motion to
9 Dismiss under the applicable rules here, more than 20
10 days after, I don't know. I think you could raise it
11 as a legal issue, i.e. whether the Commission has
12 jurisdiction. I think you can raise it on appeal,
13 that the Commission does not have jurisdiction. If
14 you don't comply with the procedural rules and make
15 your argument within the time prescribed, I'm not sure
16 that you can raise it in a Motion to Dismiss.

17 **COMMISSIONER CLARK:** What sense would it
18 make if you agree that you don't have jurisdiction to
19 allow a case to go forward simply because it was filed
20 more than 20 days after the time? What you're
21 suggesting is you go forward with it regardless of the
22 fact you might conclude that you have no jurisdiction.
23 Does that make any sense?

24 **MR. WRIGHT:** Well, in the abstract perhaps
25 not. In this case where the Commission majority in

1 the Duke Smyrna case has concluded that it has
2 jurisdiction, you know, we submit --

3 **COMMISSIONER CLARK:** I realize that's a
4 different argument. I mean, that goes to the merits
5 of jurisdiction.

6 **MR. WRIGHT:** Right.

7 **COMMISSIONER CLARK:** Not to the timeliness
8 of it.

9 **MR. WRIGHT:** True.

10 **MR. CHILDS:** Can I --

11 **MR. WRIGHT:** I'm not quite --

12 **MR. CHILDS:** I thought you were finish.

13 **MR. WRIGHT:** I will be done momentarily.

14 We fully believe that the Commission
15 majority in the Duke New Smyrna case was correct where
16 it held quite unequivocally that Duke New Smyrna was
17 an applicant in its own right, independent of the
18 contract. And we fully expect the Commission to be
19 upheld and, accordingly, we don't think that Florida
20 Power's argument on the applicant or Nassau issues has
21 merit and don't think that constitutes grounds for
22 dismissal.

23 **CHAIRMAN GARCIA:** Okay. Thank you. Staff?

24 **MR. CHILDS:** Could I respond to that -- it
25 is our motion -- briefly?

1 **CHAIRMAN GARCIA:** Respond to --

2 **MR. CHILDS:** To the argument by OGC on the
3 Motion to Dismiss.

4 **CHAIRMAN GARCIA:** Well, I think you got a
5 chance, unless another Commissioner has a question for
6 you. I'm sure that Susan will, but let's get through
7 this since you wanted to get to 6. And then I'll let
8 you respond. Let Staff go, and then we'll let you go.

9 **MR. KEATING:** Well, I'm just going to cover
10 the same issues that Mr. Wright covered that have been
11 discussed in oral argument so far.

12 First, regarding compliance with Rule
13 25-22.071 regarding filing of Ten Year Site Plans,
14 we're in agreement with Okeechobee that the rule does
15 not require it three years in advance. We feel that
16 at a minimum, Okeechobee is in substantial compliance
17 with the filing requirements in that their petition
18 for determination of need includes most, if not all,
19 of the information that would be included in it's Ten
20 Year Site Plan.

21 As to the issue concerning compliance with
22 our bidding rule, again, as stated in the
23 recommendation, we're in agreement with Okeechobee.
24 We believe that the language that Okeechobee cited
25 from the Duke docket, while it does not expressly

1 state that merchant utilities are exempt or that the
2 rule does not apply to merchant utilities, we believe
3 that it's clearly implied by that language,
4 specifically two lines: "If Duke New Smyrna were to
5 construct the project, it could propose to meet a
6 utility's need pursuant to the bidding rule." And
7 second, "The Duke New Smyrna project simply presents
8 another generation supply alternative for existing
9 retail utilities." We think that language is clear.
10 That the Commission --

11 **CHAIRMAN GARCIA:** Let me understand that. I
12 want to try to understand it. Mr. Childs is telling
13 us in a very strict interpretation of that rule, or
14 asking us to make a strict interpretation of our own
15 rule, and that we are required to, and thereby Duke is
16 not -- OGC is not a proper applicant before us.

17 And Mr. Wright is arguing the other side of
18 that. That he's saying if I read that precedent which
19 was set by the Duke case, that I wouldn't think that I
20 needed to file. That we had settled that. Is that
21 what you're saying? Just so that I --

22 **MR. KEATING:** That's essentially what I'm
23 saying. The language that was in the Duke order
24 supports Okeechobee's position.

25 **COMMISSIONER CLARK:** Read those two sections

1 you rely on for that.

2 **MR. KEATING:** These two lines are both from
3 the language that Mr. Wright cited earlier.

4 First, "If Duke New Smyrna were to construct
5 a project, it could propose to meet a utility's need
6 pursuant to the bidding rule."

7 **COMMISSIONER CLARK:** That goes to the issue
8 of whether they can be a bidder, not whether they have
9 to ask for bids on their project.

10 **MR. KEATING:** And what I'm saying is that
11 language -- to me it clearly implies that the role of
12 a merchant utility in the RFP process is to provide
13 responsive bids to an RFP.

14 **COMMISSIONER CLARK:** Not be the one issuing
15 the RFP?

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

17 **COMMISSIONER CLARK:** All right.

18 **MR. KEATING:** And we believe to require
19 anything otherwise is going to lead -- is an absurd
20 result. I mean, basically, I think FPL is asking
21 Okeechobee, through a waiver proceeding, to prove
22 something that I think is -- and I don't know how many
23 people agree with me -- but is obvious. And that is
24 that the rule does not apply to Okeechobee and was
25 never intended to apply to Okeechobee.

1 **CHAIRMAN GARCIA:** Let me ask you -- and I
2 don't know, and perhaps you don't. But it almost
3 strikes me if we were to use Mr. Childs' definition in
4 this, we would also be asking them to file a rate
5 case. We would be asking them to disclose all sorts
6 of information that we required since they are a
7 utility under it. So we -- I imagine that if I combed
8 the rules of the PSC, I would find using Mr. Childs'
9 argument, that they are a regulated utility, then a
10 whole series of things would apply to this company.

11 And I think -- I guess the question is to
12 you, Mr. Childs, why would we want this rule to apply
13 to this utility? I mean what sense can there be for a
14 merchant plant to put out a bid to provide power to
15 itself when no ratepayers are involved?

16 **MR. CHILDS:** Well, first of all -- and I
17 still would ask for an opportunity to respond, but I
18 want do that now. I'll try to answer that question.

19 Why I'd want the rule to apply is because,
20 first of all, OGC affirmatively alleged in their
21 petition that they were an electric utility. And
22 we've challenged that on another basis and said they
23 didn't allege the basis for that. They simply said
24 they were an electric utility. We don't think that's
25 sufficient. But, nevertheless, they made that

1 allegation. They made that allegation because that's
2 the status that's associated with their petition for
3 determination of need.

4 And, therefore, I react to the rule that
5 says if you're covered by, and the plant is one that
6 requires a determination of need under Section
7 403.519, then this is what you must do. And it does
8 because they are an investor-owned electric utility.

9 So it's not a strict -- I don't think it's a
10 narrow or strict interpretation at all. I think it's
11 the plain language. Why I would want it to in the
12 context of what does it do in the case is this: The
13 petitioner, OGC, is trading on an argument about
14 captive customers. And, therefore, because there are
15 captive customers on the one hand, then investor-owned
16 utilities that are not merchant plants have to comply
17 with the rules. Since they don't have a captive
18 customer then they don't.

19 And I'm trying to make a point, when I was
20 trying to answer your question earlier today, that you
21 have a statutory responsibility to address what is the
22 most cost-effective -- whether this is the most
23 cost-effective alternative. And in addressing whether
24 it's the most cost-effective alternative, I'm
25 suggesting that you should not, you cannot take it on

1 faith that they say, "We have an incentive to do it
2 cheaply." I'd say, "We do, too." But we don't
3 suppose that you will take it on faith that that's the
4 case. You would require us to take that step of
5 evaluating alternatives so that your statutory
6 obligation could be fulfilled.

7 **CHAIRMAN GARCIA:** Alternatives to what,
8 Mr. Childs? Alternative to yourself?

9 **MR. CHILDS:** No. The alternative that they
10 may have as to that facility. They say, "We're going
11 to build a facility. We're going to build it here."
12 That's what they want to do. And yet they have a
13 case, and they've affirmatively alleged that this is
14 the most cost-effective alternative, but they say
15 nothing about bidding. So they want to address the
16 most cost-effective alternative under their rules of
17 the game.

18 **COMMISSIONER CLARK:** I think their point is
19 it shouldn't matter to us because it's not -- it is --
20 the power from the plant will be purchased when and if
21 it is the cheapest power, and the cost-effectiveness,
22 in a sense, is immaterial because the investors will
23 bear the responsibility of the efficiency of it, not
24 the ratepayers.

25 **MR. CHILDS:** And I respectfully submit

1 that's dead wrong. That's the philosophy that they
2 have presented to you, and we reject it.

3 **COMMISSIONER CLARK:** And why is it wrong?

4 **MR. CHILDS:** Well, first of all, we think
5 it's an issue that we want to address in the hearing.
6 But I think what it does, it says once again, first of
7 all, we won't tell you anything about the plant other
8 than the direct cost of construction. That's all
9 we're going to tell you because that's proprietary.
10 Okay. You can't know anything else about the plant.
11 And yet they want to tell you that it's a very low
12 cost. They won't tell us the cost, nor do they tell
13 you that the output on that facility -- from that
14 facility is going to be priced at cost. It's not
15 going to be priced at cost.

16 When this Commission looked at the issue,
17 for instance, associated with the qualifying
18 facilities, small power producers either selling
19 as-available energy, which is what I alluded to
20 earlier today in the decision in 1988 -- when your
21 Staff said if you're going to meet your statutory
22 responsibility, you have to look at that. Those were
23 facilities that were selling on an as-available basis.
24 The utility didn't have to buy from them.

25 **COMMISSIONER CLARK:** But you -- as

1 qualifying facilities you had to buy from them at
2 avoided cost.

3 **MR. CHILDS:** We had to buy from them at
4 avoided cost. And the Commission said, "We can't take
5 it on faith any longer that that is the appropriate
6 price, so it's appropriate to look at whether that's
7 the least cost alternative when the decision is to
8 whether to authorize the plant to be built." The
9 analogy is that I'm suggesting, the analogy is that
10 when the Commission was looking at this before it said
11 you would not rely upon that sort of proxy pricing.
12 And later on you addressed it, and that's the issue
13 from Duke. You addressed it as to the co-applicant
14 issue.

15 What I would suggest to you is this: That
16 when the Commission was considering questions of at
17 what price energy, not capacity, but at what price
18 energy should be purchased from qualifying facilities,
19 one of the things it said was is that it should be
20 purchased at the lesser of avoided cost for the cost
21 the utility would have incurred had it constructed the
22 facility itself. They are not proposing to sell it
23 the lesser of. They are proposing to sell it an
24 equivalence to avoided cost.

25 So our point is, for instance, head-to-head,

1 they have a plant here that they propose to build it's
2 550 megawatts. They say we will displace generation
3 on the system in Florida economically. And you don't
4 have to buy from us if you don't think it's economic.
5 And probably we don't. I think that begs the question
6 of what the Siting Act requires, because I think that
7 addresses whether you need the plant. But I think
8 hypothetically, and in reality, a utility or someone
9 else could say, "Wait a minute. If you're proposing
10 to build a plant at that price, I can sell output from
11 a similar plant at a lower price than you're proposing
12 to. I ought to be built first." That's exactly the
13 illustration of what I think this Commission is
14 supposed to be doing. It's not -- and if you say it's
15 the most cost-effective alternative, I don't think
16 that it means, well, under the theory it's pretty
17 good. I think you're supposed to examine that plant.

18 **MR. KEATING:** And, Commissioners, I think
19 that gets into a substantive issue on the merits of
20 whether this is the most cost-effective, and we're
21 starting to get away from the sufficiency of the
22 petition, which is what we're looking at on a Motion
23 to Dismiss.

24 **MR. CHILDS:** But I think that that's the
25 argument. The argument is being made on the merits to

1 say to you -- and I was responding to a question, I
2 thought. It may have been be long-winded, but I was
3 trying to respond to the question. The argument on
4 the merits has been made to you that utilities won't
5 buy unless it's in their benefit. That's an argument
6 on the merits as to how it's going to work.

7 **CHAIRMAN GARCIA:** Mr. Wright.

8 **MR. WRIGHT:** Very briefly. I do agree with
9 Mr. Childs that you all do have a statutory obligation
10 to consider whether any proposed power plant is the
11 most cost-effective alternative. And Okeechobee has
12 put forth competent substantial evidence that the
13 Okeechobee generating project is the most
14 cost-effective alternative. All we're talking about
15 right now is whether we're required to go through
16 additional proof of that by jumping through the hoop
17 much of the bidding rule, which we submit to you we
18 think is clear from the record of when it was adopted
19 and clear from the language cited from the Duke New
20 Smyrna Order is not required.

21 **CHAIRMAN GARCIA:** Thank you.

22 Mr. Childs, you wanted to respond to it.

23 **MR. CHILDS:** I do. Several points.

24 One, this is not just any rule, as
25 Mr. Wright suggested. It's not just any rule that

1 might be laying around out there that they've
2 overlooked. They are overlooking a rule that says
3 it's a precondition. That's the bidding rule. And he
4 didn't ask for any exception and they didn't even
5 mention it. So I think the characterization of any
6 rule is a little misleading. Also, I don't think
7 we're suggesting a strict literal reading. I think
8 we're asking you to look at the plain language of it,
9 what it says. Each investor-owned utility.

10 **CHAIRMAN GARCIA:** That being the case,
11 though, Mr. Childs, aren't there a whole series of
12 rules that this Commission has for your utility which
13 you would then apply to this utility because of their
14 own definition? I mean, I wish I was as conversant as
15 you are on this.

16 **MR. CHILDS:** Well, you know, that's one of
17 the problems, I think. Because they chose to
18 characterize themselves that way.

19 And, for instance, if you go back to Chapter
20 366, from the time that it was amended to create a
21 definition of "electric utility," Chapter 366 used the
22 term electric utility repeatedly. And I know from
23 working on legislation from time to time that we would
24 put in "electric utility" because we're trying to
25 distinguish ourselves from the gas utilities; not for

1 any reason other than that.

2 But now it's been argued to you -- it's been
3 argued to you in the context of the Duke case that it
4 was important that you recognize that electric utility
5 as defined in Chapter 366 would fit in the definition
6 in the Siting Act of electric utility so that even
7 though they didn't have a obligation to serve, they
8 were covered. And they were permitted to file. I
9 would say that the problem is -- in my opinion, the
10 problem is not that various provisions would apply to
11 them, but that it was never intended for the
12 construction that they urged in the first place.

13 Going back to some comments, though, about
14 the --

15 **COMMISSIONER CLARK:** Yes. I think what
16 you're arguing, I think, is the whole context of the
17 rules and the statutes support the notion that they
18 weren't supposed to be an applicant in the first
19 place. The decision has been made on that.

20 **MR. CHILDS:** I'm not trying to argue that
21 now. But I think if you find that that creates a
22 difficulty, that that's a problem. That that's a
23 problem.

24 The suggestion is to you about the vision
25 for the rule. I don't think you should go to the

1 vision for the rule. I think you should go to the
2 plain language. And the plain language, I think,
3 establishes conclusively that they are covered. I
4 think that the law --

5 **CHAIRMAN GARCIA:** Do you think, though,
6 because it's a rule that we promulgate ourselves that
7 part of it is for us to make sure that we make sense
8 of those rules that we promulgate ourselves?

9 **MR. CHILDS:** I'm going to move to that. I
10 totally disagree with that characterization. To say
11 to you that you all you don't have to look at it the
12 same way that courts do, you can interpret your rules,
13 I say that's absolutely wrong. That's precisely the
14 reason you have 120.542 now. That's precisely the
15 reason. And that wasn't mentioned by Mr. Wright.

16 There's another thing to suggest here. You
17 know, in the recommendation I mentioned it earlier,
18 it's a Seminole case that was addressed earlier today.
19 You go read the recommendation in that proceeding
20 which came out on October 19, and statutory
21 construction was at issue in this case on a motion to
22 dismiss. Statutory construction was at issue because
23 the motion to dismiss was based upon a purported
24 statutory construction that was not consistent with
25 the plain language. And your Staff advises you, much

1 the same as I have, about the rules of statutory
2 construction. The rules of statutory construction are
3 applicable to you. I mean, there was a time when an
4 agency could say, "Well, you know, as we go along and
5 we look at these rules, we don't want to apply it
6 because that's not our intent." But this is exactly
7 what got into the reason for the amendment to the
8 Administrative Procedure Act and the reason for the
9 discussion about the extent to which an agency -- in
10 the Administrative Procedure Act before addressed it
11 and said you couldn't waive a rule with these ad hoc
12 kind of decisions unless the rule permitted you to
13 waive them. And the statute changed again and it
14 says -- 120.542 -- it addresses this as being the way.
15 And I know I've argued about your independent waiver
16 provisions and I still believe that's correct. But I
17 recognize that the statute was amended again in 1999
18 as to specific authority of agencies.

19 I don't think that you have that power, and
20 I think it's inconsistent with what you're doing.
21 It's the plain language. The plain language of the
22 rule is applicable. 120.542 says that if you believe
23 that your rule would produce unreasonable results,
24 then that's a ground for waiver. It's not a ground
25 for ignoring the rule. It's a ground for waiver.

1 **CHAIRMAN GARCIA:** Do we need a motion to do
2 that or can we do that ourselves?

3 **MS. CHILDS:** I think it says -- I'm not sure
4 you can do it yourself. I think it says "Variances
5 and waivers shall be granted when the person subject
6 to the rule demonstrates that the purpose of the
7 underlying statute will or has been achieved by other
8 means by the person, and when application of a rule
9 would create a substantial hardship or would violate
10 principles of fairness." And I think the first part
11 of that sentence clearly indicates that the argument
12 by OGC is misplaced.

13 It's unintended results is one of the
14 grounds in the first sentence of (1). If it would
15 produce unintended results, then that's a reason for a
16 variance or waiver. And then in (2) in addressing it
17 specifically says that when the purpose of the
18 underlying statute -- in this case you have to have a
19 statute to authorize you to have that rule in the
20 first place -- will or has been achieved by other
21 means, then that's the basis for the argument.

22 So I'm saying that what they are arguing to
23 you is to wink at it and not require them to comply
24 either with the rule or with the pleading
25 requirements. This is not a novel principle of law as

1 to the application of your rules.

2 The Commission, with all due respect, did
3 not exempt municipals and wholesale -- excuse me,
4 municipals and co-ops because this Commission believes
5 that the city commissions would take care of that
6 problem. That was -- you know, there's discussion
7 about that but there's discussion about the size of
8 the facilities; what would be involved in it. And
9 it's never been resolved as to whether -- although
10 they are not subject to the rule -- that it's
11 permissible to pursue a need determination without
12 competitive bidding even if you are a municipal or a
13 co-op.

14 Briefly on the Ten Year Site Plan.

15 **COMMISSIONER CLARK:** Mr. Childs.

16 **MR. CHILDS:** Well, I'm saying you applied
17 the bidding requirement to Seminole Cooperative in
18 1989, and you would not decide their case. And I
19 think just as someone wants to argue to you about the
20 significance --

21 **COMMISSIONER CLARK:** Where is that board you
22 had that said we decided not to include them in the
23 rule.

24 **MR. CHILDS:** You decided not to include them
25 in the rule. But my point is you apply the

1 restriction to them before you even had a rule. And
2 you said as a practical matter you have to do it. In
3 fact, one of the Commissioners said the reason you
4 have to do it is because these alternatives are now
5 available. It's not because of a rule. They're now
6 available. And since they are now available, in order
7 for us to know whether it's the cheapest or the best
8 alternative you have to explore it. So I'm saying
9 that I think a party in a case could raise a question.
10 You didn't explore all of the alternatives, and that's
11 one of them.

12 Briefly, on the Ten Year Site Plan, I think
13 it's an interesting construction. I mean, if the rule
14 says you're supposed to file the Ten Year Site Plan,
15 they are under (b) of the rule because they don't file
16 routinely. So the other utilities that Mr. Wright
17 suggests might violate the identification
18 requirements, they are filing annually anyway.

19 **COMMISSIONER CLARK:** But, Mr. Childs, what
20 about the fact that it says either in the year they
21 decide to construct or three years prior. I seems to
22 be an alternative.

23 **MR. CHILDS:** I don't think it says "or three
24 years prior." I think it says "at least three years
25 prior." My point is to say --

1 **COMMISSIONER CLARK:** But it still says "or."

2 **MR. CHILDS:** Well, it does say "or." But
3 even so, they haven't filed at all. They haven't
4 filed anything. And they argue, well, you know, it's
5 interesting -- maybe he didn't mean it but he said we
6 weren't an electric utility in April. The basis for
7 their allegation that there's an electric utility is
8 not that they own anything or operate anything; it's
9 that they will do so. So I don't know when that's
10 supposed to begin. I guess that's indefinite. But
11 they could have waited and filed. I mean, I think if
12 you're supposed to file in that year, and you apply
13 the rule, you say you don't get to pick the most
14 emergency time that you want to file your petition.
15 If you're supposed to file your Ten Year Site Plan
16 first, that's what you should do. And we think that
17 the rules of pleading require that you comply with the
18 rules as a precondition, that you allege it; it's an
19 essential fact, and if you don't, you should be
20 dismissed.

21 **CHAIRMAN GARCIA:** Mr. Childs, in this case
22 if you wanted to build a merchant plant in Florida you
23 would have to wait three years, file a site plan for
24 those three years and just wait indefinitely and
25 then --

1 **MR. CHILDS:** No, I wouldn't do that at all.
2 If somebody asked me I'd say the first thing I'd do is
3 I'd go tell the Commission you've got a rule, it
4 doesn't achieve the purpose, and what you should do is
5 you'd ask the Commission -- as Florida Power
6 Corporation did -- you ask them to waive the rule.
7 You don't ignore the rule and file a petition. That's
8 my point. Is that this is not something to be decided
9 sort of ultimately as to how it should be --

10 **COMMISSIONER CLARK:** Let me ask you this
11 Mr. Childs. Rather than dismissing it, should we give
12 them leave to amend their pleadings?

13 **MR. CHILDS:** I think that's the effect of a
14 dismissal. If it's not with prejudice, then they have
15 the ability to comply with the rules and amend their
16 pleadings as appropriate.

17 **COMMISSIONER CLARK:** But don't courts not
18 dismiss it and just require them to file an amended
19 pleading?

20 **MR. CHILDS:** I think that courts normally
21 grant --

22 **COMMISSIONER CLARK:** My view is that it
23 appears to me that these things can be remedied.

24 **MR. CHILDS:** Well, I think they can be
25 remedied if they comply with the rule. If they get --

1 **COMMISSIONER CLARK:** Or they can allege the
2 rule doesn't apply to them.

3 **MR. CHILDS:** And if they seek a waiver, get
4 a waiver from the rule, then they don't have to comply
5 with the rule. That's exactly the situation you apply
6 to Florida Power Corporation. They sought a waiver.
7 You said, "We deny it." So -- and they, incidentally,
8 were making the same sort of arguments that they
9 thought they were meeting the underlying purpose -- or
10 the purpose of the underlying statute. And you
11 disagreed.

12 **COMMISSIONER CLARK:** Would you tell me --
13 give me more information about that proceeding. Was
14 that the standard offer?

15 **MS. CHILDS:** The order is in Item 4 in the
16 handout. It was a February 9, 1999, decision of this
17 Commission. And that's the Order.

18 **COMMISSIONER CLARK:** But this was a rule --
19 was this a rule waiver on the bidding rule?

20 **MR. CHILDS:** Yes.

21 **MR. SASSO:** Yes, ma'am.

22 May I respond briefly on the timeliness
23 issue, if this is of any concern to the Commission?

24 **CHAIRMAN GARCIA:** Go ahead, Mr. Sasso.

25 **MR. SASSO:** Very well.

1 We've heard that there are decisions that
2 support the construction that we're untimely with a
3 motion to dismiss if we don't file 20 day after
4 filing. There are no such decisions. The TECO
5 decision on its face indicates that the motion was
6 filed more than 20 days after filing and service.
7 There's no indication on the face of that decision
8 that service was not made at the time of filing. The
9 rules say flat out you have 20 days after service on a
10 party.

11 **COMMISSIONER CLARK:** But even if we apply
12 that rule your argument is that it's not untimely at
13 any time because it's jurisdictional.

14 **MR. SASSO:** Yes, ma'am.

15 **COMMISSIONER CLARK:** It may be untimely for
16 Mr. Childs' motion but it wouldn't be untimely for
17 yours.

18 **MR. SASSO:** Yes, ma'am. We believe it would
19 be bad press and bad policy to apply this, to hold
20 that it's untimely for any motion. Even if you were
21 to treat filing a service, we ought to be given the
22 benefit of the rule which says we get five days if
23 service was by mail if you were going to deem filing
24 to be some type of service. But we were given the
25 benefit of no service days. We filed 21 days after

1 filing, even without any service, and that's clearly
2 timely under any reasonable construction of the rule.

3 The Third District Court of Appeals has held
4 lack of jurisdiction over the subject matter may be
5 raised at any time. Furthermore, lack of jurisdiction
6 is properly raised by Motion to Dismiss, which answers
7 your question, Commissioner Clark, that, yes, you can
8 file a Motion to Dismiss to challenge jurisdiction at
9 any time during the proceeding. So on either of those
10 two grounds our motion is timely.

11 **CHAIRMAN GARCIA:** Okay.

12 **MR. MOYLE:** Can I have one quick word, if I
13 could. There's been a lot of back and forth and my
14 colleagues at Florida Power & Light have taken quit a
15 bit of time. But I just want to make a couple of
16 quick points.

17 We have tried to do everything that we
18 believe was illustrative coming out of the Duke case.
19 You know, there's language in there that, as your
20 Staff has indicated, they are of the belief that we're
21 not subject to either the Ten Year Site Plan rule or
22 the bidding rule.

23 The Staff recommendation says you should not
24 be reaching an absurd result. I think what's before
25 you is a matter of interpretation. Mr. Childs is

1 urging you to interpret the rule one way. Mr. Wright
2 is urging you to interpret another.

3 I will not say absurd, I would say ironic.
4 That if the very rule that was put in place, in my
5 opinion, to protect retail ratepayers, that has never
6 been used by Florida Power & Light to date, and it's
7 been on the books for a number of years, is then used
8 to force OGC, who will not bind retail ratepayers to
9 go through this process. That was my only comment.

10 **CHAIRMAN GARCIA:** Staff have anything or
11 that's it? Commissioners, do you want to vote this or
12 do you want to go to Issue No. 6?

13 **COMMISSIONER DEASON:** Let me ask a quick
14 question first.

15 **CHAIRMAN GARCIA:** Absolutely.

16 **COMMISSIONER DEASON:** I'll address this to
17 Mr. Wright or to Mr. Moyle, whoever wants to answer.

18 Obviously you're firm in your conviction
19 that your Petition for Determination of Need is
20 sufficient and certainly should not be dismissed. And
21 I understand your arguments. My question is it
22 appears to me that whatever result takes place in this
23 case, there's going to be an appeal. Have you thought
24 about whether you would like the opportunity to amend
25 your petition to perhaps alleviate some deficiencies

1 which this Commission may or may not agree with are
2 deficiencies but the Court may? Are you adamant
3 enough in your position that you're willing to have
4 just that many more issues on appeal that may result
5 from this case?

6 **MR. WRIGHT:** Can we have a minute, Your
7 Honor? Thank you. (Pause)

8 **MR. KEATING:** Chairman Garcia, I just
9 realized there was one other point I wanted to make,
10 but that was probably about half an hour ago when I
11 started making comments. It was in regard to I didn't
12 address Florida Power Corporation's Motion to Dismiss.

13 All I would simply say on that is Florida
14 Power Corporation has asserted that perhaps this case
15 will require an extension of what was decided in Duke.
16 And I would simply say that in the Duke case the
17 Commission, however divided, decided that Duke was a
18 proper applicant by itself.

19 **MR. MOYLE:** In response to that question,
20 Commissioner Deason, I think we're comfortable with
21 the interpretation you all made in the Duke case and
22 the interpretation recommended by Staff with respect
23 to this.

24 It would be damaging, obviously, to have a
25 motion to dismiss this petition be granted. I think

1 what I would ask is that you would deny the motion to
2 dismiss. We would go back in and look -- we have
3 looked very closely at it, but look closely at it even
4 more. You know, No. 6 on your agenda is an emergency
5 waiver. If we feel that that is appropriate, we may
6 seek that as a course of relief. But at this point I
7 think we're comfortable with your interpretation that
8 we would urge upon you and ask that you deny the
9 motions to dismiss.

10 **COMMISSIONER DEASON:** Let me see if I
11 understand. You're comfortable with your argument
12 that we should deny the motions to dismiss, but you
13 want the ability, if you deem it appropriate at some
14 future time, to amend your petition?

15 **MR. MOYLE:** I would -- I think, you know,
16 while I don't agree with it, you know, Mr. Childs was
17 asked the question, you know, what would you do if
18 somebody came to you with a merchant plant? And he
19 said, "I'd come in and ask for a rule waiver."

20 You know, I'm not saying we're going to do
21 that. But what I'm saying is you can deny the motions
22 to dismiss. We can go back and take a closer look at
23 this issue, and if we feel it does put in jeopardy a
24 lot of issues on appeal, we can come in and file a
25 request for a rule waiver.

1 **COMMISSIONER DEASON:** Mr. Moyle, I think you
2 either have a petition before this Commission or you
3 don't. If you're not comfortable with it and you plan
4 to amend it you probably need to withdraw it, because
5 without this waiver -- and we haven't addressed the
6 waiver yet -- right now we're laboring under an
7 extremely tight time frame to try to process this.
8 And I don't think it's fair to this Commission for you
9 to hold us to the 90 days under our rule and then tell
10 us, "Well, we might be amending it later so just hold
11 your hats." That's not fair to us or the other
12 parties. And I need a clear answer as to what your
13 intentions are.

14 **MR. MOYLE:** Obviously, we spent a lot of
15 time, effort, energy preparing the petition. As a
16 lawyer I'm going to tell you I'm comfortable with the
17 petition. The waiver is another issue to be decided.
18 If you grant the waiver, then obviously we'd like to
19 have the chance to say, "Well, if the waiver is
20 granted for a time indefinite, we'd like probably to
21 look at it and have a chance to amend it." Maybe it's
22 an ordering issue that -- depending on how you do the
23 motion --

24 **COMMISSIONER DEASON:** I guess when we get to
25 Issue 6 we'll address that.

1 **CHAIRMAN GARCIA:** Commissioner, the
2 arguments we're sort of engaging in here, while they
3 are very intelligent, they bring the whole issue back
4 to what Staff referred to as making the law an
5 absurdity. The problem is that if we ask them to do
6 this -- and Mr. Childs hasn't said that that makes it
7 all fine. What he does say is that they'll have
8 complied with that. And I'm certain if you open our
9 rule book you will find all sorts of things that Duke
10 will have to do as a utility. And then we will be
11 back here three months from now because we missed the
12 fact that -- I don't know, that they have to file with
13 their dispatch but they don't -- they can't file with
14 their dispatch because they don't have an electric --

15 **COMMISSIONER CLARK:** I don't think that's
16 his argument. His argument is that when you file for
17 a determination of need, you have to indicate that you
18 put it out for bid. It's the specific rule that
19 details what you have to do.

20 **CHAIRMAN GARCIA:** Correct, Commissioner.
21 But that rule -- first of all, there are two answers
22 to that. And I think both parties have spoken to it,
23 but I think when you read the Duke decision, that
24 wasn't the issue there. And I think Staff states it.
25 Whether you imply it or not it states it. And here we

1 find ourselves because they call themselves a utility,
2 then they bring themselves under a whole series of
3 requirements. These requirements have nothing to do
4 with what they are in the business of doing. It's
5 almost the absurdity of asking the utility to file for
6 a determination of need three years before it's here.
7 It's a nice argument, it's there, but that isn't what
8 merchant plants do.

9 I think we're asked to participate in the
10 absurdity and sit here and judge over a series of
11 rules that weren't meant to apply to this company
12 under any stretch of the imagination. So then you go
13 to the other argument. Mr. Childs said, "Well, then
14 you erred last time because they are not a utility."
15 That was the whole basis of the appeal. So that being
16 the case, then where do we stand? They are not a
17 utility. Therefore, they cannot apply. Therefore, we
18 can't have it. So it's a circle that just follows
19 itself. I mean nothing they do will ever be enough --

20 **COMMISSIONER CLARK:** Let me state what
21 you're saying differently. You're saying once this
22 Commission made the decision that merchant plants were
23 appropriate, then this is sort of a fallout issue
24 because it's not -- we made the decision right or
25 wrong, the majority, that they didn't have to show

1 need to serve retail ratepayers. The need for this
2 rule also went by the board. Therefore, they didn't
3 have to plead it in this petition.

4 **CHAIRMAN GARCIA:** If I am filing in
5 Florida -- and I think we have the problem that we
6 have Mr. Wright doing both cases, so we say, well,
7 Schef, we know what we meant and we meant what we
8 knew.

9 When we look at this case -- if I'm sitting
10 outside of Florida -- if we're going to play these
11 theoretical games -- and I read the Duke decision, I
12 think it opens the door for merchant plants in Florida
13 because we have a wholesale market, we talked about
14 that. We didn't require them to file a determination.
15 Of course, we didn't require them to file a Ten Year
16 Site Plan because they are not producing in Florida.
17 And so if we ignore that, though, and then we
18 played -- the other side of this is Mr. Childs'
19 argument, which is by wherever you define yourself,
20 Florida does not allow merchant plants. And either in
21 smaller or in large, if they say they are an electric
22 utility, this is why they are not an electric utility.
23 If they are an electric utility, this is what we must
24 do to be in Florida. So by either definition merchant
25 plants do not exist in Florida. And I think that

1 following that argument in either direction leads to
2 the same result. No applicant will be proper before
3 this Commission.

4 **COMMISSIONER CLARK:** Unless they have an
5 obligation to serve a retail load.

6 **CHAIRMAN GARCIA:** Correct. Only the
7 definition of an electric utility that Mr. Childs
8 holds. In other words, a regulated electric utility
9 the way Mr. Childs sees it. So then we find ourselves
10 in this predicament, that we're encumbered by the very
11 rules that were created to protect ratepayers. We're
12 using it to protect Mr. Childs when Mr. Childs hasn't
13 even had exposure. Mr. Childs' client. And what
14 we're doing is sending mixed signals to the market.

15 We determined in Duke, however close,
16 however wide -- we determined that this was good for
17 Florida. And we stipulated a whole series of cases
18 that were enumerated in a decision that's a hundred
19 or two hundred-plus pages long, which by the way is an
20 excellent read.

21 And we've decided this issue. And now we're
22 sending out a message. We've got probably seven,
23 eight, nine, ten utilities which are working off the
24 precedence of this Commission issue. Be it now or be
25 it -- and now we're going to redefine that because

1 we're going to go back and redefine the issue because
2 they call themselves an electric utility. Any way you
3 approach this issue will not be sufficient for the
4 opponents of this. You know, one would ask the
5 question. I would go further. I would say are these
6 proper intervenors in this case? I mean, how are they
7 affected by the outcome of this decision before
8 Florida? They are not obligated to purchase. Their
9 ratepayers are not at risk. Why are they here? is a
10 question that we might want to ask.

11 It's a broader argument than what we do here
12 today. But we're clearly sending a message to those
13 who want to come into Florida: Don't worry about our
14 decisions. Don't worry about what we issue. Worry
15 about the next one because it's all back to zero.

16 Commissioners, I'm truly troubled by what
17 I've seen here today. I've seen a gaming of the
18 system. And I don't think it's been done on the
19 Commissioners' side. I think Commissioners do in good
20 faith, to try to result the broadest opinion possible
21 to do it.

22 I sat as Prehearing Officer on the Duke case
23 and I think I let in -- most of the intervenors come
24 in hoping to get as much knowledge before this
25 Commission as possible. And if this were possible, if

1 it were possible to get five Commissioners here, I
2 would like nothing better than to have had
3 Commissioner Clark on this. But the truth is we're
4 going to have a three-person panel to make a decision.
5 We are asked to make a decision in these cases. We
6 are given the time frame to make these decisions.
7 Again, we game the system.

8 **COMMISSIONER CLARK:** We don't have a time
9 frame on this one.

10 **CHAIRMAN GARCIA:** No, we don't have a time
11 frame using the underlying argument. If tomorrow he
12 files, we have 90 days to make that decision. So we
13 again put ourselves in the time clock.

14 The whole purpose of this is to give some
15 stability to the market. And the whole purpose of our
16 making these decisions is to see how we hurt
17 ratepayers, Mr. Childs' or Mr. Sasso's clients. And
18 in this case I find myself aghast, I guess, at how we
19 could play a game with Florida's wholesale market and
20 think that there's not going to be an effect to our
21 decision here today.

22 Whether this goes or not doesn't affect us
23 but certainly does affect Floridians. You know, I
24 wonder where we end up if this is how -- the message
25 that we're going to send out there. I think we open

1 the door to say, well, don't trust Florida decisions
2 because they'll bind you up in legalisms.

3 Mr. Childs' argument is ridiculous on its
4 face. If you use this argument, and no one will ever
5 be a proper applicant because if -- first of all, it's
6 impossible for them to meet the standards of that
7 argument. How do you file three years in advance? Or
8 you ask for a waiver for a rule that clearly wasn't
9 meant to apply to them. And so following that rule --
10 well, because he called himself a utility, the next
11 thing I'm going to ask is all sorts of filings, which
12 would be required of your clients on a quarterly
13 basis. I'm going to ask you for fuel adjustment. I'm
14 going to ask you for all sorts of things that aren't
15 required because that's not what you're doing.

16 Commissioners, any way you want to go with
17 this is fine. But I think what troubles me is, first
18 of all, I think we've allowed the process today to be
19 gamed. We've sent a message out there. When this was
20 filed today, this isn't a question of being even.
21 Because if you carefully read the statute, we need a
22 majority of the sitting Commissioners to vote it out.
23 I'm referring now to Issue 1. So it isn't a question
24 of if it would have been a tie vote, if Susan and I
25 would have voted, the motion would have still failed.

1 We would have needed three. So clearly by looking at
2 the system -- we have four Commissioners sitting. We
3 look at the previous vote. We basically use the rules
4 of the Commission.

5 **COMMISSIONER CLARK:** You are presuming an
6 outcome that you don't know is going to happen.

7 **CHAIRMAN GARCIA:** That's not the outcome I'm
8 talking about, Susan. The outcome I'm talking about
9 is putting a full Commission in a position where it
10 cannot make a majority vote. I'm not arguing where we
11 end up. I'm not presuming where OGC argument ends up.
12 I'm presuming where it put us at the beginning. And
13 that's what troubles me.

14 I think we, in good faith, want us all to be
15 here, and I'd like us all to be here. But when you do
16 this, what you are doing, in essence, knowing you need
17 three votes, is presuming we're not going to be able
18 to make a decision. And I don't argue that we do it
19 with good thinking, but I do believe that in the end
20 what we've done is allowed the system to be played.
21 And to go further, to look at Mr. Childs' argument,
22 just makes a mockery of the entire process.

23 It's impossible, following his rationale, to
24 file before this Commission and expect any
25 determination. Because once you define yourself as an

1 electric utility, the next thing you do is you have to
2 have a series of requirements which are absurd on its
3 face for a merchant plant that does not put at risk
4 Florida ratepayers, and more importantly does not put
5 at risk Mr. Childs' or Mr. Sasso's clients. What it
6 does is, is make the wholesale market of Florida more
7 competitive. And if this is the decision we're going
8 to end up doing, I worry about what we've done here
9 and where that puts us.

10 **COMMISSIONER DEASON:** Well, we still have
11 three issues. We need to decide and we've heard
12 argument on Issue 4, and on Issue 5, and we still have
13 Issue 6. And I'd like to address these issues and get
14 out of here.

15 **COMMISSIONER JACOBS:** Can I interject
16 something as to Issue 5? I have been really trying to
17 be very clear on this, and to do so I went back to the
18 New Smyrna Order. And amazingly, it became pretty
19 clear to me. Let me speak to, first of all, how we
20 get to Issue 5.

21 On Page 15 on the Staff analysis, the first
22 section, Standard of Review, it says "A motion to
23 dismiss raises an a question of law whether the
24 petition alleges sufficient facts or states a cause of
25 action." You heard that.

1 Second paragraph, "In order to determine
2 whether the petition states a cause of action upon
3 which relief may be granted," which is a standard and
4 was stated earlier, "it is necessary to examine the
5 elements needed to be alleged under the substantive
6 law on the matter."

7 That takes me to the defining point: In
8 this decision it indicated that the law as to who is
9 an applicant is 403.519. I would suggest to you that
10 that law was substantially interpreted, amended,
11 enhanced -- however you want to view it -- but it was
12 impacted significantly by this decision.

13 When we look at this petition in this docket
14 to dismiss, we have to determine what the substantive
15 law is according to this standard where our Staff
16 says.

17 The critical and defining point in this
18 docket in my mind is the status of EWG to file alone
19 for a Petition of Need.

20 I won't go through all of the elements in
21 this decision, but I think there's some critical
22 analysis on Page 17 of the decision, where it -- the
23 Order speaks to Duke New Smyrna as alone, in and of
24 itself, is a proper applicant. And what that decision
25 says is that it is a proper applicant, both because it

1 was individually a regulated electric company and
2 because it was a joint applicant with the city.

3 I have searched and I have not found in this
4 decision where we made a finding and made a vote --
5 the majority -- let me step back for a minute. I
6 think to be honest you've got to go the majority
7 decision here, so I'm stepping aside from my dissent.
8 I think it's only fair that you look at what the
9 majority held in this case.

10 I've not found in the majority decision
11 where there was a ruling as to the efficacy or
12 applicability of the rule that's been cited. That is
13 a point of law that was not raised and not decided in
14 that case.

15 **CHAIRMAN GARCIA:** You don't feel that Staff,
16 where it points out what we cited to this, that I
17 think it covers this issue. Where we distinguish it.

18 **COMMISSIONER DEASON:** I think Staff
19 acknowledged, and I think the petitioners acknowledged
20 that wasn't decided in that case. Am I mistaken?

21 **MR. KEATING:** I believe what I stated is
22 there was an expressed statement by the Commission
23 that the rule did not apply, but that the language in
24 the Commission's Order clearly implies to me, and I
25 think Okeechobee agrees, that the role of a merchant

1 plant in the RFP process is to provide responsive
2 bids.

3 **COMMISSIONER DEASON:** Okay. I don't dispute
4 that's what was said. I don't think that's -- I still
5 don't think that that says that we made a finding and
6 voted on the applicant of this rule.

7 Now, but even a more interesting point to
8 me. What happens -- and I'll ask this of Staff --
9 normally when somebody is going to do a plant, an
10 in-state utility does a plant, they have a host of
11 powers: Eminent domain, et cetera, correct? Where
12 does those arise? How do those powers arise?

13 **MR. KEATING:** It's by statute.

14 **COMMISSIONER JACOBS:** By statute. In 366,
15 correct?

16 **MR. KEATING:** I'm not sure it's in 366.

17 **COMMISSIONER JACOBS:** Okay. That's my
18 point. It arises by statute. Now, what we have
19 determined in Duke is that here's a company that comes
20 in by another statute and is authorized to site a
21 plant. Where do they get the eminent domain authority
22 from?

23 **MR. WRIGHT:** We don't have it.

24 **COMMISSIONER JACOBS:** Now, exactly my point.
25 There has not been a determination as to what kinds of

1 powers in that regard a plant like this should have.
2 Now, so where am I going? I think if you follow the
3 rationale, the majority opinion in Duke, the petition
4 checks off on those points. But I think what we have
5 is a fundamental evolution, fundamental transition of
6 the substantive law as it relates to a single DWG
7 filing for petition of need in the state,
8 certification of need in this state. Now, I have some
9 feelings about how we proceed. I'll go ahead and
10 state those.

11 I'm torn because, again, I don't think the
12 petition -- I'm sorry, I don't think the Motion to
13 Dismiss is the form or the opportunity to rule upon or
14 overrule the majority opinion in this case. I think
15 that's what our tendency has been today, to decide
16 whether or not we want to overrule the majority
17 decision. I don't think that's what we're here for.
18 We're here to decide whether based on the substantive
19 law as it exists today, a cause of action has been
20 stated. And I think there are two -- those two I can
21 cite. I'm sure there are others but on those two
22 points I don't think the majority decision reaches a
23 conclusion.

24 **COMMISSIONER CLARK:** You're indicating that
25 with respect to the Motion to Dismiss, particularly

1 with whether or not they are an applicant, has to be
2 decided in this case not only by the statute but by
3 our decision in Duke, by the majority's decision in
4 Duke.

5 **COMMISSIONER DEASON:** I want to be very
6 clear. I'm saying that as to the resolution of the
7 Motion to Dismiss, I think our decision in Duke has to
8 have some relevance.

9 **COMMISSIONER CLARK:** Has to have precedence.

10 **COMMISSIONER JACOBS:** I, quite frankly, want
11 to step outside of that and argue what that relevance
12 should be, but I think it's dangerous to do that. If
13 you give it relevance, then I think -- I'm led down
14 the path of saying that the position in this case
15 checks off on all of those. I still say, though, that
16 material issues of fact -- I'm sorry, material issues
17 of law have been raised and are not resolved such that
18 they are left in dispute.

19 **CHAIRMAN GARCIA:** Let me ask, can they
20 resolved in your mind going to hearing or should we,
21 as Mr. Childs says, we found an error here, so what we
22 should do is -- I think he's offered two options. One
23 is that Mr. Moyle files a waiver on these issues that
24 he has a dispute with and refiles the petition. Or in
25 the alternative that we change our rules. Is that the

1 only process that you feel? Or do you think that the
2 decision going forward and going to hearing we can
3 address Mr. Childs' concerns. Mr. Childs doesn't
4 believe we can.

5 **COMMISSIONER JACOBS:** Well, if I'm not
6 mistaken, the standard for granting the Motion to
7 Dismiss is that there's no dispute left in. That if
8 you take everything alleged in their petition as true,
9 then there should be nothing -- there's no undisputed
10 issue out there and you cannot grant that petition.
11 As troubling as it may be, what I guess I'm coming to
12 the conclusion is that if you take to be true
13 everything they allege in their petition, I still come
14 to some fundamental legal issues, one of which has
15 been raised, that are in dispute, and, therefore,
16 argues against granting the Motion to Dismiss.

17 **CHAIRMAN GARCIA:** Commissioners, any other
18 comments? All right.

19 **COMMISSIONER DEASON:** I just have a
20 question. Are we going to address Issues 4 and 5
21 before we address Issue 6, or how are we going to
22 proceed?

23 **CHAIRMAN GARCIA:** I thought we could address
24 4 and 5 then we'll get to 6. I think there will be
25 some discussion there. All right. Do we have an

1 issue -- motion on 4?

2 **COMMISSIONER DEASON:** I move Staff on
3 Issue 4.

4 **CHAIRMAN GARCIA:** Is there a second?

5 **COMMISSIONER CLARK:** Let me -- I agree that
6 a motion to dismiss should not be granted. But I
7 think the parties should be given leave to amend their
8 filing with respect to addressing the notion of the
9 bidding rule; that it should not apply. You know, I
10 think -- I don't think they -- with respect to the
11 site plan, I think they still have the opportunity to
12 file a site plan and it is not essential at this point
13 to have filed the site plan. But I do think they need
14 to make an allegation with respect to the
15 applicability, or nonapplicability, or ask for a
16 waiver of the bidding rule. And if -- I do agree that
17 it should not be dismissed.

18 **CHAIRMAN GARCIA:** So what you're saying is
19 you grant them the opportunity to file that with -- in
20 this very proceeding, and to ask for that if they wish
21 to?

22 **COMMISSIONER CLARK:** Yes.

23 **COMMISSIONER DEASON:** And let me ask this:
24 Assuming there's not a waiver granted, what does that
25 do to the 90-day clock, which is already ticking?

1 **COMMISSIONER CLARK:** I don't think it
2 necessarily changes that. That you can amend the
3 petition and that doesn't change time frames, I don't
4 think. In a sense, it makes the petition conform to
5 what it needs to. I mean, you have leaves to amend
6 the petition even when evidence is adduced.

7 **COMMISSIONER DEASON:** You can file one piece
8 of paper that says this is a Petition for Need
9 Determination, on the 89th day I'll supply all of the
10 backup information. Trust me.

11 **COMMISSIONER CLARK:** I would agree. That is
12 an extreme case. If that's the case, you would
13 dismiss it. But I don't think this particular
14 omission rises to the level of a Motion to Dismiss,
15 but I do think the pleadings should be amended to
16 address it because our rules require them to address
17 it.

18 **MR. KEATING:** So Commissioner Clark, would
19 you be saying that they have substantially complied
20 with the pleading requirements in a sense?

21 **COMMISSIONER CLARK:** Yes. But they should
22 amend -- be granted leave to amend their pleading to
23 address the bidding rule. And I would view it as an
24 issue to be addressed at the proceeding, whether it
25 applies or not. They can take the position that it

1 doesn't, and other parties can take the position it
2 does.

3 **MR. MOYLE:** I appreciate that. I really do.
4 My client is in a difficult position having, as
5 Commissioner Jacobs said, attempted to rely on what we
6 believe to be the precedent of this Commission in the
7 Duke case.

8 You know, that puts them in jeopardy if we
9 don't understand the decision with respect to the bid
10 rule sooner. Because we did everything Duke did.
11 Duke didn't comply with the bid rule, they didn't
12 file --

13 **CHAIRMAN GARCIA:** You want to tell me where
14 that puts us? What Commissioner Clark has asked of
15 you, does that require -- we already have to extend
16 the time because we're going to a full panel and
17 Commissioner Clark, I think, had a conflict in those
18 days and we're going to have to figure it out. We may
19 be sitting here at Christmas, but we'll have to take
20 care of this one way or another to meet our statutory
21 requirement unless you waive it, and that's your
22 decision to do.

23 **MR. MOYLE:** I guess my point is simply if we
24 were to amend the petition and say, as Mr. Childs'
25 suggest, we need to put some statement in there about

1 the bid rule. If the amendment was the bid rule
2 doesn't apply to us, then the way I see it, you all
3 are still in a position of having to reach a decision
4 as to whether the bid rule does or does not apply to
5 us.

6 **COMMISSIONER CLARK:** I think we would in the
7 proceeding.

8 **CHAIRMAN GARCIA:** I think we could do that
9 as a preliminary.

10 **COMMISSIONER CLARK:** That would go to the
11 cost-effective issue, which Mr. Wright says he
12 believes you still have to show; that it is the most
13 cost-effective alternative. He's conceded that you
14 still have to show that.

15 **MR. WRIGHT:** We have to put on evidence and
16 you have to consider it.

17 **CHAIRMAN GARCIA:** The problem is the time
18 frames aren't right and that's all Mr. Moyle is
19 arguing. But the time frames aren't right anymore, I
20 mean, the -- hearing what we have.

21 **COMMISSIONER CLARK:** Yes. But we may
22 potentially have another hearing date because a motion
23 to continue a hearing, the Pasco County hearing, has
24 been filed as I understand it, the Aloha case that was
25 moved.

1 **CHAIRMAN GARCIA:** I don't have a problem
2 with moving it. I'm just saying we're going to have
3 to regardless already.

4 **COMMISSIONER CLARK:** But that's like the
5 13th and 14th of December. So if we move it then,
6 nothing needs to change.

7 **CHAIRMAN GARCIA:** I think I've got a
8 conflict on those days. That's one of the reasons it
9 was moved.

10 **COMMISSIONER JACOBS:** Are we talking about
11 Issue 6?

12 **COMMISSIONER CLARK:** No.

13 **CHAIRMAN GARCIA:** We're talking Susan moved
14 Issue 4 --

15 **COMMISSIONER DEASON:** No, no. I moved --

16 **CHAIRMAN GARCIA:** Terry moved Issue 4 and
17 Susan is trying to amend it by saying they have leave
18 to file.

19 **COMMISSIONER CLARK:** I would deny the Motion
20 to Dismiss but grant leave to file an amendment to the
21 petition to address the bidding rule. And if you take
22 the position it doesn't apply, you should allege that.
23 And then it will be part of your proof with respect to
24 the cost-effectiveness.

25 **CHAIRMAN GARCIA:** So that be would a

1 preliminary issue in the case.

2 **COMMISSIONER CLARK:** The most cost-effective
3 alternative.

4 **CHAIRMAN GARCIA:** You know what, just to see
5 where this pans out, because maybe we may end up where
6 you are since now we have four, we have to grow on
7 consensus. I will second Commissioner Deason's motion
8 without your amendment. So that --

9 **COMMISSIONER JACOBS:** Remind me what that
10 was.

11 **CHAIRMAN GARCIA:** The motion is that we do
12 not dismiss it. We deny --

13 **COMMISSIONER DEASON:** We grant -- we just
14 approve Staff's recommendation, which Staff's
15 recommendation doesn't say anything about amending the
16 petition one way or the other.

17 **COMMISSIONER JACOBS:** My concern is -- I
18 quite frankly think that it's in their best interest
19 to do that because I really do think that that issue
20 is going to arise. It arises --.

21 **CHAIRMAN GARCIA:** I worry about that. I
22 don't disagree with you. I think it is in their best
23 interest to allege it and ask for a waiver. I would
24 do it automatically. But I forewarn you of what that
25 is going to create. They are going to have to file 68

1 different waivers.

2 **COMMISSIONER CLARK:** That's absurd. I don't
3 think that's true at all.

4 **COMMISSIONER JACOBS:** No. No. On its
5 face -- on its face 403.519 requires that we have to
6 make that determination. We have to determine that
7 this is at least -- that this is -- I'm sorry. I
8 don't have the language in front of me.

9 **CHAIRMAN GARCIA:** The least cost
10 alternative.

11 **COMMISSIONER JACOBS:** On its face, the
12 Petition of Need Determination requires it, and we
13 will have to make that finding, will we not?

14 **COMMISSIONER DEASON:** We will. But that
15 doesn't mean they have to comply with the bidding rule
16 on make that showing, not necessarily. We'll
17 determine that at hearing, I suppose.

18 **COMMISSIONER DEASON:** Interesting. Because
19 I remember in the testimony in the New Smyrna case I
20 asked a witness about this. The witness sponsored by
21 the petitioner asked them about the bidding rule and
22 the response was he didn't like it.

23 **CHAIRMAN GARCIA:** Yes. I remember.
24 Mr. Nesbitt. And he asked in applying both ways
25 Mr. Nesbitt -- first of all, he thought it was a waste

1 of time for the investor-owned utility -- Mr. Nesbitt
2 had that great quality to insult and offend as he was
3 trying to please. And he was saying he didn't agree
4 with our rule. He didn't think that it was good and
5 that it was really a sham, you know, in the sense he
6 thought they could game that system, which was fine.

7 **COMMISSIONER JACOBS:** That brings me to my
8 fundamental point. I think we have to flesh out in
9 this case --

10 **CHAIRMAN GARCIA:** I agree. And I'm not
11 arguing that. I guess you're hearing officer in this
12 case. I assume that they haven't they are insane, but
13 I assume that that's one of the issues they are going
14 to directly address, because if they are in their
15 right minds and read your dissent, clearly, you know,
16 one way or the other they are going to have to try to
17 get a majority of the panel or the full Commission
18 that sits there. And one of the issues will be
19 whether they are an efficient provider.

20 You have an issue with that and I would
21 assume that in this hearing that will be one of the
22 issues that will be explored. I don't know. Is that
23 one of the issues in the proceeding? I haven't seen
24 them. Is that in the --

25 **MR. KEATING:** Is it in the petition? Which

1 specific issue?

2 **CHAIRMAN GARCIA:** The --

3 **COMMISSIONER JACOBS:** As to whether or not
4 adequate proof had been shown that there was a --

5 **COMMISSIONER CLARK:** The most cost-effective
6 alternative. Mr. Wright has just said he agrees that
7 they have to show that.

8 **MR. KEATING:** That's something that we're
9 required to consider -- sorry.

10 **CHAIRMAN GARCIA:** That's all right.

11 **MR. KEATING:** I was just going to say that's
12 something by our statute we're required to consider.

13 **CHAIRMAN GARCIA:** Exactly. Within this
14 hearing.

15 **COMMISSIONER CLARK:** We have a motion and a
16 second. All those in favor says "aye." Aye.

17 **CHAIRMAN GARCIA:** Aye.

18 **COMMISSIONER DEASON:** Aye.

19 **COMMISSIONER JACOBS:** Aye.

20 **CHAIRMAN GARCIA:** Opposed, "nay."

21 **COMMISSIONER CLARK:** I guess I will vote --
22 I'm in a quandary. I would vote for the decision, the
23 Motion to Dismiss, and I would grant with leave to
24 amend. If that would not carry the majority, I still
25 would not vote to dismiss it. I concur in the

1 decision. But I would reach it for different reasons.

2 **CHAIRMAN GARCIA:** Terry, I'm sorry. I'm
3 like a blind man. Issue 5. Do we have a motion?

4 **COMMISSIONER DEASON:** I move Staff on
5 Issue 5.

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

7 **COMMISSIONER JACOBS:** Yeah, a second.

8 **COMMISSIONER CLARK:** Let me just make sure
9 that, is this on the basis of timeliness?

10 **MR. KEATING:** I don't know that you have to
11 make a decision on timeliness if you're not
12 comfortable at this point.

13 **COMMISSIONER CLARK:** See, I think -- is this
14 Motion to Dismiss the Motion to Dismiss on
15 Jurisdiction?

16 **MR. KEATING:** Yes.

17 **COMMISSIONER CLARK:** Okay. I think we need
18 to clarify our rules with regard to motions to
19 dismiss. We need to address -- if we can -- I'm not
20 sure we can -- but what we might have to say if an
21 entity is not a party, say that the time runs when
22 it's filed or five days after, or make it clear so
23 that we don't have to guess at when it is. I would
24 say at least with respect to jurisdiction, I think it
25 can be raised any time. So it is a motion on the

1 merits.

2 **COMMISSIONER DEASON:** Yes. I think Staff
3 attests the merits of the Motion to Dismiss and that's
4 the basis for. My motion is not based because it was
5 untimely. It's based upon the merits of the argument.

6 **CHAIRMAN GARCIA:** We have a motion and a
7 second. We will, I guess, instruct Mr. Smith to come
8 back, I guess, with a rule.

9 **COMMISSIONER CLARK:** I think that needs to
10 be clarified in some way.

11 **CHAIRMAN GARCIA:** Maybe we could get a
12 memo -- maybe if you bring it to Internal Affairs on
13 this rule. I don't think we need you to make a
14 soliloquy on it. I'm asking you to come to Susan --

15 **COMMISSIONER CLARK:** We need to provide some
16 clarity so the issue doesn't always come up. Does
17 filing mean served when the person isn't a party?

18 **MR. SMITH:** The problem is the rule.

19 **COMMISSIONER CLARK:** Point it out to whoever
20 we need to point it out to, that it leaves an
21 ambiguity that need to be addressed.

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

25 **COMMISSIONER CLARK:** Aye.

1 **COMMISSIONER DEASON:** Aye.

2 **COMMISSIONER JACOBS:** Aye.

3 **COMMISSIONER CLARK:** I'd like to indicate
4 that my vote on Issue 5 is a result of -- we already
5 have had a decision on the issue. I think the Courts
6 will resolve whether or not we have jurisdiction of
7 this. I still don't believe to be an applicant you
8 needed to have the obligation to serve -- I stand by
9 my dissent in that case, but that case has been
10 decided. It is precedent for us to follow. And,
11 therefore, I don't think it would be appropriate to
12 vote to dismiss it on that basis.

13 **COMMISSIONER DEASON:** Mr. Childs, do you
14 want to argue this one?

15 **MS. CHILDS:** Issue 6?

16 **CHAIRMAN GARCIA:** Yes. You had said you had
17 something to add on Issue 6 and that was a separate
18 argument.

19 **MR. CHILDS:** I would suggest -- we filed the
20 support. It's Florida Power Corporation's motion
21 (mike is not on) but I would suggest they --

22 **CHAIRMAN GARCIA:** I'm sorry? That who?

23 **COMMISSIONER DEASON:** He's Power Corp's --

24 **CHAIRMAN GARCIA:** Oh, I'm sorry. It's Power
25 Corp's -- oh, it's Power Corp's, I'm sorry.

1 **MR. SASSO:** It's quite all right. Should I
2 proceed on Issue 6?

3 **CHAIRMAN GARCIA:** Go ahead. Lateness of the
4 time is all I ask. You have been very good today,
5 Mr. Sasso.

6 **MR. SASSO:** I'll try to be brief on this
7 one, too, because I believe that we've substantially
8 discussed it. And if I'm not mistaken, I believe
9 we're in agreement that the underlying statute,
10 403.519, does not dictate the time constraints that we
11 find ourselves under, the 90-day rush to a hearing.
12 And this makes this a classic case for application of
13 the rule on variances and waivers.

14 As Mr. Childs discussed, that rule was
15 intended to give this Commission the opportunity to
16 avoid strict application of the rule when it would
17 lead to unintended results, and that's exactly what
18 would occur here.

19 The time limits were designed to ensure
20 compliance with the Power Plant Siting Act when a
21 completed site certification application had been
22 filed and that's not the case.

23 Yes, Mr. Moyle might be able to file such an
24 applicant at some point in the future. We could argue
25 over whether that would be gaming the system, but

1 currently there is none on file.

2 We did not create the circumstances in which
3 we find ourselves. We're reacting to them. And those
4 circumstances are such that we believe there's no
5 point of going forward with the current schedule. It
6 amounts to hurrying up and wait. We believe that
7 going forward on the current schedule would lead to a
8 substantial hardship for a variety of reasons.

9 We have argued and requested that the
10 Commission stay this proceeding pending the outcome of
11 the Duke case. I think everybody acknowledges that
12 that decision will have a profound impact on this
13 proceeding in that it very well may be the case; that
14 the Commission and the parties will expend
15 considerable time and resources and trouble just to
16 find that that was all for not.

17 We certainly understand the interest and
18 expediency in efficient government and issuing
19 rulings, et cetera, but our system happens to be one
20 of checks and balances. It happens to be one that
21 provides for judicial review. And expediency needs to
22 be tempered with that in mind. The most efficient
23 government may not always be the best. And in this
24 case we would submit that it would be the best
25 approach, one that would conserve the resources of

1 this Commission and of the parties to wait for the
2 outcome of that appeal since it will have a profound
3 impact on the course of these proceedings.

4 The petitioner has given us a reason for why
5 they've delayed in filing the completed site
6 certification application. They said they don't want
7 to incur the cost associated with that process because
8 of the risk associated with this process, the need
9 proceeding. We would submit that their interest
10 coalesces with ours.

11 Proceeding with this case at this time
12 merely exacerbates the risk that they and we and this
13 Commission will needlessly incur costs associated with
14 this proceeding.

15 **CHAIRMAN GARCIA:** Isn't that sort of a
16 chicken-and-an-egg sort of argument? Either way, I
17 mean, they can make it too. But isn't it sort of that
18 way?

19 **MR. SASSO:** Oh, I don't think so. If we
20 just step back and look at the big picture and what's
21 going on here. The big picture is when Duke is
22 decided, we'll all know where we stand with respect to
23 jurisdiction. We'll all know where we stand. They
24 will know. We will know. The Commission will know.

25 **CHAIRMAN GARCIA:** Are you saying that if the

1 Duke decision comes out -- let's say it comes out the
2 way the majority voted -- are you saying that then you
3 would not have raised these objections about if they
4 are a proper applicant or some of Mr. Childs' comments
5 about needing to file a Ten Year Site Plan, and then
6 we would know, or wouldn't that still be up in the
7 air --

8 **MR. SASSO:** There still may well be issues.
9 It depends for what the Court says. The Court may
10 have a rationale that was different from ours,
11 different from yours. There may be some language or
12 some aspects of the decision that we can't even
13 anticipate.

14 While this Commission decided what it
15 decided in Duke, I don't believe that the Commission
16 could have possibly had the foresight to anticipate
17 all of the ramifications of that decision at that
18 time, including what rules might be implicated,
19 including the bidding rule. And so just because the
20 Commission decided certain basic issues in that case,
21 in a fairly condensed period of time, where we were
22 all focussing on Nassau because that was, in our view,
23 the controlling authority at that time, does not mean
24 that this Commission does not have residual issues to
25 decide, even if Duke turns out to be the law. Like

1 what are the ramifications for the bidding rule.

2 **CHAIRMAN GARCIA:** Doesn't that put us in the
3 same place, though, Mr. Sasso?

4 **MR. SASSO:** Not at all.

5 **CHAIRMAN GARCIA:** Wait until this gets
6 argued, the Duke case gets argued, in January. The
7 Court comes out with a decision, say, in -- I don't
8 know. You're probably a better student of this --
9 two, three months later. Is that possible?

10 **MR. SASSO:** That's certainly possible.

11 **CHAIRMAN GARCIA:** Maybe they come out with
12 something in March -- let's say June they come out
13 with a decision. Mr. Wright and Mr. Moyle then file
14 before us? And you are going to have new legal
15 arguments. I expect you to have more reasons why this
16 isn't a good idea.

17 **MR. SASSO:** Well, my answer that they are
18 residual issues depends upon an assumption that this
19 Commission's decision would be affirmed. If the Court
20 reverses, that ends this case. If it affirms, yes,
21 the Court may say something we have to react to. But
22 by definition we can't do that until we have seen the
23 decision. We can all try, collectively, the
24 Commission and the parties, to anticipate various
25 wrinkles, the bid rules, something else, and we can

1 have a full-blown hearing about those things just to
2 find we've wasted our time, even if this Commission
3 has affirmed.

4 **CHAIRMAN GARCIA:** Right. That's precisely
5 my point, though. Either way. Whether this
6 Commission is affirmed or not, we're still going to
7 have legal issues. I assume that you will still
8 pursue that, as you are well within your right to
9 pursue it and probably appeal it again, and we will
10 then be waiting for the next decision.

11 **MR. SASSO:** That's inherent in the process.
12 But the point I make is that if the Commission is
13 reversed, we will have gone through all of that
14 needlessly. It is even possible, given what we have
15 just discussed, that even if the Commission is
16 affirmed we may have wasted time because we can't
17 react to the decision until we've seen it. So it
18 would be in everybody's best interest to wait for the
19 outcome of that decision. In fact, that's what Duke
20 itself decided. Even though they did file a site
21 certification application at or before the time they
22 filed the need proceeding, they decided -- perhaps it
23 was in consultation with the Governor and the Cabinet
24 or their aides, but they all decided it was the
25 prudent thing to do to wait. And that's what we're

1 suggesting is the case here.

2 Add to that the fact that we were granted
3 intervenor status only on November 4. Up until that
4 time, the petitioner declined to give us any discovery
5 whatsoever on the ground that we're not a party. We
6 have been playing catch-up ever since. We still have
7 not been given very basic discovery. We very recently
8 filed a Motion to Compel to get stuff that we
9 fundamentally need to prepare for this hearing. We
10 have serious due process concerns about whether if we
11 stay to this track, we will be able to protect our
12 interest and participate meaningfully and to the
13 benefit of this Commission in the hearing. So for
14 that reason, too, because we'll incur an economic
15 hardship associated with perhaps wasting our energies,
16 if the decision is reversed on appeal, or even if it's
17 affirmed. And because of the prejudice to our
18 interest in proceeding on this lickety-split pace
19 without any necessity dictated by the statute
20 whatsoever, we've asked for relief. And we've asked
21 for it on an emergency basis for the obvious reason
22 that if we don't get it now, we effectively don't get
23 it at all.

24 **CHAIRMAN GARCIA:** Mr. Childs.

25 **MR. CHILDS:** Commissioners, we support the

1 request by Florida Power Corporation, but I want to
2 make a few comments that relate to Florida Power &
3 Light in addition.

4 Our argument and support is principally one
5 of due process. We're on a very fast track but we
6 find ourselves, despite being a fast track, trying to
7 participate with substantial disadvantage. One is
8 that the petition was filed without any support of
9 testimony, as is it done from time to time in need
10 determination proceedings where you are pursuing it on
11 a fast schedule. Testimony is filed so all parties,
12 recognizing we only have 90 days, have a starting
13 point in the case. That was not done.

14 I contacted counsel for OGC after I got a
15 copy of the petition and asked if they would agree
16 that we could intervene in the proceeding, and they
17 would not do that so we petitioned to intervene. And
18 we petitioned to intervene on October 7 of this year.
19 And although OGC never objected to the intervention --
20 ultimately they wouldn't agree to it, but they didn't
21 object either, intervention was only granted in
22 November on the 4th. We, too, don't have the
23 information that we think we need under the
24 circumstances when there's no compelling need to apply
25 that schedule. We urge you to grant an extension, and

1 for that reason support the request by Florida Power
2 Corporation.

3 **CHAIRMAN GARCIA:** Thank you, Mr. Childs.
4 Who is arguing?

5 **MR. MOYLE:** Mr. Chairman, a couple of
6 points, and I will try to be brief. I'm going to
7 start with sort of a couple of policy arguments that
8 Mr. Sasso and Mr. Childs have made, and then talk
9 specifically about the law as it treats these
10 emergency requests for a waiver.

11 But the two things I hear why this should
12 not go forward is, number one, the Duke case is still
13 out there, and number two, somehow their due process
14 rights have been denied. Let me address Duke first of
15 all.

16 I think it would be very bad for this
17 Commission to make a statement that it is not going to
18 go forward on issues that we believe are important to
19 the state of Florida simply because an appeal has been
20 taken.

21 You know, I'm sure there are countless
22 public policy issues that you all wrestle with every
23 day that are likely to reoccur, that if you said,
24 "Wait a minute. An appeal has been taken. We're not
25 going to hear any of these until the appeal is

1 resolved," you know, that would grind things to a
2 halt. And where does it end? Is there a request for
3 certiorari jurisdiction asserted to the United States
4 Supreme Court, which is, you know, 18 months, two
5 years? There would be no meaningful, in my opinion,
6 finality that that could be relied on if you made that
7 decision. Obviously, I would urge you to go forward.

8 The due process point. There's a Commission
9 rule that talks about having the proceeding heard
10 within 90 days. It's a Commission rule. It's been on
11 the books. The utilities, I'm sure, are familiar with
12 it having filed a number of applications for need with
13 you.

14 I gave every utility a heads up that we were
15 filing this either the day before or the day that it
16 was filed. They have known about it. You know, to
17 say that the due process rights are denied is, in my
18 opinion, a stretch. I mean FPL has served over 200
19 interrogatories and they are adequately preparing for
20 their case. We've already responded to the first set
21 of discovery. We're on an expedited time frame but,
22 again, it's consistent with your rule and the parties
23 are able to prepare and respond to this case.

24 FPC in a pleading yesterday indicated they
25 intend to call no witnesses, yet the testimony filing

1 deadline was pushed back at FPL's request. I think
2 they can adequately be prepared. I think the due
3 process concerns are addressed. It's a rule that they
4 are quite familiar with, and I would deny the petition
5 on the grounds of due process.

6 Those were the policy arguments. I know
7 it's late. We have had a lot of arguments about
8 strict compliance with rules earlier. I would be
9 remiss if I didn't make a couple.

10 What FPC has filed and FPL has joined is an
11 emergency request for a waiver. The law is clear that
12 in order to seek an emergency you must allege, and I
13 quote, "an immediate danger to the public health,
14 safety and welfare." This is required by rule. I
15 wasn't done. That alone is deficient and grounds to
16 deny.

17 They've alleged that there's a substantial
18 hardship. Disruption in expense is what they've
19 alleged.

20 Now, the law on the waivers requires that
21 you support your allegations with facts and that a
22 waiver has to be supported by competent substantial
23 evidence. I don't see any competent substantial
24 evidence. There are no affidavits, there's nothing in
25 there except bare allegations and a pleading. I think

1 that's legally deficient.

2 You know, the law is clear with respect to
3 interveners; that they take the case as they find it.
4 I, in preparing for this, was thinking what the
5 reaction would be from one of the investor-owned
6 utilities if OGC attempted to intervene in one of
7 their need determinations and then filed a petition
8 that the matter be delayed indefinitely.

9 I don't think that it would be met with any
10 less resistance than I'm meeting this petition with.
11 The case ought to be heard as scheduled. It ought to
12 go forward, and the waiver is not in the public
13 interest. I'd be happy to answer any questions that
14 you might have.

15 **MR. WRIGHT:** Can I chime in?

16 **CHAIRMAN GARCIA:** We're finished there. Do
17 you have something to add, then you'll respond?

18 **MR. KEATING:** I'll try to be brief, and
19 partly because I don't know if I can talk that much
20 longer today.

21 I want to bring it back to the law on rule
22 waivers because I haven't heard anybody discuss it
23 yet.

24 For a waiver to be granted, the petitioner
25 needs to demonstrate two things. One, that the

1 purpose of the underlying statute will be achieved if
2 the rule waive is granted. And two, either that they
3 will suffer a -- that application of the rule will --
4 to the petitioner will create a substantial hardship,
5 or that application of the rule violates principles of
6 fairness.

7 In Staff's analysis we believe that while
8 Florida Power Corporation has demonstrated that the
9 purpose of the underlying statute will be achieved if
10 this rule is waived, we do not believe that they have
11 satisfied the other prong of the test. We don't
12 believe that they have demonstrated substantial
13 hardship. The hardship they have demonstrated is
14 unnecessary time and expense of going forward with
15 this case because the Duke case is on appeal. To me
16 that's speculative. The statute says -- let me
17 find -- the statute says that they must allege facts
18 to show that they will suffer -- hold on. Let me make
19 sure I've got that right. I don't want to give you
20 the wrong information -- that it would create a
21 substantial hardship.

22 I don't think that you can say for sure that
23 it would create a substantial hardship because we do
24 not know what the Duke opinion, the Duke decision of
25 the Supreme Court will be. There will be a

1 substantial hardship only if the Duke decision is
2 overturned.

3 **COMMISSIONER CLARK:** What about addressing
4 the due process issue? I would agree with you that
5 whether or not we delay it for the Duke decision is
6 more a matter of discretion and probably doesn't deal
7 with substantial hardship or principles of fairness.
8 But it seems to me, like -- a thing you have to
9 consider even more than just principles of fairness is
10 the fundamental issue of due process. Do you think in
11 this case that due process rights in any way are
12 adversely affected and respond to the fact that they
13 ask for intervenor status the beginning of October and
14 it wasn't granted until November?

15 **MR. KEATING:** I'll start by saying that I
16 don't think --

17 **COMMISSIONER CLARK:** I assume that they
18 couldn't propound discovery or prepare during that
19 time.

20 **MR. McKEE:** I think Okeechobee can give you
21 more detail -- I think they did give some detail on
22 how they've treated discovery.

23 The Prehearing Officer at the request or
24 pursuant to motions filed by the intervenors has
25 approved an expedited discovery schedule, 14 days with

1 all requests and responses to be served by express
2 mail or fax or hand delivery, and has also adjusted
3 the testimony filing schedule to allow intervenors
4 more time prior to filing testimony. And, you know, I
5 understand that it's a tight -- that we're working in
6 a tight time frame under the rule.

7 Beyond that, I didn't -- to be honest I
8 didn't look much at due process arguments because I
9 didn't think they were necessarily raised in the
10 petition under the allegations or the -- the
11 allegations of substantial hardship or principles of
12 fairness.

13 **MR. SASSO:** First, let me just clarify
14 something so there will be no misimpression about it.
15 We did indicate that we would not be offering any
16 employees of Florida Power Corporation as witnesses
17 but we do propose to submit testimony to the
18 Commission in this case.

19 Now, we've heard a couple of arguments. One
20 is that the Commission can't slow down every time
21 there's an appeal. This is not just any case. It's
22 not just any appeal. I think that everybody on both
23 sides of this case would recognize that the Commission
24 is proposing to embark on a new course for Florida.
25 The Chairman has been a very eloquent spokesperson for

1 why we should do that, and there have been other
2 persons who have indicated perhaps why we should not.
3 But it's certainly a very new development and one
4 that's highly controversial. In fact, the petitioner
5 in the Duke case has called it a case of first
6 impression. There's no mistake that this is a very
7 significant development. This is not just like any
8 other case. And there's a substantial question about
9 the jurisdiction of the Commission. There's a
10 substantial that even if it has jurisdiction, what the
11 Court will say about it, what ramifications that will
12 have on this proceeding.

13 Have we presented evidence in support of our
14 petition? Of course, we don't need affidavits to
15 state what's plainly on the public record that there
16 is an appeal; that the case has been filed. We have
17 the proceedings, we have the docket in this case to
18 know what is involved in the case.

19 Have we pleaded hardship? Yes, we have.
20 Hardship doesn't mean that we have to prove an actual
21 deprivation of due process but we perhaps can. But we
22 certainly have something very close to it.

23 **CHAIRMAN GARCIA:** What happens if the Court
24 decide with us, all right, on this case, and -- or,
25 yeah, let's say the Court decides with us but you

1 appeal it to the Supreme Court. Or maybe Duke doesn't
2 get everything they want, we get half measures from
3 the Court. So Duke appeals it to the Supreme Court,
4 they find some reasoning and rationale -- and it's a
5 huge case. And then six months from now you come in
6 here with a determination of need. Should we then
7 stop all determination of needs before the Florida
8 Public Service Commission until three years from now
9 when we get a decision?

10 **MR. SASSO:** All determination of need by
11 merchants?

12 **CHAIRMAN GARCIA:** By any one.

13 **MR. SASSO:** I don't understand how that --

14 **CHAIRMAN GARCIA:** By you also, because I'm
15 sure that Mr. Wright will be able to come in here and
16 say, "My interests are being harmed here if you make a
17 decision."

18 **MR. SASSO:** I don't understand how that
19 follows.

20 **CHAIRMAN GARCIA:** Well, Mr. Wright will say
21 if, "Well, if I was allowed to build this, I would be
22 able to bid when you come in to bid. I would be able
23 to supply that power on a contract basis. I would be
24 able to make money. But because we're holding
25 decision until the Supreme Court finishes, shouldn't

1 we hold all of them until we create that new day or
2 dawn in Florida?

3 **MR. SASSO:** It doesn't follow at all. They
4 can bid now in response to an RFP by a utility in this
5 state.

6 **CHAIRMAN GARCIA:** Yeah. They just can't
7 build.

8 **MR. SASSO:** They can build if we go through
9 a need proceeding and the project is approved. So
10 they have an avenue right now, as contemplated by
11 current law.

12 As I was about to say, we have been given
13 leave to intervene only recently. We can make a case
14 that our due process rights are at stake. We don't
15 have to go that far. There has been substantial
16 hardship. There will be substantial hardship.

17 As regards discovery, we've tried it both
18 ways. Florida Power propounded discovery before we
19 were granted party status. The petitioner responded
20 by saying, "We don't have to respond until you're a
21 party and we're not going to." FPL waited until they
22 were given party status and then propounded discovery.
23 But either way, neither of us got a lick of discovery
24 until we were granted party status. So we're playing
25 catch-up and we're very hard pressed to do that in

1 this case.

2 So when you're talking about hardship, you
3 have to look at the context. In the context of this
4 rule, it's a procedural rule that specifies the time
5 for getting the job done. We've demonstrated, and I
6 think there's complete agreement, that it makes no
7 sense in this case. It's not dictated by any statute,
8 it's not mandatory in any way, yet we're being forced
9 to abide by it in very adverse circumstances. Have we
10 demonstrated an emergency? Yes, we have.

11 What the rule says is that a petition for
12 emergency must state the facts indicating an emergency
13 and show not that there's going to be danger to the
14 public safety et cetera, as has been reported, the
15 rule says specific facts to show that the petitioner
16 will suffer an immediate adverse effect unless the
17 variance or waiver is issued more expeditiously than
18 the time frames provided. We've demonstrated that.
19 Unless the relief is given within 30 days, we will not
20 get any effective relief. If the Commission takes the
21 full 90 days to act on our petition for waiver, it's
22 effectively denied. So we've met the condition
23 specified in the rule for emergency.

24 So we believe we've pleaded and we've
25 satisfied all the requirements to demonstrate that the

1 application of the rule in this case would achieve
2 unintended results.

3 **MR. MOYLE:** I feel obligated to make a point
4 of clarification with discovery because that's
5 something --

6 **CHAIRMAN GARCIA:** John, that's it. Unless
7 the Commissioners want to hear any more, 7:20 is late
8 enough. We've heard it all.

9 Is there a motion?

10 **COMMISSIONER DEASON:** I'm willing to make a
11 motion.

12 I would move to deny Staff and to grant the
13 waiver. To clarify that, we would not be laboring
14 under a 90-day clock. And the primary reason for that
15 is that I share in the concerns about the due process
16 rights of the parties. I think it is an extremely
17 important issue, and that this matter needs to get the
18 full amount of attention that discovery and things of
19 that nature can bring to light.

20 I'm concerned, though, with the idea that we
21 must wait until the Court rules. That is such an
22 indefinite period that I think that then starts
23 infringing upon the due process rights of the
24 applicant in this proceeding.

25 So I would grant the waiver, and I would

1 leave it to the discretion of the hearing officer,
2 prehearing officer, to come up with a schedule which
3 gives ample time to the parties to fully litigate this
4 matter, but not set an arbitrary deadline -- not
5 deadline, but arbitrary time frame which says we're
6 not going to process this case until the Supreme Court
7 rules. I don't know if that's going to be three
8 months or three years from now.

9 **CHAIRMAN GARCIA:** Okay. We have a motion.
10 Is there a second?

11 **COMMISSIONER CLARK:** Second.

12 **COMMISSIONER JACOBS:** If I may, following
13 with that discussion, when we first looked at this
14 motion, I had asked for some dates and we tentatively
15 have some dates we can look to. I can give them to
16 you now but I would want to confirm them.

17 **CHAIRMAN GARCIA:** I think you've got a
18 motion and a second, and if you're comfortable with
19 it, we've got three votes so you don't have to --

20 **COMMISSIONER CLARK:** I want to concur in the
21 motion that I think it is really the call of the
22 applicant if they want to wait for the Duke decision
23 to come out. If they feel comfortable moving forward
24 and believe that is the appropriate way to go, I think
25 we should look -- I think the issue is due process,

1 not waiting for the Duke decision.

2 **CHAIRMAN GARCIA:** I'm going to vote against
3 the motion. While I understand the motion, I clearly
4 think that the time frame given here for the issue
5 that's before us and the concerns that this Commission
6 should take, statutory turns, obligations we must
7 meet, I think we have more than enough time to develop
8 those with the time that we have. And I have to
9 concur, though, with the motion by
10 Commissioner Deason, I think, to wait for the Supreme
11 Court to decide is absurd. But that said, we have a
12 motion and a second. All those in favor signify by
13 saying "aye."

14 **COMMISSIONER CLARK:** Aye.

15 **COMMISSIONER DEASON:** Aye.

16 **COMMISSIONER JACOBS:** Aye.

17 **CHAIRMAN GARCIA:** Opposed, "nay." Nay.

18 **MR. KEATING:** Chairman Garcia, I would just
19 like to clarify for the motion for purposes of
20 drafting an order whether in denying Staff in the
21 motion the Commissioners are denying Staff's argument
22 that this is not technically an emergency by your
23 petition, but that it was appropriate to hear this as
24 a nonemergency petition.

25 **COMMISSIONER DEASON:** That's correct.

1 Perhaps it's moot. The reason it was filed as an
2 emergency was so it could be heard in a timely manner.
3 It's being heard in a timely manner. So I don't know
4 the significance of whether we determine it as an
5 emergency or not.

6 **MR. SASSO:** It doesn't matter to us as long
7 as the Commission acts on it.

8 **MR. KEATING:** My concern is only for
9 precedential purposes if we get an another emergency
10 ruling or petition and if we said this amounts to an
11 emergency.

12 **CHAIRMAN GARCIA:** No, I don't think we have
13 said.

14 **COMMISSIONER DEASON:** No, I'm not -- that's
15 not part of the motion. I understand the reason it
16 was filed and characterized as an emergency, but I
17 don't think that we need to state that it is an
18 emergency.

19 **CHAIRMAN GARCIA:** That brings up a question,
20 though. Under what authority are we granting this?

21 **MR. KEATING:** Under the same authority under
22 the rules. Basically if the Commission finds that
23 it's not an emergency petition, it can treat it as a
24 nonemergency petition.

25 **CHAIRMAN GARCIA:** Even though we have a

1 90-day time frame?

2 **COMMISSIONER CLARK:** That deals with the
3 waiver of the rule, not with the emergency part of it.

4 **COMMISSIONER DEASON:** The emergency part of
5 it just says that we've got to process it within,
6 what, 30 days of receipt of the petition. We're doing
7 that anyway.

8 **MR. KEATING:** Correct.

9 **COMMISSIONER DEASON:** So we don't have to
10 classify it one way or the other.

11 **CHAIRMAN GARCIA:** I just want to understand.
12 I thought that it was -- I want to make sure we're
13 doing this right. Our rule requires 90 days to
14 process this and we are waiving our own rule. Is that
15 what we're doing?

16 **MR. KEATING:** No. The uniform rules require
17 30 days to process it. I think it's actually the
18 statute.

19 **COMMISSIONER DEASON:** Thirty days to process
20 the waiver request.

21 **MR. SASSO:** You have up to 90 days and
22 you've acted within that period of time.

23 **COMMISSIONER DEASON:** Thirty days if it's an
24 emergency.

25 **MR. KEATING:** Yes.

1 **COMMISSIONER DEASON:** So if we say it's not
2 an emergency, we could have taken longer but we're
3 not, so it's a moot point.

4 **MR. SASSO:** I would agree. You don't have
5 to decide whether it's an emergency or not. You've
6 addressed it; you've addressed it within 90 days.
7 You've addressed it within 30 days. It's academic to
8 characterize it either way. You've addressed it.

9 **CHAIRMAN GARCIA:** I just want to understand
10 how that affects their 90 days. I want to understand
11 what the decision does.

12 In essence, Mr. Moyle enters this proceeding
13 thinking he has 90 days for us to make a
14 determination, correct? And what we've done today is
15 say, we, the Commission, need more than 90 days to
16 process this application, so we've waived our rule.

17 **COMMISSIONER CLARK:** No. The decision is
18 have they made out a case for waiver of the rule? And
19 the Staff has indicated it does meet the first prong,
20 that it is -- it will still accomplish the underlying
21 purpose of the Act, because there is no time frame
22 now, under the statute -- because they haven't filed
23 at DEP -- and that principles of fairness would
24 require the waiver to meet due process considerations.

25 **MR. KEATING:** And I had only sought

1 clarification on sort of the threshold or the
2 preliminary matter, whether it was an emergency or
3 nonemergency. If we -- and if we say it's a
4 nonemergency, an FAW notice has been issued and the
5 time for comments has run, so we're procedurally okay
6 there.

7 **CHAIRMAN GARCIA:** Okay. Very good. Yes,
8 Mr. Moyle.

9 **MR. MOYLE:** One point. At the risk of being
10 beheaded here, but earlier on Commissioner Clark said
11 she thought that the Supreme Court ought to receive
12 notice that this -- I thought I understood her to say
13 that this case is here; that an issue, the EWG issue
14 or the federal public utility issue is also presented,
15 and I presume that would be some type of judicial
16 notice and asked that it be expedited.

17 **COMMISSIONER CLARK:** I think it would be
18 well to file something with the Court to indicate
19 to -- I know we've asked for expedited processing. I
20 think we should indicate to them that here's further
21 evidence that we need this expedited treatment. We
22 already have another case which we're processing. And
23 that, please, if you could make a decision sooner
24 rather than later, we'd appreciate it.

25 **MR. MOYLE:** Okay. Thank you.

1 **MR. SMITH:** I think there was a Motion to
2 Expedited filed and the Court denied it. They said
3 they have got it set for oral argument, on the 6th.

4 **COMMISSIONER CLARK:** The 4th.

5 **MR. SMITH:** So there already has been a
6 motion --

7 **COMMISSIONER CLARK:** But this is new
8 evidence to me.

9 **CHAIRMAN GARCIA:** This is a new reason why
10 to hurry it on. Maybe this is pretty please with
11 sugar on top.

12 **MR. MOYLE:** Maybe I was confused. I thought
13 that the -- there are a number of issues before the
14 Supreme Court, and EWG is one of the issues. Maybe I
15 misheard or misunderstood, but I was under the
16 impression that you wanted to let them know that this
17 issue is likely to be reoccurring and that they ought
18 to decide this issue, the EWG issue.

19 **COMMISSIONER CLARK:** No.

20 **CHAIRMAN GARCIA:** No. All right.

21 Thank you very much. That was wonderful
22 arguments. Enjoyed it. Thank you.

23 You know, I have to say something. Since I
24 started here Commissioner Deason has always -- every
25 time I predict that we'll be done by 11, like a wise

1 soothsayer he says, "You think so?" I was guaranteed
2 we'd be out of here by 11 this morning.

3 Thank you very much. Appreciate it.

4 (Thereupon, the hearing concluded at
5 7:30 p.m.)

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1 STATE OF FLORIDA)
2 COUNTY OF LEON)

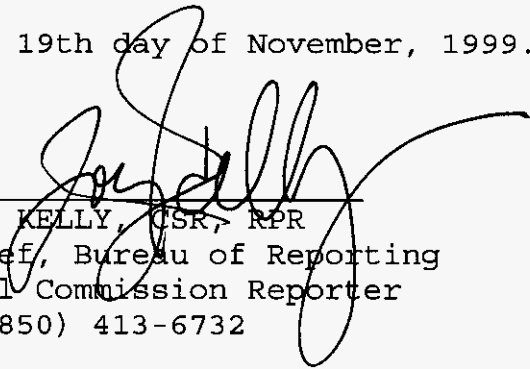
CERTIFICATE OF REPORTER

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

5 DO HEREBY CERTIFY that the Agenda Item 54 in
6 Docket No. 991462-EU was heard by the Florida Public
7 Service Commission at the time and place herein
8 stated; it is further

9 CERTIFIED that I stenographically reported
10 the said proceedings; that the same has been
11 transcribed by me; and that this transcript,
12 consisting of 172 pages, constitutes a true
13 transcription of my notes of said proceedings.

14 DATED this 19th day of November, 1999.

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Chief, Bureau of Reporting
Official Commission Reporter
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