

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

In the Matter of : DOCKET NO. 991462-EU
:
Petition for determination of :
need for an electrical power :
plant in Okeechobee County by :
Okeechobee Generating Company, :
L.L.C. :

*
* ELECTRONIC VERSIONS OF THIS TRANSCRIPT *
* ARE A CONVENIENCE COPY ONLY AND ARE NOT *
* THE OFFICIAL TRANSCRIPT OF THE HEARING *
* AND DO NOT INCLUDE PREFILED TESTIMONY. *
* *

PROCEEDINGS: ORAL ARGUMENT

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

DATE: Monday, February 7, 2000

TIME: Commenced at 2:00 p.m.
Concluded at 4:10 p.m.

PLACE: Betty Easley Conference
Room 152,
4075 Esplanade Way
Tallahassee, Florida 32399

REPORTED BY: JANE FAUROT, RPR
FPSC Division of Records & Reporting
Chief, Bureau of Reporting



1 APPEARANCES:

2 JILL HENNINGER BOWMAN, Carlton and Fields, One
3 Progress Plaza, St. Petersburg, Florida 33701, and James
4 A. McGee, Post Office Box 14042, St. Petersburg, Florida
5 33733-4042, appearing on behalf of Florida Power
6 Corporation.

7 CHARLES A. GUYTON, JOHN T. BUTLER and Gabe
8 Nieto, Steel, Hector & Davis, 215 South Monroe Street,
9 Suite 601, Tallahassee, Florida 32301, appearing on behalf
10 of Florida Power & Light Company.

11 ROBERT SCHEFFEL WRIGHT, JOHN T. LaVIA, III,
12 Landers & Parsons, 310 West College Avenue, Tallahassee,
13 Florida 32301, and JON MOYLE, Moyle, Flanigan, Katz,
14 Kolins, Raymond & Sheehan, P.A., 210 South Monroe Street,
15 Tallahassee, Florida 32301, appearing on behalf of
16 Okeechobee Generating Company, L.L.C.

17 WILLIAM COCHRAN KEATING, FPSC Division of Legal
18 Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida
19 32399-0850, appearing on behalf of the Commission Staff.

20

21

22

23

24

25

P R O C E E D I N G S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COMMISSIONER JACOBS: Call the hearing to order,
oral argument hearing to order.

Counsel, read the notice.

MR. KEATING: Pursuant to notice, this time and
place have been set for an oral argument in Docket
991462-EU, petition for determination of need for an
electrical power plant in Okeechobee County by Okeechobee
Generating Company, LLC., to address the motions to
compel of Florida Power & Light and Florida Power
Corporation and the motions for protective order by
Okeechobee Generating Company and Florida Power & Light.

COMMISSIONER JACOBS: Take appearances.

MR. WRIGHT: Robert Scheffel Wright, the law
firm the Landers and Parsons, appearing on behalf of
Okeechobee Generating Company. Also with me is John T.
LaVia, III, same firm, same client.

MR. MOYLE: John Moyle, Jr., appearing on
behalf of Okeechobee Generating Company.

MR. BUTLER: John Butler and Gabe Nieto of
Steel, Hector, and Davis appearing on behalf of Florida
Power & Light Company.

MS. BOWMAN: Jill Bowman and Jim McGee appearing
on behalf of Florida Power Corporation.

MR. KEATING: Cochran Keating appearing on

1 behalf of Commission staff.

2 COMMISSIONER JACOBS: That's all? Very well.
3 As I understand it, we have a series of pretrial motions
4 that we are going to entertain today. Now, it is my
5 understanding that the motions to compel and the motion
6 for protective order have some common, some overlap in
7 terms of subject matter. It will be my thought that we
8 could have arguments on those concurrently. If that is
9 not -- and I offer that only as a suggestion. If you feel
10 in any way some discomfort with that, I am open to that.

11 MR. BUTLER: Commissioner Jacobs, I think that
12 works real well. In fact, what Florida Power & Light had
13 structured really was just around the three substantive
14 areas or subject matter areas that we have disputes on
15 rather than trying to do it by particular motion. And so
16 we are certainly happy to proceed that way.

17 COMMISSIONER JACOBS: Mr. Wright, you had a
18 concern.

19 MR. WRIGHT: Commissioner Jacobs, I think that
20 is an appropriate way to proceed by subject area. I'm not
21 sure what the subjects that Mr. Butler had in mind were,
22 but to me I think it breaks down pretty much as follows.
23 There are three main components of information with
24 respect to which we have asserted the trade secret
25 privilege as confidential proprietary business

1 information. Those relate to a document known as the PG&E
2 generating pro forma. Certain cost information furnished
3 by our anticipated equipment vendor, ABB, or ASEA Brown
4 Boveri, and certain pricing and contract detail
5 information between us and our gas supplier with whom we
6 have a precedent agreement. The gas supplier is
7 Gulfstream Natural Gas System, LLC.

8 Separate from that there is a different issue
9 related to the production of the computer models
10 underlying our expert witness, Doctor Dale Nesbitt's
11 testimony. For ease of reference, I think we can just
12 call these the Altos, A-L-T-O-S models.

13 Finally, there are actually two more things, I
14 think. One is FPL's motion for leave to propound
15 interrogatories in excess of the 200 authorized by the
16 orders establishing procedure in this case. And then
17 there are some schedule -- I'm not sure if these are on
18 the notice or not. There are some scheduling motions
19 pending before you. I'm sorry, those aren't on the
20 notice. We think they do require dealing with, but they
21 do depend on the outcome of certain decisions that will be
22 made in resolving these motions.

23 COMMISSIONER JACOBS: Okay. The PG&E generating
24 costs pro forma --

25 MR. BUTLER: Yes.

1 COMMISSIONER JACOBS: -- and as I understand it
2 the gas price issues and underlying issues is subservient
3 to that?

4 MR. BUTLER: It is similar to it. The issue
5 about their production is largely the same. They are not
6 coming from the same document, though. Basically, I would
7 agree with Mr. Wright's sort of division into those
8 issues. The only one I would add is we also have an issue
9 with respect to interrogatories that either would be
10 answered by or are directly propounded to expert witnesses
11 of OGC, but otherwise the way he described it is fine.

12 And my proposal would be to start with
13 discussing the Altos model or models, and next to discuss
14 the interrogatory issues. Which is really, you know, two,
15 the question of expert interrogatories and also the number
16 of interrogatories. And, finally, something that is sort
17 of a catch-all, this category of confidential -- claims of
18 confidential business information protection that goes to
19 the PG&E pro forma to some cost information that we have
20 requested to ABB documents and to the Gulfstream gas
21 agreement that Mr. Wright mentioned.

22 COMMISSIONER JACOBS: Okay. What kind of time
23 are we looking at?

24 MR. KEATING: I believe we have an hour, is that
25 correct?

1 COMMISSIONER JACOBS: I'm flexible, but I don't
2 want to be here much more than an hour.

3 MR. BUTLER: Flexible on the lower end.

4 COMMISSIONER JACOBS: Yes. Here is what I think
5 I would like to do. Unless you have an objection, let's
6 do have arguments on the Altos model first. And I take
7 that to be the most substantive issue?

8 MR. BUTLER: I think that is probably right.

9 COMMISSIONER JACOBS: Okay. So let's reserve --
10 let's hold out 15 minutes, we can stretch it to 20 minutes
11 if need be for that one. Is that okay?

12 MR. WRIGHT: We are fine in proceeding with the
13 Altos models, Commissioner.

14 COMMISSIONER JACOBS: Okay. Then let's go to
15 the pro forma issue. Is there much controversy around
16 interrogatories, is that something that is in significant
17 dispute?

18 MR. WRIGHT: I would have to say yes, sir. We
19 object fairly strongly to their request for leave to --
20 their motion to propound additional interrogatories which
21 they propounded after we had already served them.

22 COMMISSIONER JACOBS: Okay. I just wanted to
23 know what --

24 MR. WRIGHT: And I think the issue on the
25 experts responding to interrogatories is also going to be

1 contentious.

2 COMMISSIONER JACOBS: Okay. Why don't we hold
3 those then to the 3rd. Maybe we can combine those two
4 together perhaps. That would be useful.

5 MS. BOWMAN: Commission Jacobs, Jill Bowman for
6 Florida Power Corporation. I think this can be reserved
7 for last, but there is just a very few requests for
8 admissions that are also the subject of one of our motions
9 to compel that I would like to address.

10 COMMISSIONER JACOBS: Okay. That sounds like
11 probably we could hold it until then.

12 MR. WRIGHT: Commissioner, just so I'm clear,
13 you said we would do the pro forma second. Did you mean
14 to include the other information with respect to which we
15 assert confidentiality, the ABB and the Gulfstream
16 information?

17 COMMISSIONER JACOBS: All of that is information
18 contained in the pro forma?

19 MR. WRIGHT: No, sir.

20 COMMISSIONER JACOBS: Because I think those are
21 different documents.

22 MR. BUTLER: They are.

23 MR. WRIGHT: They are different documents. They
24 are all related to our pricing information and our
25 competitively sensitive proprietary business information.

1 COMMISSIONER JACOBS: But there certainly is a
2 privilege.

3 MR. WRIGHT: The privilege is the same, the
4 legal issues will be the same.

5 COMMISSIONER JACOBS: I'm fine rolling those all
6 in if you all are fine. I think that would be fine with
7 me.

8 MR. BUTLER: That's what we would prefer, too.

9 COMMISSIONER JACOBS: Okay. Then that would be
10 great. Did I miss anything? All right. Let's have fun.
11 We'll start here. Now, I'm just going to say per side, I
12 didn't want to hold rebuttal or anything of that nature,
13 but I'm open to that if you guys want to hold tight to
14 that kind of procedure. But I will just give you each
15 your time per side and then we would go on the next issue.
16 Is that a reasonable procedure, or do you absolutely feel
17 the need have rebuttal back?

18 MR. BUTLER: It depends on what they say.

19 COMMISSIONER JACOBS: I just thought of this.
20 On each one of these you had a motion -- let me make sure
21 I have it correct. You had a motion to compel, you had a
22 motion for protective order. I just thought technically
23 each should have an opportunity to present their own
24 motion then there would be a response to that motion.

25 MR. WRIGHT: Split it.

1 COMMISSIONER JACOBS: Yes, that is my thought.
2 I think you can cover -- I want to make sure you have
3 adequate opportunity to cover your ground without getting
4 into all of those technical frailties. And so here is
5 what I will do, we will go ahead and just split the time
6 in half between the two sides and then move on to the next
7 issue, okay?

8 MR. BUTLER: That's fine.

9 COMMISSIONER JACOBS: For this one we'll go
10 ahead and say 15 minutes on this one. So you have seven
11 and a half minutes and you have seven and a half minutes.

12 The next one, the pro forma, could we do it in
13 ten minutes? So you have five minutes per side.

14 MR. BUTLER: I think so.

15 COMMISSIONER JACOBS: Okay. And then we will
16 just kind of work from there. Those two up front I
17 thought we might want to do some time limitation and then
18 if we need to press on we can do that, but let's just
19 start with that as a beginning premise. Is that okay?

20 MR. BUTLER: That's fine.

21 COMMISSIONER JACOBS: Now, are you going to
22 argue, as well?

23 MS. BOWMAN: Yes, Commissioner Jacobs. We had
24 agreed that Florida Power & Light would take the lead on
25 these arguments which are all made by both Florida Power

1 Corporation and Florida Power & Light. I would like an
2 opportunity just to add some comments.

3 COMMISSIONER JACOBS: Okay. That works fine for
4 me if that is okay with you, Mr. Wright.

5 MR. WRIGHT: Well, as long as it is in their
6 block of time it's fine with me.

7 MR. BUTLER: I will just try to finish a minute
8 or two early.

9 COMMISSIONER JACOBS: Okay. I'm going to be
10 flexible a little bit. I want to make sure that we don't
11 close anybody off. I will be a bit flexible to make sure
12 that we cover the ground, that is my main concern here.

13 MS. BOWMAN: Thank you, Commissioner.

14 COMMISSIONER JACOBS: Those are kind of sketchy,
15 but those are the ground rules. And with that --

16 MR. BUTLER: May I proceed?

17 COMMISSIONER JACOBS: You will go first. Go
18 ahead.

19 MR. BUTLER: Thank you, Commissioner. And as
20 noted, this is concerning the question of access to the
21 Altos computer models. OGC has built its case around
22 analyses that its witness Doctor Nesbitt performed using
23 the Altos and NARE models. Unfortunately, so far it has
24 refused to allow either FPL or Power Corp access to those
25 models unless they agree to one of two alternatives; buy a

1 year long standard license costing \$85,000, or view the
2 models under conditions that would have the following
3 really troublesome provisions from our perspective.
4 Require constant supervision of the Altos personnel -- or
5 by Altos personnel of FPL's consultants providing OGC a
6 perfect opportunity to a road map to FPL's trial
7 preparation. To make matters worse, FPL would have to pay
8 OGC for those Altos personnel sitting over their
9 shoulders.

10 Second is to give OGC complete access before
11 trial to all of FPL's work product generated from use of
12 its models and a guarantee that that information would be
13 admissible at trial. Third is to muzzle FPL's
14 constitutional right ever to criticize the Altos models in
15 the future even if they were used against FPL in
16 subsequent adverse proceedings.

17 And, finally, it would require FPL's experts,
18 some of whom live and work within a few miles of Altos'
19 California offices to travel across country here to view
20 the models that could just as easily be viewed in
21 California. And to add insult to that injury, FPL would
22 have to pay for Altos personnel to travel here so that
23 they could babysit the FPL consultants.

24 Now, OGC has conceded that intervenors are
25 entitled to an opportunity to conduct discovery with

1 respect to the Altos models. That is in their first
2 motion for protective order at Page 9. And this is
3 consistent with the Commission's discovery order in the
4 local telecommunications service docket where the
5 prehearing officer you may recall found that equity in
6 this proceeding dictates that AT&T should provide
7 reasonable access to relevant information upon which it
8 bases its filed cost proxy model.

9 All we are asking you to do here today is to
10 direct OGC to arrange for reasonable access. We are not
11 asking for free access and we are not asking for unlimited
12 access. We just want the burden of access to be allocated
13 more fairly than what OGC has been willing to do. And for
14 this we propose two alternatives, either of which is
15 acceptable to FP&L, but both of which unfortunately so far
16 have been rejected by OGC.

17 The first is that FPL would pay \$17,000 for a
18 limited use two-month license under the standard terms of
19 Altos' license agreement. This payment represents 20
20 percent of the 85,000 fee for a year-long license, or
21 basically 10 percent of the annual license fee per month.

22 COMMISSIONER JACOBS: So Altos does offer this
23 kind of a limited license?

24 MR. BUTLER: No. It has not been offered to us
25 to this point.

1 COMMISSIONER JACOBS: Have they offered it to
2 others?

3 MR. BUTLER: I don't know whether they have
4 offered this limited term license or not. They have only
5 offered to us the year long \$85,000.

6 But, OGC's counsel, Mr. Wright, has advised me
7 on January 4 that a short-term license fee of 10 percent
8 per month is what a vendor of an undisclosed but what he
9 characterized as well-known electric utility modeling
10 software company provides. It is also consistent with
11 what Michael Rib, who is Power Corp's Director of Resource
12 Planning, and Matthew Harris, Senior Consulting Project
13 Manager for Henwood Energy Services have attested to in
14 affidavits to the Commission about the availability of
15 short-term licenses to models for these sorts of purposes.

16 Now, FPL proposes that under this short-term
17 license the Altos models would be loaded onto four FPL
18 laptop computers, two of which would be used by FPL and
19 its attorneys, and the other two by FPL's consultants.
20 FPL would agree to pay an additional \$5,000 for the extra
21 two computers, because the standard Altos license
22 agreement only provides for two computers and says that it
23 is like \$2,500 each to get the model loaded on an
24 additional computer. So we would pay the extra \$5,000 to
25 have it loaded onto the extra two computers. FPL's

1 consultants would agree to be bound by all the terms of
2 the license, including the provisions limiting use of the
3 models to this proceeding, and would enter into any
4 reasonable confidentiality and nondisclosure agreement
5 required by Altos.

6 The laptops would be presented to Altos
7 immediately following the conclusion of this proceeding
8 for Altos to unload the models. I understand that there
9 is readily available software that can prevent copying of
10 models while they are residing in the laptop, so copying
11 of models by the consultants or FPL shouldn't be a
12 concern.

13 Finally, FPL would turn over all the model runs
14 that it performed at the time that it unloaded the models,
15 but not during the proceeding where they could be used
16 against us as essentially free discovery. The only
17 modification to Altos' standard license agreement that FPL
18 would require is that there is a provision in it saying
19 that Altos can identify FPL as a licensee. And under the
20 circumstances that doesn't seem appropriate. FPL is
21 licensing the model only because it needs to for the
22 purposes of participating in this proceeding. And the
23 stated reason why that access is important which is to be
24 able to allow different licensees to talk to each other
25 about sharing the model wouldn't apply here. We wouldn't

1 have any plans of sharing it with any other licensee.

2 Alternatively, FPL is prepared to accept --

3 COMMISSIONER JACOBS: Is there some kind of
4 agreement, side agreement that would cover that?

5 MR. BUTLER: I'm sorry, cover what?

6 COMMISSIONER JACOBS: Your proposal? Basically,
7 an agreement on limited disclosure or confidentiality as
8 to your use outside of the scope of your discovery.

9 MR. BUTLER: We have not come to terms of a
10 specific agreement to that. This proposal I just outlined
11 has been presented in outline form to OGC, but hasn't been
12 accepted and hasn't gone farther than that yet. But we
13 certainly would be happy to work something like that out
14 with them if that is what the Commission prefers for us to
15 do.

16 Alternatively to that approach, which is
17 basically using the standard license agreement, just
18 limiting its term and limiting the price under the
19 licensing agreement, FPL is also prepared to accept OGC's
20 proposal for on-site kind of nonpossessory access to the
21 models except for the four extremely onerous requirements
22 that I mentioned earlier that we feel the Commission
23 should not permit.

24 Now, first of all, there is no reason the access
25 need only be here at the Commission's offices instead of

1 at ALTOS's offices in San Jose, California. It could be
2 made available in both places without any hardship to
3 Altos and would be much cheaper for FPL and its
4 consultants.

5 Second, Altos personnel should not be allowed to
6 babysit FPL's consultants while they review the models and
7 conduct test runs .

8 Third, FPL and its consultants should not have
9 to turn over the models runs or other output from their
10 review of the models until after the proceeding is
11 concluded so that it doesn't amount to free discovery.
12 Unless, and let me make one point clear, depending on the
13 circumstances, particularly if the experts who reviewed
14 the models are testifying experts, there is a pretty good
15 argument that their work product, which could include
16 their model runs, may be discoverable under conventional
17 rules of discovery. And if they are, we would accede to
18 their production and discovery.

19 All we want is the same protection that the
20 rules of discovery would normally provide distinguishing
21 between testifying experts on the one hand and
22 nontestifying experts on the other. We just don't want to
23 have to give more access to our work product than what the
24 Rules of Civil Procedure would require.

25 Third is that FPL should be -- or, I'm sorry,

1 fourth and final is that FPL should be allowed to comment
2 on the models and criticize them if appropriate in any
3 forum so long as it does not disclose confidential
4 information about the models in the course of doing so.

5 The only legitimate concern I can see in Altos'
6 condition about not bad-mouthing the models is that FPL or
7 others with access shouldn't be allowed to use that as a
8 vehicle to get confidential information about the models
9 made public. And we would certainly agree not to disclose
10 anything in future comments on the model that would be
11 confidential information about them.

12 We just don't want to be hamstrung to where if
13 we have a proceeding just like this one on another plant
14 next year and the applicant in that situation uses Altos
15 models that we have to sit on our hands and not point out
16 flaws in them at that point in time. So, that is pretty
17 much it.

18 Either of those two approaches is acceptable to
19 FPL. You know, there is a clear need for FPL and Florida
20 Power Corporation to get access to these models to be able
21 to test how they work and how the conclusions were
22 generated. Those models are fundamental to the case that
23 OGC has made in this proceeding, and I think either of the
24 approaches I have suggested would be more than fair to
25 OGC.

1 Thank you.

2 COMMISSIONER JACOBS: Could you walk me through
3 briefly again your on-site option. And what I'm concerned
4 with there is as I understood it, you were willing to --
5 you wanted to do it in California, is that correct? You
6 would be open to doing it in California.

7 MR. BUTLER: Yes, at Altos' office in
8 California. That instead of having to come here to the
9 Commission where they would have set up a computer for it,
10 our people would just go to the Altos office in California
11 to look at the computer.

12 COMMISSIONER JACOBS: But you would want to have
13 a degree of privacy, you would not want --

14 MR. BUTLER: Yes. Basically, we would just go
15 into a room where the computer would be and the computer
16 in the room without having an Altos person sitting in
17 there watching every keystroke to see what we are doing.

18 COMMISSIONER JACOBS: Would you do the same
19 function, you would load it into your laptops there, as
20 well?

21 MR. BUTLER: No, I'm sorry. This would be their
22 laptop. We would use their laptop or their desk top,
23 whatever it is, but use it in their facility. The main
24 difference between the two options, really you just hit on
25 it, is whether we possess the computers or not.

1 In the first option that we would be paying
2 \$17,000 for this license, we would actually possess the
3 computers until the end of the case and then let them
4 unload their models.

5 In the second we don't possess it. All we do is
6 either come here to the Commission or go to Altos' office
7 in California and use their computer rather than getting
8 the stuff loaded onto our own computers.

9 COMMISSIONER JACOBS: Okay, I understand.

10 MS. BOWMAN: Commissioner Jacobs, may I?

11 COMMISSIONER JACOBS: Yes, go ahead.

12 MS. BOWMAN: For Florida Power Corporation, I
13 would just like to say that we are in accord with Florida
14 Power & Light's position. We have not prepared an
15 alternative proposal to the extent that they have, but
16 there have been several exchanges between the parties
17 concerning what we view as the custom and practice in the
18 industry, which is for modeling companies such as Altos to
19 provide limited licenses or limited licensing arrangements
20 for just these kind of circumstances where the party
21 seeking discovery of the model is not interested in using
22 the models for any commercial purpose, but only for the
23 purposes of litigation. We have not been able to make any
24 ground in those regards, although we do think we have
25 suggested a payment of \$17,000 which would be in accord

1 with the industry custom and practice of between 10 and 20
2 percent for the type of use that we are trying to gain
3 here.

4 On the other side for the on-site use, Florida
5 Power Corporation is willing to either go to California or
6 to have that made available to us here at the Public
7 Service Commission. We would agree with Florida Power &
8 Light that the conditions of the OGC's proposal regarding
9 the on-site access to the models is onerous in just a very
10 few points, and if we can take those out of the picture
11 then the remainder of their proposal would be acceptable.
12 And those, again, are the supervision of consultants or
13 experts in doing their work and the agreement that any
14 work that is performed by Florida Power Corporation and/or
15 its consultants would be automatically subject to
16 discovery and admissible in this proceeding.

17 COMMISSIONER JACOBS: I would be interested in
18 your interpretation of the scope of the right, or the
19 scope of access you have a right to get to expert -- to
20 the basis of an expert witness' testimony. And
21 specifically, as I understand, the distinction between
22 what the rules allow and what the rules of evidence allow.

23 MR. BUTLER: Well, you know, I think that your
24 decision in the telecommunications services docket pretty
25 well sums up the tension. You know, you have got on the

1 one hand this question of not having sort of ownership or
2 direct control over the models in question and, therefore,
3 the issue of the extent to which the rules of discovery
4 that would apply if this was an OGC model, you know,
5 govern it at all.

6 But on the other hand, the sort of fundamental
7 issue of fairness about needing access to information that
8 is going to be central to another party's case. And I
9 think that even OGC would concede here that, you know, the
10 Altos models are central to the case. You know, we have
11 been given inputs and outputs, but basically all that is
12 doing is just letting us kind of see how they did their
13 runs. We can't explore, you know, what happens with the
14 models under circumstances other than what it is that, you
15 know, Altos has chosen to present.

16 And I don't know of any legal test, to be honest
17 with you, better than just the reasonable access that you
18 had described in that order. But, you know, reasonable
19 access is important. If we don't get to actually quote,
20 unquote, play with the models, we can't really understand
21 at a level sufficient to adequately critique their case
22 what it is that OGC has used the models to do.

23 So it is, you know, extremely important that we
24 get that access. We have proposed conditions that I think
25 address all of OGC's reasonable concerns about bad things

1 that could happen from our access to it, and it just comes
2 down to kind of an equitable balancing in my mind of, you
3 know, need versus impact. And I think that we have
4 adequately addressed the impact and that the need here in
5 view of centrality of the models to their case is pretty
6 clear.

7 COMMISSIONER JACOBS: Okay. Thank you.
8 Mr. Moyle or Mr. Wright.

9 MR. WRIGHT: Thank you, Commissioner Jacobs.

10 COMMISSIONER JACOBS: They went over, so I'll
11 give you some flexibility in time, as well.

12 MR. WRIGHT: I hope not to need more than seven
13 and a half minutes. We'll give it a shot.

14 This case is very much like the cost of basic
15 local telecommunications service, or at least the
16 discovery dispute in this case is very much like the
17 similar discovery dispute in the cost of basic local
18 telecommunications service docket in which you made a
19 ruling on a similar discovery issue last year.

20 We don't have the models. OGC is not a
21 licensee. No affiliate of OGC is a licensee of any of the
22 models here. One of OGC's distant affiliates has licensed
23 a different version of the gas model, but that is it.
24 Furthermore, these models represent the valuable
25 intellectual property of Altos Management Partners and

1 Market Point, Inc. Market Point, Inc. owns and markets
2 the software platform in which the Altos models run and
3 that software platform is called Market Point trademark.

4 We agree with the movants here and we are a
5 counter movant in that we have moved for a protective
6 order, that the real issue is reasonable access. We
7 submit that we have offered more than reasonable access to
8 these models. By hand we handed counsel for Florida Power
9 Corporation and Florida Power & Light Company on
10 December 7th, two months ago today, a proposed term sheet
11 by which these models would be made available to them and
12 their bonafide employees here at the Public Service
13 Commission on computers maintained here at no licensing
14 fee whatever.

15 To protect Altos and Market Point's interests in
16 their valuable intellectual property, we proposed that if
17 they were to use consultants to review these models and
18 work with them, that Altos would be allowed to have those
19 consultants supervised. In the cost of basic local
20 telecommunications service, or just cost of local service
21 docket, you ruled that the intervenors who sought the
22 intellectual property of AT&T's consultant shall not be
23 permitted to remove the requested information from the
24 consultant's premises.

25 We are concerned, Altos and Market Point are

1 concerned that certain of their competitor consultants
2 could copy down information from the stuff, and frankly
3 it's going to be hard for them not to learn it and know it
4 anyway, but we are concerned they could copy it down and
5 take it away with them. This would be a significant
6 economic loss of Altos' and Market Point's valuable
7 intellectual property. That is why the supervision
8 proposal is in there.

9 Now, subsequent to this, there are -- I will
10 say, I aver to you as a matter of fact that the president
11 of Altos, who is also an officer in Market Point, Doctor
12 Nesbitt, has advised me that there are a couple of
13 consulting companies in particular whom he views as
14 serious competitors, and the disclosure of this
15 information to those competitors would be very sensitive
16 to him.

17 We have offered in January -- I do not remember
18 the date -- but by letter to counsel for FPC and FPL, we
19 have offered to relax the supervision requirement, that is
20 not to even require supervision if Altos were given the
21 authority to screen the consultants. For example, say you
22 can't use Consultant X because they are too serious of a
23 competitor. You can use A, B, C, D, or E, but you can't
24 use X or Y. But the point is that the supervision
25 requirement is in there to protect Altos' valuable

1 information.

2 I will tell you that the starting point for FPC
3 and FPL was that we had to give the information away for
4 free and that has never been the practice here. In every
5 case I have been in or known about where they used PROMOD,
6 or PROSCREEN, or COUGAR (phonetic), or anything else, and
7 this actually extends to civil litigation in which I
8 personally have been involved, they have said we object,
9 we will not give you discovery of these models until you
10 demonstrate to our satisfaction that you have the license,
11 and we have taken the same position here. And further, we
12 have moved for a protective order.

13 The gist of their argument that Altos should be
14 made to turn this over for a proposed license fee of
15 \$17,000 is really just a challenge to the reasonableness
16 of Altos' standard commercial fees. The terms that we
17 have proposed to them, if they want to license the model
18 and have the basically unlimited use and allow their
19 consultants to use it and whatever that goes with that, is
20 the standard commercial terms and conditions under which
21 Altos and Market Point make their products available. I
22 am advised by Altos and Market Point that they have not
23 offered any limited term licenses to others.

24 As to the location of provision of models, we
25 frankly had not focused on that. I doubt that that would

1 really be a problem. I think the bigger issue is the
2 supervision issue. Regarding the proposal that they be
3 required to turn over all of their interim runs, we
4 believe that that is -- it actually should be fairly
5 discoverable in any event and we just want assurance that
6 we won't get in another discovery fight on that that will
7 take us past the filing date.

8 I'm not saying that their consultants would do
9 this or not, but I have heard from other attorneys who
10 practice in contentious litigation that there is a
11 practice of having one set of persons do a bunch of runs
12 who are nontestifying experts, and from whom discovery is
13 most difficult, and screen those runs so that the only
14 thing that the testifying expert ever sees is something
15 that suits their theory of the case.

16 And given the severe restrictions provided in
17 the Rules of Civil Procedure of discovery of nontestifying
18 experts, frankly we are concerned about exactly that
19 scenario being played out here.

20 Finally, as regards the proposed restriction in
21 our no license fee proposal, and that is that they not be
22 allowed -- that they be restricted from bad-mouthing the
23 Altos models, we have several concerns. Frankly, Altos
24 has a competitive concern that for whatever reason those
25 associated on the other side might see fit to disparage

1 the Altos models to other potential clients, and potential
2 colleagues or existing colleagues of Altos. And that is
3 what we are trying to protect against.

4 Frankly, I think Mr. Butler's hypothesized
5 example that next year in a proceeding in which the Altos
6 model was again at issue they wouldn't be able to talk
7 about it is off base. We have not in any way proposed
8 that they be restricted from criticizing the model on the
9 record in this case. We made it clear. They can say
10 whatever they want to on the record in this case where we
11 have the protection of being able to cross-examine them
12 and find out if there really is a basis for their
13 criticism.

14 Once the case is over, if they are out there
15 talking to another merchant plant developer, or if their
16 consultant is talking to another merchant plant developer
17 and says, you know, that Altos model isn't any good, dah,
18 dah, dah, Altos would have no recourse. It is something
19 that would be very difficult to detect in the first place
20 and would have no recourse.

21 COMMISSIONER JACOBS: That was the question I
22 posed earlier. Would this be something that could be
23 subject to a nondisclosure agreement?

24 MR. WRIGHT: Well, I think it would be. The
25 problem is we are trying to get some protection on the

1 front end of exactly that. That is what we have proposed.
2 You know, not only nondisclosure, but nondisparagement
3 outside the record of this case. If the Altos model is on
4 the record in another merchant proceeding next year, I
5 would think we would probably be going forward on the same
6 terms. I wouldn't anticipate Doctor Nesbitt changing his
7 mind about the terms. It would be at issue in the record
8 there and I would expect that Altos and Market Point whose
9 issue this really is, would be amenable to similarly
10 allowing discussion, criticism, critique, what have you of
11 the models on the record in that proceeding where they
12 would have the protection of being able to cross-examine
13 and challenge such criticism.

14 In closing, Your Honor, two more things. One,
15 we have turned over all the model runs that were done in
16 connection with this case. At least to the best of my
17 knowledge that is true. We turned over a diskette or a
18 zip disk, actually, containing 63 megabytes and thousands
19 of pages of spreadsheets for all the runs here.

20 And, finally, again, this comes down to
21 reasonable access. We submit to you that the standard
22 commercial terms and conditions offered by Altos under
23 which it licenses its models to everybody, anybody in the
24 world, are reasonable and we submit to you that within the
25 principles articulated in the cost of local service

1 discovery order cited in our pleadings that our proposal
2 for a no license fee on-site availability to bonafide
3 employees with certain restrictions applicable to
4 potential competitive consultants more than satisfies the
5 reasonable access requirements enunciated in your order.
6 And accordingly, we think our motion for protective order
7 ought to be granted and their motion to compel ought to be
8 denied.

9 COMMISSIONER JACOBS: Very well. I will ask you
10 the same question I asked. How do you see the tension
11 then -- the rules give -- in my mind they give more
12 flexibility in terms of allowing discovery of experts and
13 on the face of the statute. And, I'm sorry, I didn't give
14 you the statute. I realized that after I had asked you.
15 It was 90.708 -- 705, I'm sorry, which provides what the
16 terms are for discovery for an expert witness.

17 MR. WRIGHT: Uh-huh.

18 COMMISSIONER JACOBS: I'm sorry, for disclosure.
19 Not discovery, disclosure. There seems to be that tension
20 there. How would you evaluate that?

21 MR. WRIGHT: My recollection, and Mr. Keating
22 appears to have it handy, my recollection is that that
23 statute says that an expert witness shall reveal and
24 provide testimony regarding his -- the basis for his
25 opinions and factual statements given in his testimony

1 when called upon to do so. And by the rules of discovery
2 of experts, basically there is a very limited number of
3 interrogatories you can ask of experts relating to their
4 identification. You can ask for production of documents
5 and you can take their deposition. I would see that
6 really being resolved by their being able to look over the
7 expert's shoulders during the deposition as occurred for
8 at least a day and a half, I think a little bit longer in
9 the Duke/New Smyrna case, in which Doctor Nesbitt was also
10 a witness, and ask questions about the model with Doctor
11 Nesbitt going forward. So I don't really see a problem
12 there, Your Honor.

13 COMMISSIONER JACOBS: Let me go to their on-site
14 option.

15 MR. WRIGHT: Yes, sir.

16 COMMISSIONER JACOBS: I take it you are opposed
17 to that?

18 MR. WRIGHT: I can't say whether I am or not. I
19 think I saw it in passing, but frankly with conversations
20 with opposing counsel, I had really been focusing on the
21 nondisparagement provision, and the fee provision, and the
22 supervision of consultants provision. And, frankly, I
23 have not discussed that with Doctor Nesbitt. I would be
24 willing to do so. I don't see that as being a real
25 problem myself. I would have to confer with Doctor

1 Nesbitt, but I do not see that as being a problem, sir.

2 COMMISSIONER JACOBS: Okay. And as I
3 understand -- now, how do you respond to the contention
4 raised by the movants that there is a standard industry
5 practice of allowing these limited licenses?

6 MR. WRIGHT: I can't say that that is a standard
7 industry practice or not, Commissioner Jacobs. I know
8 that one company that I called said that they do that on
9 the basis of about 10 percent of the annual licensing fee
10 per month. I can tell that you in litigation in which we
11 were involved against Florida Power Corporation, we had to
12 pay for a six month license because that was the minimum
13 that the vendor in that instance, ABB, would give us. And
14 we had to pay \$55,000 for it. So I can't agree that that
15 is the custom and practice in the industry. It sure
16 wasn't when I was on the other side of it two years ago.

17 COMMISSIONER JACOBS: And I don't -- we don't
18 have jurisdiction over that party anyway here, so --

19 MR. WRIGHT: Not directly. Well, I think the
20 principles you set forth in the cost of local service
21 order were fine. You said equity requires that they be
22 given reasonable access to this third party vendor's
23 information. And you provided for protections where they
24 wouldn't be allowed to take it away. We think what we
25 have proposed entirely satisfies the principles

1 articulated in that order. It provides reasonable access.
2 They could have had access since the second week of
3 December to these models here in the Gunter Building. We
4 believe we have offered reasonable access. No license
5 fee, and as of mid-January or so we even offered, subject
6 to Altos' ability to screen the consultants to prevent
7 Altos' and Market Point's most serious competitors from
8 seeing the information unsupervised.

9 COMMISSIONER JACOBS: All right. So much for
10 that one. That takes care of the issue of the model.

11 I'm sorry, I didn't leave any time for staff.
12 Did you have any --

13 MR. KEATING: I didn't plan to join in the
14 argument. I don't have a horse in this race.

15 COMMISSIONER JACOBS: Very well. Then let's
16 move on to the pro forma issue. I don't know whether it
17 would be worthwhile -- it sounds like this issue may be
18 more to your leading off, Mr. Wright, than the companies?

19 MR. BUTLER: I think that we are the ones who
20 are seeking the information and moving for compelling it.
21 It seems like it makes sense for us to be the ones to tell
22 you why we ought to get it and them to tell you why they
23 don't think we should have it. I mean, if you want to
24 reverse it, that's fine, but it is in many respects in the
25 same posture as the model issue.

1 COMMISSIONER JACOBS: We will proceed as we
2 have.

3 MR. BUTLER: We have kind of bundled together
4 several things where the point is a claim by OGC that they
5 will not produce either answers to interrogatories or
6 documents because they are confidential business
7 information. And there are four categories here of these.
8 OGC has objected to providing any answer to Interrogatory
9 Number 82 concerning the capital costs for the project or
10 the cost of capital for the project. Similarly, in
11 response to Interrogatory Number 83, OGC has given the
12 total direct construction costs for the project, but has
13 refused to disclose either the development costs or the
14 total, the construction plus development costs. And,
15 finally, in response to Interrogatory Number 1, OGC has
16 refused to provide detail on its direct project
17 construction cost estimate of \$190 million. That is sort
18 of the first of these areas.

19 The second is, in response to Request for
20 Production Number 8, OGC has provided a document called a
21 precedent agreement with Gulfstream Natural Gas System,
22 but has redacted from it information on the conditions
23 under which OGC is entitled to the benefits of that
24 agreement, and certain information on gas transportation
25 prices that are included within the agreement or actually

1 within a second agreement that is attached to it.

2 The third category is in response to Request for
3 Production Number 43, OGC has refused to produce a
4 pro forma analysis of the project and related information
5 that were prepared by PG&E.

6 COMMISSIONER JACOBS: I'm sorry, say it again,
7 what information?

8 MR. BUTLER: Refused. To produce a pro forma
9 analysis of the project and related information prepared
10 by PG&E Generating, that is the pro forma that you were
11 referring to initially.

12 And then finally in response to Request for
13 Production Number 24 and 26, concerning operational
14 reliability and availability and maintenance schedules for
15 the project, OGC has provided a generic ABB reference
16 guide for the GT 24 gas turbines that it intends to use at
17 the project, but it states in its response that the
18 responsive documents to that request, quote, include,
19 unquote, the reference guide. And the answer doesn't
20 commit whether there are or aren't other responsive
21 documents. Those are kind of the four categories of
22 documents and information, interrogatories to which this
23 confidentiality argument applies.

24 COMMISSIONER JACOBS: So on Item Number 3 --

25 MR. BUTLER: Uh-huh.

1 COMMISSIONER JACOBS: -- essentially what you
2 are saying is that there are some specifications which
3 might go to the operational limits of this equipment which
4 you think you need and you don't have.

5 MR. BUTLER: Yes. Actually that was category
6 four. But, yes, the ABB Reference Guide is kind of a
7 generic publicly, or not publicly available, but generic
8 to all projects reference guide that ABB generates. We
9 have been provided that. We suspect that there may be
10 some project-specific bid-related documents that OGC has
11 in its possession but has not provided because of
12 confidentiality assertions with respect to it.

13 COMMISSIONER JACOBS: Okay.

14 MR. BUTLER: In attempting to defend its refusal
15 to provide the projects cost of capital or either
16 development or actual -- I'm sorry, total project capital
17 costs, OGC asserts that disclosure of this information
18 would adversely effect its competitive position with
19 respect to affiliates of FPL, among others.

20 Similarly, OGC argues that disclosure of the
21 redacted conditions precedent and the pricing information
22 in the Gulfstream Natural Gas Systems contract would harm
23 Gulfstream's and OGC's competitive positions vis-a-vis
24 various competitors and customers which could include FPL
25 and affiliates of FPL.

1 Finally, OGC has argued that the detail behind
2 the 190 million direct construction cost estimate derives
3 from recent bids that OGC has received, and that those
4 bids are claimed to be confidential. FPL doesn't
5 necessarily accept OGC's assertions of adverse competitive
6 impacts or the claim of confidentiality for the bids that
7 were received, but we are really not here today to dispute
8 those assertions.

9 The important point that we are here for today
10 is that even if the asserted adverse impacts were true,
11 that those would exist, they are not reasons to foreclose
12 all access to the requested information.

13 You know, cost information is essential in
14 review of OGC's application. You know, the Commission's
15 Rule 25- 22.0813 specifically recognizes the importance of
16 cost information in a need determination proceeding such
17 as this where the petition is not based exclusively on
18 asserted need for capacity. FPL's Interrogatories 82 and
19 83 and its Request for Production Number 8 are simply
20 attempting to discern cost information that according to
21 Rule 22.081 should have been included in OGC's petition in
22 the first place.

23 The PGE Generating pro forma analysis of the
24 project is also relevant to a full review of the project
25 in this proceeding. Certainly an analysis of the

1 project's economic viability by an entity that will be
2 directly or indirectly paying for the project is a very
3 useful measure of what the actual project economics would
4 be.

5 By the same token, you know, whether the inputs
6 to and the results of the analysis that PG&E Generating
7 performed comport with Doctor Nesbitt's analysis of
8 economic viability is a very useful way of comparing and
9 measuring the reasonableness of Doctor Nesbitt's analysis.
10 It is no answer to suggest, as OGC has done, that FPL can
11 makes its own estimates of those inputs to the analyses.
12 What matters is how the applicant itself has analyzed its
13 own project.

14 As to the detail behind OGC's estimated direct
15 construction costs, OGC's explanation for why it will not
16 disclose that information itself provides a compelling
17 reason for FPL to need to see it. OGC admits that what it
18 has done is to take bids and then to adjust those bids to,
19 quote, reflect project-specific differences, quote.

20 So, in other words, they haven't actually used
21 the bids, or haven't necessarily used the bid numbers
22 they received, they have adjusted them to do something,
23 presumably to reflect what they consider to be more
24 appropriate figures for the project at hand. But, it is
25 certainly very relevant to FPL and important to this

1 proceeding to be able to see what it was that, you know,
2 OGC actually got as bids, and what adjustments it made.
3 Otherwise we are just having to take their word for it
4 that those adjustments were reasonable and appropriate.

5 Without access to the detail and OGC's specific
6 rationale for that detail, FPL and the Commission really
7 can't meaningfully assess the reasonableness of that
8 construction cost estimate.

9 Where disclosure of confidential business
10 information is essential to the proceedings, disclosure
11 must be allowed with whatever protections may be fashioned
12 to avoid unnecessary hardship to the disclosing party.
13 That is the holding in Goodyear Tire and Rubber Company v.
14 Cooley, 359 So.2d 1200, which both of us have cited for
15 different reasons.

16 In order to accommodate OGC's stated concerns
17 over disclosing the requested cost information and pro
18 forma analyses to FPL or its affiliates, what we propose
19 to you is to limit disclosure to FPL's outside counsels
20 and its outside consultants with their entering into an
21 agreement with OGC and whoever else it needs to be, that
22 they will not further disclose that information to
23 personnel at FPL or its affiliates. And this would fully
24 address OGC's stated concern, which is that this
25 information gets into the hands of FPL or FPL affiliate

1 personnel who are competitors of OGC, and that, you know,
2 those people can use it against OGC's competitive
3 interests.

4 None of us sitting here at the table plan on
5 building any merchant plants soon. So, you know, if we
6 just have the information in our bounds not to disclose it
7 to FPL or its affiliates, there really should not be a
8 valid concern about that disclosure.

9 Finally, I would like to --

10 COMMISSIONER JACOBS: That was a point, but
11 finish, I will ask when you are done.

12 MR. BUTLER: No, go ahead. Sorry.

13 COMMISSIONER JACOBS: The point that was raised,
14 which is an interesting one, is that they are not
15 necessarily going to be concerned about the lawyers or
16 even the employees of your respective companies. Their
17 concern is that your contractors, i.e., the consultants
18 that you may contract with who are very active in this
19 community of expertise will have a natural incentive to
20 inquire in that.

21 MR. BUTLER: Well, interestingly, I think that
22 the argument or the stated concern is the opposite in what
23 we were talking about on the Altos models to what we are
24 talking being here. There they are not all that concerned
25 about FPL personnel seeing the models, because they don't

1 view, Altos doesn't view the FPL personnel as their
2 competitors. They view some of these outside consultants.

3 Here, though, on this issue that we are talking
4 about now, I think it is has flipped. Here I don't think
5 there is any valid concern that telling, you know, the
6 attorneys representing FPL or these kind of economic
7 modeling consultants that FPL may have as outside
8 consultants is going to hurt the competitive interests of
9 OGC, or of Gulfstream Natural Gas, or ABB. Their concern
10 is that this information gets to FPL or its affiliates and
11 that those people will use it either to craft a better
12 competitive position or in future bargaining with those
13 companies or something like that. So here the fix we are
14 proposing is kind of the opposite fix, it is to not let
15 the FPL personnel have it, and to, instead, restrict it
16 only to the attorneys and the consultants.

17 COMMISSIONER JACOBS: Got you.

18 MR. BUTLER: Finally, you know, turning to the
19 last of my categories regarding the ABB reference guide
20 that we have been provided and the statement in their
21 response that responsive documents include but are not
22 said to be limited to the reference guide. Frankly, we
23 don't know what else, if anything, it is that ABB has -- I
24 mean, I'm sorry, that OGC has that would be responsive to
25 this request. They have not identified to us specific

1 documents that are responsive to this particular request,
2 but have been withheld because of a claim of
3 confidentiality or other basis for nondisclosure.

4 We just have this ambiguous statement that the
5 responsive documents include this, and therefore
6 presumably might include something else. I would be a
7 little surprised if OGC does not have something beyond
8 just the reference guide. Because as I mentioned at the
9 outset, that is really a very generic document, not
10 project specific, and I would suspect that they have
11 gotten more specific understandings with ABB than just
12 that generic reference guide.

13 If not, let them tell us that they have not, and
14 we will just go to trial based on that understanding. But
15 if they have other documents, I think at this point the
16 only fair thing to do is to have them produce those
17 documents to us. And we would certainly be willing to
18 enter into appropriate nondisclosure agreements. But it
19 is too late now to have them today start identifying those
20 documents, and then having another one of these hearings
21 somewhere, you know, down the rode where we and they can't
22 agree on whether those documents should be produced to us.

23 They are responsive, they had a burden to come
24 forward with saying what they were and then justify good
25 cause why they should not be produced. We don't know

1 anything about them. And at this point the only thing
2 fair to do is to produce them to us. Thank you.

3 MS. BOWMAN: Commissioner Jacobs, if I can add
4 some additional comments.

5 COMMISSIONER JACOBS: Okay. Keep me in line.
6 Go ahead.

7 MS. BOWMAN: Florida Power would like to address
8 substantively the same categories of documents. OGC has
9 refused to produce documents which are the subjects of
10 Florida Power's Production Request Number 7, 9, 16, 17,
11 18, 24, and 38, which encompass the pro forma and
12 August 18th memorandum which OGC has then countered with a
13 motion for protective order.

14 Taking in reverse order the documents discussed
15 by FPL's counsel, it is my understand that any remaining
16 ABB documents and/or Gulfstream documents are being
17 withheld by OGC based on their contention that they have
18 entered into confidentiality agreements with those
19 companies relating to the nondisclosure of various
20 information which those companies consider to be
21 confidential.

22 I would like to just point out to you,
23 Commissioner Jacobs, that in the precedent agreement which
24 has been attached to Mr. Karloff's testimony, the
25 precedent agreement between Gulfstream and OGC --

1 COMMISSIONER JACOBS: This is the gas.

2 MS. BOWMAN: Yes, this is the gas agreement.

3 Gulfstream indicates an exception to the nondisclosure
4 agreement that OGC has entered into which is that if it
5 becomes necessary to provide information in order to
6 obtain a regulatory certification, that that would be
7 appropriate. And it suggests certain protections be
8 provided in those circumstances and asks OGC to request
9 those protections.

10 We think that those protections would be
11 appropriate as to all of these documents, and basically it
12 is a two-fold protection. That OGC would produce the ABB
13 and Gulfstream documents and not be in violation of any
14 confidentiality agreements if the disclosure of those
15 documents was limited to persons necessary for use only in
16 the litigation and not for any commercial purpose. In
17 other words, I would include in addition to what FPL has
18 offered as an alternative protection not just consultants
19 and counsel in this case, but also any company personnel
20 that would be necessary to decision-making in connection
21 with the litigation. And certainly there could be certain
22 provisions relating to the disclosure of the personnel to
23 which that information had been provided.

24 Moving on to the documents that OGC is
25 contending it need not produce because they are simply

1 confidential or proprietary information, we would suggest
2 that OGC, except with respect to their pro forma, the PG&E
3 pro forma and the August 18 memorandum, which are the only
4 two documents which are the subject of their motion for
5 protective order have not met the standard to protect any
6 of the other documents which they claim are confidential.
7 And that is they have not given you sufficient information
8 to determine whether those records ought to be protected
9 and certainly haven't given us sufficient information to
10 determine whether we ought to agree that they should be
11 protected.

12 What they have done is they have just simply
13 listed them in response to production requests, identified
14 letter of such and such a date between OGC and ABB
15 confidential proprietary business information. And I
16 would suggest that that is insufficient under both the
17 Commission's rules and the case law to meet what they have
18 to put before you, which is a showing that these documents
19 are entitled to protection. And they have not come
20 forward with that showing as to any of the documents
21 except they arguably have with regard to the pro forma and
22 the August 18th memorandum which are the subject of the
23 protective order and which is not all-inclusive of the
24 documents that they are claiming are proprietary and
25 withholding on that basis.

1 I don't think it is appropriate for them to
2 simply be able to object and say that these documents
3 which we have cursorily identified are proprietary and
4 confidential and withhold them and give you no basis to
5 make a finding of fact that they are, in fact, entitled to
6 protection, and then have an order entered that says they
7 don't have to disclose them at all.

8 I think that the proper procedure would have
9 been for them to identify the reasons that those
10 constitute trade secrets or confidential proprietary
11 information and then to permit a rebuttal of that. And
12 then for you to be able to make a finding of fact in that
13 regard.

14 And, therefore, except as to the documents that
15 are subject to the motion for protective order, we would
16 contend that there would be no issue with regard to
17 whether those ought to be produced at this time. They
18 simply ought to be produced because they haven't come
19 forward and made the proper showing to you that these are
20 entitled to protection.

21 As to the other documents, I think it is clear
22 under the law that even if those documents are entitled to
23 protection, they ought to be given only limited protection
24 when there is a showing that there is a reasonable
25 necessity for those documents in the litigation.

1 And I think that the proposal offered by Florida
2 Power & Light, which provides an extensive amount of
3 protection to disclosure outside of this litigation, and
4 the alternative, which I have suggested, which only adds
5 those persons in the companies necessary to the
6 decision-making in the litigation is sufficient
7 protection, and is what would usually happen in this
8 circumstance.

9 Very rarely should discoverable information be
10 completely not subject to any kind of discovery.
11 Certainly there are kinds of information that everybody
12 believes ought to be entitled to protection. That doesn't
13 mean we don't get to see it. It means that we don't
14 disclose it, we use it only in this litigation, and that
15 we limit the personnel that has access to that
16 information, and that is adequate protection.

17 What it doesn't mean is that they get to make
18 allegations, and then when we go and ask them to produce
19 the documents that are the basis of those allegations,
20 they get to say, no, those are proprietary and
21 confidential, and we don't have to show them to you. You
22 just have to trust us that our allegations are accurate.

23 And I would just suggest that we have the right
24 to test those allegations. And we have the right to
25 access to those supporting documents, and that there are

1 protections available that can be put into place that
2 would serve those purposes adequately, and that do not
3 require you to make a decision that we either do or we
4 don't get them absolutely.

5 COMMISSIONER JACOBS: Very well. Mr. Wright, I
6 gave them substantial leeway, so I will afford you the
7 same.

8 MR. WRIGHT: I will be as quick as I can, Your
9 Honor. The documents that are at issue here are, I
10 believe, a document identified -- we have identified all
11 of these documents to them. They have made some
12 statements to the effect that we haven't identified
13 documents, but we have. We have identified all known
14 documents known to us and our clients that would be
15 responsive to their production requests.

16 The documents at issue here are the PG&E
17 Generating pro forma, an August 18, 1999 memorandum, a
18 June 8th, 1999 ABB bid summary, an adjustment sheet for
19 the Okeechobee Generating Project relative to the
20 June 8th, 1999 ABB bid summary which was related to a
21 different project as indicated in our papers. The
22 estimated cost for OGC was derived from that adjusted for
23 project-specific conditions here.

24 COMMISSIONER JACOBS: And that goes into the
25 pro forma analysis, those bids of third parties?

1 MR. WRIGHT: Here is the fact as I understand
2 it, Commissioner Jacobs. OGC has not received a bid, per
3 se, for this, for this project. They have received a bid
4 for another project.

5 COMMISSIONER JACOBS: I understand.

6 MR. WRIGHT: Of identical configuration. The
7 same, what we call two-on-two configuration of ABB GT 24
8 combined cycle gas-fired power plants, and it has been
9 adjusted to reflect Florida conditions at the Okeechobee
10 site.

11 COMMISSIONER JACOBS: I got you.

12 MR. WRIGHT: The last of the documents at issue
13 here is the unredacted precedent agreement between OGC and
14 Gulfstream Natural Gas System, our gas transporter.

15 Just to over, so I covered the fact that we have
16 identified all documents. Similarly, I will tell you that
17 the unredacted precedent agreement is regarded as
18 confidential proprietary business information by both OGC
19 and Gulfstream and is the subject of a confidentiality
20 agreement as between OGC and Gulfstream.

21 Similarly, the detailed cost information in the
22 ABB bid summary is regarded as confidential proprietary
23 business information by both OGC and ABB, and is also the
24 subject of a confidentiality agreement as between ABB and
25 OGC or PG&E Generating or both. The pro forma is an

1 internal PG&E Generating document. The memorandum is
2 similarly an internal PG&E Generating document.

3 In the previous -- I will start here. In the
4 previous conversation you asked what the tension was.
5 Here is the tension in this situation. These documents
6 are highly sensitive, competitively sensitive,
7 confidential proprietary business information that we and
8 our gas transportation supplier, Gulfstream, and our
9 anticipated equipment vendor, ABB, regard as such and
10 regard as trade secrets.

11 This information is information that is
12 disclosed basically to no one outside of these. With
13 respect to the pro forma, neither PG&E Generating or OGC
14 or any affiliate thereof discloses that pro forma to the
15 investment bankers or anybody else. It is an internal
16 highly secret document.

17 It contains extremely sensitive, competitively
18 sensitive information including but not limited to PG&E
19 Generating's what we call forward price curves for energy
20 and capacity. And if I can suggest maybe you visualize
21 this, it's a set of spreadsheets. It is a set of
22 spreadsheets that shows various data and then results
23 based on that data. It contains forward price curves, and
24 by that we mean the projections year-by-year of what the
25 prices for gas are going to be, what the prices for

1 electricity are going to be.

2 COMMISSIONER JACOBS: Those are industry, they
3 conform with industry assumptions and industry
4 standards, do they not? And I'm not trying to get you to
5 go to a place where you don't want to go.

6 MR. MOYLE: Can I just jump in for a second? I
7 would say that they don't. What we are talking about is
8 stuff that is unique to PG&E Generating. I mean, they may
9 have an assumption that is different than what FP&L has or
10 what some other company, that is why they are so
11 sensitive.

12 I mean, to use an analogy like a law firm, what
13 we are being asked for are what is your billing rate, how
14 much do you pay your paralegals, your secretary, all of
15 this very, very sensitive information that just by the
16 very nature of we have got a bunch of lawyers in the room
17 today shows how intense this competition is.

18 I mean, we are going to be talking about prices
19 in the wholesale energy market. This information helps
20 you figure out your price. It would do tremendous damage
21 to us to have to disclose this. And that is in response
22 to your question about is it different. It shows our
23 thinking as to what we think future prices are going to
24 be.

25 COMMISSIONER JACOBS: Okay.

1 MR. WRIGHT: It is information developed
2 internally for the competitive purpose of evaluating
3 markets and potential projects in markets. It is
4 nationwide. It would be susceptible to being used to
5 identify similar cost information and pricing information
6 for every project that PG&E Generating would be developing
7 in the United States. It includes also costs of capital,
8 rates of return and net revenue projections.

9 And by the way, to let you know how secret this
10 is, and this is kind of by way of responding to your
11 question of does it conform to industry standards, I
12 haven't seen it. Mr. Moyle hasn't seen it. Mr. LaVia
13 hasn't seen it. This is a highly secret, highly
14 competitively sensitive document. It also contains
15 information that goes to the very core of how PG&E
16 Generating makes its business decisions. The tension --
17 and accordingly, we assert the trade secret privilege
18 provided by the Florida Evidence Code to protect this
19 information.

20 I will tell you that trade secret privilege may
21 be overcome as a matter of law if the party seeking that
22 information can show a reasonable need. We don't believe
23 that either FPL, or FPC, or TECO can show a reasonable
24 need. The information that we are talking about is
25 similar to information developed by others. But every

1 company, whether it is Duke, or FP&L Energy, or TECO Power
2 Services, or Progress Energy Corp, or CSW Energy, or
3 anybody else has their own take on what is commonly called
4 in the industry, Commissioner, the forward price curve.
5 And it is big news and it is secret. And it is one of the
6 key factors that determines whether one wants to
7 participate in a market and how one evaluates the
8 potential in that market.

9 FPL, I bet, knows as much -- has as much basic
10 information about the Florida wholesale power market as
11 PG&E Generating does. They can develop their own forward
12 price curve. I would frankly be surprised if the haven't.
13 FPL has recently developed and is proposing to develop not
14 only Greenfield gas-fired combined cycle units, but
15 repowering gas-fired combined cycle units. FPL Energy is
16 developing gas-fired combined cycle power plants in at
17 least four states, Texas, Washington, Massachusetts, and
18 Pennsylvania that I know. They know a lot about what
19 equipment costs, they can make informed decisions about
20 potential rates of return and so on.

21 And my point is this. They don't need this
22 information if their purpose is to test the validity of
23 the evidence upon which we have based our base. That, in
24 fact, is Doctor Nesbitt's testimony and Doctor Nesbitt's
25 analyses. If they want to test the validity and challenge

1 the validity of our affirmative case -- we have got a
2 burden, our burden is to put on competent substantial
3 evidence as to all of the factors in the statutes. We
4 have done that. We have put on extensive evidence
5 regarding the economic viability of this project, where it
6 will fall in Florida's protection supply stack, and so on
7 based on Doctor Nesbitt's analyses.

8 If they want to challenge that -- and that is
9 our case in chief as to cost-effectiveness of this project
10 in addition to our conceptual, if you will, position that
11 since power purchases will only be made when it is less
12 expensive than another alternative, it has got to be
13 cost-effective to the ratepayers that you are concerned
14 with. But if they want to test that, they have got all
15 the information they need to test it.

16 Accordingly, we don't believe they meet the
17 reasonable necessity test of overcoming the protection
18 accorded the trade secret privilege. And the trade secret
19 privilege does indeed extend to requiring or providing the
20 provision by the tribunal that discovery not be had at
21 all. In Federal Deposit Insurance Corp v. Balkaney
22 (phonetic), quoting another case, Hollywood Beach Hotel
23 and Gulf Club v. Gilliland, the court stated, "The rule
24 that allows a party to request production of its
25 opponent's records is in no sense designed to afford a

1 litigant an avenue to pry into his adversary's business or
2 go on a fishing expedition to uncover business methods,
3 confidential relations, or other facts pertaining to the
4 business."

5 And whether their real intent is to be on a
6 fishing expedition, I know that language is somewhat
7 inflammatory, or not, the effect would be the same. The
8 effect would be to allow them to pry into my client's
9 business, to uncover their confidential relations, to
10 uncover their secrets, their trade secrets, their valuable
11 intellectual property and other facts known to them
12 pertaining to their business.

13 The analysis as to ABB extends somewhat further.
14 We don't want our competitors to know what we are paying
15 for our turbines and the details of our -- the components
16 of our construction costs, and neither does ABB. When
17 they go to negotiate with FPL, or TECO Power Services, or
18 FPL Energy, or anybody else, they don't want to go into
19 those negotiations knowing that they have somehow found
20 out what is being paid as between them and another client.

21 And similarly with respect to the Gulfstream
22 precedent agreement, the pricing terms of that agreement
23 are individually negotiated between Gulfstream and each
24 potential shipper, in this case OGC. The conditions
25 precedent are not standardized conditions precedent. They

1 are individually negotiated. And the future service
2 options are similarly individually negotiated. They are
3 secret as to PG&E and our future service options as to
4 what we have to do in order to trigger the other
5 performance obligations under the contract. And certainly
6 the pricing is very sensitive and very secret as to us,
7 and similarly with respect to Gulfstream, and we have
8 explained this in our papers.

9 Gulfstream doesn't want to go negotiate with FPL
10 or with anybody else if they know what they have agreed to
11 charge OGC for gas shipment. So the tension is the
12 tension between protecting our interests and our trade
13 secrets versus an asserted reasonable necessity for this
14 information. And we assert to you they don't have and
15 can't show that reasonable necessity.

16 COMMISSIONER JACOBS: Okay.

17 MR. WRIGHT: The one other document is this
18 August 8th memorandum. It contains a fair amount of
19 information relating to other projects outside the state.
20 And the movants have indicated they are willing to not see
21 any of that information. It will be kind of hard to take
22 it out, and it also relates to our pricing strategy. I
23 think in one of the motions they have asked for an
24 in camera review of that, and that might be something as
25 to that document that we could accommodate.

1 Let me just make sure I have gotten everything I
2 wanted to say. I think that concludes my argument. Thank
3 you.

4 COMMISSIONER JACOBS: Excuse me just a minute.

5 MR. WRIGHT: Let me make one more point, I found
6 another note. I will be quick.

7 COMMISSIONER JACOBS: Sure.

8 MR. WRIGHT: Thank you. Following up on a
9 comment you made earlier in this discussion, the
10 disclosure to any of the intervenor's outside consultants
11 would potentially be disastrous to us. The disclosure of
12 our forward price curves to an outside consultant who is
13 working for another merchant developer somewhere in -- you
14 know, I'm familiar with this business, and I know a lot of
15 the consultants are doing so, of our forward price curves,
16 or hurdle rate, our cost assumptions, would create an
17 untenable situation for the consultant because you can't
18 unknow or unlearn something that you know or have learned.

19 And from our perspective it would be virtually
20 impossible to police. I mean, you have got some synapses
21 in the consultants brain that says their hurdle rate is
22 whatever it is, some number. And, you know, that just
23 might color the way the person thinks about it. And if
24 they came into possession of the documents you never know
25 what is going happen. It is a real concern. Things get

1 out by accident. If they don't have them, they can't get
2 out.

3 COMMISSIONER JACOBS: I want to do something
4 real briefly. I was thinking about cutting the time
5 short, but if you would, I want to give you -- I want to
6 ask you a question and I will give you a brief opportunity
7 to respond. Actually, I'm going to ask you to respond to
8 a point that they raised. That being that you have the
9 essence -- in your own institutional knowledge and in your
10 internal knowledge have the essence of background and fact
11 that you should need to be able to challenge any position
12 that they would raise without access to the highly
13 sensitive data -- let me not characterize it as that -- to
14 the sensitive data as he characterizes it.

15 MR. BUTLER: What we have is information that
16 FPL or its affiliates would use for its own analyses.
17 What we want to see is what the applicant in this
18 proceeding actually used or should have actually used in
19 analyzing its own project. You know, those may or may not
20 be the same. We want to know what it is that OGC and its
21 parent and affiliates consider in reviewing this project.

22 You know, they have presented in this case a
23 witness, Doctor Nesbitt, who pretty much prides himself on
24 not relying on anything from OGC. He just uses kind of
25 generic industry standard type information, but that is

1 clearly not what the company has used itself in assessing
2 this project. And I think that it is important to know as
3 to the true economic viability of this project what OGC
4 and its affiliates consider, not what FPL might guess that
5 they would consider, or what it would use if it had made
6 the same consideration. You know, that is not what is
7 before us.

8 One other thing I wanted to add, it is a
9 different point, but it is just to clarify. Mr. Wright
10 had mentioned the fact that some of the PG&E information
11 goes to projects other than this particular project, and I
12 hadn't made it clear when I was explaining FPL's proposal,
13 we are not looking for them to disclose to us information
14 about pricing or other details on projects other than this
15 particular project.

16 COMMISSIONER JACOBS: Very well.

17 Ms. Bowman, do you have anything to add on the
18 question that I asked?

19 MS. BOWMAN: Yes, Commissioner Jacobs. I would
20 just make two points. OGC's position is that with Doctor
21 Nesbitt's modeling and inputs and assumptions and with
22 what is generally available to Florida Power Corporation,
23 we have enough to analyze or evaluate this project. But
24 what is not accurate about that is this, Doctor Nesbitt,
25 as Florida Power & Light pointed out, Doctor Nesbitt's

1 analysis does not include any real numbers. It is all his
2 prediction and his assumptions. So there is no way to
3 test and see whether what OGC is putting forward through
4 Doctor Nesbitt is actually what OGC intends to do with
5 this project. And I think it ought to be of great concern
6 to the Commission that what they are telling the
7 Commission on the one hand through Doctor Nesbitt may be
8 something distinctly different from what they actually
9 plan to do and how they actually plan to operate in
10 Florida.

11 And, in fact, if there was no distinction
12 between the two, if that was sufficient for us to attack
13 what they are saying that they are going to be capable of
14 doing in this state, then it seems to me they would have
15 given us the information because there would be no
16 divergence between what Doctor Nesbitt has said and what
17 OGC would be purporting that they could do in basis of
18 performance.

19 Second is, OGC is asking Florida and asking this
20 Commission to determine that there is a need for this
21 project because they can add to reliability. They say
22 rely on us, we are going to run 93 percent of the time.
23 We are going to increase reserve margins and on and on.
24 They have put at issue central in this case the economic
25 viability of this plant. And Doctor Nesbitt's analysis

1 using numbers that are his own and not OGC's are not a
2 sufficient test of how this plant is actually going to
3 operate in the state if it is permitted to be built.

4 COMMISSIONER JACOBS: Let me pose it this way.
5 Would you be able to -- is there a way for you to assess,
6 let's look at the specifications of the turbines. Is
7 there not an ability on behalf of yourself or Power &
8 Light to acquire the information to assess whether or not
9 their statements as to the operation of specifications of
10 the turbines is going to be reasonable? Whether or not --
11 I mean, because I wouldn't imagine that the manufacturing
12 company is going to go and produce a specially designed
13 turbine for them that would operate at certain
14 specifications beyond or below what they are normally
15 going to sell. Is that not a reasonable assumption to
16 make?

17 MS. BOWMAN: Well, I think with regard to the
18 pricing information relating to the turbines and/or
19 Gulfstream's transportation agreement, those are issues
20 separate from that which they are asserting that we have
21 sufficient industry information. I think they are
22 asserting that those pricing --

23 COMMISSIONER JACOBS: I'm sorry, I mixed the
24 two. My main concern was that what they are asserting is
25 available generally in the industry.

1 MS. BOWMAN: And our response to that would be
2 this, Commissioner, that there is information generally
3 available in the industry that Florida Power Corporation
4 utilizes and develops its numbers, but those numbers may
5 well suggest that what OGC has put forward through Doctor
6 Nesbitt, using Doctor Nesbitt's analysis and not any real
7 project numbers, that this project isn't going to make
8 money.

9 And if that is what we discover from general
10 industry information, then it creates the very need that
11 we are saying exists, which is to see what their project
12 real numbers are, and OGC's basis for saying they are
13 going to make money when our own numbers, what we can
14 gather in the industry indicates that this is not an
15 economically viable plant.

16 COMMISSIONER JACOBS: Very well. I'm sorry, I
17 did say I would allow you -- go right ahead briefly.

18 MR. WRIGHT: Thank you. A couple of things.
19 First off, the movants here have not had a chance to take
20 Mr. -- well, it hasn't worked out for them to take Mr.
21 Finnerty's deposition yet. That will be next week. When
22 they take his deposition they will learn that at the time
23 we went forward with the project, filing the need
24 determination, all, in fact, that OGC did rely on was
25 Doctor Nesbitt's analyses.

1 What they have asked for and they have made it
2 very clear by their phraseology is what we want is some
3 other internal secret information. You know, that is not
4 need. What we want is this other information. Their
5 assertion that it is clearly, that Doctor Nesbitt's
6 analyses are not what the company has used is just not
7 true as I indicated.

8 As regards the pro forma, the pro forma relates
9 to other projects throughout the country. The information
10 therein is not separable. They indicated they would be
11 willing to have us screen out other information, that
12 information relating to other projects. That is not
13 possible in the case of the PG&E Generating pro forma.
14 The information is inseparable, and it would permit the
15 identification of information with respect to other
16 projects by what you might call reverse engineering;
17 working back from what is in there to what would apply
18 elsewhere.

19 Ms. Bowman's statement that Doctor Nesbitt's
20 information is not sufficient as a case in chief is simply
21 a conclusory allegation regarding the adequacy of the
22 evidence that we have put forward in our case in chief.
23 In fact, she went on to say that FPC's numbers derived
24 from generally available industry sources, thereby
25 admitting that such information is generally available,

1 may suggest that this project won't make money, that it
2 might not be economically viable.

3 And I would suggest to you there is plenty of
4 information readily available to the Commission based on
5 what the utilities in Florida are already doing that would
6 confirm that this is. But the real point in this motion
7 argument is the information is available and if their
8 analyses using credible industry source information were
9 to indicate that the Okeechobee generating project were
10 not economically viable, they could attempt to put that
11 information on and those conclusions on as part of their
12 case in rebuttal to our case in chief and we would have a
13 chance to contest that in the same way they have a chance
14 to contest Doctor Nesbitt's analyses.

15 COMMISSIONER JACOBS: Very well. Next issue.

16 MS. BOWMAN: Commissioner Jacobs, just a point
17 of clarification before we go on. When we were talking
18 about the Gulfstream documents, everybody has been
19 referring only to the precedent agreement. There are some
20 additional Gulfstream documents which are designated in
21 response to an answer to a production request by Florida
22 Power Corporation, I believe it is Number 7, that they
23 have also claimed are confidential. And I just didn't
24 want there to be the impression that there was just the
25 one agreement that was at issue.

1 COMMISSIONER JACOBS: So to be clear, you want
2 to make sure that when we rule as to that document that we
3 are ruling to the document and its attachments?

4 MS. BOWMAN: Well, I don't know that there are
5 specific attachments, but there are documents related to
6 that.

7 COMMISSIONER JACOBS: Related to that. Okay, I
8 understand.

9 MR. WRIGHT: Just to be clear, they are
10 documents that we obtained from Gulfstream that Gulfstream
11 regards as confidential, Your Honor.

12 COMMISSIONER JACOBS: Okay, I understand.

13 MR. BUTLER: And for the sake of clarity,
14 because this became unclear to me in an answer given
15 earlier by Mr. Wright, can we learn today just to either
16 make go away or know we have still got something, on the
17 Request for Production Number 24 and 26, the ones that go
18 to the questions of reliability, availability, maintenance
19 schedule, and where we got this ABB reference guide
20 provided, whether there are or are not any other documents
21 responsive to that.

22 Because when I heard the answer by Mr. Wright,
23 or heard his description of the various documents
24 involved, it sounded like the answer may be no, but I'm
25 not sure.

1 MR. WRIGHT: Excuse me one minute, Your Honor.

2 COMMISSIONER JACOBS: Sure.

3 MR. MOYLE: And there are bunch of things, I
4 think, if you have the time we need to get into in terms
5 of scheduling and some of that. And maybe we can get into
6 some of that at that point.

7 COMMISSIONER JACOBS: We are going to the issue
8 on interrogatories, and then I think we can get to some of
9 the scheduling stuff pretty quickly, I'm hoping. And then
10 we had the issues of the --

11 MS. BOWMAN: Some very brief requests for
12 admissions.

13 COMMISSIONER JACOBS: -- admissions.

14 MR. KEATING: I believe we may also have the
15 issue of interrogatories that would be answered by
16 experts.

17 COMMISSIONER JACOBS: That was my next, unless
18 there was anything else.

19 MR. BUTLER: Two related interrogatory issues
20 which Mr. Nieto is going to discuss with you.

21 COMMISSIONER JACOBS: Okay. Let's proceed on
22 that.

23 MR. NIETO: As Mr. Butler said, there are two
24 issues here. The first are --

25 COMMISSIONER JACOBS: I'm sorry to interrupt

1 you. Did you want to give them a response? That's up to
2 you. If you guys want to talk about it outside of
3 argument, that is fine, as well.

4 MR. WRIGHT: I think that will probably work.
5 Thank you.

6 MR. NIETO: As I was saying, there are two
7 separate issues with the interrogatories. The first are
8 objections that OGC made to certain of our questions as
9 going beyond the scope of discovery allowed of testifying
10 expert witnesses. And the second is an objection that we
11 have exceeded the scope of the maximum allowable number of
12 interrogatories. And I will just deal with these
13 separately, because they really raise separate issues.

14 On the first objection, interrogatories going
15 beyond the scope of experts discovery, the interrogatories
16 really fall into two categories. The first are questions
17 that were directed to OGC as a party or to its internal
18 personnel, and those are at 62 to 70, 118 and 170. All of
19 these ask for clarification of various statements or the
20 factual basis for OGC's petition, or ask questions that
21 were directed to OGC's Mr. Karloff, an internal OGC
22 employee.

23 The second category are questions Number 119 to
24 199, which were directed to OGC's Doctor Nesbitt, who is
25 an outside consultant.

1 The reasons those are two separate categories is
2 that the rule cited by OGC only applies to discovery
3 directed to an outside expert. It does not apply to
4 discovery directed to a party even if the discovery is
5 about its expert.

6 Shortly after that rule was enacted in 1996, a
7 split developed among the district courts on precisely
8 that issue. Some districts saying that you couldn't ask
9 questions of parties about their experts, some holding the
10 opposite. Just this past April, the Florida Supreme Court
11 resolved the issue in Allstate v. Boecher, 733 So.2d 993,
12 and they confirmed that the Rule 1.280(b)(4) is not a
13 blanket prohibition on discovery directed to parties even
14 if it relates to their expert witnesses.

15 Therefore, with respect to those questions
16 directed to OGC, we feel they have a duty to answer.
17 Now, they may not have information responsive to the
18 question, and if that is the case, that's fine, they can
19 answer and say they don't know the answer. But we believe
20 that we are entitled to a response. And, quite frankly,
21 we believe they can answer some of the questions.

22 You know, we note that OGC had a duty to
23 investigate the factual allegations behind its petition
24 and may have gained information responsive to our
25 questions in that form, and we would also note that the

1 majority of our questions relate to the Altos modeling
2 which OGC's Mr. Finnerty expressly relied upon in his
3 testimony. To the extent he has knowledge, we feel that
4 they should answer the questions directed to them.

5 The second category are the questions that
6 relate to Doctor Nesbitt's prefiled testimony. Now, those
7 do fall within the prohibition of the rule. They fall
8 within its expressed terms. But the rule has a catch-all
9 exception which allows a presiding officer to allow
10 further discovery when the interest of justice would so
11 provide.

12 The one qualification there is that we, as the
13 party seeking discovery, would be required to pay the
14 reasonable fee of OGC's experts in answering, which we are
15 perfectly willing to do as long as that fee is, as the
16 rule says, reasonable.

17 And we will feel that in this case this case
18 really merits the exception for two reasons. First of
19 all, the rule was never meant to shield a party from
20 discovery related to the merits of its case. It arose in
21 the context of several Supreme Court and district court
22 cases where parties had levied burdensome interrogatories
23 at their opponent's experts to discern all kinds of
24 sensitive financial information regarding the expert's
25 practice in an effort to show bias or what have you.

1 In reaction to that, the Supreme Court enacted
2 the rule to limit the discovery of experts so as to
3 prevent parties from seeking marginally relevant
4 information that would pose an extreme burden to the
5 expert. You know, the irony here is that OGC is now using
6 the rule to protect the most relevant information in this
7 case. I mean, these questions go directly to the heart of
8 their allegations before this Commission and their
9 assertion that the project is economically viable. And we
10 feel it is a gross misapplication of the rule to shield
11 such discovery.

12 This case is increasingly complex, and OGC
13 suggests that we should just depose its witnesses. Well,
14 we submit that deposition is just an inadequate substitute
15 for written discovery. Most of the questions that we have
16 asked are very detailed and go to the factual assumptions
17 behind the Altos modeling. You can't really expect Doctor
18 Nesbitt or some other deponent to recall all of these
19 details on demand.

20 So, basically, if you were taking depositions
21 what you would have is a situation where we would have to
22 ask questions, adjourn the deposition, let the witness
23 figure out the answers, then reconvene the deposition to
24 get his answers and then go on to the next round. It
25 would be a very cumbersome, very lengthy, and very

1 expensive approach for both sides.

2 It is much simpler for OGC to simply answer our
3 questions. We would pay their experts' fees to the extent
4 the questions are directed to its experts, and that would
5 provide for a streamlined and efficient discovery process
6 when we do depose Doctor Nesbitt.

7 And there is really no burden to OGC here. The
8 first set of questions are those directed to it as a
9 party. If it has knowledge, it can answer. If it doesn't
10 have knowledge, it can just say that. There is no burden
11 at all.

12 For the second round of questions, 119 to 199,
13 which are directed to Doctor Nesbitt, we are willing to
14 pay Doctor Nesbitt's time, so we don't see how that poses
15 any kind of a burden to the opposing party when we are
16 picking up the tab.

17 The second issue really relates to that last
18 point. We ran to 200 interrogatories at number 159 when
19 you count subparts. So, basically, our last forty
20 questions exceed the maximum number of interrogatories.
21 Realizing that, we filed a motion to extend the number of
22 interrogatories from 200 to 400, and we feel that that
23 motion should be granted.

24 OGC in this case filed a very cursory petition.
25 They make all kinds of bare conclusions about the economic

1 viability of their project, its relative competitiveness
2 to existing and proposed units and so forth without ever
3 really setting forth the factual basis for those
4 assertions. And if you read through our third and fourth
5 sets of interrogatories, that is really all those
6 questions are directed to, trying to get the background
7 information that OGC had a duty to provide in the first
8 instance under Commission Rule 25-22.081(3).

9 In other words, we have been required to expend
10 numerous interrogatories just to get information they
11 should have given us in the first instance. For that
12 reason alone we feel that additional interrogatories are
13 warranted.

14 Furthermore, as I suggested just a minute ago,
15 we are paying for nearly half of the questions that we
16 asked because they were directed to its experts. So there
17 is certainly no burden in that respect from OGC having to
18 comply with additional discovery requests.

19 For those reasons we feel both our motions, our
20 motion to compel and our motion to extend the number of
21 interrogatories should be granted.

22 COMMISSIONER JACOBS: Okay. Ms. Bowman.

23 MS. BOWMAN: We do not have a motion on this
24 point at this time, although we have submitted similar
25 interrogatories which would seek information. But we

1 would be willing to submit to the Commission's
2 determination as it relates to FPL's on our own issues.

3 COMMISSIONER JACOBS: Mr. Wright.

4 MR. WRIGHT: Thank you, Commissioner Jacobs.

5 Again, I will be as quick as I can. With respect to the
6 questions propounded to OGC, many of these questions do go
7 directly -- even though posed to OGC, go directly to
8 information developed by Doctor Nesbitt. For example,
9 FPL's Interrogatory Number 62 reads, "For each of the
10 Altos management partners model runs relied upon by OGC
11 and its witnesses, identify by region the generating units
12 owned by Florida Utilities, et cetera."

13 Clearly, interrogatories of this nature are
14 answerable really only by the experts or -- really only by
15 the experts. It is good case law that we are allowed by
16 law to rely on our experts. Hypothetically, we could
17 answer these and we could say, "We relied on Doctor
18 Nesbitt and we don't have any independent information
19 outside of that." As Mr. Nieto suggests, we think that
20 is a waste of time. But if that is what you rule, that is
21 what we will do.

22 As regards the interrogatories propounded to
23 Doctor Nesbitt, a few things to say. FPL's offer to pay
24 for Doctor Nesbitt's and other Altos personnel, I assume
25 other Altos personnel time in answering ing these

1 interrogatories was heard by my ears for the first time
2 this afternoon. They had previously just wanted our
3 experts to respond.

4 Mr. Nieto is correct that the rule doesn't
5 shield parties from discovery on the merits. What the
6 rule does is what the rule does. It provides as -- it
7 provides for how discovery on the merits is to be
8 obtained.

9 Mr. Nieto suggests that there would be no burden
10 in us responding since they are going to pay for our
11 consultants' time. Certainly that takes the financial
12 burden away. However, I frankly haven't counted the
13 number of interrogatories propounded to Doctor Nesbitt, or
14 Doctor Nesbitt and/or Altos, but I think it is in the
15 vicinity of 80 or so plus numbered subparts. And the time
16 required to do it would be at least somewhat of a burden
17 on our ability to prepare Doctor Nesbitt for trial.

18 Ms. Bowman's suggestion or statement that we
19 filed a very cursory petition is really no more than name
20 calling. It is a conclusory statement that we didn't --
21 maybe it wasn't Ms. Bowman. If it wasn't, I'm sorry. The
22 statement by somebody down at the other end that we filed
23 a very cursory petition is just conclusory. Our petition
24 was entirely complete with respect to the required
25 allegations. And, in fact, as I'm sure you know, has

1 already withstood motions to dismiss by both FPL and FPC.

2 With respect to the maximum number of
3 interrogatories, the 247 includes only numbered subparts.
4 We believe that there are other subparts where if you read
5 the interrogatory it clearly asks for two or more
6 different things. They didn't file their motion for leave
7 to propound these interrogatories until after we had to at
8 least deal with them by evaluating them and objecting
9 where appropriate.

10 I am concerned about the burden on Doctor
11 Nesbitt's and Mr. Blaha's time in responding to these, but
12 I guess I would say that given that they are willing to
13 pay for them, pay for their time in responding to these
14 interrogatories, I think that is something we could work
15 on. We may have to have some accommodation as to time
16 because of other scheduling matters involving Doctor
17 Nesbitt, but that part of it I think would be okay.

18 I don't think they should be allowed to ask
19 whatever the number of interrogatories is, whether it is
20 247 or 290-odd, I'm not sure what it is when you count all
21 the real subparts. You all give about seven times more
22 interrogatories than Florida Rules of Civil Procedure
23 provide in the normal course of business, and we would
24 submit to you that 200 is enough. And if they want to
25 call and send revised interrogatories, we will treat them

1 promptly and try to get answers based on their
2 representation that they will pay our experts to respond
3 to them.

4 Thank you.

5 COMMISSIONER JACOBS: Okay. That leads us to
6 the issue on requests for admissions.

7 MS. BOWMAN: In the interest of time,
8 Commissioner Jacobs, I would just like to identify and ask
9 that the Commission rule on --

10 COMMISSIONER JACOBS: I'm sorry, I may not have
11 them, but go ahead, I will write them down.

12 MS. BOWMAN: Okay. Our first motion to compel
13 included a request that OGC be required to respond to
14 Florida Power's Request for Admissions Number 29, 30, 41
15 through 44, and 55. Just very briefly, there are
16 basically three categories. The first, Request for
17 Admissions Number 29 and 30 go directly to allegations
18 made in OGC's petition which they apparently are now
19 refusing to admit are true. I think they ought to be
20 required to either admit or deny them. And if they feel
21 the need to deny them, then they need to also withdraw
22 them from their petition.

23 As to Request for Admissions Number 41 through
24 44, OGC has objected to responding to these requests
25 saying that they are directed at their parent or affiliate

1 corporations, PG&E Generating or PG&E Corp. And I would
2 suggest that Florida Power is not asking that nonparties
3 respond to requests for admissions, but that OGC simply
4 admit certain facts concerning their affiliates.

5 It is as though if I were to ask someone to
6 admit that their neighbor is Mr. Green, and they are
7 saying, "Well, I'm not Mr. Green, so I can't admit that."
8 Clearly they have information relating to their affiliates
9 and ought to be in a position to admit or deny those
10 requests.

11 As to the last request, it is simply a request
12 that given certain circumstances would they agree that a
13 certain sets of facts was true or false, and they just
14 simply have objected that the request for admission is
15 argumentative. I think it is fairly simple; they can
16 either admit or deny it and ought to be compelled to do
17 so.

18 COMMISSIONER JACOBS: Okay. Very well.

19 MR. WRIGHT: Commissioner, it is covered in our
20 papers.

21 COMMISSIONER JACOBS: Okay. Mr. Butler.

22 MR. BUTLER: Mr. Butler is here.

23 COMMISSIONER JACOBS: And you are?

24 MR. NIETO: Mr. Nieto.

25 COMMISSIONER JACOBS: Nieto, I'm sorry. Mr.

1 Nieto, meet Mr. Wright. I'm sorry.

2 Anything else from staff?

3 MR. KEATING: I think the only issues we haven't
4 touched on, I believe, are scheduling issues.

5 COMMISSIONER JACOBS: Very well. What are the
6 primary outstanding issues on scheduling?

7 MR. KEATING: I guess what the schedule is going
8 to be from here on out through the hearing.

9 MR. MOYLE: Commissioner Jacobs, John Moyle on
10 behalf of OGC. We did the other day receive an order
11 setting the hearing for March 20th through March 22nd with
12 a prehearing conference on March 3rd.

13 What I would suggest we need to do is work
14 backwards. OGC has filed its testimony back, I believe in
15 October is when we filed our original testimony,
16 October 25th, and the original schedule had two weeks
17 between the time when we would file our testimony and the
18 time that the intervenors would file theirs.

19 They asked for a little more time, I think you
20 gave them a couple of weeks. But once the case got
21 continued, they now have had our testimony for over three
22 months and we still don't know who their witnesses are
23 going to be. We filed a motion to get that date, I think
24 they responded and said there is some discovery issues.
25 But one of them, I think, said they could do it on

1 February 8th or 9th, and the other February 4th.

2 The point being we just are getting ready for
3 trial, we are doing depositions, we had more depositions last week, we
4 have got more depositions this week. We are in dire need of
5 getting their intervenor testimony so we can start taking
6 their folks' depositions before we file our rebuttal
7 testimony. So that is one of the issues outstanding.

8 I think of a lot of them with respect to
9 post-hearing briefs and that kind of thing we have pretty
10 much talked about, and one of the earlier schedules had
11 that laid out. But really I think with a couple of
12 points, a discovery cut-off schedule and an intervenor
13 testimony due date and a rebuttal date, those are the
14 things that we need to focus on and try to get established
15 today.

16 MR. GUYTON: Commissioner Jacobs, I didn't enter
17 an appearance earlier. My name is Charles Guyton with
18 the law firm of Steel, Hector and Davis appearing on
19 behalf of Florida Power & Light Company.

20 I would agree with Mr. Moyle that his approach
21 to things is indeed working backwards. I think what we
22 have here is a situation where we are looking at a March
23 hearing date instead of a December hearing date, because
24 the Commission decided that there was a need for and time
25 for additional discovery that the original schedule did

1 not allow.

2 Most of those issues have been joined now for a
3 couple of months. And really the bottleneck, if you will,
4 is the ruling on discovery. We will tell you what we told
5 counsel for OGC in late November and staff counsel several
6 other times. We need several weeks -- actually we told
7 them we need a month from the time we gain access to the
8 Altos model and the other confidential information that is
9 before you today to be able to prepare our responsive
10 testimony. And I will say that I don't think we need the
11 full month or four weeks that we said in late November we
12 would need now, but we still need time to take a look
13 at -- once we get access to the model, to understand how
14 it works, to be able to address that in our testimony.
15 Because that is, as has been observed several times here
16 today, the real heart and soul of this case.

17 If we were to get access later this week, we
18 would still submit that what is reasonable to prepare and
19 to have a meaningful opportunity to prepare and critique
20 the model would be another three weeks to file testimony.
21 And then I think we should work from that day forward to
22 figure out what the interim or intervening dates are that
23 would allow us to accomplish the March hearing date.

24 And if we don't have enough time for the March
25 hearing date, then let it slip. But we are not proposing

1 that. What we are simply proposing is that we need enough
2 time to put our case together. And the key to that is
3 getting the ruling on the discovery and the access to the
4 information.

5 COMMISSIONER JACOBS: Ms. Bowman.

6 MS. BOWMAN: Yes, Commissioner Jacobs. Florida
7 Power is in accord with Florida Power & Light on this
8 issue. I would just comment that the suggestion that we
9 had earlier in papers filed in response to OGC's
10 scheduling order suggested that we could be prepared to
11 file testimony by what would now be tomorrow was based on
12 our understanding that the discovery matters would have
13 been dealt with sometime in the January time frame which
14 has been prevented by the on-going business of the
15 Commission and some other things.

16 COMMISSIONER JACOBS: I didn't realize it had
17 taken this long. I wish we could do it .

18 MS. BOWMAN: And what we would appreciate,
19 likewise, is an opportunity to have the rulings on these
20 discovery issues and a sufficient period of time to permit
21 our personnel or consultants to evaluate and utilize the
22 models and any other information obtained in order to
23 submit any testimony we would have in regard to those
24 topics. And I think that the time frame suggested by Mr.
25 Guyton in the nature of three weeks would be appropriate

1 and doable if we could gain immediate access and such
2 necessary training as OGC would require.

3 COMMISSIONER JACOBS: Let's go off for just a
4 moment.

5 MR. WRIGHT: I think Mr. Moyle wanted to respond
6 to that.

7 MR. MOYLE: Well, just in brief response. To go
8 back to where we were when we had the long argument that
9 day on the motion for a continuance, they were supposed to
10 file all of their testimony three days after that
11 argument. If the only issue they have is related to an
12 economist and Doctor Nesbitt, maybe there is a little bit
13 of an accommodation that can be made there.

14 But with respect to any other witnesses that
15 they have or they expect to offer, they ought to go ahead
16 and file that posthaste and give us the opportunity to get
17 ready for trial.

18 I mean, I don't think it's a big secret that the
19 longer merchant plants are delayed the better things are
20 for the opponents. We want to hold this March hearing
21 date and would urge you to do everything you can to get us
22 to that date.

23 COMMISSIONER JACOBS: Off the record for just a
24 moment.

25 (Off the record.)

1 COMMISSIONER JACOBS: Let's go back on the
2 record.

3 Having heard all the arguments today, here is
4 how I would like to proceed. We would like to take a
5 brief period, and I mean really brief, to consider the
6 arguments and we would anticipate an order by Wednesday on
7 these issues. I would not want to wait any longer than
8 that. Thursday morning at the very latest, but by
9 Wednesday.

10 We would like -- I think what I want to do today
11 is go ahead and rule that for those witnesses that -- and
12 it is up to you what they are. But if you have witnesses
13 whose testimony are not dependent upon this discovery that
14 is outstanding, then I would like that testimony to be
15 filed posthaste.

16 Now, I don't know what those are, but if -- and
17 when I say posthaste, staff is going to come up with a
18 schedule by when, when did you say you would have that?

19 MR. KEATING: We will work out something this
20 afternoon.

21 COMMISSIONER JACOBS: Okay. So they will get
22 with you. But as to witnesses whose testimony is not
23 relying on this outstanding discovery, I think we ought to
24 go ahead and get that filed right away. My goal would be
25 to give you a period of time -- I want to sit down with

1 staff this afternoon or in the morning and figure out what
2 that would be -- that after this order is issued that you
3 would have the time -- if the order says you get access,
4 if the order says you get access then we will sit down at
5 that moment and say what period of time we would give in
6 order for you to come back with your testimony based on
7 having completed that discovery. And then we would move
8 forward from there.

9 My goal would be to keep the March dates. I,
10 quite frankly, wish we wouldn't have gotten ourselves into
11 this box, but we did. But my goal is to keep the March
12 dates. I would be very, very leery of moving those more
13 than one day, maybe a week tops. So that is my concept of
14 the schedule at the moment. And, again, we very quickly
15 would like to have some details and to have that out for
16 you.

17 I think that covers about everything. Did any
18 of the parties have any other matters that should come
19 before the Commission today?

20 MR. MOYLE: Just for your information, you heard
21 a lot of motions to compel today by Florida Power & Light.
22 We have served discovery on them, they have objected to
23 our discovery. We filed motions to compel last week. Mr.
24 Wright and Mr. LaVia have. So there may be some more, I
25 think.

1 In fairness to them, they have not yet
2 responded. If they are prepared to talk about those
3 today, seeing as we are here on a discovery dispute day it
4 may make some sense to get all the discovery issues
5 resolved so we can move forward with the March hearing.
6 But you did ask the broad question are there other
7 outstanding issues, and we do have some motions to compel
8 discovery that they have objected to.

9 COMMISSIONER JACOBS: And you did mention those
10 earlier. I'm sorry.

11 MR. GUYTON: I was just simply going to say I
12 appreciate the opportunity, but since they were served on
13 us at 4:30 Friday afternoon we are not prepared to address
14 those yet today.

15 COMMISSIONER JACOBS: Okay. I would appreciate
16 the parties if they would work through those. If we need
17 to I will -- we will do an emergency hearing to take care
18 of those. That's where I am on that. If I've got an hour
19 we will do it. Great.

20 With that, we are adjourned.

21 (Oral argument concluded at 4:10 p.m.)
22
23
24
25

1 STATE OF FLORIDA)
2 COUNTY OF LEON)

CERTIFICATE OF REPORTER

3 I, JANE FAUROT, RPR, Chief, FPSC Bureau of
4 Reporting FPSC Commission Reporter,

5 DO HEREBY CERTIFY that the hearing in Docket No.
6 991462-EU was heard by Commissioner E. Leon Jacobs, Jr,
7 Prehearing Officer at the time and place herein stated; it
8 is further

9 CERTIFIED that I stenographically reported the
10 said proceedings; that the same has been transcribed by
11 me; and that this transcript, consisting of 85 pages,
12 constitutes a true transcription of my notes of said
13 proceedings.

14 DATED this 11th day of February, 2000.

15
16
17
18
19
20
21
22
23
24
25



JANE FAUROT, RPR
FPSC Division of Records & Reporting
Chief, Bureau of Reporting