

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of : DOCKET NO. 001064-EI
: PETITION FOR DETERMINATION
: OF NEED FOR HINES UNIT 2
: POWER PLANT BY FLORIDA
: POWER CORPORATION.
: -----

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PROCEEDINGS: PREHEARING CONFERENCE

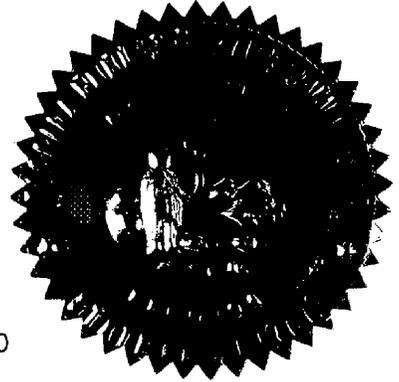
BEFORE: COMMISSIONER LILA A. JABER
Prehearing Officer

DATE: Wednesday, October 11, 2000

TIME: Commenced at 9:40 a.m.
Concluded at 12:00 p.m.

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

REPORTED BY: KORETTA E. STANFORD, RPR
Official FPSC Reporter



1 APPEARANCES:

2 GARY L. SASSO and JAMES MICHAEL WALLS
3 Carlton Fields, One Progress Plaza, Suite 2300, St.
4 Petersburg, Florida 33701-4352, appearing on behalf
5 of Florida Power Corporation.

6 R. ALEXANDER GLENN, director, Regulatory Counsel
7 Group, P.O. Box 14042 (BT-15A), St. Petersburg, FL 33701,
8 appearing on behalf of Florida Power Corporation.

9 SUZANNE BROWNLESS, P.A., 1311-B Paul Russell Road,
10 Suite 201, Tallahassee, FL 32301, appearing on behalf of
11 Panda Energy International.

12 DEBORAH D. HART, BOB ELIAS, and KATRINA D.
13 WALKER, Florida Public Service Commission, Division
14 of Legal Services, 2540 Shumard Oak Boulevard,
15 Tallahassee, Florida 32399-0870, appearing on behalf
16 of the Commission Staff.

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P R O C E E D I N G S

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2 MS. HART: Pursuant to the Notice issued August
3 22nd, 2000, this time and place have been noticed for a
4 Prehearing Conference in docket number 001064-EI, petition
5 for determination of need of Hines 2 power plant by
6 Florida Power Corporation.

7 The purpose of the Prehearing Conference is to
8 consider the simplification of the issues, the
9 identification of the positions of the parties on the
10 issues, the possibility of obtaining admissions of fact
11 and of documents which will avoid unnecessary proof, the
12 identification of exhibits, the establishment of an order
13 of witnesses, and such other matters as may aid in the
14 disposition of the action.

15 COMMISSIONER JABER: Let's take appearances.

16 MR. SASSO: Garry Sasso with Carlton Fields
17 representing Florida Power Corporation.

18 MR. GLENN: Alex Glenn representing Florida
19 Power Corporation.

20 COMMISSIONER JABER: Alex --

21 MR. GLENN: Glenn.

22 COMMISSIONER JABER: Spell your name.

23 MR. GLENN: G-L-E-N-N.

24 MR. WALLS: Mike Walls, representing Florida
25 Power Corporation.

1 MS. BROWNLESS: Suzanne Brownless representing
2 Panda Energy, International.

3 MS. HART: Deborah Hart, PSC Legal Services.

4 MS. WALKER: Katrina Walker, PSC Legal Staff.

5 COMMISSIONER JABER: Ms. Brownless, have you
6 filed a petition to intervene?

7 MS. BROWNLESS: No, ma'am. We are here today in
8 order to inform the Commission that we will be filing our
9 petition for intervention tomorrow. I can briefly say
10 what our substantial interest is for the benefit of the
11 Commissioner, which is that we were an unsuccessful bidder
12 in the RFP issued by Florida Power Corporation in this
13 project.

14 COMMISSIONER JABER: Okay. Thanks for the
15 heads-up. File your petition to intervene. We'll issue a
16 separate order on that after the parties have an
17 opportunity to respond. Since the hearing is end of the
18 month, I would encourage you to hand-deliver your petition
19 to intervene.

20 MS. BROWNLESS: We will hand-deliver it
21 tomorrow.

22 COMMISSIONER JABER: Preliminary matters?

23 MS. HART: Not at this time, Commissioner.
24 There is a pending motion to strike, but it relates to one
25 of the issues, and we can either take it up now or take it

1 up at the time we get to that issue.

2 COMMISSIONER JABER: No, we'll take it up at the
3 time we get to the issue. Wasn't there a motion to have
4 oral argument on that same matter?

5 MS. HART: Yes.

6 COMMISSIONER JABER: We'll take that up then,
7 too.

8 Under Pending Motions, I thought you'd listed
9 something else, too. Staff has a pending --

10 MS. HART: We have listed an anticipated motion
11 to strike portions of FPC's rebuttal testimony. We have
12 not filed that motion at this point, pending the
13 determination today on FPC's motion to strike Issue 6.

14 COMMISSIONER JABER: Then, it's not a pending
15 motion, right?

16 MS. HART: You're correct. We'll strike that
17 from Pending Motion section.

18 COMMISSIONER JABER: What about Florida Power
19 Corp.'s request for confidential classification?

20 MS. HART: That is awaiting Staff analysis,
21 which is being done expeditiously, and we will get an
22 order to you in the next few days for your review and seek
23 to have that order issued expeditiously.

24 COMMISSIONER JABER: When is the hearing?

25 MS. HART: October 26th.

1 COMMISSIONER JABER: And when did the request
2 for confidential classification come in?

3 MS. HART: At the same time that the proceeding
4 was filed on August 7th.

5 COMMISSIONER JABER: Today is Wednesday?
6 Today's Wednesday?

7 MS. HART: Yes.

8 COMMISSIONER JABER: I'd like to have that order
9 by Friday.

10 MS. HART: We'll do it.

11 COMMISSIONER JABER: Okay. Here's what I intend
12 to do. We're going to go page by page, and you all can
13 point to me changes to your draft prehearing order,
14 changes to your position. We'll take up the motion to
15 strike, Issue 6, during the discussion of Issue 6.

16 Ms. Brownless, fair warning, I think, you're
17 here to listen.

18 MS. BROWNLESS: Thank you.

19 COMMISSIONER JABER: Page 1.

20 MS. HART: Staff has no comments.

21 MR. SASSO: I have a question. Perhaps Staff
22 can respond. We were provided with a draft prehearing
23 order, which had a big draft stamp on it. This morning,
24 Staff brought to the hearing room a clean copy of that.
25 Have there been any changes? Because we have had an

1 opportunity last night to review the draft prehearing
2 order, but we haven't seen this before now.

3 MS. HART: Mr. Sasso, I believe, it is
4 identical.

5 MR. SASSO: Very well. Issue 6 is different.
6 Staff did circulate, on a separate page today, yet another
7 formulation of Issue 6, which is different from what we
8 had in our draft.

9 COMMISSIONER JABER: Ms. Hart, why don't you do
10 this for us. As we go along, point out the changes
11 between the drafts on each page. And Mr. Sasso, we'll
12 proceed slowly so that we can look at each page carefully.

13 No changes to page one, though.

14 MS. HART: No.

15 COMMISSIONER JABER: Page 2, you added, it looks
16 like, a sentence to the top of page 2.

17 MS. HART: That's correct. We added a more
18 complete statement of the statute of 403.519, including
19 the part of that statute that says, "other matters within
20 the Commission's jurisdiction which it deems relevant."

21 MR. SASSO: We do have a concern about the
22 addition that you've just identified, Commissioner Jaber.

23 The point of the identification of issues is to
24 specify which matters must be addressed at the final
25 hearing. Staff had originally included an issue that was

1 a catch-all taken from the statute, other matters within
2 the Commission's jurisdiction. We pointed out that that's
3 not an issue, that's statutory authority. And that may
4 give rise to some issues that need to be identified.
5 Staff agreed, withdrew that as an issue, and now it has
6 surfaced again here.

7 Our concern about this is that it is open-ended,
8 it doesn't tell us what, if anything, Staff intends to do
9 with this at the hearing. We believe we're entitled to
10 fair notice of any issues that Staff intends to raise. We
11 have attempted to identify all those in the issues
12 statement. And so, we're concerned about simply this
13 recitation that the hearing will be held to determine
14 these unidentified matters.

15 COMMISSIONER JABER: Staff?

16 MS. HART: It's simply a statement of what the
17 statute says.

18 COMMISSIONER JABER: Mr. Sasso, I think that we
19 can all agree that Staff can't identify issues at the last
20 minute nor raise any concerns that the parties don't have
21 notice of.

22 I'm not concerned with language in the case
23 background. I don't think that gives Staff any additional
24 authority or opportunity to raise an issue that they're
25 not going to tell you about.

1 MR. SASSO: With that understanding, we're okay
2 with that.

3 COMMISSIONER JABER: And Staff, I would just ask
4 that you make sure that doesn't happen.

5 All right. Page 3.

6 Page 4. On page 4, please note that I've asked
7 that oral summaries be limited to five minutes. If you
8 have concerns about that, you need to let me know right
9 now.

10 MR. SASSO: That's fine.

11 COMMISSIONER JABER: All right. Order of
12 Witnesses.

13 MR. SASSO: I'm sorry. Up at the top of page 3
14 under roman numeral 5, we did have a suggestion there
15 before roman numeral 6.

16 COMMISSIONER JABER: Okay. That would be page
17 4?

18 MR. SASSO: I'm sorry, it's on our page 3. Oh,
19 I guess, it's changed now.

20 COMMISSIONER JABER: What's your concern?

21 MR. SASSO: Let me just catch up with you here.
22 I guess, it's on the new page 4, roman numeral 5. This
23 provides that all testimony that's been prefiled will be
24 inserted after the witness has taken the stand and
25 affirmed the correctness of the testimony, et cetera.

1 What we wanted to suggest that perhaps we could
2 add a statement: "provided, however, testimony and
3 exhibits may be admitted by stipulation."

4 COMMISSIONER JABER: Staff?

5 MS. HART: I have no objection to that.

6 COMMISSIONER JABER: We could certainly add it,
7 Mr. Sasso, but we do admit exhibits in by stipulation as a
8 matter of course.

9 MR. SASSO: And testimony.

10 COMMISSIONER JABER: And that would be reflected
11 in a stipulation.

12 MR. SASSO: That's fine; again, as long as we
13 have that understanding.

14 COMMISSIONER JABER: What is your concern
15 exactly? Are you working on stipulating the testimony and
16 exhibits of a witness?

17 MR. SASSO: We may have certain witnesses who
18 Staff has no questions of and who we have no particular
19 interest in bringing to the hearing. They did provide
20 prefiled testimony, but if everybody's in agreement, they
21 don't need to actually testify. We can excuse them of the
22 need to be here and not take up the Commission's time
23 either. But we just wanted to be sure we would have that
24 opportunity.

25 COMMISSIONER JABER: All right, let's do this.

1 We are not going to add that to the prehearing order. As
2 a matter of course, certainly, if the parties and Staff
3 agree to stipulating a witness's testimony in without
4 cross examination you'll bring that to the Commissioners'
5 attention.

6 And to the degree, you can reach agreement
7 before the prehearing order is issued, then, you need to
8 reflect the stipulation under the proposed stipulation
9 section of the prehearing order for me. And when I sign
10 the prehearing order, Mr. Sasso, I'll know who those
11 witnesses are.

12 MR. SASSO: Thank you.

13 COMMISSIONER JABER: Any changes to the order of
14 witnesses?

15 MR. SASSO: No.

16 MS. HART: No.

17 COMMISSIONER JABER: Page 5, you have possible
18 rebuttal. Rebuttal testimony hasn't been filed yet in
19 this case?

20 MS. HART: It has been filed, Commissioner. We
21 put that in terms of possible rebuttal, depending on the
22 outcome of the motion to strike today.

23 MR. SASSO: This rebuttal testimony is addressed
24 to the testimony of Mr. Dickens, whose testimony is
25 limited to Issue 6.

1 COMMISSIONER JABER: All right.

2 MR. SASSO: And we would also like to add, as an
3 additional exhibit, again, contingent upon your ruling on
4 Issue 6, the deposition of Mr. Billy Dickens, which was
5 taken yesterday.

6 COMMISSIONER JABER: Okay. Remind me when we
7 get to the exhibit section.

8 Any changes to your basic position, Mr. Sasso?

9 MR. SASSO: There is a typographical error on
10 page 6 near the bottom of the page, last paragraph, second
11 sentence, third line, an "of" has been dropped between
12 internal review and supply-side. I guess, it's the top of
13 page 7 now, I'm advised. It's still at the bottom of page
14 6.

15 COMMISSIONER JABER: Yes, it's on page 6, bottom
16 paragraph, the sentence will read, "FPC determined to seek
17 approval to build Hines 2 only after conducting a rigorous
18 internal review of supply-side and demand-side options."

19 MR. SASSO: Correct. And also, we would like to
20 add a sentence almost at the very end of the basic
21 position right before the last sentence, which says "for
22 all these reasons," we would like to add the following:
23 "Finally, Staff's proposal calls upon the Commission to
24 assert the power to deny FPC a reasonable rate of return
25 on costs prudently incurred, in violation of FPC's rights-

1 under the Florida statutes and the Florida and United
2 States constitutions."

3 COMMISSIONER JABER: Mr. Sasso, I was going to
4 ask you to shorten your basic position, and you're making
5 it longer.

6 All right. Staff, any changes to your position?

7 MS. HART: No.

8 COMMISSIONER JABER: Okay. Changes to Page 8.

9 MR. SASSO: Yes. We have an objection to the
10 inclusion of Issues 1 and 2.

11 COMMISSIONER JABER: All right. Let's talk
12 about Issue 1. Staff, your position is that Florida Power
13 Corporation is an applicant within the meaning of the Act.
14 Certainly, they're not going to argue with that. Why
15 isn't this a proposed stipulation?

16 MS. HART: We are prepared to stipulate to that
17 this morning.

18 COMMISSIONER JABER: A statement in the form of
19 a stipulation that you are a proper applicant should not
20 be a problem.

21 MR. SASSO: That's fine. We didn't understand
22 why it was identified as an issue for the hearing.

23 COMMISSIONER JABER: All right. We're going to
24 drop Issue 1, and you're going to reflect in the
25 stipulation section that they're a proper applicant.

1 MS. HART: Right.

2 COMMISSIONER JABER: Issue 2.

3 MR. SASSO: Issue 2 is similar to Issue 1, in
4 our view. During the issues identification conference,
5 Staff advised us that they took both Issues 1 and 2 from
6 the Florida Supreme Court's recent decision in what we
7 call the Duke case or the Garcia case.

8 That decision, of course, didn't apply to -- it
9 wasn't designed to address the position of regulated
10 Florida utilities and need proceeding. It was a merchant
11 case. And Issues 1 and 2 are taken from a case addressing
12 merchant issues.

13 As you'll recall, Commissioner Jaber, the
14 Florida Supreme Court, in the Duke case, addressed the
15 question whether an independent power producer that was
16 not fully committed under contract to a Florida retail
17 utility had standing to seek a need determination. The
18 Court held that it did not.

19 That is the context in which the Court discussed
20 the issue of fully committed. Staff's response to that
21 appears in the draft prehearing order, and it says, "In
22 Tampa Electric versus Garcia, the Court did not draw a
23 distinction between merchant plants and public utility
24 plants. Therefore, Staff has no position at this time
25 pending discovering evidence adduced at the hearing."

1 Well, we, frankly, disagree that that decision
2 did not draw a distinction between merchant plants and
3 public utility plants. That was the whole point of the
4 case.

5 COMMISSIONER JABER: Staff?

6 MS. HART: Contrary to what Mr. Sasso says, the
7 Supreme Court did make no distinction. They required, in
8 their revised opinion, that it's clear that a plant must
9 be fully committed to Florida customers who purchase at
10 retail rates. They don't say what fully committed is, but
11 they don't make any distinction between merchant plants
12 and public utilities.

13 COMMISSIONER JABER: So, is your issue really
14 whether this utility will be fully committed, not whether
15 a determination applies to merchant plants versus
16 regulated utility? I mean, I think, Mr. Sasso has a good
17 point with respect to the first part of your position.

18 You say the Court does not make a distinction.
19 But what I hear you saying, Staff, is with respect to
20 determining whether the facility is fully committed, you
21 still believe you need to make that determination, but you
22 don't know what the answer to that question is until the
23 evidence of the hearing.

24 MS. HART: Right, that's correct.

25 COMMISSIONER JABER: So, if this issue stays in,

1 shouldn't your position be modified?

2 MS. HART: Yes.

3 MR. SASSO: May I respond, briefly?

4 The facility here will be owned and operated by
5 a regulated retail utility that has an obligation to
6 serve. That is the commitment that the Court said was
7 lacking in the Duke case.

8 The only way an independent power producer can
9 come into the state is to demonstrate a contractual
10 commitment which was missing to a utility that has an
11 obligation to serve. If you would prefer, Commissioner
12 Jaber, I can call attention to some salient language in
13 the decision which, I think, makes this clear.

14 COMMISSIONER JABER: Do that, Mr. Sasso.

15 MR. SASSO: Okay. The decision begins with the
16 following: "The issue presented concerns the statutory
17 authority of the PSC to grant a determination of need for
18 an electric power company's proposal to build and operate
19 a merchant plant in Volusia County."

20 The Court goes on to say, "We conclude that our
21 analysis of the siting act, articulated in the Nassau
22 decisions, is applicable to the present case." And the
23 Court reiterated, "A need determination proceeding is
24 designed to examine the need resulting from an electric
25 utility's duty to serve customers," which we have.

1 "Nonutility generators have no similar need, because they
2 are not required to serve customers."

3 The Commission's interpretation of Section
4 403.519 comports with this Court's decision in Nassau 1.
5 In that decision we rejected Nassau's argument that the
6 siting act does not require the PSC to determine need on a
7 utility-specific basis.

8 COMMISSIONER JABER: Mr. Sasso, what page are
9 you on and which opinion?

10 MR. SASSO: Page 13 of the slip opinion of the
11 Supreme Court. The Court went on to say, "Rather, we
12 agreed with the Commission that the need to be determined
13 under Section 403.519 is the need of the entity ultimately
14 consuming the power"; in this case, FPL. "Based upon our
15 Nassau analysis of the siting act, we conclude that the
16 granting of determination of need on the basis of the
17 present application does exceed the PSC's present
18 authority."

19 So, the Court was drawing the distinction
20 between a retail utility, such as Florida Power
21 Corporation, which has a statutory obligation to serve and
22 the need of an IPP, which doesn't exist, except
23 derivatively under contract, fully committed to a retail
24 utility that has such an obligation.

25 Florida Power Corporation is committed to serve

1 under statute. That is the commitment that confers
2 standing upon us to seek this determination of need. The
3 Court's discussion of whether the applicant is fully
4 committed is in the context of a merchant plant, which
5 must demonstrate a contractual commitment to a retail
6 utility, which confers the standing to seek a
7 determination of need.

8 COMMISSIONER JABER: Staff?

9 MR. ELIAS: Something else that was present in
10 the Duke decision was a firm commitment by Duke to provide
11 30 megawatts of electricity to a retail-serving utility
12 pursuant to contract. So, there was an element of a
13 retail utility's need in that proposal.

14 And the Court found that the statutory scheme,
15 embodied in the siting act and FEECA was not intended to
16 authorize the determination of a need for a proposed power
17 plant output that is not fully committed to use by Florida
18 customers who purchase electrical power at retail rates.

19 The focus is on the plant and not the particular
20 entity that is pursuing the need determination. And we
21 think it's appropriate for the Commission to consider in
22 the context of this application what the Court's language
23 meant with respect to this particular facility.

24 COMMISSIONER JABER: Mr. Elias, didn't the Court
25 look at the 30 megawatts and said that was indicative of -

1 the plant not being fully committed for use in the Court's
2 determination that this was not a proper applicant?

3 MR. ELIAS: Let me see if I can find the
4 particular language.

5 "We agree with the appellants that the fact that
6 Duke's joining with New Smyrna in this arrangement for a
7 30 megawatt commitment does not transform the application
8 into one that complies with the siting act and FEECA."
9 That's what they said, as far as that commitment goes.

10 COMMISSIONER JABER: When you look at an
11 application for need of a retail utility, a traditional
12 IOU, as opposed to a merchant power plant, in the
13 determination of need, aren't you going to look at the
14 committed use? I guess, I'm trying to understand why we
15 need a separate issue to look at fully committed for use,
16 if you have an issue on need.

17 MR. SASSO: I don't think we do, Commissioner
18 Jaber. The Florida Supreme Court in the Garcia case did
19 not intend to change the decades of authority and this
20 Commission's decisions involving IOU siting cases.

21 MR. ELIAS: Well, and, I think, in the past,
22 we've looked at need determinations where there was
23 admittedly going to be some of the output that was sold at
24 wholesale.

25 COMMISSIONER JABER: Here's my question,

1 Mr. Elias: In making a determination on need, won't the
2 Commission need to look at how much of the power has,
3 indeed, been requested and committed to the retail
4 ratepayer?

5 MR. ELIAS: Yes.

6 COMMISSIONER JABER: All right. So, really, in
7 reviewing your issue on need, you'll be looking, if
8 appropriate, at the Duke decision and analyzing whether --
9 how relevant it is to your need determination. I'm trying
10 to understand why this issue wouldn't be duplicative of a
11 need determination issue.

12 MR. ELIAS: Well, you could argue that this is a
13 one-issue case, should the petition be granted. And then,
14 we could address each and every specific statutory
15 criteria and every precedent and every court decision
16 that's applicable within the context of answering that
17 decision or we can break it down into more specific, more
18 focused issues that we believe address the specific
19 concerns, as well as the general statutory requirements
20 that we see upon reviewing the application.

21 And the answer -- the short answer to your
22 question is, yes, you could do it. The question is
23 whether that is going to provide the parties with adequate
24 notice and enable the Commissioners to best focus their
25 efforts on the specific issues that we believe need to be

1 brought to their attention and --

2 COMMISSIONER JABER: Let me tell you my problem
3 with the issue as it's worded and why I think it does two
4 things. It makes an assumption, and it's duplicative.

5 The way you all have worded Issue 2, it assumes
6 that the Supreme Court has set the standard for all need
7 cases, and that's still a debate. That's still at issue.
8 How far the Supreme Court went is still at issue.

9 It's almost like to leave this issue in, you
10 have to add an issue, how does the TECO decision affect
11 this matter. And then, if it affects this matter, then,
12 you know, is the Florida Power Corp. need determination
13 case plant fully committed for use?

14 What we'll do at the end of going through the
15 issues is I'm going to take a 15-minute break, and I'm
16 going to let you sit down with Florida Power Corporation
17 and see if you can reach a resolution on whether this
18 issue is appropriate. And if so, how should it be worded.

19 Bob, specifically, what I'm saying to you is the
20 way the issue is worded, you've reached the conclusion
21 that the TECO case applies to all need determinations
22 forevermore. And what I'm suggesting to you is that's
23 still -- it might still be an open issue.

24 MR. ELIAS: And I don't think it was our intent
25 to preclude someone from suggesting that the case, when it

1 was inapplicable insofar as this petition goes, I don't
2 think that that was -- I know that's not what we intended.

3 COMMISSIONER JABER: Right. That's why I think
4 there's room for resolution.

5 Now, Mr. Sasso, I also think that what you've
6 said to me is more of a position than a reason to strike
7 the issue. I think, there's room for resolution on how
8 this issue should be worded.

9 There is a question, at least in one
10 Commissioner's mind, about how the Duke decision now
11 relates to our cases of need going forward. So, keep that
12 in mind when you're working with Staff on this issue.

13 MR. SASSO: I will, Commissioner. And I should
14 say that Staff initially suggested to us that while these
15 issues came from the Garcia case, they anticipated being
16 able to stipulate to both of these issues. We think both
17 of these are givens in the case of an IOU plant such as
18 this. And if Staff would be willing to stipulate to this
19 issue, we could treat it the same way as Issue 1.

20 MR. ELIAS: We'll certainly explore that
21 opportunity.

22 COMMISSIONER JABER: Great. Well, then, 15
23 minutes would be quite appropriate, but we'll wait until
24 we're done with all the issues.

25 Issue 3.

1 MR. SASSO: Yes. In preparing this draft order,
2 Staff attempted to take from our basic position, which we
3 had included in Issue 3 and Issue 4, the salient
4 provisions applicable to both Issues 3 and Issue 4, and
5 they got flip-flopped in the process. And we could
6 suggest that our position that appears under Issue 3 would
7 more appropriately be placed under Issue 4. And the
8 position, as it appears under Issue 4, would be more
9 appropriately placed under Issue 3.

10 COMMISSIONER JABER: Ms. Hart, you'll move the
11 position under Issue 4 and have it reflected under Issue 3
12 and vice versa?

13 MS. HART: We can certainly do that through the
14 wonders of word processing.

15 COMMISSIONER JABER: Okay. Mr. Sasso, any
16 changes to your positions on either of those issues?

17 MR. SASSO: No, ma'am.

18 COMMISSIONER JABER: Issue 5, page 10.

19 Issue 6.

20 No changes to Issue 5, right?

21 MS. HART: Right.

22 MR. SASSO: Well, again, in preparing the
23 statement, Staff dropped out paragraphs from what we had
24 included in our prehearing statement on this issue. We
25 would prefer that they be reflected, although I'm mindful

1 of your request that we try to keep this shorter.
2 Obviously, in the post-hearing statements, we would need
3 to keep it much shorter, but I am concerned that the
4 portion left in was really only the introductory paragraph
5 which indicates we issued an RFP. It doesn't say much
6 about what became of that.

7 And so, I would be inclined at this time to ask
8 that our original position be included in its entirety,
9 although perhaps we can take a look and see if we can trim
10 it down during that 15-minute break.

11 COMMISSIONER JABER: That's fine. We'll turn
12 the 15-minute break, I think, into half an hour. And
13 here's what I want you all to do. Make sure the positions
14 that Florida Power Corp. has given Staff are the positions
15 you have in the prehearing order, Ms. Hart.

16 MS. HART: Yes.

17 COMMISSIONER JABER: And you're absolutely
18 right, you trim down your positions in your post-hearing
19 filings. So, make sure that their positions are reflected
20 accurately.

21 COMMISSIONER JABER: Issue 6. Mr. Sasso, you
22 filed a motion to strike Issue 6?

23 MR. SASSO: That's correct.

24 COMMISSIONER JABER: Staff, you filed a response
25 to that?

1 MS. HART: That's correct.

2 COMMISSIONER JABER: And Mr. Sasso, as for oral
3 argument on the motion, which I'll grant; I don't think we
4 have to, actually, in a prehearing conference, but I'll go
5 ahead and grant it just to resolve the request for oral
6 argument.

7 Let me make sure I have Staff's response, too.
8 Staff, what I don't have is the request for oral argument,
9 but we're going to grant it, because it's not necessary to
10 rule on anyway. They're entitled to oral argument at the
11 prehearing conference, but was there anything else in the
12 request for oral argument that I need to know about?

13 MS. HART: The only thing that I might bring to
14 your attention is that they stated either that it be heard
15 today or -- and quoting from their request, if need be,
16 before the full panel of Commissioners. I would advise
17 you that it needn't be heard before the full panel and
18 that you can hear it today.

19 COMMISSIONER JABER: We're doing that. That's
20 exactly what we're going to do. So, Mr. Sasso, go ahead
21 and tell me why you think Issue 6 should be stricken.

22 MR. SASSO: Very well. We have moved to strike
23 both Issue 6 and, of course, also the testimony of
24 Mr. Billy Dickens, which is limited to Issue 6.

25 And as you point out, again, that we

1 conditionally filed rebuttal testimony of two witnesses,
2 and that would be withdrawn, if our motion were granted,
3 of course. Now, Issue 6 has changed over the days before
4 this hearing. And I've been handed the most recent
5 iteration of it, which apparently was prepared last night
6 or this morning.

7 COMMISSIONER JABER: Wait a minute, Mr. Sasso, I
8 need a copy of that.

9 MR. SASSO: The current version, for the record,
10 asks, "Given the Commission's responsibility, pursuant to
11 Sections 366.03 and 366.06, Florida statutes, to set fair,
12 just, and reasonable rates and Section 403.519 to
13 determine the need for adequate electricity at reasonable
14 cost using the most cost-effective alternative available,
15 should FPC's retail customers be obligated to pay the cost
16 of the Hines 2 Unit for the expected life of the Unit?"
17 That's the current version of the issue.

18 Now, how has Staff sought to answer this? Well,
19 they've filed the prefiled testimony of Mr. Dickens, who
20 recommends that the cost of the plant be included in rate
21 base, but then, five years out, that the decision to
22 continue to provide cost recovery be subject to ex-post
23 review or after-the-fact review, based on conditions that
24 exist at that time, regardless of how reasonable it was to
25 build this plant today.

1 This proposal violates the Commission's old
2 precedent in which the Commission has repeatedly held that
3 it will not determine policy issues, such as this, which
4 really go to ratesetting, and the like, in the context of
5 a need proceeding. And Staff's proposal amounts to an
6 inappropriate invitation to the Commission to exceed its
7 statutory powers.

8 COMMISSIONER JABER: This agency has stated, in
9 some form or fashion, that a policy issue is not
10 appropriate for a petition for a need determination case?

11 MR. SASSO: Yes, ma'am.

12 COMMISSIONER JABER: Where?

13 MR. SASSO: In our Hines 1 case, in fact, which
14 we cite and discuss in our memorandum.

15 In that case, and Staff relies on this in its
16 response; in that case, an intervenor and FPC were
17 debating the issue whether QFs ought to be held to cost
18 performance standards and recovery of cost standards
19 applied to a utility and whether there ought to be some
20 limit placed on the amount of contracted for QF power.
21 And the Commission determined that that was inappropriate.

22 In fact, Staff argued in that case, as we've
23 quoted in our memorandum, "As discussed in the recommended
24 order, issues relating to the recovery of costs incurred
25 in the construction of power plants are considered in the-

1 utility's rate case. If the intervenor is asking that the
2 Commission change its regulatory policy to require
3 utilities to be held to the same cost and performance
4 standards as that of QFs, this would have to be done in
5 rulemaking."

6 The Commission agreed and held that policy
7 issues, such as this were, quote, beyond the scope of this
8 proceeding and more properly addressed in a generic
9 rulemaking docket or ratemaking proceedings. That was in
10 our own Hines 1 case.

11 We've also referred to an FPL decision and a
12 Gulf decision where the Commission made clear that rate
13 issues need to be handled in rate cases. Other policy
14 issues need to be handled in generic dockets,
15 investigations, rulemaking and the like, but not in need
16 cases. And the same result ought to ensue here.

17 Now, by way of background, I think, it is
18 relevant to point out this issue occurred to staff,
19 really, as an afterthought. Staff initially provided us
20 with a list of issues that Staff believed should be
21 addressed in this need case. This was not among them.

22 We appeared for the issues identification
23 conference, and we were told that morning that the policy
24 bureau of the Staff wanted to raise a new issue. We asked
25 what it was, and we were advised they didn't want to ruin

1 our lunch, we'd learn about it at the I.D. conference.

2 COMMISSIONER JABER: But you would acknowledge
3 that parties and Staff can raise issues up until the
4 prehearing conference.

5 MR. SASSO: Yes. And our point is not to say it
6 was untimely, but to say that this was injected outside
7 the scope of the issues that Staff, itself, originally,
8 conceived were the relevant issues in this proceeding.
9 And the issue was identified in a conference, in general
10 terms, not in writing. We indicated we were upset about
11 this. The Staff said they weren't surprised, but they
12 pressed ahead with this. We received a written version of
13 it later. It has changed two or three times. And now we
14 have the current version.

15 What's wrong with this issue? Well, as I've
16 indicated, it calls upon the Commission to make a
17 fundamental policy change in the way the Commission
18 regulates utilities. This is a very broad fundamental
19 policy issue that Staff is calling upon the Commission to
20 result in the context of our need proceeding. Mr. Dickens
21 explained in his testimony --

22 COMMISSIONER JABER: If that were true, can't
23 this agency change policy anytime it deems appropriate?

24 MR. SASSO: No, it can't. The legislature has
25 made quite clear that rulemaking is a preferred means of -

1 policymaking, and certain procedures have to be taken.
2 And more fundamentally, as I'll explain, in this instance,
3 the agency doesn't even have the statutory authority to
4 change this policy.

5 Mr. Dickens testified in his prefiled testimony
6 that he is recommending a change to what he calls the
7 orthodox regulatory compact, which exists under current
8 law. And he agreed under the -- in his deposition about
9 the terms of this compact. He characterized it as an
10 agreement among the state in the form of the Public
11 Service Commission, the ratepayers and the utilities, to
12 the following, and it's more than that. It's a matter of
13 statutory right and constitutional right. Under this
14 compact, regulated utilities have an obligation to serve.
15 And pursuant to that obligation, they make decisions to
16 build power plants.

17 COMMISSIONER JABER: But isn't the question --
18 doesn't Staff's issue go to how much of the cost should be
19 recovered from the retail ratepayer?

20 MR. SASSO: It goes to how much and it goes to
21 the procedure for examining cost recovery.

22 COMMISSIONER JABER: No, that's Mr. Dickens'
23 testimony that goes to the procedure. I'm just talking
24 about the issue right now.

25 MR. SASSO: Well, the Staff's issue goes,

1 fundamentally, to the question should there be cost
2 recovery for the life of this plant at all or, to some
3 extent, should that be denied? I mean, that's what the
4 issue squarely raises. And Mr. Dickens addresses that
5 issue.

6 COMMISSIONER JABER: Now, if the statute -- your
7 argument is the statute says that the costs have to be
8 recovered from the retail ratepayer?

9 MR. SASSO: That question is answered by the
10 statute --

11 COMMISSIONER JABER: All right.

12 MR. SASSO: -- that says that we have a right to
13 a reasonable return on costs reasonably incurred. That is
14 answered by a statute. They're, essentially, asking
15 should the statute be changed.

16 COMMISSIONER JABER: Now, if the statute answers
17 the question, what's wrong with the question? If you know
18 what the answer is going to be to the question, what's the
19 harm in having the question?

20 MR. SASSO: Well, there are two reasons why
21 we're concerned about it. One is it is not appropriate in
22 a need proceeding to be asking should a legislation be
23 changed. Even if the answer is no, the Commission doesn't
24 have authority to change the legislation. That is not an
25 appropriate issue to be adjudicated at a hearing in a need

1 case.

2 The question, whether a legislation ought to be
3 amended, is being addressed by the governor's study
4 Commission right now, but it is not an appropriate issue
5 to be addressed at the need case. It is only -- it only
6 creates a potential for mischief. We're going to spend
7 our time debating this issue. We've already filed the
8 testimony of three witnesses. We're talking about
9 discovery. We'll be consuming hearing time.

10 And the best that can be said of it, as you've
11 indicated, Commissioner Jaber, the answer is summarily no,
12 the law should not be changed, it cannot be changed. So
13 what is the benefit to the Commission or the parties to
14 debate legislative change in the context of a need case?

15 The worse that can come of this is tremendous
16 mischief, because if some action is taken at the
17 invitation of Staff that's going to create legal error and
18 needless appeals, which will delay and potentially thwart
19 the development of this project.

20 So, we're very concerned about the injection, in
21 this case, of a legislative policy issue, which should not
22 be addressed by the Commission in our need case. We don't
23 want to be sidetracked with statutory legislative policy
24 issues.

25 COMMISSIONER JABER: Where in their issue,

1 Mr. Sasso, do you believe they're advocating that the
2 statute be changed?

3 MR. SASSO: In Mr. Dickens' testimony he
4 recommends a proposal to change the regulatory compact.
5 Now, of course, he doesn't get into a discussion of
6 statutes, because he's talking about policy.

7 COMMISSIONER JABER: That's Mr. Dickens'
8 testimony, and that will be subject to cross examination
9 and your rebuttal testimony. Look at this issue and tell
10 me where in this issue Staff is advocating that the
11 statutes be changed.

12 MR. SASSO: They don't advocate it in the
13 statement of the issue, of course, because it's a
14 question. But the question is, is it appropriate to
15 obligate Florida Power Corporation's retail customer for
16 the cost of the Hines 2 Unit for the expected life of the
17 Unit?

18 We would suggest two things: At best, that's a
19 rate case issue. As this Commission has recognized in the
20 Hines 2 case, that's a rate case issue. The Commission
21 has rules for handling rate cases. There are special
22 procedures that have to be followed, notice has to be
23 given, special hearings have to be convened, and they're
24 attempting to inject in this proceeding a ratemaking issue
25 that is not appropriate for this case.

1 Second, yes, they haven't given the answer, but
2 the question makes no sense, unless we're prepared to
3 contemplate an answer other than summarily yes. I mean,
4 why does it make any sense to identify as issues questions
5 that have clear statutory responses right down the line?

6 You know, is the Public Service Commission the
7 regulatory authority? Is Florida Power Corporation a
8 utility? Is Florida Power Corporation entitled to a
9 reasonable rate of return on its assets? We could go
10 through the whole set of statutory standards and criteria,
11 but that is not an appropriate use of issues for a
12 hearing, let alone the submission of testimony.

13 We've already been called upon to expend time
14 and effort and energy in the development and filing of
15 testimony on this issue, which is really a nonissue.

16 COMMISSIONER JABER: What do you think the
17 legislature meant in Section 403.519 when it said that the
18 Commission must consider adequate electricity at
19 reasonable cost? What do you think the legislature meant?

20 MR. SASSO: Well, that's quite clear. Based on
21 a long line of precedent by this Commission, reasonable
22 costs are to be determined at the time a decision is made
23 to build a plant, based on all of the circumstances known
24 at the time. There are procedures to develop this.

25 The utility is required to issue an RFP, if it's

1 an IOU, as we have, to test market, evaluate responses.
2 We do our own analysis. And as a result of all the
3 information known to us and the circumstances that exist
4 at the time the decision is made, we make a decision
5 whether the costs are reasonable for going forward with
6 this project.

7 Again, in his testimony, Mr. Dickens conceded
8 that our proposal is the most cost-effective proposal
9 available to Florida Power Corporation today. The Staff
10 is seeking to inject an entirely different issue in this
11 case. The issue is framed around Mr. Dickens' proposal,
12 not vice versa, and that's important to understand.

13 COMMISSIONER JABER: All right. Let me keep
14 bringing you back to the issue. I don't want to talk
15 about Mr. Dickens' testimony yet. Let me ask the question
16 this way. The Commission, under 403, is required to look
17 at reasonable cost.

18 MR. SASSO: Correct.

19 COMMISSIONER JABER: Is it your argument that
20 this issue doesn't go to the Commission's determination of
21 whether this is adequate electricity at reasonable cost?

22 MR. SASSO: My position is we already have an
23 issue about reasonable cost.

24 COMMISSIONER JABER: Which one?

25 MR. SASSO: It's probably Issue 3. No, that's -

1 reliability and integrity. Issue 4, is there a need for
2 the proposed Hines 2 Unit, taking into account the need
3 for adequate electricity at reasonable cost? Issue 7, is
4 the proposed Hines 2 Unit the most cost-effective
5 alternative available?

6 Those issues squarely address the issues that
7 have to be dealt with in this hearing. And those issues,
8 under well-established law, are to be resolved based on
9 the facts and circumstances known to the utility and the
10 Commission today.

11 The reason Staff wants to inject this as a
12 different issue is precisely because they want to raise a
13 different issue, not either of these that have already
14 been clearly and specifically articulated. And we cannot
15 address this issue, with all respect, without reference to
16 the origin of it and the intent of it and the proposal
17 that this is built around, namely Mr. Dickens' testimony.
18 That was the origin of this issue.

19 COMMISSIONER JABER: Anything else? We're going
20 to come back to Mr. Dickens' testimony, but I want to
21 limit your argument now for the issue.

22 MR. SASSO: Okay. As I was indicating, this
23 issue calls upon the Commission, essentially, to review
24 statutory authority, to change statutory authority. It is
25 very different from the other issues which are squarely

1 encompassed is 403.519, such as reasonable cost recovery,
2 reasonable cost -- I'm sorry, not reasonable cost
3 recovery, but the need for adequate electricity at
4 reasonable cost. This is a cost recovery issue, which is
5 a rate issue.

6 The Supreme Court has held, and the statutes
7 make it quite clear, that utilities shall not be denied a
8 reasonable rate of return on their rate base. The Supreme
9 Court has held that is a constitutional right. That is
10 not an issue that is fairly subject to debate in our need
11 case.

12 Should the Commission wish to raise rate
13 recovery issues, there's an appropriate vehicle provided
14 in the statutes for doing so, and there is also a law that
15 governs how they can do so. They cannot retroactively
16 disapprove decisions to build plants based on hindsight
17 review, which is the thrust of the proposal. That's very
18 clearly established in the law.

19 Our decision to build this plant, which is
20 subject to scrutiny by the Commission today, must be
21 reviewed based on facts and circumstances existing today.
22 Staff wants to suggest a proposal where, five years out,
23 we include a condition in the need determination requiring
24 that the Commission and the utility review circumstances
25 that exist, then to decide whether cost recovery should be

1 permitted going forward, and that is inappropriate.

2 COMMISSIONER JABER: That's Mr. Dickens'
3 testimony.

4 MR. SASSO: That is Mr. Dickens' testimony.

5 COMMISSIONER JABER: That will be subject to
6 cross examination.

7 MR. SASSO: That is correct.

8 COMMISSIONER JABER: And refuted by your
9 rebuttal testimony.

10 MR. SASSO: That is correct.

11 COMMISSIONER JABER: If this issue is left in,
12 there will be two ways that Staff can attempt to have
13 evidence on this issue, right, testimony or cross
14 examination?

15 MR. SASSO: Right.

16 COMMISSIONER JABER: So, I'm still struggling to
17 understand what your problem with this issue is.

18 MR. SASSO: It is not an issue that is
19 encompassed within the statutory criteria. Now, in the
20 latest iteration they have attempted to anchor it in the
21 statute, but that doesn't make it so, because we already
22 have issues taken out of the statute.

23 COMMISSIONER JABER: But why doesn't it fall
24 under 403.519 with respect to looking at adequate
25 electricity at reasonable cost?

1 MR. SASSO: That issue is already clearly
2 identified. This is intended to be a different issue.
3 That creates mischief. It creates peril for us going
4 forward in this hearing. There is no good reason to have
5 a separate issue which, at best, is redundant and, at
6 worst, is intended to do something different.

7 Now, what does Staff say about this in its
8 response? Well, first, they've said this is not a policy
9 issue, they're not attempting to raise a policy issue.
10 But, in fact, that is exactly contrary to what we have
11 been told from day one about this. We were told that this
12 was an issue that the policy bureau wanted to raise.

13 Mr. Dickens, who is going to address this, is
14 from the policy bureau. He's identified himself as a
15 policy wok. He is commissioned to look at the tea leaves,
16 as he put it, and to anticipate policy changes, and that
17 is what the Staff intends to do with this issue.

18 Staff goes on to say that consideration of
19 impact to ratepayers of costs of new plants is within the
20 ambit of the issues in 403.519. As we've indicated, those
21 issues in 403.519 are clearly flagged.

22 Staff goes on to say, well, this is within the
23 Commission's jurisdiction to set rates, which are just,
24 fair, and reasonable. This is not a rate case. There are
25 special proceedings for rate cases.

1 COMMISSIONER JABER: When was the last time you
2 filed a rate case?

3 MR. SASSO: Rate case was filed many years ago,
4 several years ago. But whether or not that's appropriate,
5 we currently have a stipulation that the Commission has
6 approved about our rates. When and whether that is
7 appropriate is the subject for another day and another
8 context.

9 Staff goes on in their response to argue that a
10 conclusion of prudence is implicit in the process of
11 determining whether a given proposal is cost-effective and
12 reasonable. We agree completely that if the Commission
13 approves our decision to build this plant, based on
14 circumstances demonstrated today, which demonstrate today
15 that the decision is an appropriate one and the selection
16 is cost-effective, then, yes, that does indicate that it's
17 a prudent decision.

18 Staff recognizes that we have an appropriate
19 objection to revisiting that on the basis of hindsight.
20 And they say the reason they want this issue in today is
21 to deal with that, so it's not going to be hindsight
22 review. But that's like saying, well, you know, I'm going
23 take your wallet tomorrow, and it's okay if I do it, if I
24 tell you today I'm going to do it. It doesn't make it
25 okay to suggest that there be hindsight review five years

1 down the road just because they tell us today that they're
2 going to engage in it.

3 So, to sum up, Commissioner Jaber, we don't
4 think that this issue has any appropriate place in this
5 proceeding. You have suggested some ways why issues of
6 cost might be relevant, and those are squarely and fairly
7 encompassed in other issues that have been identified.
8 The intent of this, and the spirit of it and the wording
9 of it, really, is to address cost recovery, which is not
10 within the scope of this proceeding.

11 COMMISSIONER JABER: You think that one of the
12 reasons this issue should be stricken is because it
13 duplicates, to some degree, Issue 4?

14 MR. SASSO: It certainly does.

15 COMMISSIONER JABER: Mr. Dickens' testimony,
16 then, could be considered under the ambit of Issue 4?

17 MR. SASSO: No, because he's already
18 disqualified it as under Issue 4. He said he has no
19 quarrel with the proposition that we have demonstrated
20 compliance with all criteria of 403.519. This is the most
21 cost-effective alternative and that we're entitled to a
22 need determination to build this plant. His only concern
23 is that there be a condition for future revisiting of this
24 decision. That's his testimony. It does not support --
25 it does not address any of the other issues in this case,--

1 which is why we've moved to strike it.

2 COMMISSIONER JABER: All right. Anything else?

3 MR. SASSO: Not at this time, thank you.

4 COMMISSIONER JABER: Staff?

5 MS. HART: Commissioner, Mr. Sasso has made a
6 lot of my arguments for me. Staff is not suggesting that
7 this is a new policy issue. In fact, we're taking
8 exception to the characterization of this as a policy
9 issue. It's simply a component of the examination that
10 the Commission must do under 403.519, as the Commissioners
11 pointed out, the need for adequate electricity at
12 reasonable cost and whether this proposal is the most
13 cost-effective alternative available.

14 In addition, I'd point out that the statute also
15 states that the Commission shall consider any other
16 matters, within its jurisdiction, that it deems are
17 relevant to the proceeding. Consequently, FPC's argument
18 that this is outside the statutory authority or the new
19 legislation that's necessary is not correct. It is
20 squarely within the terms of 403.519 for the Commission to
21 consider the cost impacts of a proposed plant.

22 The impact of the cost of any proposal on the
23 retail customer is inherent in the consideration of the
24 determination of the reasonable cost of service and
25 whether it's the most cost-effective alternative.

1 Once this Commission grants a need
2 determination, all those decisions and costs identified to
3 that point are deemed prudent. And those costs are
4 subject to recovery in the absence of changed
5 circumstances. So, Staff is trying to make the Commission
6 aware that these matters should be considered in the
7 context of the need determination.

8 Rather than proposing a strictly hindsight
9 review, Staff's proposals are that the Commission
10 consider, in the context of this proceeding, the changing
11 regulatory environment that's being seen nationwide.

12 While hindsight may not be appropriate, neither is tunnel
13 vision, and the Commission cannot ignore the realities
14 that have occurred in the nine years since Hines 1. It's
15 been nine years since FPC last saw a need determination.

16 And there have been a number of events that have
17 taken place, including -- as I state in our response,
18 including the Energy Policy Act of 1992 and the FERC
19 orders 888, 889 and order 2,000. It's entirely
20 appropriate for the Commission to consider the impact
21 that these actions, which are designed to foster a
22 competitive wholesale market, should have on a utility's
23 resource choices.

24 COMMISSIONER JABER: See, let me -- what is your
25 -- in your own words, what is your issue? Because

1 everything you've said is not should FPC's retail
2 customers be obligated to pay the costs. What I hear you
3 saying is there is no dispute as to the cost recovery
4 coming from the retail ratepayer. You're not trying to
5 say that -- you're not trying to prevent Florida Power
6 Corporation from recovering the costs of the unit from the
7 retail ratepayer.

8 MS. HART: Appropriately recovering, I would
9 agree with that.

10 COMMISSIONER JABER: Right. And you just
11 acknowledged that once the decision on the need is made,
12 the costs are prudent.

13 MS. HART: Right.

14 COMMISSIONER JABER: That's not should Florida
15 Power Corporation's retail customers be obligated to pay.
16 You answered your own question. What is your issue? What
17 is Staff trying to accomplish with this issue? That's the
18 first question. And the second question is how is it
19 different from Issue 4?

20 MS. HART: Again, I think, it could be taken up
21 in Issue 4, outside the considerations of trying to set
22 out the issues as explicitly as possible for all the
23 parties involved.

24 COMMISSIONER JABER: Answer this, Ms. Hart, for
25 me. Is the Commission -- assuming this is a policy issue,

1 is the Commission prevented from identifying or
2 considering policy issues in need determination cases?

3 MS. HART: I would say no. They've done it
4 before. Actually, in Hines 1 there was discussion of the
5 impacts of various things on FPC's credit rating, which is
6 arguably a policy issue that's not any different than the
7 consideration of the costs involved in building Hines 2.

8 COMMISSIONER JABER: And how do you respond to
9 Mr. Sasso's argument that pure policy decisions are more
10 appropriate for rulemaking?

11 MS. HART: Well, rulemaking -- I'd have to say I
12 disagree. Rulemaking is something that is done when there
13 is a uniform kind of policy determination that's going to
14 apply to all cases in the future.

15 I would argue that need determinations need to
16 be taken on a case-by-case basis and that every need at
17 every point in time is going to be different. And so, any
18 guidelines that a rule might provide would be too
19 restrictive.

20 COMMISSIONER JABER: Tell me the issue, in your
21 own words, that you envision addressing your concerns.
22 You said you want the Commission to consider the cost
23 impacts.

24 MS. HART: Right.

25 COMMISSIONER JABER: You said you want the

1 Commission to consider the changing regulatory
2 environment. A lot has changed since Hines 1.

3 MS. HART: Right.

4 COMMISSIONER JABER: What is the concern that
5 Staff has that it wants the Commission to consider?

6 MS. HART: The concern is that ratepayers will
7 be on the hook.

8 COMMISSIONER JABER: Okay. Here's what we're
9 going to do. We're going to start the 30-minute break.
10 Actually, I'm going to start back up at 11:15. Here are
11 the things I want accomplished during the break.

12 Mr. Sasso, you're going to make sure that Staff has your
13 positions to Issues 2, 3, 4, and 5, I think.

14 MR. SASSO: Yes, ma'am.

15 COMMISSIONER JABER: Ms. Hart, you're going to
16 make sure you have that.

17 MS. HART: Right.

18 COMMISSIONER JABER: You're going to try to
19 resolve Issue 2, and I'm going to consider Issue 6 during
20 the break.

21 MR. SASSO: May I just correct one misimpression
22 that may have been created?

23 COMMISSIONER JABER: Yes.

24 MR. SASSO: Ms. Hart mentioned that there was
25 discussion in Hines 1 about credit ratings, et cetera.

1 That discussion, which Staff mentions in its memorandum,
2 was a discussion between the parties. When the Commission
3 issued its order, it declared that policy issues were
4 outside the scope of the proceeding, and that was the
5 policy issue it was addressing, the set-up policy issues
6 of which that was 1.

7 COMMISSIONER JABER: Mr. Sasso, during the
8 break, you need to take a look at Issue 6 and work with
9 Staff on wording of the issue that would satisfy
10 everyone's concerns. To the degree that issue is
11 duplicative with Issue 4, I want someone to point out to
12 me the duplication.

13 And Staff, you need to be prepared to point out
14 to me the difference between the issues. Let me just --
15 you know, fair warning, I'm not inclined to strike a Staff
16 issue, if it's appropriate in a proceeding. But Staff, I
17 don't hear that yet. So, you need to be ready to explain
18 to me why this issue is different from Issue 4, and what
19 it is you're trying to accomplish.

20 Okay. We'll convene at 11:15.

21 (Brief recess.)

22 COMMISSIONER JABER: Let's continue the
23 prehearing. Ms. Hart, did you get clarification on the
24 positions for Issues 3, 4, and 5?

25 MS. HART: Yes, 3 and 4 and 5, yes. We will be

1 switching FPC's -- we'll be switching 3 and 4, their
2 position, and on 5 we'll insert their entire position, as
3 stated in their prehearing statement.

4 COMMISSIONER JABER: Okay. Let's go back to
5 Issue 2.

6 MS. HART: Issue 2 we have not been able to
7 reach resolution on.

8 COMMISSIONER JABER: Mr. Elias, when we left
9 Issue 2, I suggested to you that the determination of
10 fully committed for use can be addressed in the need issue
11 and you, I think, acknowledged that that could be done?

12 MR. ELIAS: Yes. Could we leave open the
13 possibility of reaching a stipulation on this issue? Or,
14 you know, it may be that we can come to some resolution
15 that, you know, between now and the time the prehearing
16 order is issued.

17 COMMISSIONER JABER: Yes.

18 That brings us back to Issue 6. Staff, as I
19 understand it, you have revised language?

20 MS. HART: Yes, and I'll read it. "Given the
21 uncertainty in today's energy market, is it prudent for
22 FPC to commit to a 30-year rate base generating unit?"

23 COMMISSIONER JABER: Read it again.

24 MS. HART: "Given the uncertainty in today's
25 energy market, is it prudent for FPC to commit to a

1 30-year rate base generating unit?"

2 COMMISSIONER JABER: Mr. Sasso, do you have an
3 objection to that issue as a replacement for the current
4 Issue 6?

5 MR. SASSO: Yes, we do.

6 COMMISSIONER JABER: What's your objection?

7 MR. SASSO: Well, we've had only a few minutes
8 to consider it. It was just handed to us a moment ago.
9 But based on our quick review, this appears to be an
10 attempt now to challenge our decision to build the plant,
11 which has never been placed in issue by the Staff before.
12 It is not what Mr. Dickens testified to. It seems to
13 substitute a different standard for the need standard in
14 the statute. It assumes or implies that uncertainty in
15 today's energy market is a given, and we're not sure
16 what's intended by that.

17 The rules are clear. They are well defined in
18 the Florida statutes. Unless and until they are changed,
19 we are obligated to follow them. We have followed them to
20 a tee. And so, as far as we're concerned, we don't think
21 it's an open question what our obligation to do is at this
22 point and time. So, we don't think it's an appropriate
23 issue. To the extent that Staff is simply trying to
24 rephrase other issues that are clearly presented by
25 403.519, they're already in the case.

1 COMMISSIONER JABER: All right. Let me get some
2 clarification from you on your position, whether it
3 relates to the new-reworded issue or the old Issue 6. Is
4 it your position that the Commission does not have the
5 authority to look at cost after the petition for need is
6 approved?

7 MR. SASSO: No, not at all. The Commission
8 always retains the authority under existing law to review
9 cost on a prudency basis, to review our ongoing operation
10 of the plant on a prudency basis. The Commission has
11 tools under existing law to deal with these issues. There
12 may be a rate case issue.

13 What this represents is really an effort to get
14 a jump on restructuring deregulation in two respects; one
15 is we keep being told repeatedly by Staff we ought to go
16 out to the wholesale market. Well, the Supreme Court has
17 already spoken to that. We followed the rules set down by
18 this, Commission about how we test the wholesale market.
19 We issued an RFP, we got responses, we evaluated them. It
20 so happens that the two proposals we got do not comply
21 with existing law, but we evaluated them anyway.

22 So, we followed the rules about how you test the
23 wholesale market, and we went ahead and made the decision,
24 given alternatives available to us at this time. So, we
25 think it's utterly inappropriate for Staff to be

1 attempting to force us to go out into this so-called
2 wholesale market, which the Supreme Court has just flatly
3 squelched with respect to the merchant issue. It's an
4 attempt to really backdoor the merchant issue. It's an
5 attempt to get a jump on deregulation in another respect,
6 too; and that is, to the extent the laws in the state may
7 change some day, to the extent that there will be
8 deregulation or restructuring, there will be stranded cost
9 issues. We will have to deal with stranded costs,
10 stranded benefits and so on.

11 And, you know, at that time all the stakeholders
12 will have to come at a table and address those issues in a
13 responsible manner, and the legislature will have to
14 address how to handle transition. There has not been
15 deregulation. It is not well defined, if it occurs; when
16 it occurs, it's up in the air. What it looks like is up
17 in air. It'll be the legislature's responsibility to
18 address the transition, and none of that framework is in
19 place.

20 This is an effort to get an unauthorized jump on
21 that deregulation and to engineer a transition in an
22 inappropriate manner. That's really what this is. And
23 that's our concern.

24 COMMISSIONER JABER: Setting aside your concern,
25 with respect to deregulation and with respect to the

1 wholesale market overall, what I hear you acknowledging is
2 that you think this agency has authority to look at cost
3 after the approval of the need determination application.

4 MR. SASSO: There is a well-defined body of law
5 about prudence review, and it cannot be a hindsight type
6 of prudence review. But currently, in this proceeding,
7 that's not what this is all about. Right now the statute
8 dictates that we are here to inquire into need. Is there
9 a need for this plant, given certain criteria? All of
10 those criteria have been identified and spelled out in the
11 issues in this case.

12 COMMISSIONER JABER: Right. But as part of the
13 inquiry into need, you also acknowledge that the
14 Commission has the authority to look at the cost aspect.

15 MR. SASSO: The reasonableness of the cost, yes.

16 COMMISSIONER JABER: All right. Is there any
17 place, in your opinion, in this proceeding to look at the
18 cost recovery mechanism?

19 MR. SASSO: Not cost recovery. As such, the
20 Commission should not be looking at cost recovery issues
21 in this proceeding. There is a cost recovery mechanism
22 that gives the Commission the occasion to do that.

23 There's a rate proceeding, there are provisions
24 in the statute that speak about how the utility can seek
25 rate adjustments, how the Commission could seek rate

1 adjustments. That's done on a different proceeding, and
2 it's done under certain standards, which we've already
3 discussed, to some extent, statutory standards, that make
4 clear that once a plan is in rate base, we are entitled to
5 a reasonable return on that investment.

6 COMMISSIONER JABER: All right. Here's what
7 I'll do with Issues 2 and 6: I'm not going to rule on
8 including either issue today. By Friday, we will issue an
9 order on both of those issues.

10 To the degree either issue is reworded, Staff, I
11 want you to show the new language to Florida Power
12 Corporation and be able to represent to me whether they've
13 seen it, whether they agree with it.

14 Florida Power Corp., I've got your motion to
15 strike. That is all I need to make my ruling. And we
16 will have a decision on both of those issues by Friday so
17 that if the issues stay in, they'll be incorporated in the
18 prehearing order. To the degree they're going to be
19 modified, I will modify them, which means you need to be
20 prepared to have a position to the modified issues after
21 you talk to Staff.

22 MR. SASSO: Ma'am, do I understand that you may
23 -- to the extent you believe it's appropriate, you may
24 modify issues from the form in which they're presented by
25 Staff? Because if that's the case, then, we would need an

1 opportunity to state a position to any modified issue.

2 COMMISSIONER JABER: Yes. All right? Issue 7
3 -- but let me say something to Staff and to Florida Power
4 Corp. It's Wednesday. That gives you the rest of this
5 afternoon and tomorrow to get together and talk about
6 these issues. You're not far from each other. And as I
7 listen to the arguments, in certain places, you're saying
8 the same thing. So, I encourage you to sit down and talk
9 this afternoon and tomorrow.

10 Issue 7.

11 Issue 8.

12 MS. HART: We believe that we've reached a
13 stipulation on Issue 8. And so, that will be added to
14 stipulated matters.

15 COMMISSIONER JABER: What is the stipulation?

16 MS. HART: That there are no -- that the answer
17 is no to the issue as it's stated. We agree with FPC.

18 COMMISSIONER JABER: So, the stipulation will
19 read, "There are no conservation measures taken by or
20 reasonably available to Florida Power Corporation which
21 might mitigate the need for the proposed power plant."

22 MS. HART: Right.

23 COMMISSIONER JABER: Changes to Issue 9?

24 MR. SASSO: Yes, ma'am. The draft order
25 indicates that our witness on this issue will be

1 Mr. Crisp. We would like to add Taylor, also.

2 COMMISSIONER JABER: Okay. Issue 10.

3 MR. SASSO: Yes. We would like to state a
4 position on that and have that reflected in the order.

5 Our position would be, yes, after a favorable
6 determination of need.

7 COMMISSIONER JABER: We really don't need this
8 issue, do we, Issue 10?

9 MS. HART: I think, we refer to it as a filler,
10 a space saver. It will be in the recommendation,
11 ultimately. We can strike it, if the Commissioner
12 prefers.

13 COMMISSIONER JABER: It's all right. Leave it
14 for now, but I really don't need to see this issue in
15 other cases. I think, it's a given that you're going to
16 address the closing of the docket.

17 MS. HART: Okay.

18 COMMISSIONER JABER: Exhibit List.

19 MR. SASSO: Yes. As we indicated previously, we
20 would like to add, contingent on the Commissioner's ruling
21 on Issue 6, the deposition of Mr. Dickens.

22 COMMISSIONER JABER: Can there be a stipulation
23 with respect to having Mr. Dickens' deposition as an
24 exhibit at the hearing?

25 MS. HART: Okay. We have no problem with that,

1 provided any depositions that we take of FPC's rebuttal
2 witnesses will be afforded the same treatment, and any
3 witnesses that we take depositions of.

4 COMMISSIONER JABER: Mr. Sasso?

5 MR. SASSO: I'm sorry, I'm not sure I understood
6 the proposal.

7 COMMISSIONER JABER: What they're saying is they
8 don't have any objection to just stipulating Mr. Dickens'
9 deposition into the record, if you don't have any problem
10 with their use of depositions of your witnesses,
11 stipulating those depositions into the record.

12 MR. SASSO: I don't anticipate any objection,
13 but they haven't taken any depositions. I'm not sure
14 whether or not there'll be an intervenor.

15 COMMISSIONER JABER: All right. Here's what
16 we'll do. For now, you can show Mr. Dickens' deposition
17 as an exhibit.

18 MS. HART: Okay.

19 COMMISSIONER JABER: And to the degree you can
20 reach a stipulation, you can do that by Friday.

21 MS. HART: Okay.

22 COMMISSIONER JABER: Anything else, Mr. Sasso,
23 on the exhibits?

24 MR. SASSO: No.

25 COMMISSIONER JABER: Staff?

1 MS. HART: No.

2 COMMISSIONER JABER: Proposed Stipulations. I
3 had that you will have Issue 1 as a stipulation --

4 MS. HART: Right.

5 COMMISSIONER JABER: -- and Issue 7. No,
6 actually, it was Issue 8.

7 MS. HART: That's correct.

8 COMMISSIONER JABER: We've addressed all pending
9 motions, in some form or fashion. You'll have an order to
10 me on the confidential classification by Friday. I
11 thought there were objections to discovery outstanding,
12 too.

13 MS. HART: Those have been resolved. Discovery
14 has changed hands, and the objections were overcome.

15 COMMISSIONER JABER: All right.

16 MR. SASSO: Excuse me, Commissioner. There
17 should be an additional item under Pending Motions, to the
18 extent request for confidential classification will
19 qualify. And sometimes, I know they're not listed as
20 motions, but we do have a second request for confidential
21 classification concerning interrogatory answers we've
22 provided, and that should be reflected, as long as we're
23 reflecting the other one.

24 MS. HART: And documents as well, right?

25 MR. SASSO: Yes.

1 COMMISSIONER JABER: When was that filed?

2 MS. HART: I don't believe it's been filed yet.
3 They provided documents yesterday that Staff reviewed and
4 let them know which things we wanted copies of and,
5 therefore, their request will cover those things that
6 Staff picked out, rather than a wholesale kind of request
7 for all of it. So, I believe, they'll file it shortly.

8 MR. SASSO: There was a second request filed
9 yesterday for the interrogatories and attachments to
10 interrogatories and, perhaps, it was just too recent to be
11 picked up on the screen.

12 COMMISSIONER JABER: Okay. Ms. Hart, just have
13 it reflected as a pending motion and bring me an order --

14 MS. HART: Okay.

15 COMMISSIONER JABER: -- if appropriate.

16 Now, Mr. Sasso, with respect to striking
17 Mr. Dickens' testimony, that will depend on the issue, to
18 some degree. Obviously, with respect to striking the
19 issue and the testimony, I recognize that your rebuttal
20 testimony would be withdrawn or not?

21 MR. SASSO: Right.

22 COMMISSIONER JABER: Anything else?

23 MS. HART: Not from Staff.

24 COMMISSIONER JABER: Do you all understand what
25 you're to do before Friday?

1 MR. SASSO: Yes, ma'am.

2 MS. HART: Yes.

3 COMMISSIONER JABER: Great, thank you. This
4 prehearing is adjourned.

5 (Prehearing concluded at 12:00 p.m.)

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1 STATE OF FLORIDA)

2 : CERTIFICATE OF REPORTER

3 COUNTY OF LEON)

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5 I, KORETTA E. STANFORD, RPR, Official FPSC Commission
6 Reporter, do hereby certify that the Prehearing Conference
7 in Docket Number 001064-EI was heard by Commissioner Lila
8 Jaber at the time and place herein stated.

9 It is further certified that I stenographically
10 reported the said proceedings; that the same has been
11 transcribed under my direct supervision; and that this
12 transcript, consisting of 59 pages, constitutes a true
13 transcription of my notes of said proceedings.

14 I FURTHER CERTIFY that I am not a relative, employee,
15 attorney or counsel of any of the parties, nor am I a
16 relative or employee of any of the parties' attorney or
17 counsel connected with the action, nor am I financially
18 interested in the action.

19 DATED this 17th DAY OF OCTOBER, 2000

20

21

Koretta E. Stanford
KORETTA E. STANFORD, RPR
FPSC Official Commission Reporter
(850) 413-6734

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