

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

IN RE: DOCKET NO. 000442-EI - Petition for  
determination of need for the Osprey Energy  
Center by Calpine Construction Finance  
Company, L.P.

---

BEFORE: COMMISSIONER E. LEON JACOBS, JR.  
COMMISSIONER LILA A. JABER  
COMMISSIONER BRAULIO L. BAEZ

PROCEEDINGS: AGENDA CONFERENCE

ITEM NUMBER: 49\*\*

DATE: Tuesday, October 17, 2000

PLACE: 4075 Esplanade Way, Room 148  
Tallahassee, Florida

REPORTED BY: MARY ALLEN NEEL  
Registered Professional Reporter

ACCURATE STENOGRAPHY REPORTERS  
100 SALEM COURT  
TALLAHASSEE, FLORIDA 32301  
(850)878-2221

**BUREAU OF REPORTING**

RECEIVED 10-31-00

DOCUMENT NUMBER-DATE

14086 OCT 31 8

FPSC-RECORDS/REPORTING

## PARTICIPANTS:

ROBERT ELIAS, FPSC, on behalf of the Commission Staff.

CHARLES GUYTON, Steel, Hector & Davis, on behalf of Florida Power & Light Company.

RACHAEL ISAAC, FPSC, on behalf of the Commission Staff.

GARY SASSO, Carlton Fields, on behalf of Florida Power Corporation.

ROBERT SCHEFFEL WRIGHT, Landers & Parsons, on behalf of Calpine Construction Finance Company L.P.

## STAFF RECOMMENDATION

Issue 1: Should the Commission grant Calpine's request for oral argument?

Recommendation: Yes. The Commission should grant Calpine's request for oral argument.

Issue 2: Should the Commission grant FPL's emergency motion to hold this matter in abeyance?

Recommendation: No. FPL's motion should be denied.

Issue 3: Should the Commission grant Calpine's petition for a determination that Rule 25-22.082(2), Florida Administrative Code, does not apply to Calpine, or grant Calpine's alternative request for waiver of Rule 25-22.082(2), Florida Administrative Code?

Recommendation: The Commission should grant Calpine's petition for a determination that rule 25-22.082(2), Florida Administrative Code, does not apply to Calpine.

Issue 4: Should the Commission grant Florida Power & Light Company's (FPL's) motion to dismiss Calpine's Petition for Determination of Need for an Electrical Power Plant?

Recommendation: No. Calpine's petition for need determination states a cause of action upon which relief can be granted because it alleges all of the required elements. At the time Calpine files its information concerning contractual commitments, it shall file all the information required by Rule 25-122.081, Florida Administrative Code.

Issue 5: Should the Commission grant Florida Power Corporation's motion to dismiss Calpine Construction Finance Company L.P.'s petition for determination of need for an electrical power plant?

Recommendation: No Calpine's petition states a cause of action upon which relief can be granted because it alleges all of the required elements.

Issue 6: Should this docket be closed?

Recommendation: No. This docket should remain open for the hearing.

1 COMMISSIONER JACOBS: Item 49.

2 MS. ISAAC: Commissioners, Item 49 is  
3 staff's recommendation on some procedural  
4 matters in the Calpine need determination case,  
5 and the parties are here to address the  
6 Commission.

7 COMMISSIONER JACOBS: Okay. Who's up  
8 first? We may need to take appearances here.  
9 Should we start with Mr. Guyton or --

10 COMMISSIONER JABER: Mr. Chairman, one of  
11 the things I had a question for staff on was the  
12 order of the issues we should consider. I know  
13 we need to rule on oral argument, but it seems  
14 to make sense that after we deal with that, we  
15 should deal with the motions to dismiss before  
16 we get to any other issue.

17 COMMISSIONER JACOBS: Staff? I'm sorry.  
18 It's not your motion. It's Calpine's motion. I  
19 was about to go out of order. But before we do  
20 that, go ahead and -- staff, do you have a  
21 recommendation on the order of issues?

22 MS. ISAAC: Yes. I would go ahead with the  
23 oral argument issue, and then --

24 COMMISSIONER JACOBS: Go right ahead.

25 MR. ELIAS: You could take -- we debated,

1 or at least I did, whether or not to put the  
2 motions to dismiss first or the motion to hold  
3 in abeyance first. You know, my thought was  
4 that if you decide to hold it in abeyance, you  
5 don't need to reach the motions to dismiss. And  
6 on the other hand, if you decide to dismiss it,  
7 you don't need to reach the motion to hold it in  
8 abeyance. So it's really six of one, half a  
9 dozen of another how you proceed.

10 COMMISSIONER JACOBS: Let's do this. Let's  
11 take up the motion for oral argument first, and  
12 then let's go to the motion to dismiss, I think,  
13 because that -- if we do the motion to dismiss,  
14 we don't have a motion for abeyance, and that  
15 would be the case. But let's do the motion for  
16 oral argument and then go to the motion to  
17 dismiss.

18 COMMISSIONER JABER: I can move Issue 1,  
19 Mr. Chairman.

20 COMMISSIONER BAEZ: Second.

21 COMMISSIONER JACOBS: It has been moved and  
22 seconded to move staff on Issue 1, which means  
23 we'll have oral argument.

24 COMMISSIONER JABER: Ten minutes per side  
25 it looks like staff is recommending. Yes.

1 CHAIRMAN DEASON: Yes.

2 MR. GUYTON: Commissioner, may we be heard  
3 briefly on the extent of that? This is a  
4 significant motion. The last time we had  
5 occasion to argue a motion to dismiss on a case  
6 like this, it took eight hours. I don't think  
7 that anybody plans that, but I have about a  
8 seven-minute presentation, and I think Mr. Sasso  
9 has something akin to that. I would very much  
10 like to be able to go through my entire  
11 presentation. And we're only talking about a  
12 few additional minutes. We would ask that we  
13 not be limited just to ten minutes a side.

14 COMMISSIONER JACOBS: Well, we do have some  
15 restrictions. Commissioners?

16 COMMISSIONER JABER: We don't want hours.

17 COMMISSIONER JACOBS: I know. I'm --

18 MR. GUYTON: Agreed. I'm talking seven,  
19 eight minutes instead of five.

20 COMMISSIONER JABER: It sounds like 15  
21 minutes per side.

22 COMMISSIONER JACOBS: Yes, that was my  
23 thought, 15 minutes per side. So we'll go 15  
24 minutes per side. And I guess you're up.

25 MR. GUYTON: Commissioners, my name is

1 Charles Guyton. I'm with the law firm of Steel,  
2 Hector & Davis, and I represent Florida Power &  
3 Light Company in this proceeding.

4 Calpine has filed a petition for a  
5 determination of need in which it acknowledges  
6 that it does not have either a contract or a  
7 co-applicant. Calpine's petition also fails to  
8 make utility-specific allegations regarding the  
9 statutory need criteria. They don't even  
10 identify the purchasing utility. Instead, they  
11 ask you to presume that they will meet those  
12 utility-specific requirements later when and if  
13 they sign a contract.

14 Allegations of a contract, a purchasing  
15 utility, a co-applicant, and that the statutory  
16 criteria of Section 403.519 are met from the  
17 perspective of a purchasing utility are  
18 necessary elements of a cause of action in a  
19 need case by a wholesale power plant developer  
20 such as Calpine. Therefore, Calpine's petition  
21 fails to state a cause of action and should be  
22 dismissed.

23 Now, there are four critical errors in the  
24 staff recommendation that's before you. One, it  
25 fails to follow the legal principle that the

1 petitioner must allege all of the elements  
2 necessary to state a cause of action. And we  
3 just covered the missing elements.

4 Two, it asks you to rely on matters outside  
5 the petition, assurances that Calpine has  
6 provided to staff that Calpine will file the  
7 necessary missing information at a later date.

8 Third, it acknowledges that the petition  
9 fails to meet your minimum pleading requirement  
10 under Rule 25-22.081, but it inexplicably fails  
11 to recommend dismissal.

12 And fourth, it fails to discuss the case  
13 law that states when an action is premature, the  
14 case cannot be cured by supplemental pleadings;  
15 it must be dismissed.

16 Now, if you follow the case law that staff  
17 has cited in its staff recommendation, you will  
18 ignore staff's repeated statements that Calpine  
19 has provided assurance to staff that it will  
20 provide necessary supplemental information. You  
21 will also disregard any supplemental information  
22 that Calpine may offer today regarding a  
23 potential Memorandum of Understanding with  
24 Seminole. We appreciate the courtesy that  
25 Seminole extended us yesterday by informing us

1 that they were going to present a Memorandum of  
2 Understanding today at the agenda conference.  
3 But that matter is outside the petition and must  
4 be disregarded by the Commission.

5 Under the case law that the staff cites to  
6 you, it was improper for staff to mention the  
7 assurances that it has received, and it would be  
8 improper for you to consider other things that  
9 Calpine may offer today. The motion to dismiss  
10 must be decided solely on the petition before  
11 you.

12 Now, staff acknowledges in its  
13 recommendation that the petition is defective.

14 COMMISSIONER JABER: You need to clarify  
15 for me the --

16 MR. GUYTON: All right.

17 COMMISSIONER JACOBS: -- Memorandum of  
18 Understanding point before you move on.  
19 Seminole has entered into a Memorandum of  
20 Understanding with whom?

21 MR. GUYTON: With Calpine. There's a  
22 document that we were provided a few hours ago  
23 that purports to be a Memorandum of  
24 Understanding between Calpine and Seminole. We  
25 understand it has been filed with the

1 Commission. I expect it to be discussed later  
2 in argument today.

3 We would respectfully submit that whatever  
4 it states -- and I will say that I have not done  
5 a lengthy or detailed review of it -- it is  
6 outside the pleading, and under the case law  
7 cited by you must be disregarded in terms of the  
8 consideration of a motion to dismiss.

9 Now, staff acknowledges in their  
10 recommendation that the petition is defective  
11 under Rule 25-22.081. They do that at page 20  
12 of the recommendation when they ask you to  
13 consider that supplemental information will be  
14 provided, and I quote, to cure the present  
15 defect, end quote. Staff recognizes that this  
16 petition is defective under that minimum  
17 pleading requirement rule, and that's grounds  
18 for dismissal.

19 But most importantly, Commissioners, it is  
20 grounds for dismissal when a cause of action  
21 that has been filed is premature. Calpine has  
22 not alleged all the elements necessary for it to  
23 state a cause of action have occurred. Instead,  
24 Calpine alleges that they may occur in the  
25 future, they may secure a contract, they may

1 secure a co-applicant, they may amend their  
2 pleading to make utility-specific allegations.  
3 In such a case where all the necessary elements  
4 of a cause of action do not exist when the case  
5 is filed, the case is premature, and it should  
6 be dismissed without leave to amend.

7 Now, I want to quote to you from Trawick,  
8 Trawick's Florida Practice and Procedure, a well  
9 recognized authority, for this very proposition.  
10 And it's taken from Section 1.2 of Trawick.

11 "Every cause of action has two or more  
12 elements. All of the elements must occur or be  
13 complete before an action is commenced. If all  
14 the facts giving rise to a cause of action do  
15 not exist at the time the action is filed, it is  
16 premature. This has not been changed by  
17 permitting supplemental pleadings setting forth  
18 transactions, occurrences, or events that have  
19 happened since the date of the pleading sought  
20 to be supplemented. The objection that the  
21 action is premature may be raised by a motion to  
22 dismiss the pleading if the allegations show the  
23 defect," end quote.

24 Commissioners, that is precisely the  
25 situation that you have before you today.

1 Calpine's petition does not and did not state a  
2 cause of action, because all of the necessary  
3 elements did not exist when Calpine filed.

4 Calpine and your staff hope that Calpine may be  
5 able to make those necessary allegations in  
6 supplemental pleadings before trial, but that's  
7 not the law. If a cause of action is premature  
8 because the elements didn't exist when it was  
9 filed, it should be dismissed, and it cannot be  
10 cured by supplemental proceedings.

11 As the Third DCA has observed, and I quote,  
12 "The claims should be dismissed without leave to  
13 amend, allowing the refileing of a new suit if,  
14 as and when such alleged causes of action may  
15 mature." That's from Rolling Oaks Homeowners  
16 Association vs. Dade County, 492 So.2d 686.

17 Commissioners, you're being encouraged to  
18 ignore the deficiencies of the petition, rely  
19 upon outside of the petition assurances made by  
20 staff, and perhaps to be made here today, and  
21 assume that supplemental filings will cure these  
22 deficiencies, and either misapply or ignore  
23 applicable legal principles.

24 These are the same types of errors that  
25 were urged upon you in the recently reversed

1 Duke case. There, like here, it was suggested  
2 that you should disregard the Nassau cases,  
3 although they were clearly applicable. There,  
4 like here, you were urged not to dismiss a case  
5 which should properly have been dismissed. And  
6 as a result, the intervenors and the applicant  
7 spent hundreds of thousands of dollars that were  
8 wasted, and we ended up with a case in which  
9 there was reversible error.

10 This case should be dismissed without leave  
11 to amend, and Calpine should be allowed to  
12 refile if and when it secures its necessary  
13 contract and co-applicant.

14 I'll reserve what time I have for rebuttal.  
15 Thank you.

16 COMMISSIONER JACOBS: Before we begin, how  
17 would you address the case law cited by Calpine?  
18 What about the Scherer case?

19 MR. GUYTON: Well, they cite the Scherer  
20 case not in regard to our motion to dismiss, but  
21 in regard to the motion for abeyance. And I can  
22 address that now, or I can address it later when  
23 we address the motion for abeyance, so whatever  
24 your pleasure is, Commissioner.

25 COMMISSIONER JACOBS: You'll do that

1 later? Okay. That's fine.

2 MS. SASSO: Good afternoon. I'm Gary  
3 Sasso with Carlton Fields, representing Florida  
4 Power Corporation.

5 I would like to take a slightly different  
6 road, but end up at the same point, and actually  
7 raise even a more fundamental objection to this  
8 proceeding.

9 The petition should be dismissed for the  
10 simple reason that Calpine is not a proper  
11 applicant. It does not have standing. It does  
12 not have legal entitlement to initiate a need  
13 proceeding. As a matter of law, it is logically  
14 and legally impossible for Calpine at this time  
15 to file a legally valid petition. And likewise,  
16 it is legally untenable for this Commission to  
17 process it. This Commission simply does not  
18 have jurisdiction to process Calpine's petition.

19 The Florida Supreme Court has said four  
20 times now that independent power producers like  
21 Calpine are not applicants.

22 COMMISSIONER JABER: How do you know that  
23 without an evidentiary hearing? How do you know  
24 they're not a proper applicant until you've  
25 heard evidence at a hearing?

1 MR. SASSO: On the face of the petition,  
2 Calpine identifies itself as an independent  
3 power producer that does not have a contract  
4 with a retail utility. On the face of the  
5 petition, it concedes that it currently, or at  
6 least as of the time it filed the petition, did  
7 not have a power purchase agreement to meet the  
8 needs of a retail utility. And under the Duke  
9 decision and under the Nassau decisions before  
10 that, that is dispositive of Calpine's standing  
11 to file this proceeding.

12 The Supreme Court made that clear, as I  
13 said, four times, twice in the Nassau cases and  
14 now twice in the Duke case. In Duke, this is  
15 what the Supreme Court said. It said, "Our  
16 analysis of the Siting Act articulated in the  
17 Nassau decisions is applicable to the present  
18 case." Quoting the Nassau cases, the Supreme  
19 Court said in Duke, "Only an applicant," quoting  
20 applicant, "can request a determination of need  
21 under section 403.519."

22 The Court reviewed the legislative history  
23 that we discussed in that case and reaffirmed  
24 that the only proper applicants are Florida  
25 utilities that, quote, have a duty to serve

1 customers. In reviewing the legislative  
2 history, it agreed with us that retail utilities  
3 have standing to bring a need proceeding. This  
4 is what the Court said. "Our reading of this  
5 statutory history leads us to continue to  
6 conclude that the present statutory scheme was  
7 intended to place the PSC's determination of  
8 need within the regulatory framework allowing  
9 Florida regulated utilities to propose new power  
10 plants to provide electrical service to their  
11 Florida customers at retail rates."

12 Nothing could be clearer. Calpine is  
13 simply not a proper applicant. That is what the  
14 Supreme Court has said now repeatedly.

15 This Commission's own decision in the  
16 Martin expansion case, which was the seminal  
17 decision on which the Nassau cases relied,  
18 provides further instruction here. That is the  
19 case where this Commission first said that an  
20 independent power producer who would like to  
21 sell power at wholesale to a retail utility  
22 can't initiate a need proceeding on its own. In  
23 that case, Florida Power & Light had several  
24 projects underway. It was going to build  
25 several plants, and it had outstanding RFPs.

1 And the Commission addressed the issue, what  
2 happens if an IPP enters into a contract with  
3 Florida Power & Light? Could that IPP file a  
4 need proceeding?

5 And the Commission said quite clearly, no,  
6 it cannot, even if the contract between the  
7 utility and the applicant makes the -- I'm  
8 sorry, between the utility and the IPP makes the  
9 IPP solely responsible for seeking permitting  
10 before the Public Service Commission. This is  
11 what the Commission said. It said the reason is  
12 simple. The need for the capacity remains that  
13 of the utility. The winning bidder has no  
14 independent need of its own. In order for the  
15 specific mandates of the statute to be  
16 meaningful, they must be answered from the  
17 utility's perspective. The type of information  
18 required by the PSC rule that's at issue here is  
19 exclusively in the hands of the utility. It  
20 gave an example. The independent power  
21 producers under any moniker do not have the  
22 ability to produce accurate load forecasts  
23 because they don't have the database on which  
24 such an analysis is built.

25 So the point is that even if Calpine enters

1 into an agreement with Seminole, which it has  
2 not -- and I'm going to address that in a  
3 moment. Even if it does, Calpine is not the  
4 proper applicant.

5 COMMISSIONER JACOBS: Seminole is?

6 MR. SASSO: Seminole would be.

7 COMMISSIONER JACOBS: Okay.

8 MR. SASSO: And that is what we suggest.  
9 If Calpine is on the verge of entering into a  
10 power purchase agreement with Seminole, Seminole  
11 needs to be the applicant to initiate a request  
12 for a determination of need. Calpine comes in  
13 as a co-applicant. Its standing is entirely  
14 derivative of an applicant that has standing to  
15 request a determination of need. It cannot come  
16 in and say, "We're casting about for a  
17 co-applicant."

18 That's like filing a lawsuit asking for  
19 damages for an automobile accident that hasn't  
20 occurred yet, where you describe yourself, say,  
21 "This is who I am. This is the business I'm in.  
22 I drive dangerously, and I expect to be in an  
23 accident by the time of trial. These are the  
24 statistics about the rate of accidents in the  
25 State of Florida. And by the time I get to

1 trial, I expect to be able to identify other  
2 pertinent parties in the case." And it's even  
3 worse. It's like in this case, we have a  
4 complaint that's filed by a minor that does not  
5 have standing to sue in a court that does not  
6 have jurisdiction. That's an apt analogy to  
7 what is taking place here.

8 Calpine does not have legal standing to  
9 initiate the request. If and when it enters  
10 into a contract with Seminole, then, like every  
11 other need case, the utility that has the retail  
12 commitment should come before the Commission and  
13 initiate the request under this rule. That  
14 utility would be in a position to provide  
15 meaningful responses to the inquiries in this  
16 Commission's rules. Calpine could appear as a  
17 co-applicant and help sponsor that plant. But  
18 then the Commission would have (1) a proper  
19 applicant with standing, and (2) it would have  
20 meaningful information.

21 The information that has been provided to  
22 the Commission so far about this plant is, with  
23 all respect, virtually worthless, because it  
24 tells us a lot about Calpine, but says nothing  
25 about the retail need, which has to be the

1 premise for siting this plant, for getting a  
2 need determination for a new power plant in  
3 Florida under the Duke decisions.

4 So there is something to be said in the  
5 final analysis for doing things the right way.  
6 There is something to be said for maintaining  
7 the integrity the process, the integrity of the  
8 statutes, the Supreme Court's decisions, this  
9 Commission's own decisions, and this  
10 Commission's rules. And what Calpine has  
11 proposed and what the staff has supported is  
12 simply not the right way to do things.

13 And with all respect, we request that the  
14 petition be dismissed forthwith, without further  
15 ado. It's improper even to hold it in abeyance,  
16 because the Commission doesn't have jurisdiction  
17 to process it any further. And if and when the  
18 parties do enter into a contract, Seminole can  
19 come before the Commission.

20 We have been handed a copy of what is  
21 called a Memorandum of Understanding.

22 COMMISSIONER JABER: Seminole could come in  
23 to the Commission as a co-applicant.

24 MR. SASSO: No. Seminole would file the  
25 need petition as the retail utility requesting a

1 determination of need, that Seminole needs the  
2 plant to meet its identified retail needs.  
3 Seminole is a cooperative with 11 members that  
4 have retail need. And if Seminole believes that  
5 it has a need for more capacity to serve its  
6 retail load, then it needs to come before this  
7 Commission, explain what that need is, how this  
8 plant is best situated to serve it, and then  
9 this Commission is in a position to pass on that  
10 information.

11 COMMISSIONER JABER: Because it's your  
12 position that as a mere co-applicant, to the  
13 degree there's a defect, it couldn't be cured by  
14 finding a co-applicant.

15 MR. SASSO: That is absolutely the case.

16 COMMISSIONER JABER: And what do you cite  
17 to support that?

18 MR. SASSO: Both of the Nassau cases and  
19 both of the Duke decisions in this case. If the  
20 Commission will read them carefully, as we have  
21 many, many times, those cases make it abundantly  
22 clear that when an independent power producer is  
23 entering into an agreement with a retail  
24 utility, the retail utility has the standing,  
25 and only the retail utility has the standing to

1 initiate the need petition, to request a  
2 determination of need.

3 The independent power producer has a  
4 limited role in that proceeding. It can come in  
5 as a co-applicant. Here we have the cart before  
6 the horse, or the tail wagging the dog, whatever  
7 you want to call it. But we have the party who,  
8 at best, can come in after he has been selected  
9 by a retail utility with a retail need, can come  
10 in in support of that retail utility's petition  
11 for a determination of need. Instead, what we  
12 have is, we have an IPP jumping the gun, saying,  
13 we haven't found a utility to want us yet, but  
14 we want you to keep the case alive, give us  
15 hearing dates, pretend like we're a legitimate  
16 applicant, that we have standing under the law  
17 to request a determination of need, even though  
18 we can't even tell you what that need is yet.  
19 But we will someday find a utility who will do  
20 business with us, and then they can provide the  
21 information that everybody acknowledges,  
22 including staff, is absolutely indispensable to  
23 your proceeding with this case.

24 The Memorandum of Understanding, just very  
25 briefly -- and I know that I'm asking your

1 indulgence on time. Again, this was handed to  
2 us just earlier today, and what it says is that  
3 the parties have entered into a Memorandum of  
4 Understanding which provides the framework for  
5 an agreement to be entered into. The parties  
6 have, quote, agreed to negotiate toward a  
7 definitive agreement. "whereas, buyer and  
8 seller have entered into discussions regarding  
9 the sale and purchase of firm electric capacity,  
10 which discussions have led the parties to agree  
11 on fundamental terms and to pursue negotiations  
12 toward a power purchase agreement" -- this is  
13 where we are now. We have an intent to  
14 negotiate in good faith.

15 This is further what the agreement says:  
16 "Buyer," meaning Calpine, "shall provide" -- I'm  
17 sorry. No, not Calpine. Buyer would be  
18 Seminole. "shall provide such support for the  
19 petition for determination of need for Buyer's  
20 plant as the parties mutually agree is necessary  
21 if and when the PPA is executed by the parties.  
22 Buyer's support shall include, if deemed  
23 necessary and appropriate, becoming a  
24 co-applicant." It's got it all backwards. If  
25 and when Seminole decides that this plant meets

1 Seminole's need, then Seminole comes to the  
2 Commission, files a proper need petition, and  
3 Calpine comes in as a co-applicant.

4 COMMISSIONER JABER: Then for the sake of  
5 administrative efficiency, what do we accomplish  
6 by dismissing the case if Seminole can turn  
7 around and file their own petition?

8 MR. SASSO: The Commission has no  
9 jurisdiction over this case. It is really not a  
10 matter of expediency. It is a matter of power.  
11 The Commission has no jurisdiction over a need  
12 proceeding that is initiated by an entity that  
13 is not a proper applicant. It is an issue of  
14 fundamental power, which is what the Court said  
15 in Duke. It said the Commission was without  
16 jurisdiction to enter this order. This entity  
17 was not an applicant who had standing to request  
18 a determination of need. It's an issue of  
19 power.

20 what do you accomplish? A much more  
21 efficient result than what we have already  
22 incurred today. what we have incurred today is  
23 needless proceedings, needless use of this  
24 Commission's resources and the parties'  
25 resources. Calpine has actually filed

1 testimony. We've engaged in all kinds of  
2 discussions about discovery. Over what? We  
3 don't even know what the retail utility is. We  
4 don't have information about its need. This has  
5 been an incredible waste of time.

6 The most expeditious, not only the most  
7 legal, but the most expeditious way to handle  
8 this case is to say to Calpine, "Thank you, but  
9 we're not empowered to accept your petition. If  
10 you enter into a contract with Seminole, let  
11 Seminole come back and file a well-pleaded  
12 petition that does not have the conceded defects  
13 that staff acknowledges it has."

14 Let Seminole provide all the information  
15 that this Commission has repeatedly recognized,  
16 beginning with the Martin expansion order, that  
17 only the retail load bearing utility can provide  
18 to this Commission. And then we all start with  
19 the proper beginning. We have a petition that  
20 makes sense. It has the information required by  
21 the Commission's rules, and the Commission can  
22 then proceed not on a false start without  
23 jurisdiction, but with the power vested in this  
24 Commission by the Legislature.

25 COMMISSIONER JACOBS: Very well. Thank

1           you.

2           Mr. Wright?

3           MR. WRIGHT: Thank you, Mr. Chairman.

4           Commissioners, naturally enough, Calpine  
5           supports the staff's recommendations on Items 4  
6           and 5, Florida Power & Light's and Florida Power  
7           Corporation's motions to dismiss, that is, the  
8           recommendations that those motions be denied.  
9           Staff's recommendation was right a week ago when  
10          it was filed based on the facts as they existed  
11          at that time, and it is right today in light of  
12          the new facts. The new facts are that Seminole  
13          and Calpine Energy Services -- Calpine Power  
14          Services, L.P., an affiliate of Calpine  
15          Construction Finance Company, the petitioner in  
16          this case and the primary applicant in this  
17          case, have executed a Memorandum of  
18          Understanding.

19          Notwithstanding Mr. Sasso's inaccurate  
20          characterizations of that memorandum, that  
21          agreement is regarded as a binding agreement by  
22          both Calpine and Seminole. The point of the  
23          references to the definitive agreement are that  
24          there will be some more terms added. Under  
25          Florida law, the document that contains all the

1 essential terms and the document that we filed  
2 under cover of a request for protected  
3 confidential treatment today does in fact  
4 contain all the appropriate terms regarding  
5 pricing, duration, and everything else that's  
6 material to the performance of this contract.

7 And Mr. Eves, who is director of business  
8 development for Florida for Calpine, is present  
9 today, and he will aver, if you want him to,  
10 that what I say is true. Likewise,  
11 Mr. Woodbury, who is vice president of power  
12 procurement, or the equivalent thereof, for  
13 Seminole is also here, and he will say the same  
14 thing.

15 COMMISSIONER JABER: Mr. Wright, I seem to  
16 recall some case law as well that would prohibit  
17 us from considering that contract or Memorandum  
18 of Understanding outside the scope of a motion  
19 to dismiss. Aren't we supposed to just look at  
20 the four corners of the pleading?

21 MR. WRIGHT: You can look at the four  
22 corners of the pleading, but I certainly think  
23 it's relevant, and it is on record with the  
24 Commission now. If you want to look at the four  
25 corners of the pleading, we have pled from the

1           outset and have argued extensively and explained  
2           extensively, consistent with Commission  
3           precedent, that the way we have pled our case is  
4           lawful, is consistent with Commission precedent  
5           regarding conditions subsequent or conditions to  
6           be placed on determinations of need, and that it  
7           brings the need determination petition that we  
8           have filed squarely within the scope of what the  
9           Court has said is allowed in Tampa Electric vs.  
10          Garcia.

11           COMMISSIONER JABER: No, let me ask it a  
12          different way.

13           MR. WRIGHT: well, I think I understand.  
14          The point is, if you want to just address what  
15          we filed without the Memorandum of  
16          Understanding, we can address it that way. And  
17          what I was saying is that all of our pleadings  
18          to date, up until this morning when we filed our  
19          notice of request for confidential treatment of  
20          the agreement with Seminole, addressed the case  
21          on exactly that basis. And that is in fact the  
22          basis upon which the staff analyzed this. In  
23          short --

24           COMMISSIONER JABER: You're saying with or  
25          without that contract or Memorandum of

1           Understanding, we can go forward with your  
2           petition.

3           MR. WRIGHT: Yes, ma'am.

4           COMMISSIONER JABER: Since you have  
5           substantially alleged the elements that are  
6           needed to be considered for the need. Is that  
7           your acknowledgment that legally we shouldn't  
8           consider the contract, consider that you filed a  
9           contract or a Memorandum of Understanding today?  
10          I thought that's what the case law said.

11          MR. WRIGHT: I think that's correct. I  
12          think that the standard for a motion to dismiss  
13          is taking all the well-pleaded allegations as  
14          true. We're kind of in what I would say is at  
15          least a gray area, in that what has happened is,  
16          the allegations -- certain important allegations  
17          that we made in our petition back in June have  
18          now become in fact true, as a matter of fact.

19          So on that basis, I would submit that it  
20          would be appropriate for you to consider that.  
21          But if not, then we certainly up until this  
22          morning -- in fact, the staff's recommendation  
23          as well addresses this on the basis that we have  
24          alleged sufficient facts, including a condition  
25          subsequent, a condition to be placed on our need

1 determination, that we would demonstrate the  
2 utility-specific commitment required by the  
3 Court's order in Tampa Electric v. Garcia.

4 COMMISSIONER BAEZ: Mr. Wright, you seem to  
5 have made a representation on behalf of staff  
6 that I don't -- I would like to know whether  
7 they're in agreement with.

8 MR. ELIAS: I didn't hear it.

9 COMMISSIONER BAEZ: I think I heard  
10 Mr. Wright say that even without -- if we say,  
11 you know, this contract obviously wasn't part of  
12 the filing -- I'm sorry, the MOU wasn't part of  
13 the filing, that staff was still considering the  
14 appropriateness of the application even in its  
15 absence. And I just want to know if you're all  
16 right with that.

17 MR. ELIAS: This recommendation was  
18 written prior to us being advised that the  
19 MOU --

20 COMMISSIONER BAEZ: But it was written --  
21 and you correct me if I'm wrong. It was written  
22 sort of contingent on these assurances that were  
23 given.

24 MR. ELIAS: That goes to -- well, there are  
25 two things. That goes to the question of

1           whether or not the case should be held in  
2           abeyance. And ultimately, the fact remains that  
3           this is Calpine's petition. They're going to  
4           have to prove that they meet the requirements of  
5           403 as well as Tampa Electric Company vs. -- as  
6           interpreted by the Court in Tampa Electric  
7           Company vs. Garcia before.

8           COMMISSIONER BAEZ: Right. And my question  
9           to you is, conceding, as Commissioner Jaber -- I  
10          understand her question to be that we would be  
11          -- staff might be willing to proceed or support  
12          this petition notwithstanding the fact that  
13          there, quote, is not agreement, or that this  
14          agreement isn't part of the petition at this  
15          point, that we're not considering the existence  
16          -- I mean, we've rung the bell. We all know  
17          that there's an MOU, and I guess I would have  
18          questions as to whether that was sufficient for  
19          any petition. But let's say for the moment it  
20          doesn't exist --

21          MR. ELIAS: For purposes of the motion to  
22          dismiss, and surviving a motion to dismiss only,  
23          yes.

24          COMMISSIONER JACOBS: I'm struggling with  
25          that. The point of a motion to dismiss is to

1 look at the pleadings and determine -- whether  
2 or not we have an MOU next week or last week or  
3 three weeks from now, whether on the four  
4 corners of that document, there are assertions  
5 sufficient to raise a claim upon which relief  
6 can be granted. And that is -- I want to go  
7 back to a point very quickly, Mr. Wright. It  
8 goes to -- I want to actually touch on the point  
9 brought up by Power Corp.

10 what they're saying is you fail because  
11 you've missed an indispensable party here, that  
12 you came without an indispensable party. And  
13 they would assert -- and I'm trying to stay away  
14 as much as I can, but they would assert the  
15 wrong party, but at least an indispensable party  
16 is not here. How do you address that?

17 MR. WRIGHT: what we asserted is that  
18 before we asked the Commission for -- if  
19 necessary, if necessary, what we asked the  
20 Commission to do is to allow our case to  
21 proceed. We alleged and averred that we would  
22 provide information of the utility-specific  
23 commitment as soon as it became available. And  
24 we asked the Commission that if we had not  
25 accomplished that, fulfilled that allegation by

1 the time we got to the hearing, we asked the  
2 Commission, consistent with Commission  
3 precedent, which is cited extensively in our  
4 pleadings, we asked the Commission to grant our  
5 need determination on a conditional basis in the  
6 same way that the Commission has granted  
7 conditional need determinations in the past, on  
8 the basis that before the power plant could ever  
9 be built, before construction could begin, we  
10 would demonstrate the required utility-specific  
11 commitment pursuant to Tampa Electric v. Garcia.  
12 That's what we alleged.

13 And as to the indispensable party piece, we  
14 agree that before construction can begin, we  
15 would have to have the appropriate co-applicant  
16 whose need we would be meeting. I don't believe  
17 that the case law says that in order to come in  
18 the door in the first place, that's what  
19 happens. In Cedar Bay, Cedar Bay came in by  
20 itself and you all -- you all's predecessors  
21 said FPL as the contracting party with Cedar Bay  
22 is an indispensable party and joined them into  
23 the case. Now, granted, that was -- I think  
24 that was pre at least one of the Nassaus. I  
25 don't remember the exact timing of that. But

1           nonetheless, that is how the indispensable party  
2           term came to be in the PSC's need determination  
3           jurisprudence.

4           But we agree -- you know, we agree that  
5           there is an indispensable party. But as a  
6           matter of factual allegation, we alleged to you  
7           that we would show up at an appropriate time --  
8           and there was some discussion as to whether that  
9           appropriate time is before the hearing or after  
10          the hearing. Based on precedent, we assert that  
11          it's at any time before construction, because  
12          you have precedent out there in need  
13          determination cases where you have said it's  
14          completely within our authority to impose  
15          conditions on need determinations. And you have  
16          let need determinations -- you have granted  
17          affirmative determinations of need based on  
18          conditions to be satisfied subsequently that did  
19          not exist, non-final contracts that did not  
20          exist at the time your final orders were  
21          entered.

22                 COMMISSIONER JACOBS: I could understand  
23                 certain particular conditions that might be left  
24                 open. However, as a matter of jurisdiction, if  
25                 we don't have the proper parties before us, that

1 in my mind goes a little bit beyond having --  
2 and I want to get your response to this.  
3 There's a reason in my mind why, and it's Issue  
4 2 in the recommendation today, because in order  
5 -- if we do that, we have to grant that.

6 MR. WRIGHT: I'm sorry. Have to grant  
7 what?

8 COMMISSIONER JACOBS: Issue 2, I think it  
9 was. I may be wrong. The waiver.

10 COMMISSIONER JABER: Oh, 3.

11 COMMISSIONER JACOBS: Issue 3. I'm sorry.  
12 If we go with your logic, then there can be  
13 no process where you would have gone and sought  
14 the least cost alternative, because you don't  
15 have the grounding upon which to base that  
16 analysis. How do we get beyond that? I'm not  
17 saying that that -- that's an important issue  
18 for me. How do we get beyond that?

19 MR. WRIGHT: well, the relationship is, as  
20 the staff have characterized it, that whether a  
21 power plant that we are going to build to meet a  
22 specific utility's need, which we acknowledge is  
23 required under the TECO v. Garcia decision, is a  
24 function of whom we are selling that power plant  
25 to.

1           The staff have recommended, rightly, in our  
2 opinion, that the rule was never intended to  
3 apply to wholesale utilities like Calpine. They  
4 said that whether we have to -- whether any  
5 bidding process has to be followed will be  
6 determined according to the entity with whom we  
7 contract.

8           If it's a muni or a co-op, they are  
9 expressly exempt from the rule; hence, no  
10 bidding requirement would apply.

11           If we were to contract with an  
12 investor-owned utility, who was intended to be  
13 subject to the -- an investor-owned retail  
14 utility, who was intended to be subject to the  
15 bidding rule, then whether this had to go  
16 through a bidding process would be determined  
17 according to whether the need that we were  
18 meeting would have been met by a power plant  
19 that had to go through a bidding requirement.  
20 If it would have been met by a power plant that  
21 would not have been met by a Power Plant Siting  
22 Act jurisdictional plant, then the answer would  
23 be no bidding process would be required. If it  
24 would be met -- for example, Florida Power's  
25 Hines 2 unit, if it would have been met by an

1           entity that would have -- by a power plant that  
2           would have been subject to the Power Plant  
3           Siting Act and the need determination process,  
4           then that utility would have had to fulfill the  
5           bidding process.

6           But the rule was never intended to apply to  
7           us, and that's what the staff have recommended,  
8           and that's what the background of that rule  
9           shows.

10           COMMISSIONER JACOBS: Well, not to get  
11           into -- I don't want to go too far off into  
12           arguing that issue, so let me stay as conceptual  
13           as possible. Arguably, we weren't looking at  
14           particular market entrants when our predecessors  
15           -- we were looking at a particular process, were  
16           we not?

17           MR. WRIGHT: You were looking at a process  
18           to protect captive ratepayers.

19           COMMISSIONER JACOBS: Correct.

20           MR. WRIGHT: That's exactly what you were  
21           looking at.

22           COMMISSIONER JACOBS: Correct. And that  
23           process applies whoever the interests are,  
24           aren't they, or wouldn't it?

25           MR. WRIGHT: Well, it applies when there

1 are captive ratepayers involved. And -- I don't  
2 want to get too far afield either, but what  
3 we've alleged is that the existence of this  
4 project by itself inherently serves the  
5 fundamental purpose of the rule, which is to  
6 protect captive ratepayers by providing  
7 utilities with an alternative, with an  
8 additional alternative source, as you all said  
9 in your Duke/New Smyrna order that was reversed  
10 on other grounds.

11 COMMISSIONER JACOBS: Okay. I don't want  
12 to get you too far afield.

13 COMMISSIONER JABER: Mr. Wright, you would  
14 agree that in the context of a motion to  
15 dismiss, the foundation, what we need to be  
16 looking at is whether you've alleged the  
17 elements needed under the substantive law --

18 MR. WRIGHT: Yes, ma'am.

19 COMMISSIONER JABER: -- to go forward. And  
20 under 403, one of the things that you're  
21 supposed to allege is your status as a proper  
22 applicant, as staff has laid out in the  
23 recommendation. And then also, you have to  
24 support a utility-specific need.

25 That brings us back to the contract. Help

1 me understand why the filing of that contract  
2 with your petition is not what we need to be  
3 considering.

4 See, the trouble I'm having -- let me  
5 articulate for you the entire concern I have and  
6 let you respond completely. The trouble I  
7 shared with you all at the prehearing  
8 conference, and I'll do it again today, is this  
9 lack of ability, whether it be on our staff's  
10 part or the parties', to govern themselves  
11 accordingly in this case. It's like they're  
12 having difficulty doing discovery. And I don't  
13 mean to speak for staff. It's just an  
14 observation I've made in being the prehearing  
15 officer in this case. It's difficult to know  
16 what questions to ask and how to conduct  
17 themselves, because a lot of it depends on who  
18 you enter into a contract with and the need that  
19 you demonstrate as a foundation. Now, help me  
20 get over that concern.

21 MR. WRIGHT: If I may, Commissioner, what I  
22 would say to you is that the case -- well, let  
23 me back up. We have pled our case alleging all  
24 the necessary elements, and we have alleged that  
25 the plant meets all the statutory criteria. We

1 have given you have all the information you  
2 would normally have in a need determination  
3 case. We've given you information regarding  
4 Calpine, we've given you information regarding  
5 peninsular Florida need, how the plant will meet  
6 peninsular Florida's need for system reliability  
7 and integrity, how it will meet peninsular  
8 Florida's need for adequate electricity at a  
9 reasonable cost. We have made specific  
10 allegations based a well known computer model,  
11 PROMOD 4, as to how much money it would save if  
12 it were dispatched economically within the  
13 system. We have made the appropriate  
14 allegations that it's the most cost-effective  
15 alternative for meeting peninsular Florida's  
16 needs as well as Calpine's needs.

17 Now, what we have not alleged with  
18 specificity, leaving aside the MOU, is which  
19 specific utility is going to take the power.  
20 What we have alleged is that there will be a  
21 specific utility, and we alleged that we were  
22 working as hard as we could to get the  
23 arrangements in place that we were even at the  
24 time in June working on, and that we would  
25 furnish the Commission with that information as

1 soon as it became available.

2 Your order establishing procedure  
3 recognizes exactly those facts as alleged and  
4 sets up, as we understand it --

5 COMMISSIONER JABER: No. What my order  
6 establishing procedure did was recognize that  
7 you said you would file a contract by November  
8 1st.

9 MR. WRIGHT: Okay.

10 COMMISSIONER JABER: And those dates in the  
11 order on procedure were --

12 MR. WRIGHT: Designed to accommodate --

13 COMMISSIONER JABER: Designed to  
14 accommodate that, that's exactly right. But the  
15 concern I have is, as we go forward, I'm now  
16 realizing that those dates don't allow parties  
17 and staff enough time to do discovery and file  
18 testimony.

19 MR. WRIGHT: Well, I would submit to you,  
20 that goes to the issue of abeyance and not the  
21 issue of dismissal. And if there needs to be  
22 some modification of interim dates, we're  
23 willing to work with that. We would really like  
24 to keep the hearing dates, and we set forth in  
25 quite explicit detail in our responsive

1 pleadings to the IOUs' motions to dismiss why it  
2 is in the public interest to proceed with this  
3 case as quickly as possible.

4 Delay, which we believe and assert is FPL's  
5 and FPC's strategy here, delay costs the state  
6 the benefits of this power plant. It costs the  
7 state cost savings in the generation of  
8 electricity. It costs the state primary fuel  
9 savings. It costs the state available  
10 reliability benefits, and it costs the state  
11 available environmental benefits.

12 COMMISSIONER JABER: If we can consider  
13 your application by law, if it's permissible to  
14 consider your application by law, those are the  
15 benefits to the state.

16 MR. WRIGHT: Yes, ma'am.

17 COMMISSIONER JABER: You would agree with  
18 everyone's concern that this case needs to be  
19 handled correctly and processed correctly.

20 MR. WRIGHT: Yes, ma'am.

21 COMMISSIONER JABER: I think that everyone  
22 shares that goal. What is wrong with delaying,  
23 dismissing, whatever, for a time period that  
24 would allow Seminole Electric to come in and  
25 apply for the need petition?

1           MR. WRIGHT: Well, there's two parts to the  
2 answer to your question, and the answer is,  
3 what's wrong from a public interest perspective  
4 -- and we have cited to you in our pleadings the  
5 public interest mandates that apply to this  
6 Commission, both in 366.01 and in 366.81. In  
7 the public interest, you should not dismiss this  
8 case and not slow it down, because it would be  
9 contrary to the public interest to do so.

10           As a legal matter, we assert to you -- as  
11 we have since we filed our petition on June  
12 19th, we assert to you that your precedent  
13 specifically contemplates, recognizes, and  
14 authorizes conditions on need determinations.  
15 All we have asked for here is that you let us in  
16 as an applicant, process our case, and if  
17 necessary, impose a condition on us that before  
18 we can ever build a power plant, we make the  
19 utility-specific demonstration.

20           COMMISSIONER JABER: You don't have  
21 anything to lose, though. See, you make it  
22 sound as if the --

23           MR. WRIGHT: We all do.

24           COMMISSIONER JABER: -- imposition of a  
25 condition helps us in some way. But in the

1           meantime, our staff would have -- in this agency  
2           would have expended resources on your  
3           application that at the end of the day we may  
4           not have jurisdiction to process. And to the  
5           degree there are intervenors, they would have  
6           expended a whole lot of money fighting with you  
7           all.

8           MR. WRIGHT: well, on that point, I would  
9           say --

10          COMMISSIONER JABER: So that position  
11          doesn't help me any.

12          MR. WRIGHT: well, on that point, I would  
13          say whatever they spend is up to them. whatever  
14          you all spend I think has to be viewed in the  
15          balancing context as to whether it's worth a few  
16          weeks of your staff's time and perhaps three  
17          days of your time at the hearing to enable the  
18          potential gain of a year's worth of additional  
19          benefits. And I would submit to you that in any  
20          kind of public interest balancing context, that  
21          kind of tradeoff is one that you have to answer  
22          in the public interest and allow this to go  
23          forward.

24          COMMISSIONER JABER: Okay.

25          COMMISSIONER JACOBS: Are we -- go ahead

1 and finish.

2 MR. WRIGHT: Yes. I'm sorry. I've had to  
3 answer a lot of questions.

4 I think I -- I hope I answered your  
5 question regarding the potential difficulties  
6 with discovery. Basically, the IOUs have taken  
7 the position that they don't care doing  
8 discovery about anything other than the  
9 contracts. And they were free to, as of  
10 September 19th when you let them in, conduct  
11 discovery on all of our testimony and everything  
12 else, and they elected not to. If they want to  
13 conduct discovery on it now, they can sure do so  
14 in accordance with the applicable rules. And  
15 as of today, we can start working on discovery  
16 regarding the contract.

17 I would just say with respect to the  
18 precedent, if you didn't have jurisdiction -- if  
19 you don't have jurisdiction to do this plant  
20 because there is a non-final event pending out  
21 there, as we stand here, ignoring the MOU, the  
22 non-final event being the identification of a  
23 retail load serving co-applicant and the need  
24 associated with that applicant, then you didn't  
25 have jurisdiction to do the Polk unit because

1           there were non-final contracts out there, and  
2           there were non-final contracts in other need  
3           determination cases.

4           The Duke case is not like this case. The  
5           threshold issue there was whether a merchant  
6           plant could go forward. This is not a merchant  
7           plant. We have made it very clear from day one,  
8           June 19th, that this is not a merchant plant.  
9           This is a contract wholesale plant. We have  
10          pled factually that this is a contract wholesale  
11          plant, that the output would be committed  
12          pursuant to contracts.

13          The Nassau v. Beard case says that a need  
14          determination is only available after the  
15          applicant -- after retail need is identified,  
16          in essence. It doesn't say you can't get in the  
17          door in the first place without that.

18          COMMISSIONER JABER: How is that different  
19          from Duke? Duke, as I understand it, entered  
20          into a contract with the City of New Smyrna  
21          Beach.

22          MR. WRIGHT: Right.

23          COMMISSIONER JABER: You can call it a  
24          merchant plant, or you can call it a wholesale  
25          contract provider, whatever.

1 MR. WRIGHT: Yep.

2 COMMISSIONER JABER: You've entered into --  
3 want to enter into contracts. What's the  
4 difference between Calpine and Duke?

5 MR. WRIGHT: Duke made it clear that it was  
6 a merchant plant except as to the 30 megawatts.  
7 And what the Court said about that basically was  
8 30 megawatts isn't enough.

9 COMMISSIONER JABER: So what you're saying  
10 is --

11 MR. WRIGHT: And that the output -- what  
12 the Court said was that the statutory scheme  
13 embodied in the Siting Act and FEECA was not  
14 intended to authorize the determination of need  
15 for a proposed power plant, the output of which  
16 is not fully committed to use by Florida  
17 customers who purchase electrical power at  
18 retail rates. That was the Duke case. Our case  
19 is one in which we have alleged that we would  
20 satisfy exactly that condition.

21 MR. SASSO: May I address that?

22 COMMISSIONER JABER: What you're saying is  
23 that Osprey will be fully committed?

24 MR. WRIGHT: Yes, ma'am.

25 COMMISSIONER JABER: How do you -- okay.

1 MR. SASSO: May I address that one issue  
2 briefly?

3 COMMISSIONER JACOBS: Wait. Let him  
4 finish. Were you done, Mr. Wright?

5 MR. WRIGHT: No, sir.

6 COMMISSIONER JACOBS: Let him finish, and  
7 then we'll come back.

8 MR. WRIGHT: I just want to make it clear,  
9 we believe that Calpine is a proper applicant,  
10 because we are a regulated electric utility.  
11 This order does not say we can't be an  
12 applicant. What it says -- the Court's order.  
13 What it says is that the statutory scheme was  
14 not intended to authorize power plants, the  
15 output of which was not committed to serving a  
16 specific retail utility's needs. We have  
17 alleged that it would be. I'm trying to stay  
18 away from the fact that now we've got a  
19 contract, but we alleged that it would be. And  
20 just as a matter of factual pleading, that's  
21 sufficient to survive the motion to dismiss.

22 Your jurisdiction under 403.519 attaches to  
23 power plants subject to the Power Plant Siting  
24 Act. I don't think anybody would disagree that  
25 this power plant, the Osprey Energy Center, as a

1 540-megawatt class gas-fired combined cycle  
2 power plant with steam capacity over 75  
3 megawatts, is not subject to the Power Plant  
4 Siting Act.

5 There are really two questions for you  
6 here. Can you do what we've asked you to do?  
7 Do you have the legal authority?

8 We argue very specifically with the  
9 citations to your case law that you can. All  
10 we've done is ask for you to grant -- to the  
11 extent necessary, remember, to the extent  
12 necessary, to grant our need determination  
13 subject to the condition that before the power  
14 plant can ever be built, before we can turn the  
15 first shovelful of earth, we have to make the  
16 appropriate utility-specific need demonstration  
17 required by Tampa Electric v. Garcia.

18 And the second question is, should you  
19 allow us to go forward, should you grant the  
20 need determination in the public interest? And  
21 the answer to that question is likewise yes, for  
22 the reasons I stated before. There are  
23 significant benefits to be gained by allowing us  
24 to go forward.

25 And as to the procedural issues, they

1 really go to the question of abeyance, and we  
2 can -- I feel confident that on the facts as  
3 they exist today or at any time that we can deal  
4 with accommodating discovery and testimony  
5 interests. I mean, in Scherer 4, the case went  
6 through the final order stage with a non-final,  
7 nonbinding letter of intent. And I will aver to  
8 you that our MOU is in fact binding on us, with  
9 the execution of the definitive PPA intended to  
10 be a memorialization of the extensive document  
11 we've already agreed to. And in that case,  
12 Florida Power & Light filed on the day of the  
13 hearing a three-page single-spaced supplement to  
14 their nonbinding letter of intent, and the case  
15 still went forward.

16 Now, we filed the contract today. We are  
17 making additional terms of the contract,  
18 specifically a reopener provision, available to  
19 the parties later today as soon as we can get  
20 the copies out here, and we're willing to work  
21 with them on appropriate discovery. Naturally,  
22 as recited in our request for confidential  
23 treatment, there is information in the document  
24 that both parties consider to be extremely  
25 sensitive, competitive, confidential

1 information. But that's something that can be  
2 worked out in discovery.

3 where we sit today, we've got six weeks  
4 till hearing. We can get there on the schedule,  
5 and that's what we're asking you to do.

6 MR. SASSO: Just very briefly. Thank you,  
7 Commissioner Jacobs.

8 On the narrow legal issue, does Duke  
9 address only the granting of a petition or not,  
10 we submit it does not address only the power to  
11 grant the petition. It addresses who gets in  
12 the door to begin with. Again, to repeat, the  
13 Court said, "Only an applicant can request a  
14 determination of need under 403.519," citing  
15 Nassau. The interesting point there is, Nassau  
16 2 dismissed a petition at the threshold. The  
17 only reason the applicant, the would-be  
18 applicant in Duke got as far as it did is  
19 because the Commission mistakenly allowed it to  
20 do so, induced by the representation that Duke  
21 was distinguishable from Nassau.

22 How was Duke distinguishable from Nassau?  
23 Well, according to Duke's counsel and staff in  
24 the Duke case, Duke was supposedly  
25 distinguishable from Nassau because the IPP and

1 Nassau wanted to meet a retail utility's  
2 specific need. In Duke, counsel for Duke argued  
3 that Nassau was distinguishable because Ark and  
4 Nassau in the Nassau case wanted to meet FP&L's  
5 identified need. They said, "We're a merchant,  
6 so we're different." If an IPP seeks to have a  
7 need determination granted on the basis of  
8 meeting a utility's identified need, well, yes,  
9 then we agree. They can't be an applicant in  
10 their own right.

11 well, that's exactly what they're trying to  
12 do today in this case. And whether they're a  
13 merchant or whether they're trying to meet the  
14 need of a retail utility that they haven't quite  
15 identified yet or contracted with yet, it  
16 doesn't matter. The point is, only a load  
17 bearing utility has applicant status to initiate  
18 such a proceeding.

19 COMMISSIONER JACOBS: Last round,  
20 Mr. Wright.

21 MR. WRIGHT: Mr. Sasso left out a real  
22 important part of the Ark/Nassau holding. Ark  
23 and Nassau -- and I was in that case. Ark and  
24 Nassau were attempting to meet FPL's need  
25 without a contract. The difference here is that

1 Calpine has made it very clear from June 19th  
2 through today that we would never build a plant  
3 until and unless we had a contract and  
4 demonstrated the utility-specific need  
5 requirements to you, to the Florida Public  
6 Service Commission, consistent with the Court's  
7 holding in Tampa Electric v. Garcia.

8 MR. GUYTON: I'm sorry. I've tried to  
9 restrain myself, but that's just a factual  
10 misrepresentation, not necessarily about what  
11 they're representing here. Ark did have a  
12 contract that it proposed. It presented a  
13 contract to the Commission in its case. They  
14 said, "We want to provide this power pursuant to  
15 this contract to Florida Power & Light  
16 Company." It didn't have a signed contract, but  
17 it had a form contract that it asked you to  
18 force the utility to enter into. But I don't  
19 want you to be left with the impression that  
20 there wasn't a contract on the table.

21 COMMISSIONER JACOBS: Okay. We'll take  
22 that as a modification. Did you have anything  
23 else to add?

24 MR. ELIAS: Not unless the Commission has  
25 specific questions.

1                   COMMISSIONER JACOBS: Commissioners?

2                   COMMISSIONER JABER: I think you could help  
3 us a lot, Bob.

4                   How do you respond to the assertion that  
5 this is unlike Duke, number one? And then  
6 number two, help me understand how they've met  
7 their basic allegation that there's a need. You  
8 know, in conjunction with deciding a motion to  
9 dismiss, how have they met the very basic  
10 allegation of need without a contract?

11                   MR. WILLIS: First, it's based on the  
12 allegations in the petition that they will have  
13 a retail serving utility, that they will  
14 demonstrate a retail specific need for the  
15 output of this facility.

16                   I agree with something that Mr. Sasso said  
17 earlier, you know, in reference to the Duke  
18 decision, as applicable to here and to every  
19 other need determination as well. What the  
20 Court said was that the Commission was without  
21 jurisdiction to enter this order. We're not to  
22 the stage of passing on the propriety of the  
23 factual information that is presented to the  
24 Commission, nor at this point are we conceding  
25 that it is appropriate to ask, as Calpine has

1 requested, a conditional need determination,  
2 contingent upon some subsequent showing of a  
3 utility-specific commitment.

4 COMMISSIONER JABER: What you're saying is,  
5 it's not a given. You almost have to go through  
6 the evidentiary hearing to even determine --

7 MR. ELIAS: Yes.

8 COMMISSIONER JABER: -- whether we have  
9 jurisdiction, because our jurisdiction is  
10 dependent upon the facts that are litigated.

11 MR. ELIAS: The matters of proof that are  
12 put before the Commission in an evidentiary  
13 hearing. And that -- you know, there is no  
14 showing one way or the other on that point.  
15 What you've got are allegations. What we've got  
16 are allegations.

17 COMMISSIONER JACOBS: What about  
18 Mr. Sasso's argument that even if you go with  
19 that rationale, you've got to have -- before we  
20 can proceed, we've got to have a party status  
21 contracting utility?

22 MR. ELIAS: Again, that goes back to a  
23 factual demonstration of what's in the petition  
24 and what's brought before the Commission when  
25 the matter is heard. You know, it has been

1 represented to us that they will provide  
2 specific information by November 1st. To the  
3 extent that we don't -- we either don't receive  
4 information on or before November 1st or believe  
5 what is provided is sufficient to afford all  
6 parties, including staff, an opportunity to  
7 fully evaluate the proof that is offered and  
8 respond to the evidence or the evidence that's  
9 offered, we'll be back to you.

10 COMMISSIONER BAEZ: So then you do agree  
11 that there's I guess a continuum that you can --  
12 there is a point at which all of these pieces  
13 have got to be together, and it's not today.

14 MR. ELIAS: It's not today, and --

15 COMMISSIONER BAEZ: But it's not -- and I  
16 guess, going back to what Mr. Wright alluded to  
17 earlier, I'm not sure that it's necessarily at  
18 the point, you know, before construction. It's  
19 somewhere before that.

20 MR. ELIAS: I think that issue is very much  
21 open.

22 COMMISSIONER BAEZ: Okay.

23 MR. ELIAS: I mean, I don't -- I'm not  
24 conceding that the Commission could or should  
25 grant a conditional need determination absent a

1 showing of a specific utility need for the  
2 output of this facility in an evidentiary  
3 proceeding. And I just -- you know, those are  
4 issues yet to be determined.

5 COMMISSIONER JACOBS: what do we sacrifice  
6 if we give -- how should I say this? If we give  
7 the parties an opportunity to try and put this  
8 in the best legal posture? Let me just say  
9 this. If I were to believe the argument that  
10 the contracting utility, whoever it may be --  
11 maybe somebody else will show up with an MOU.  
12 But the contracting party needs to be here.  
13 what do we sacrifice if we allow that to happen?

14 MR. ELIAS: Well, first, I think the remedy  
15 of dismissal without leave to amend is pretty  
16 harsh. That's saying that there ain't no way,  
17 no how, on God's earth that you can amend this  
18 pleading to comport with the requirements of  
19 law, and I think that's a pretty extreme step.

20 And as to the second question of what we  
21 sacrifice, the allegations that there will be a  
22 delay in constructing needed capacity, that  
23 there are reliability, fuel savings, and other  
24 benefits that would be foreclosed to the people  
25 of the State of Florida if this project is

1 delayed any length of time. You know, you can  
2 weigh those and decide what kind of chance you  
3 want to take with them.

4 But I think that at this point, there is  
5 enough in terms of allegations to proceed  
6 without any judgment as to whether what is  
7 ultimately proved or offered in six weeks is  
8 sufficient to grant an affirmative determination  
9 of need pursuant to the statutory criteria as  
10 interpreted by the Court.

11 COMMISSIONER JABER: Commissioners, this is  
12 -- it's difficult not because the decision in  
13 this docket is difficult. It's difficult  
14 because the deck that we've been dealt from a  
15 public policy standpoint seems -- it just seems  
16 counterproductive.

17 we need additional power in the state. No  
18 one can argue with that. The Supreme Court has  
19 done what it's done. The difficulty I'm having  
20 is, we've got to consider this application with  
21 the law as it exists today, and now the Supreme  
22 Court has ruled twice. We may not like that  
23 decision, but it's the law that we operate  
24 under.

25 what is particularly difficult for me on

1           these two issues with the motion to dismiss is,  
2           I almost -- I think that there's something to be  
3           said about cross examining and going forward  
4           with an evidentiary hearing just to even  
5           determine whether the contract will meet the  
6           couple of requirements that Duke has given us,  
7           whether Calpine is a proper applicant, and two,  
8           whether the plant will be fully committed to  
9           Florida's retail ratepayers. And I don't have  
10          enough today to make that decision, and perhaps  
11          the point at which we go to hearing is too  
12          late. I would like to think there is a middle  
13          ground.

14                 I'm going to move staff on Issues 4 and 5  
15                 and give staff direction, which would be to deny  
16                 the motions to dismiss, right, 4 and 5?

17                 MR. ELIAS: Yes.

18                 COMMISSIONER JABER: But to give staff  
19                 direction that at any point they feel  
20                 comfortable enough recommending to the  
21                 Commission that this petition should be  
22                 dismissed, then I would encourage them to do  
23                 that.

24                 COMMISSIONER JACOBS: We have a motion.

25                 COMMISSIONER BAEZ: I'm beginning to

1 second-guess what the order of issues should  
2 have been. I'm uncomfortable with kicking it  
3 out as well. I would love to see some middle  
4 ground here. I'm not sure if the issues that  
5 are now coming up satisfy that concern for me.

6 But I have -- I'm not quite sure what  
7 indispensable information is missing from this,  
8 from a petition that would allow it to go  
9 forward. As you say, I don't see that there is  
10 anything that would be indispensable in at least  
11 allowing it to go forward so that we can reach  
12 the facts at some future point. So at least on  
13 the motions to dismiss, I'll second Commissioner  
14 Jaber's motion on denying.

15 COMMISSIONER JACOBS: Only as to Issues 4  
16 and 5?

17 COMMISSIONER BAEZ: Uh-huh.

18 COMMISSIONER JABER: For now, yes.

19 COMMISSIONER BAEZ: It's the only ones that  
20 are on; right?

21 COMMISSIONER JABER: For now. Can we come  
22 back to --

23 COMMISSIONER JACOBS: Well, so we have a  
24 motion and a second. I will be voting -- I will  
25 be dissenting on the vote.

1           And I agree 100 percent that this is a  
2 contorted position we find ourselves in. We  
3 need capacity in this state. And where we've  
4 arrived at this moment, we need to get to the  
5 heart of how to provide the most cost-effective  
6 power to citizens in this state, and we find  
7 ourselves wrangling over legal threshold issues,  
8 many of which probably will be best dealt with  
9 in the context of a need determination process,  
10 which historically we've done.

11           Historically we've not sat at the door and  
12 said, "Prove up every ounce of capacity this  
13 plant will produce before we let you even state  
14 your case." Historically, we've asked that as a  
15 matter of right in coming to us you demonstrate  
16 that you've sought all possible options, and you  
17 now are presenting the most cost-effective  
18 option for providing that capacity. In the past  
19 we've said, "When you do that, take  
20 consideration of conservation measures,  
21 alternatives, and everything else that could be  
22 available to you and to provide this capacity in  
23 the most cost-effective manner." This process  
24 is not doing that now, and that is the greatest  
25 discomfort I have today with where we find

1 ourselves. We must get beyond this very  
2 quickly.

3 But specifically to the issue today, I am  
4 persuaded that a contracting utility is at least  
5 a necessary party in a need determination. I  
6 won't say whether or not I would agree with the  
7 position that they should be the filing party or  
8 not. But I believe that given the context of  
9 the law as it has been interpreted for us, the  
10 contracting utility is at least a necessary  
11 party, and therefore should be involved in the  
12 petition. And I believe that is a  
13 jurisdictional issue, and therefore might  
14 sustain a motion to dismiss.

15 Having said that, there is a motion and a  
16 second. All in favor say "aye."

17 COMMISSIONER JABER: Aye.

18 COMMISSIONER BAEZ: Aye.

19 COMMISSIONER JACOBS: Opposed? Nay.

20 COMMISSIONER JABER: Now, let me take this  
21 opportunity, Chairman Jacobs, to talk to Calpine  
22 and to staff about my concerns going forward.

23 It is very hard for me at the moment to  
24 understand how the Duke situation with respect  
25 to the contract with the City of New Smyrna

1 Beach for 30 megawatts is different from the  
2 situation that you are suggesting you'll be able  
3 to show us. In other words, I'll be looking  
4 carefully at how you define fully committed.

5 Staff, Chairman Jacobs brings up precisely  
6 the point. We came -- it's interesting. We  
7 have the same concern, but we've reached a  
8 different bottom line.

9 The concern I have over whether Calpine is  
10 a proper applicant or, for example, Seminole  
11 Electric would the applicant is something that  
12 I'm going to count on you to bring up later on.  
13 And whether that's something in a brief at the  
14 hearing or some future, you know, recommendation  
15 in an agenda, I don't know. I encourage you,  
16 Bob, to find ways to help us reach incremental  
17 decisions so that to the degree we can save time  
18 and money by not going forward to hearing if we  
19 don't have to, that's something I would be  
20 looking for. You know, if the decisions are all  
21 legal decisions, perhaps an informal hearing or  
22 briefs or oral argument are in order. I don't  
23 know.

24 COMMISSIONER JACOBS: I don't know, given  
25 the context of the legal kind of gray no man's

1 land we find ourselves in, how to proceed with  
2 that. I've always felt, as I indicated  
3 previously, that the threshold issues were about  
4 identifying need, and we ought to get focused on  
5 that, and then the most cost-effective manner of  
6 meeting that need. And the Court has said that  
7 means you have to have retail need. If that's  
8 what we have to do, we have to figure out a way  
9 of getting people in the door to do that.

10 And in terms of how we go about that and in  
11 terms of transitioning to a competitive  
12 marketplace, those issues are going to be on  
13 everybody's back burner, I guarantee you, if we  
14 don't get this one fixed pretty quick. Nobody  
15 will be concerned about competition. If you  
16 don't believe me, ask our colleagues in  
17 California. We have to figure out how to get  
18 people in the door, and we have to do it  
19 quickly.

20 I quite frankly think we ought to be making  
21 sure we work very closely with the Governor's  
22 Study Commission, but it ought to be on an  
23 expedited -- there ought to be some very serious  
24 urgency to figuring this issue out.

25 MR. ELIAS: We are working with the

1 Governor's 2020 Study Commission, and their  
2 decision last month in adopting their work plan  
3 was to consider making recommendations  
4 concerning the wholesale market in the state for  
5 the 2001 legislative session. And they're  
6 meeting again tomorrow. You know, they haven't  
7 said that, yes, we're going to make  
8 recommendations. They're just going to gather  
9 the information and do what they can to be in a  
10 position to decide whether they can make  
11 recommendations, and if so, make recommendations  
12 come January.

13 COMMISSIONER JACOBS: And just -- as soon  
14 as I say getting people in the door, just  
15 getting people in the door is important, but our  
16 responsibilities and duties extend much further  
17 beyond that. And so while we get that problem  
18 solved, we have to be thinking about, okay, once  
19 you get folk in the door, how are we going to  
20 manage this new world? How will it operate?  
21 And without getting into all the extracurricular  
22 facts about what's going on in the rest of the  
23 world, we have to understand what it means when  
24 we take this action. What are we saying?

25 For instance, what does it mean when we

1 start waiving the bidding rule for every  
2 independent power producer that we say may have  
3 a legitimate claim to build a plant? Are we  
4 saying then that that automatically makes an  
5 independent power producer the most  
6 cost-effective option? What does that mean as  
7 far as public policy? How do we make sure that  
8 what -- carrier of last resort responsibilities  
9 are adhered to?

10 In this instance, because the -- I think  
11 what I'm saying is that we want the contracting  
12 utility to be on board with deciding. But if we  
13 didn't say that and we're willing to let the  
14 independent power producer have the plant, who  
15 would have carrier of last resort  
16 responsibilities, and how do we convey that?

17 Those sorts of issues I think have to be  
18 thought through by us in advance of dealing with  
19 how the wholesale market is going to play out,  
20 and we need to understand how those issues are  
21 going to play out. I'll guarantee you, right  
22 now people wish they had done those sorts of  
23 thoughts, had those sorts of thoughts in other  
24 places. And we need to use -- take the benefit  
25 of those experiences to heart and proceed very

1 carefully and cautiously ahead when we do that.

2 MR. ELIAS: One of the more sage things  
3 that I've heard recently is that, you know, one  
4 of the problems with being a pioneer is, you  
5 tend to take the arrows. And we do benefit from  
6 the fact that we're not out there on the leading  
7 edge, that we don't have the 12 and the 14 cent  
8 a kilowatt-hour electricity that are delivered  
9 prices in some places in the Northeast and  
10 California. So we do have the benefit of being  
11 able to see what does and doesn't work in other  
12 places before we move forward on a lot of these  
13 issues.

14 COMMISSIONER JABER: I'm sure they felt  
15 that way at some point too.

16 MR. ELIAS: Well, no. I mean, you talk to  
17 some of the people in California, and they  
18 recognized the acuteness of the problems that  
19 they had before they took those quantum leaps.

20 COMMISSIONER JABER: Anyway, I think that's  
21 a debate for a different day.

22 MR. ELIAS: Yes.

23 COMMISSIONER JABER: But that's Issues 4  
24 and 5, Mr. Chairman.

25 On Issue 2, procedurally, I don't know if I

1 need to move staff. Let me tell you what I have  
2 decided as we were discussing the other two  
3 issues, which is that --

4 COMMISSIONER JACOBS: I know folks are  
5 waiting. Can we take about five minutes and  
6 come back to finish this up?

7 COMMISSIONER JABER: Okay.

8 (Short recess.)

9 COMMISSIONER JABER: Chairman Jacobs, what  
10 I was about to discuss was Issue 2. And staff  
11 needs to help me get to where I need to be with  
12 respect to my concerns on the hearing schedule  
13 and discovery. I really do not want to hold the  
14 case in abeyance. I think what everyone really  
15 wants, and certainly to address my concern, I'm  
16 not comfortable with a November 29th hearing  
17 date anymore or the hearing schedule as we've  
18 laid it out.

19 Since we've decided not to dismiss the  
20 case, I think there's something to be said,  
21 though, about giving the parties and staff more  
22 time and opportunity for meaningful discovery  
23 and for testimony. So with your indulgence,  
24 Chairman Jacobs and Commissioner Baez, I would  
25 like to work with the Chairman's office on new

1 hearing dates.

2 But I don't know if that would take care of  
3 the motion to hold the case in abeyance, Bob, or  
4 if it's better to just deny the motion for  
5 abeyance and then issue a new order on  
6 procedure.

7 MR. ELIAS: Abeyance typically carries with  
8 it the notion that all activity would stop. I  
9 don't think that that's consistent with what I  
10 understand -- my understanding of what you want  
11 to do.

12 COMMISSIONER JABER: Right.

13 MR. ELIAS: Because there are things going  
14 on. There's information that's available.  
15 There's discovery that's ongoing, at least on  
16 staff's part. I think there's plenty to be done  
17 in terms of gathering the information that may  
18 be presented to the Commission at a hearing.  
19 And perhaps a continuance or a rescheduling of  
20 the hearing is more appropriate, given the  
21 concerns that you've expressed.

22 COMMISSIONER JABER: Chairman Jacobs, I  
23 would move to grant staff's Issue 2,  
24 recommendation on Issue 2. But if it's all  
25 right with you all, I'm going to work with the

1 Chairman's office on new hearing dates and  
2 issuing a new procedural order.

3 COMMISSIONER BAEZ: If that's all our  
4 understanding, I would agree with that, because  
5 my concern is this. I think -- you know, part  
6 of the utilities' arguments are reasonable, in  
7 that they haven't had time to -- you know, there  
8 are discovery issues in terms of timing.

9 I also don't believe that a November 1st --  
10 even the deadline that you've imposed on  
11 yourself for coming up with an agreement is  
12 really a realistic one. I think I hear  
13 Commissioner Jaber --

14 COMMISSIONER JABER: Well, let me clarify,  
15 because I don't think that date should change.  
16 I think November 1st should be the date that --  
17 because they've said to us from day one that  
18 they can accommodate November 1st.

19 COMMISSIONER BAEZ: But here's the  
20 situation that I see coming down the pike. If  
21 it is, as I feel deep down inside, that it's not  
22 a realistic date at this point, then what we're  
23 going to cause is another -- you know, for staff  
24 to have to come back here, you know, making a  
25 pretty dire recommendation, and that's to

1 dismiss, because it's my -- it would be my  
2 impression that certainly the MOU that doesn't  
3 exist today, you know, is probably not going to  
4 -- you know, it's not --

5 COMMISSIONER JABER: That's a good point.

6 COMMISSIONER BAEZ: It's not going to be  
7 enough on November 1st. So since we're talking  
8 about moving deadlines back, I think they should  
9 all -- you know, why don't we create a situation  
10 where everyone gets the benefit of the scaled  
11 back deadlines.

12 COMMISSIONER JABER: Well, no one can tell  
13 us I think what date Calpine could have the  
14 contracts. I mean, I think they're  
15 strategically in the best place.

16 COMMISSIONER BAEZ: Mr. Wright has --

17 COMMISSIONER JABER: We're looking at you.

18 MR. WRIGHT: I just wanted to make the  
19 point that both Calpine and Seminole are of the  
20 opinion and take the position that the MOU that  
21 we filed under cover of the request for  
22 confidential treatment today is a binding  
23 agreement and that the definitive PPA, power  
24 purchase agreement, contemplated therein is  
25 intended to manifest that. But we consider

1 ourselves bound to go forward with that  
2 agreement and bound by the terms of the MOU  
3 itself. So our position is we beat November 1st  
4 by two weeks. But we're working with you all  
5 too.

6 MR. ELIAS: There's other proof that needs  
7 to be put on the table.

8 MR. WRIGHT: True.

9 MR. ELIAS: There's the question of this  
10 utility's needs and this utility's  
11 cost-effectiveness and the whole panoply of  
12 criteria that relate to the retail serving  
13 utility that we need the opportunity to  
14 evaluate, and other parties need the opportunity  
15 too.

16 COMMISSIONER BAEZ: So what you're saying  
17 is that on November 1st, there's going to be a  
18 reckoning that goes beyond the sufficiency of  
19 this agreement.

20 MR. ELIAS: If the present schedule holds,  
21 yes.

22 COMMISSIONER BAEZ: And does that comport  
23 with the -- I guess it's an internal deadline  
24 that Calpine has placed on itself.

25 COMMISSIONER JABER: Commissioner Baez,

1 they were going to supplement testimony on  
2 November 1st.

3 COMMISSIONER BAEZ: Correct.

4 COMMISSIONER JABER: And part of the  
5 testimony was going to be the contract. But you  
6 raised a good point.

7 COMMISSIONER BAEZ: But there would be  
8 other information in addition, and that was  
9 going to be the basis upon which you were going  
10 to make an evaluation on --

11 MR. ELIAS: Evaluate the sufficiency of the  
12 information to allow the Commission to make an  
13 informed decision under the present schedule.

14 COMMISSIONER BAEZ: Okay.

15 COMMISSIONER JACOBS: Does that include an  
16 amended petition that reflects --

17 MR. ELIAS: I can't speak to what they  
18 would --

19 COMMISSIONER BAEZ: Yes, the vehicle.

20 MR. ELIAS: How they would --

21 COMMISSIONER JABER: But, you know, look.  
22 It's theirs. It is their petition, their case,  
23 their burden. I think we have been more than  
24 generous. And Schef is shaking his head.

25 The balance and the difficulty we're having

1 is because over our head is this important  
2 public policy concern of bringing additional  
3 power to the State of Florida, and we're  
4 cognizant of the needs of Florida ratepayers.  
5 If Calpine isn't processing or isn't giving us a  
6 petition that we can process correctly, that's  
7 Calpine's problem, not ours.

8 COMMISSIONER BAEZ: No, I don't disagree  
9 with you there. But I think that even beyond  
10 this overarching issue, there's another --  
11 there's a fiscally responsible issue here. I  
12 don't think -- you know, not to second-guess an  
13 initial decision that was to let this thing move  
14 on, but we've burned some time on this, and to  
15 stop it dead in its tracks means that our dime  
16 size budget is going to get impacted, certainly  
17 much more than any other party's, no offense.

18 COMMISSIONER JABER: Right. Well, I have  
19 to --

20 COMMISSIONER BAEZ: You know, that's a  
21 consideration that I have. You know, it's  
22 outside the four corners of any petition, but --

23 COMMISSIONER JABER: Let me make this  
24 commitment to you. I have got to get hearing  
25 dates first. And I will look at the schedule,

1 and to the degree that testimony can be backed  
2 up, we will. And, though, the commitment we  
3 need from Calpine is that they will try their  
4 best to meet November 1st. And if not, they  
5 need to bring something to our direction, I  
6 mean, our attention that would allow us to rule  
7 on additional time.

8 COMMISSIONER JACOBS: That sounds to me --  
9 I don't think it would be beyond the realm of  
10 possibilities that we're going to see another  
11 round of discussion about the legitimacy of this  
12 once we get all the facts before us, and I think  
13 probably to round up at that point in time and  
14 come to some conclusions about that would be a  
15 good idea before we move very much forward.

16 Mr. Elias?

17 MR. ELIAS: I'm -- yeah, this one is a long  
18 ways from over. But I'm just not sure that the  
19 kinds of issues that I think are going to arise  
20 are going to be independent of factual  
21 allegations and matters of proof.

22 COMMISSIONER JACOBS: But to go forward  
23 before we have some handle on it that gets us --  
24 we get into motion practice and discovery, and  
25 when we start discussing limited resources, that

1 goes to a much higher level and much more severe  
2 consequences before we have everything as clear  
3 as we can have it before we go off into that,  
4 don't you agree?

5 MR. ELIAS: Oh, yes. Yes.

6 COMMISSIONER JABER: Bob, Commissioner Baez  
7 made very, very good points. I think once --  
8 because we have invested a lot of time and  
9 energy and money into this case, once we nail  
10 down the hearing dates and the procedural dates,  
11 my request is that you float that order to all  
12 of the Commissioners on this panel.

13 MR. ELIAS: Okay.

14 COMMISSIONER BAEZ: So what's the motion  
15 again?

16 COMMISSIONER JABER: I would move Issue 2,  
17 and I'll work with staff and the Chairman's  
18 office on a new procedural order that moves the  
19 hearing and the testimony dates and the  
20 discovery dates.

21 COMMISSIONER BAEZ: Second.

22 COMMISSIONER JACOBS: Show it moved and  
23 seconded, that staff is moved on Issue 2, with  
24 directions pursuant to our discussion today.

25 That only leaves -- where are we now?

1 COMMISSIONER BAEZ: Three?

2 MR. ELIAS: Yes, Issue 3.

3 COMMISSIONER JACOBS: Issue 3.

4 Commissioners?

5 COMMISSIONER BAEZ: I have one question off  
6 the bat. I mean, is this not more substantive  
7 than procedural?

8 MR. ELIAS: We were going to bring this  
9 recommendation to this agenda independent of the  
10 questions that were raised by the procedural  
11 matters that we were directed to bring. It's  
12 one of those issues that we felt like needed to  
13 be resolved before the hearing, and that's what  
14 Calpine asked. And as we said in the  
15 recommendation, if you're not inclined to agree  
16 that it was not applicable to Calpine, we would  
17 bring a recommendation under the waiver criteria  
18 to the next agenda.

19 COMMISSIONER JABER: In the event we found  
20 that the rule was applicable, but we should  
21 process a rule waiver, have you noticed it?

22 MR. ELIAS: It has been noticed. The  
23 90-day period required in section 125.42 has  
24 been waived.

25 COMMISSIONER JABER: And this would

1 actually -- if we did it as a rule waiver, this  
2 issue would be PAA, or the rule waiver  
3 resolution would be PAA; right?

4 MR. ELIAS: Somebody would have to have a  
5 point of entry someplace, yes, so I would agree.

6 COMMISSIONER JABER: So isn't there some  
7 merit to making this an issue in the hearing if  
8 it's going to be PAA anyway?

9 COMMISSIONER BAEZ: I guess an additional  
10 question is, is this issue -- is this decision  
11 now as exposed as a PAA Later? If it's not the  
12 same disclosure --

13 MR. ELIAS: No, because we don't think it's  
14 applicable, and that's not subject to a right to  
15 -- an opportunity to present factual evidence on  
16 the merits by somebody whose substantial  
17 interests are affected. It would be reviewable  
18 on appeal.

19 COMMISSIONER JABER: What you're saying is,  
20 the way you've written the rec right now, it  
21 doesn't afford parties an opportunity to  
22 respond. No one's interests are substantially  
23 affected by saying that the rule applies to  
24 Calpine. The only time you would make it PAA is  
25 if you find that the rule does not apply to

1 Calpine.

2 MR. ELIAS: Yes.

3 COMMISSIONER JABER: But if we the rule  
4 applies to Calpine and they can petition for  
5 rule waiver, our disposition of that  
6 recommendation should be PAA.

7 MR. ELIAS: Yes.

8 COMMISSIONER BAEZ: Say that again.

9 COMMISSIONER JABER: I don't think I can.

10 COMMISSIONER BAEZ: No. I was impressed.  
11 You're recommending that the rule doesn't apply.

12 MR. ELIAS: Does not apply.

13 COMMISSIONER BAEZ: And Commissioner Jaber  
14 is saying that a recommendation or a  
15 determination that the rule didn't apply would  
16 have to be PAA.

17 MR. ELIAS: No.

18 COMMISSIONER JABER: No.

19 MR. ELIAS: That's procedural.

20 COMMISSIONER BAEZ: I had Noreen nodding  
21 back there.

22 COMMISSIONER JABER: Let me start over.

23 Let me do this again. Staff is saying the  
24 bidding rule does not apply to Calpine. This  
25 recommendation, if we approve it now, final, not

1 PAA.

2 COMMISSIONER BAEZ: Not subject to review.

3 COMMISSIONER JABER: At the appellate  
4 level.

5 COMMISSIONER BAEZ: By somebody else;  
6 right.

7 COMMISSIONER JABER: If we find that the  
8 rule does apply to Calpine and Calpine then  
9 petitions for a rule waiver, our resolution of  
10 the rule waiver petition would have to be PAA.

11 COMMISSIONER BAEZ: Oh, okay.

12 MR. ELIAS: Yes.

13 COMMISSIONER BAEZ: All right.

14 MR. ELIAS: And their request for relief  
15 was in the alternative. They had said that it  
16 -- they had alleged that it doesn't apply, but  
17 if we concluded that it did, they had asked for  
18 a waiver.

19 COMMISSIONER JABER: well, why don't you  
20 believe the rule applies to them, Bob?

21 MR. ELIAS: Because the requirement is  
22 visited on investor-owned utilities.

23 COMMISSIONER JACOBS: But there's a purpose  
24 behind that, isn't there? I mean, it's an  
25 interesting distinction that MOUs and co-ops are

1           exempted from the rule.

2           MR. ELIAS: And I believe the distinction  
3 was perhaps argued in terms of jurisdiction when  
4 the rule was adopted, but also that there is an  
5 another governing body making resource decisions  
6 for those ratepayers.

7           Now, as we said in the recommendation, if  
8 the contracting utility is a utility that is  
9 subject to the bidding rule, that would be an  
10 issue in the hearing. In other words, if it was  
11 Florida Public Utilities, although I'm not sure  
12 if they're subject to the rule or not, but if it  
13 was -- say Florida Power & Light Company  
14 contracted for the output of this plant. The  
15 question of compliance with the bid rule would  
16 certainly be an issue in the hearing.

17           COMMISSIONER BAEZ: Now, legally can we  
18 take into consideration what we already know,  
19 even though we haven't been taking it into  
20 consideration before?

21           COMMISSIONER JABER: This is outside the --  
22 it's not in the motion to dismiss.

23           MR. ELIAS: But this is -- I think in --

24           COMMISSIONER BAEZ: well, the motion to  
25 dismiss has been disposed of.

1 MR. ELIAS: Yes. This is apart from the  
2 motion to dismiss.

3 And the fact, you know, that the allegation  
4 is that the party that's going to purchase the  
5 output is Seminole, if there's a reason why the  
6 Commission can't incorporate that fact into its  
7 decision on this recommendation today, I don't  
8 know it.

9 COMMISSIONER JACOBS: Wait a minute, now.  
10 When we get to the point of the waiver, we're  
11 talking about the applicant; is that correct?

12 MR. ELIAS: We're not to the point --

13 COMMISSIONER JACOBS: We're talking about  
14 the --

15 MR. ELIAS: The rule does not apply.

16 And let me throw a third alternative,  
17 another alternative out there for you. Given  
18 the recent decision, if you don't want to deal  
19 with this today, there's less urgency than when  
20 we were going to hearing in six weeks in terms  
21 of the clarity of --

22 COMMISSIONER JABER: I think that's a good  
23 idea.

24 COMMISSIONER BAEZ: Sold.

25 COMMISSIONER JABER: I would move that we

1 defer ruling on Issue 3.

2 COMMISSIONER JACOBS: I'm debating that  
3 even. It has been moved and seconded that Issue  
4 3 be deferred. I'm going to go along to say  
5 that I don't think my rationale would change,  
6 but I'm going to go with it, since there's a  
7 majority anyway. My rationale won't change. I  
8 think the rule applies, and we'll see what  
9 happens there.

10 COMMISSIONER JABER: You know, Bob, though,  
11 what would be helpful when you bring this issue  
12 back is a better understanding of the purposes  
13 behind the rule.

14 COMMISSIONER JACOBS: Your distinction  
15 about the real issue here is an important issue,  
16 that if we find ourselves with either a  
17 municipality, a municipal-owned system or a  
18 co-op as a contracting utility, that is an  
19 important issue, and I think that's a real issue  
20 that we ought to make sure we clear up. But  
21 outside of that, we'll go ahead and defer this  
22 issue.

23 COMMISSIONER JABER: The Company has  
24 responded to this issue; right? The Company has  
25 responded to the petition for a waiver of the

1 rule.

2 MR. ELIAS: Yes, they did.

3 COMMISSIONER JACOBS: Very well.

4 MR. ELIAS: Point of clarification. Do you  
5 want a separate recommendation on the waiver  
6 issue, on the rule issue brought to a subsequent  
7 agenda, or do you want it rolled into  
8 consideration for the issues to be decided at  
9 the hearing?

10 COMMISSIONER BAEZ: I think if you don't  
11 bring it up -- something that you mentioned  
12 earlier, if you don't bring it up independently,  
13 then that may change the entire complexion of  
14 the hearing, so it would probably -- I don't  
15 know how you feel about it.

16 COMMISSIONER JACOBS: If our determination  
17 is that the rule applies, the hearing is too  
18 late, isn't it?

19 MR. ELIAS: Yes.

20 COMMISSIONER JACOBS: So let's do it  
21 before.

22 COMMISSIONER JABER: Next agenda?

23 COMMISSIONER JACOBS: Thank you.

24 MR. ELIAS: And I think we have one last  
25 issue, which is Issue 6.

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: Oh, yes.

MR. ELIAS: Easy.

COMMISSIONER JABER: Move staff.

COMMISSIONER JACOBS: Moved and seconded.

Thank you.

(Conclusion of consideration of Item 49.)

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

CERTIFICATE OF REPORTER

STATE OF FLORIDA)  
COUNTY OF LEON )

I, MARY ALLEN NEEL, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter transcribed under my supervision; and that the foregoing pages numbered 1 through 85 are a true and correct transcription of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, or relative or employee of such attorney or counsel, or financially interested in the action.

DATED THIS 19th day of October, 2000.

  
MARY ALLEN NEEL, RPR  
100 Salem Court  
Tallahassee, Florida 32301  
(850) 878-2221