

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 000824-EI

In the Matter of:

REVIEW OF FLORIDA POWER CORPORATION'S
EARNINGS, INCLUDING EFFECTS OF
PROPOSED ACQUISITION OF FLORIDA
POWER CORPORATION BY CAROLINA
POWER & LIGHT.



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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 21

BEFORE: CHAIRMAN E. LEON JACOBS, JR.
COMMISSIONER J. TERRY DEASON
COMMISSIONER LILA A. JABER
COMMISSIONER BRAULIO L. BAEZ
COMMISSIONER MICHAEL A. PALECKI

DATE: Tuesday, September 4, 2001

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

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1 PARTICIPATING:

2 NOREEN DAVIS and ROBERT ELIAS, FPSC Division of Legal
3 Services.

4 HAROLD McLEAN, FPSC General Counsel.

5 ROGER HOWE, Office of Public Counsel.

6 GARY SASSO; JIM McGEE and MIKE WALLS, representing
7 Florida Power Corporation.

8 JOHN McWHIRTER, JR., representing Florida Industrial
9 Power Users Group.

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15 CERTIFICATE OF REPORTER

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CHAIRMAN JACOBS: Item 21.

Are you ready to proceed?

MR. ELIAS: Commissioners, Item 21 is staff's recommendation on two pending motions in Docket Number 000824-EI, which is the Florida Power Corporation earnings review.

In Issue 1 we recommend that you deny the Florida Industrial Power Users Group's motion for expedited customer rate relief as being beyond the limits of the Commission's authority.

In Issue 2 we recommend that you grant Florida Power Corporation's request for oral argument on its motion for reconsideration of the order which established the amount of revenues to be held subject to refund pursuant to the Commission's authority under the interim statute.

Parties may participate with respect to Issue 1. With respect to Issue 2, our rule limits participation to entities which have filed a response to the motion for reconsideration. In this instance that was the Office of Public Counsel.

COMMISSIONER JABER: Mr. Elias, I have a procedural question before we get started. The order requiring the filing of MFRs and placing money subject to refund in this docket was issued June 20th. That was an order -- some parts of that

1 order were final and some parts of that order were procedural
2 interim. That is what we used to call when I was in legal
3 combination language order, is that correct? And maybe Noreen
4 needs to clarify this for me so that I can move forward off of
5 these procedural issues.

6 Orders where money is held subject to refund, that
7 part of the order uses the interim statute. The interim
8 statute is a quick and dirty procedure where courts have held
9 that appeals happen after the fact, or after the final decision
10 is made, and reconsideration is not appropriate in interim
11 orders. Someone needs to help me out on that.

12 MR. ELIAS: The language that is on this order that
13 we have always used states that the order -- the action taken
14 herein is preliminary, procedural, or interim in nature and
15 gives a right of reconsideration right in it. I'm not aware of
16 any portions of this order that were other than procedural
17 where the remedy that we advised the parties of was a direct
18 appeal.

19 MS. DAVIS: That is correct, Commissioners. And our
20 rule in Chapter 27-22, I'm sorry I don't have the recall cite,
21 does provide for reconsideration of non-final orders which this
22 would be.

23 COMMISSIONER JABER: But I am distinguishing that
24 from interim. A month after the FPC order was issued there was
25 an order issued on Aloha, it was a water case, and we initiated

1 an investigation and held money subject to refund. The
2 language on that order is a combination. It says that the part
3 of the order initiating the investigation is final and any
4 party adversely affected by the decision setting interim rates
5 and making revenues subject to refund which is intermediate in
6 nature may request judicial review by the Supreme Court in the
7 case of an electric, gas, or telephone. And then it cites the
8 Citizens versus Mayo, such review may be requested by the
9 appropriate court.

10 Again, I don't know the answer to that, but I'm just
11 looking for consistency. And perhaps Public Counsel remembers
12 the case that I'm thinking about in water where the utility
13 actually tried to do reconsideration and appeal an interim
14 order and the court came back and said you have to wait until
15 we are done with the final case. Perhaps you can look at this
16 during the break and I will give you the order --

17 MS. DAVIS: I will be happy to.

18 CHAIRMAN JACOBS: Since we have everybody here, let's
19 go ahead and do the presentations.

20 COMMISSIONER JABER: See, that's my point. I'm not
21 sure they can. I can't get past can they file reconsideration
22 of a decision that holds money subject to refund. That is a
23 fundamental question.

24 MS. DAVIS: In my view they can.

25 COMMISSIONER JABER: And are you going off of

1 knowledge or don't you want an opportunity to look at the --

2 MS. DAVIS: I would be happy to compare the two
3 orders and see, again, what the factual differences may be.
4 But as a general rule, an interim decision is a non-final
5 interlocutory type decision, and our rules provide for the
6 filing of reconsideration.

7 COMMISSIONER JABER: Mr. McLean, do you agree with
8 that?

9 MR. McLEAN: Commissioner, let me respond this way.
10 We have got a break coming up. I think we need to powwow a
11 little bit on it on before we give you a final answer. My
12 understanding over the years has been that interim orders are
13 not subject to reconsideration. But obviously we would like to
14 confer with each, I think, before we give you an answer.

15 COMMISSIONER JABER: Now, if that is correct, Mr.
16 McLean, if that is correct, it is not the parties' fault that
17 they sought reconsideration. Because the language on the order
18 in this case makes it sound like they can seek reconsideration.
19 I would feel much more comfortable if we took the time to look
20 at this issue before going further. Let's do it right.

21 MR. SASSO: Commissioner Jaber, may I be heard very
22 briefly on the procedural question?

23 CHAIRMAN JACOBS: Go right ahead.

24 MR. SASSO: I have the Citizens versus Mayo case that
25 you referred to. In that case there was an appeal taken and

1 the case was remanded for further proceedings but only because
2 the Office of Public Counsel had raised the question of whether
3 they had been given adequate due process rights to
4 cross-examine witnesses and so on in connection with that
5 interim decision. That was the reason for the remand. There
6 is no distinction in the rule for reconsideration on interim
7 orders versus other non-final orders versus final orders. An
8 interim order is an interlocutory order, and that may raise
9 special issues with respect to appealability to a court, but
10 not with respect to motions for reconsideration to the
11 Commission.

12 COMMISSIONER JABER: And you know, Mr. Sasso, you may
13 be completely correct. I don't know. But I can tell you for
14 years it hasn't been done that way in water, so I guess the
15 other question is why is it different.

16 MR. McLEAN: Commissioner, the notion that you came
17 up with initially, and that is that interim is not the last
18 word in science, it is quick and dirty, hopefully not too
19 dirty, but that it is done quickly to minimize regulatory lag
20 to affected parties and that it is not an overly scientific
21 process. And I believe that is the rationale which supports
22 the bar of reconsideration on such matters. But that has been
23 the custom that I have known over a considerable period of
24 time.

25 But, again, I would like to take a little bit closer

1 look at it because I don't know that it has arisen this sharply
2 before.

3 COMMISSIONER PALECKI: And I would like staff to look
4 at whether the language of the order itself would be conclusive
5 and would be determinative of the answer to the question. My
6 feeling is that it is probably within the discretion of this
7 Commission to go either way. And that in water and wastewater
8 they have adapted language that would specifically not allow
9 reconsideration. That in this particular case that we issued
10 an order that would allow reconsideration. And my question is
11 is that language determinative of the question.

12 MR. McLEAN: Commissioner, let me point out -- Harold
13 McLean here. Let me point out that the extent to which that
14 order permits reconsideration is one thought, and the matter to
15 which it invites reconsideration may be another. If we have
16 not invited it, then I suppose that your discretion is wide.
17 To the extent we have invited it, and I'm not saying that we
18 have, but if we did then our posture may be somewhat different,
19 but we will look at that question carefully.

20 COMMISSIONER PALECKI: Thank you.

21 CHAIRMAN JACOBS: Now that is Issue 2. Do we want to
22 take up Issue 1? Are you all here to speak to Issue 1?

23 MR. SASSO: We are not the moving party on Issue 1,
24 FIPUG is, but we are prepared to address it if need be.

25 CHAIRMAN JACOBS: I assume that is in opposition.

1 MR. SASSO: That is correct.

2 CHAIRMAN JACOBS: I would like to go and see if we
3 can address Issue 1 if that is okay, and then it sounds like we
4 will take a break and come back and deal with Issue 2
5 afterwards.

6 Mr. McWhirter.

7 MR. McWHIRTER: Mr. Chairman, my name is John
8 McWhirter appearing on behalf of the Florida Industrial Power
9 Users Group which filed its motion for immediate and expedited
10 rate relief for customers in mid-June of this year. As you see
11 this docket number is 000824, it has been open now for more
12 than a year. And I am beholden to give you some historical
13 perspective on this docket so you can have some understanding
14 of the motion filed by the Florida Industrial Power Users Group
15 and the response filed by Florida Power Corporation.

16 First of all, I would like to point out to you that
17 September 4th, 2001 is a momentous date in history for electric
18 utilities. It was on this day in 1882, 119 years ago that the
19 gas franchise that was awarded to -- for lighting that was
20 awarded to Thomas Edison for the financial district of New York
21 City began operations, and the first light bulb went on in the
22 office of J.P. Morgan, which is generally considered the
23 genesis of the electric power industry as we know it today.

24 The other momentous circumstance that occurred on
25 September 4th was your humble servant was born on that day 50

1 years after the first electric lights in New York City, which
2 would indicate that in all probability I will not be here more
3 than another ten years or so to bug the electric utilities as
4 we have in the past few years.

5 Having said that, I would like to go to the specifics
6 of this case which began in June of 1997. There was a
7 stipulation entered into between Florida Power Corporation and
8 the Public Counsel and Florida Industrial Power Users Group
9 that settled a then pending case and entered into a four-year
10 rate freeze which expired on June 30th of this year. In August
11 of 1999, there was a material change of circumstances in that
12 Florida Power Corporation announced that it was going to merge
13 its facilities with Carolina Power and Light and that
14 shareholders and customers would see a significant savings as a
15 result of the synergies growing out of that merger.

16 The press, which is in the public domain, at that
17 time speculated that the annual savings for the two
18 corporations would be somewhere in the range of \$187 million a
19 year. The greater portion of that, of course, would occur in
20 the State of Florida because Florida Power Corporation was
21 either not filling or was laying off some 1300 positions. And,
22 of course, there would be substantial other savings.

23 Now this is August of 1999, two years ago. At that
24 time and at several subsequent times, both Carolina Power and
25 Light and Florida Power suggested that they wanted to do

1 something for the ratepayers. And, in fact, as an incident to
2 approving the merger in North Carolina there was a rate
3 reduction that was offered to the citizens of North Carolina
4 sometime after that.

5 Nothing happened in this case until July of the year
6 2000 in anticipation that Florida Power or someone would come
7 forward with something comparable to that that occurred in
8 North Carolina, but nothing did happen.

9 Finally, in July of the year 2000, you opened this
10 docket. Your staff has been taking extensive discovery and
11 depositions, has looked in great detail at the savings that are
12 generated by the transaction and has recommended certain
13 action. In January of last year, the Governor's Energy
14 Commission proposed legislation which would freeze rates for
15 Florida Power. That was a serious concern to consumer
16 advocates because we recognized that Florida Power was
17 extensively overearning, had made proffers through the North
18 Carolina officials and through the Florida officials that they
19 wanted to do something for customers, and if the rate freeze
20 went into effect there would be nothing done for customers.

21 The Commission staff said that it was going to take
22 action to make a recommendation in this case. Florida Power
23 suggested that it not do so, and wrote a letter to the
24 Commission, which is part of this record, which I'm sure the
25 Public Counsel will discuss in his presentation so I won't

1 elaborate upon it in this presentation. But we went through
2 the last legislative session. The legislature in its wisdom
3 determined that for numerous reasons it would not impose a rate
4 freeze at that time.

5 On the eve of the consideration of the staff's
6 recommendation that Florida Power withhold some money subject
7 to refund in mid-June of this year, Florida Power offered a
8 settlement. And it gave some relief to customers and it
9 provided, however, that most of the money would be retained by
10 Florida Power and used to write down a regulatory asset.

11 At that moment in time, FIPUG deemed that it was
12 relieved from its responsibility not to seek a rate reduction
13 under the terms of the 1997 stipulation, because it couldn't
14 seek a rate reduction unless Florida Power did so. And it was
15 readily apparent in June of this year that Florida Power was,
16 in fact, willing to do something. And the magnitude of the
17 overcharges to the customers based upon your staff's
18 independent study after almost 12 months of discovery of the
19 facts and circumstances of this case, indicated that the
20 overcharges to the customers and base rates was somewhere in
21 the vicinity of \$10 million a month that customers are paying
22 more than they should have.

23 With that background, the Florida Industrial Power
24 Users Group looked at the provisions of Chapter 366.076, which
25 enables this Commission to take a limited proceeding action and

1 enter an order on those limited proceedings. And so we
2 recommended to you that you immediately undertake to reduce
3 customers rates, and we did this in light of the fact that only
4 a few months before that you had increased the fuel costs quite
5 significantly, and we thought in light of the fact that
6 customers' rates had gone up for fuel cost and Florida Power
7 had expressed a willingness to do something, to do right for
8 the customers, that it would welcome with open arms a prospect
9 of reducing the rates in cooperation with the parties in the
10 case and this Commission beginning on June 1st. July 1st.

11 CHAIRMAN JACOBS: You have the opinion that an order
12 issued under 366.076, and I assume PAA, overcomes the procedure
13 and due process concerns that are raised by the other parties.

14 MR. McWHIRTER: It would if Florida Power Corporation
15 wanted to do right as it said it would. Florida Power
16 Corporation would be entitled, in my opinion, to challenge that
17 order and to demand a hearing. But I likened it to the
18 circumstances in which on February 9th Florida Power
19 Corporation filed affidavits and unsupported information
20 dealing with fuel costs, and this Commission was able to
21 rapidly consider that issue and was able on March the 21st,
22 just maybe 30 days later, was able to grant Florida Power a
23 very substantial fuel cost rate increase.

24 That was not challenged, and I would presume that
25 under the circumstances of this case that Florida Power knowing

1 that the Commission had done extensive study, and by the way,
2 this case is cited by Florida Power for not utilizing 366.076
3 is based on a Commission, old Commission decision in which the
4 Commission said that it didn't have enough time to really give
5 consideration to the circumstances.

6 But in this case the Commission would have had a year
7 to consider the circumstances and, in fact, had given very
8 substantial study into the issue. So clearly the facts were on
9 the table. They were well known. Florida Power Corporation
10 wanted to do right, and I presumed that it would welcome the
11 opportunity to do it. And I was most distressed when they
12 concluded that it would rather wait and give the customers a
13 refund of another \$100 million down the line.

14 I presumed that customers, although they would be
15 getting their refund late after the hearing, that 117 million
16 was still -- or 113 million I guess it was -- was still subject
17 to refund under the Commission's rules. But the circumstances,
18 of course, under that are that during the interim the utility
19 can collect at the top of its authorized range of return. And
20 the circumstances have changed dramatically.

21 I thought even if the Commission did favor our motion
22 with favorable treatment, the Commission could grant a hearing
23 similar to the prompt hearing that you give in fuel cost
24 proceedings, and the parties having already gathered all the
25 information and having the facts on the table could quickly

1 address that issue and no later than the first of August or so
2 you could do something.

3 And I would suggest to you that even today you could
4 do something to give customers relief under our motion if you
5 don't dismiss it out of hand. And I thank you for your time
6 and attention on this momentous day for electric utilities, and
7 I hope that you will rule favorably to our motion.

8 CHAIRMAN JACOBS: Thank you; and happy birthday. It
9 was not lost on us. I noticed particular glee in the back of
10 the room there hearing that the shortness of your time
11 remaining with us was approaching.

12 Public Counsel.

13 MR. HOWE: Chairman Jacobs, we have not taken a
14 position on FIPUG's motion.

15 CHAIRMAN JACOBS: Okay. Mr. Sasso.

16 MR. SASSO: Good afternoon. Gary Sasso representing
17 Florida Power. With me today are Jim McGee with Florida Power,
18 and my partner, Mike Walls (phonetic), also.

19 Very briefly, Mr. Chairman. We began by supporting
20 staff's recommendation in this instance. Staff recommended
21 that the motion be denied because of an absence of statutory
22 authority to grant the relief requested. That is an
23 appropriate analysis. The Commission does not have statutory
24 authority to order an immediate refund.

25 FIPUG has sort of picked and chosen from various

1 procedures and statutes and historical instances in putting
2 together its request for relief. Mr. McWhirter relies on
3 staff's analysis that we challenge in Issue 2 concerning the
4 amount that should be held subject to refund pending the full
5 rate case. Well, that decision -- which has been described
6 already this afternoon as quick and dirty -- hardly amounts to
7 a study. It hardly amounts to a proceeding in which Florida
8 Power's side of the story has been aired, fleshed out,
9 entertained, considered and analyzed. It is a unilateral
10 determination by staff of an interim nature and we are going to
11 discuss our view that even that determination was
12 inappropriately reached.

13 COMMISSIONER DEASON: Mr. Sasso, if we are to -- and
14 I'm not trying to prejudge or jump ahead -- but if we are to
15 allow you to provide argument on reconsideration and we go into
16 it in greater depth, then does that carry us beyond quick and
17 dirty? And then if whatever we decide after that, having given
18 you an opportunity to argue, then does that give us the ability
19 under Florida Statutes then to lower your rates?

20 MR. SASSO: No, it would not.

21 COMMISSIONER DEASON: Explain why not.

22 MR. SASSO: Because all we are doing is following the
23 statutory procedure in that instance. The statute that Mr.
24 McWhirter relies on, 366.071, his motion is based on .076, a
25 provision that provides for limited proceeding, but the

1 preliminary determination was entered under .071 -- has a very
2 well articulated procedure, Commissioner Deason, that begins
3 with a finding and determination by the Commission that a prima
4 facie case exists to determine that the Commission -- I'm
5 sorry, that the utility involved is overearning, and we will
6 talk about this more fully on the motion for reconsideration.

7 COMMISSIONER DEASON: So are you saying our prima
8 facie case was inadequate?

9 MR. SASSO: Yes, it is legally inadequate. It was
10 based on considerations that are precluded by the statute. But
11 let's assume for the moment for the sake of argument on this
12 issue that it were legally adequate. All that does is satisfy
13 the first step of the carefully articulated procedure. There
14 is an interim decision made that a certain amount of money
15 ought to be held subject to refund based on a showing of
16 historical overearnings.

17 But that is simply a decision that these amounts of
18 monies ought to be collected and held subject to refund pending
19 the outcome of the full rate case. The statute then goes on to
20 provide that there will be a full rate case, we will have full
21 due process. At the conclusion of that rate case the
22 Commission will establish a new ROE, new parameters that can
23 govern the utility's rates thence forward, and at that occasion
24 the Commission can come back and recoup monies out of the sums
25 that were earmarked subject to refund based on the new ROE.

1 That is the way the statute is structured.

2 What FIPUG is suggesting here is that we bypass all
3 of that, we disregard that statutory procedure. And based on
4 the initial determination, which is simply the first step of a
5 multi-step procedure, the Commission flow by the hearing, flow
6 by the analysis, flow by the opportunity for the Commission to
7 put on its case, have testimony, forego the opportunity for the
8 Commission to hear all of that, make a considered decision in
9 the full rate case and immediately order refunds. And do so
10 because of yet another consideration, which is the decision
11 made in yet another docket, the fuel docket that FIPUG
12 disagrees with, but FIPUG was a party to that docket and chose
13 not to appeal that order. But what they are seeking to do here
14 is essentially collaterally attack that order by asking for a
15 like amount of relief through the fuel clause through this
16 procedure. So we are borrowing and choosing from different
17 statutory provisions.

18 The motion is predicated on 366.071, which provides
19 for a limited proceeding as we have discussed in our memorandum
20 and the cases this Commission has decided addressing that
21 statutory provision, that is a proceeding. It involves notice,
22 it involves due process rights for the utility, it involves
23 testimony, cross examination and the like. The Commission has
24 said that it is peculiarly unsuited for considering issues like
25 these that involve a consideration of all kinds of cross

1 impacts that will affect rates up or down, all that needs to be
2 considered before determining an amount of refund that is
3 appropriate. And so the Commission has refused to use that
4 procedural vehicle to accomplish what Mr. McWhirter requests.

5 To boot, as I said, he is predicating his request --
6 he is predicating his request for a certain amount on what is
7 just a first step or an interim decision by this Commission
8 which we challenged in Issue 2. And, again, trying to
9 collaterally attack the Commission's decision in the fuel
10 docket.

11 For all of these reasons, Commissioners, we suggest
12 that the motion is misconceived, that the statutory authority
13 does not exist, and it is contrary to the statutory provisions
14 that do spell out how this Commission is supposed to handle
15 issues of interim relief. It is contrary to this Commission's
16 own decisions that refused to do what FIPUG has requested and,
17 in fact, it is also contrary to a Florida Supreme Court
18 decision, which is United Telephone, a 1993 decision. A
19 different industry, but similar issue, where the court rejected
20 an attempt by the Commission to determine -- prejudge the issue
21 of ROE on an interim basis without the full panoply of due
22 process rights by calling it an interim decision. The court
23 said that is inappropriate, that violates the due process
24 rights of the utility.

25 If you are going to address something as definitive

1 as ROE, you need to give it a full hearing. Mr. McWhirter has
2 based his motion in part on his projection that ROE will be
3 dropping and based on a lot of other projections, but those are
4 matters that are appropriately taken up in the full rate case.

5 MR. McWHIRTER: Briefly in response to that, Mr.
6 Chairman.

7 CHAIRMAN JACOBS: Very briefly.

8 MR. McWHIRTER: Briefly in response to that, the
9 whole nexus of Florida Power Corporation's argument is that the
10 interim statute, 366.07 must be read in pari materia with
11 366.076, and I respectfully suggest to you that the two
12 statutes can be considered independently.

13 The only time that this Commission, as I understand
14 it, has ruled that the limited proceedings were not applicable
15 to return on equity issues was a situation in which there was
16 not enough time to give full consideration to the facts. I
17 think that case may have been appropriate under the
18 circumstances of that case. But in this case where you have
19 had more than a year to consider the facts and details and you
20 have the same quality and maybe even greater quantity of proof
21 than you have in the typical fuel adjustment proceedings which
22 has no -- and independent statutory proceeding, you could have
23 issued a final order in response to our order, or in response
24 to our motion, and let Florida Power take an appeal of that
25 unless it elected to do right by its consumers, as FIPUG has

1 done in respect to midcourse correction proceedings where a
2 final order was issued subject to later ramifications.

3 So I would respectfully suggest to you that time is
4 passing, you have a responsibility to consumers as well as to
5 utilities, and consumers rights should be given ample
6 consideration.

7 CHAIRMAN JACOBS: Thank you. Do we have a motion?

8 COMMISSIONER JABER: I can move staff on Issue 1. I
9 appreciate Mr. McWhirter's arguments. I, too, believe we have
10 an obligation to the consumers, and I think we are fulfilling
11 them with a comprehensive rate proceeding. And I think that
12 your request for a limited proceeding would have to be
13 processed as a PAA, which only causes delay. For that reason,
14 I would move staff on Issue 1.

15 COMMISSIONER DEASON: Second.

16 CHAIRMAN JACOBS: Moved and seconded. All in favor
17 say aye.

18 (Unanimous affirmative vote.)

19 CHAIRMAN JACOBS: Opposed.

20 Show Issue 1 is approved.

21 We will take a break, and come back at 1:30. At that
22 time we will hopefully have a resolution in Issue -- I'm sorry,
23 in docket -- Item 20, I should say, and then we will resume on
24 Item 21. We will be back at 1:30. Thank you.

25 (Recess.)

1 CHAIRMAN JACOBS: We will go back on the record.
2 And, Counsel, how would you like to proceed?

3 MS. DAVIS: I think Mr. McLean has the fruits of our
4 research over the past hour.

5 MR. McLEAN: Which indicates that we have on occasion
6 entertained petitions for reconsideration, motions for
7 reconsideration in water and wastewater as well as other
8 dockets. There is an additional item to consider here and that
9 is that the order which set this money subject to refund also
10 provides a path by which the affected parties can seek a motion
11 for reconsideration. So even if it were not the case that we
12 routinely did it, we have certainly essentially invited them to
13 do so here. At the very least laid the path out for them.

14 But my recollection stands corrected. Apparently it
15 is unusual, but it is certainly the case that we have granted
16 motions for reconsideration that dealt specifically with
17 interim rates in water and wastewater.

18 CHAIRMAN JACOBS: Very well.

19 COMMISSIONER PALECKI: On this issue my thoughts are
20 that the interim procedure is meant to be something that is
21 very abbreviated in nature, it is supposed to be, as
22 Commissioner Jaber stated, quick and dirty. And my thought is
23 that it is not intended that the Commission get rates set
24 exactly on an interim proceeding. That you get in the
25 ballpark, and that after the entire rate proceeding is over

1 that things are made right because the monies are held subject
2 to refund. So my thought is that generally I would not think
3 the Commission is required to allow reconsideration. But
4 having invited the parties to file reconsideration, and I have
5 a copy of that order in front of me, and the language is quite
6 clear that we have invited the parties to file the
7 reconsideration, it is my feeling that we should go ahead and
8 proceed on the reconsideration.

9 COMMISSIONER JABER: And I would agree with that.
10 Mr. McLean, I would expect that in the future you make sure
11 that we handle the water orders consistently.

12 MR. McLEAN: Yes, ma'am, absolutely.

13 COMMISSIONER JABER: May I have my orders back? Can
14 I have my orders back?

15 MR. McLEAN: Say again, please, ma'am.

16 COMMISSIONER JABER: I need my orders.

17 MR. McLEAN: Oh, certainly.

18 COMMISSIONER PALECKI: But I think perhaps it is
19 something we should discuss at Internal Affairs to decide
20 whether perhaps we would want to modify the way we are handling
21 these electric cases to correspond to the water and wastewater
22 cases where we have not allowed reconsideration.

23 COMMISSIONER JABER: See, my concern is the other way
24 around. I would like to see the water industry have the same
25 sort of flexibility we are allowing here.

1 MR. ELIAS: And, Commissioner, if I can respond to
2 two points you raised. First of all, the rule that we have in
3 place now on reconsideration of nonfinal orders makes no
4 distinction between an interim order and every other non-final
5 order that is out there. So if we are going to change our,
6 quote, policy, it is going to have to be affected through a
7 rule change.

8 And then the other thing is that in at least one
9 instance that was called to my attention the Commission in the
10 context of an interim increase has entertained a motion for
11 reconsideration which recognized that the interim increase was
12 too high based on a mathematical error in the computation. So
13 there is some symmetry to the process and some merit to making
14 sure in terms of getting the ratepayers -- making sure the
15 ratepayers are appropriately charged in the event of an interim
16 rate increase to making sure that the interim award is correct.

17 COMMISSIONER PALECKI: But if an interim award was
18 too high and it was being held subject to refund, the
19 ratepayers would be made whole after the entire proceeding.

20 MR. ELIAS: They certainly would.

21 COMMISSIONER PALECKI: Which to me kind of obviates
22 the need for reconsideration.

23 MR. HOWE: Commissioner Palecki, if I might. The
24 standard for confirming an interim is the earnings during the
25 pendency of the proceeding. The particular case that Mr. Elias

1 alluded to was, of all things, a Florida Power Corporation
2 interim rate increase in which the Commission made a
3 mathematical mistake. Commissioner Deason, I don't know if you
4 would recall, it was back in 1980. The company represented
5 that its fuel revenues and its fuel expenses were equal and
6 would have no effect on interim rates.

7 In point of fact, the expenses exceeded the revenues.
8 We asked for reconsideration and the Commission agreed that a
9 mathematical mistake had been made and ordered an immediate
10 refund of the excess interim revenues. Had they waited until
11 the end of the case, very likely that higher level would have
12 also been confirmed by the final order.

13 COMMISSIONER PALECKI: Thank you.

14 CHAIRMAN JACOBS: So we are prepared now then to
15 entertain Issue 2. And it is your motion, Mr. Sasso, do you
16 want to proceed?

17 MR. SASSO: Yes. Thank you, Mr. Chairman. We are
18 here, of course, to address the sufficiency of the interim rate
19 order which was entered on June 20th, 2001. This interim rate
20 order directed Florida Power Corporation to continue to collect
21 revenues subject to refund in the approximate amount of \$114
22 million. The significance of this, of course, is that it sets
23 a cap for the amount that can be recovered after the full rate
24 case. The refund that is ordered is actually based on whatever
25 ROE is established in the full rate case, but this interim

1 order limits the amount of money that can be recovered, and so
2 it is very significant to us. And it won't necessarily be
3 rectified by the outcome of a full rate case.

4 Now, in order to explain the basis for our motion I
5 need to take some time to explain how the statute operates, the
6 interim rate statute. And I know --

7 CHAIRMAN JACOBS: Mr. Sasso, before you move, we --
8 it was my understanding that we needed to take up whether or
9 not to have oral argument first. Is that correct, Counsel?

10 MR. ELIAS: Yes, that is what the Commission --

11 CHAIRMAN JACOBS: So we are on Issue 2, which is
12 whether or not to --

13 MR. SASSO: I'm sorry.

14 CHAIRMAN JACOBS: We have a motion and a second. All
15 in favor, aye.

16 (Unanimous affirmative vote.)

17 COMMISSIONER PALECKI: I have a question
18 procedurally, though. We only have three issues. Was it
19 anticipated that we would hear oral argument at this time and
20 then staff would issue a recommendation that we will vote on at
21 another time, or do you expect a bench vote on the --

22 MR. ELIAS: No. As we state in the recommendation,
23 we'll file a recommendation for consideration at a subsequent
24 agenda conference.

25 COMMISSIONER PALECKI: Thank you.

1 CHAIRMAN JACOBS: Very well. Now you may proceed,
2 Mr. Sasso.

3 MR. SASSO: Let me note that the staff recommendation
4 suggested that argument be limited to 15 minutes a side. I
5 would ask the Commission's indulgence in the event I need some
6 more time. I don't intend to try your patience, but it may not
7 that be possible to cover everything in 15 minutes, but I will
8 try to be as brief as possible.

9 CHAIRMAN JACOBS: How much more?

10 MR. SASSO: I hope not more than five or ten minutes
11 more than that, and I will try to stay within the 15 minutes.

12 CHAIRMAN JACOBS: With the understanding that the
13 same latitude we allow you, we allow the opposing parties, Mr.
14 Shreve.

15 MR. SASSO: Thank you, Mr. Chairman. As I was
16 saying, I will take a moment to explain how the interim rate
17 statute operates, because it is important to understand this in
18 order to appreciate the basis for our motion, which
19 fundamentally challenges the interim rate order on account of
20 its legal sufficiency or insufficiency.

21 We start with the proposition that as a general
22 matter the Commission is authorized to engage in only
23 prospective ratemaking. Then you have the question how do you
24 balance that constraint against the interest in providing
25 interim relief when it is needed and appropriate. The

1 legislature has struck the balance in 366.071, the interim rate
2 statute, as follows: The Legislature has said -- and this
3 applies for increases as well as decreases, and it is important
4 to keep this in mind because whatever the Commission does for
5 decreases is going to have some symmetrical impact on
6 ratepayers for increases.

7 The Legislature has essentially set up a dichotomy.
8 It said when the Commission seeks to obtain an interim
9 decrease, it can do so provided that it does so based on
10 currently available information. And the ground rules that are
11 in effect for that utility at this time as demonstrated by its
12 last individual rate case, the statute is very explicit on
13 this. With respect to the full rate case, that is going to be
14 based on a projected test year. And, in fact, in this case we
15 are filing MFRs for 2002 and the Commission will hear testimony
16 on appropriate rates going forward, and we will establish a new
17 ROE. And we will be permitted to use that ROE to come back and
18 get a refund out of this pool of money.

19 But the compromise between prospective versus
20 retroactive ratemaking is the pool is limited by what the
21 Commission finds is overearning on the part of the utility
22 under the current rules and current facts. So we can't change
23 the rules in the middle of the game and say even though we last
24 set your rates whenever we did and they are presumptively okay
25 and you are presumptively earning in accordance with existing

1 ground rules, we are going to come along and change those
2 ground rules after the fact and take away some of your revenues
3 in the current year. The legislature said that is
4 inappropriate. And it is very explicit in this, too.

5 The statute says that the Commission must make a
6 prima facie showing that the utility is overearning. During
7 what period? Very explicit about that. It says during the
8 most recent 12-month period. Which was an explicit change from
9 some prior case law which required that pursuant to the file
10 and suspend procedure both interim relief and permanent relief
11 was based on a projected test year where everything was based
12 on projections. The Legislature changed that and said no, you
13 have to show they are overearning based on the most recent
14 12-month period, which in this case is acknowledged to be the
15 period ending February 28th, 2001.

16 What ROE must be used for this analysis? Again, the
17 statute is very explicit, you have to use the historical ROE.
18 The statute says the last authorized rate of return on equity,
19 that must be used in making this determination.

20 Are there any other restrictions? Yes. As I have
21 explained, the statute is very explicit, you have to use the
22 existing ground rules. And so it says in making this
23 calculation the Commission makes the calculation using only
24 those adjustments that are consistent with those used in the
25 most recent individual rate proceeding of a public utility. It

1 says individual rate proceeding. Why is that? Because, again,
2 there is a distinction drawn between tasking us against our
3 existing ground rules and launching into prospective
4 ratemaking. If the statute allows the Commission to use
5 generate making principles and you are applying that to
6 revenues in 2001, you would essentially be engaged in
7 ratemaking. What should the rates be; not what are they. How
8 have we asked this utility to conduct business historically,
9 which is the test under this statute.

10 This is not the first occasion where the Commission
11 has interpreted this statute. The Commission has decided
12 numerous cases involving increases and decreases under the
13 interim rate statute, 366.071. And consistently the Commission
14 has demanded that the utility seeking an increase or the
15 Commission seeking a decrease used the historic period cannot
16 predict whether there will be overearnings in the future or
17 underearnings in the future. Prediction is ratemaking, it is
18 not are you overearning.

19 The Office of Public Counsel has characterized this
20 statute as a make whole statute, and they are right in this
21 respect. It is basically a catch up or make whole for
22 something that went wrong in that historic period. The
23 Commission in its decisions has consistently used the existing
24 ROE and consistently held that the party seeking the change in
25 status quo has the burden of showing that any adjustment it

1 wants to make is rooted in the prior individual rate case.

2 Basically, there is a presumption that currently in
3 2001 this utility is operating consistent with its ground
4 rules, is compliant with its ground rules, and its rates are
5 okay because the rates were approved by the Commission. And
6 the party seeking to change that, to change the status quo has
7 the burden of showing that a change is appropriate to enforce
8 those ground rules. Not to change them, but to enforce them.

9 Now, the interim rate order in this case departs from
10 those fundamental principles. Basically, the interim rate
11 order in this case is not based on a conclusion that this
12 utility was, in fact, overearning in this 12-month historic
13 period based on the rules in force by this Commission against
14 this individual utility for ratemaking purposes. To the
15 contrary, the interim rate order is based on a prediction that
16 we may be overearning in 2001, which is a taboo. That is not
17 what the interim statute provides.

18 In fact, the legislation was intended to change that
19 and say, no, you are rooted now in the historic period, you
20 have to show Florida Power was overearning in that 12-month
21 period. You can't make predictions about 2001. In fact, we
22 are not even filing MFRs for 2001, we are filing them for 2002
23 and for 2000. So essentially the interim rate order amounts to
24 an exercise in some crystal ball gazing, estimating or
25 predicting what the earnings situation will be in 2001, which

1 is not appropriate.

2 Now, there are four items at issue in this interim
3 rate order. In each instance staff recommended and the
4 Commission agreed to make four adjustments that would push our
5 earnings above the authorized limit. These adjustments are
6 not, in fact, inappropriate on an historic basis given the
7 grounds rules in place for this utility. The first one, the
8 Tiger Bay amortization. This is a \$63 million item.

9 There is a little bit of background on this. This
10 regulatory asset came into being when Florida Power bought out
11 some expensive cogen contracts in 1997. And this was a win/win
12 for the ratepayers because we relieved the ratepayers the
13 burden of paying these expensive contracts. There was a cost
14 of buying out these contracts and we created a regulatory asset
15 which would be amortized. And as soon as that is amortized,
16 the ratepayers will enjoy an immediate benefit in terms of the
17 relief from the burden they otherwise would have had under
18 those power purchase agreements. This is being recovered now
19 under the fuel clause.

20 So without any change in base rates, as soon as that
21 is amortized the ratepayers get an immediate rate relief. And
22 in the meantime, this is transparent for the ratepayers. They
23 are not any worse off than they would have been under those
24 power purchase agreements, but the pain is terminated much,
25 much sooner. And as soon as we can accelerate that and

1 amortize that asset, they immediately enjoy a benefit. Overall
2 this transaction is saving ratepayers over \$2 billion.

3 This matter was reviewed by the Commission and
4 approved, and the Commission expressly approved and encouraged
5 Florida Power to accelerate the amortization because it would
6 benefit the ratepayers. The order that was entered in 1997
7 explicitly says the stipulation provides FPC the discretionary
8 ability to contribute dollar amounts from its earnings to
9 accelerate the amortization of the Tiger Bay regulatory asset.
10 There are currently no assurances nor any requirements that FPC
11 will exercise this provision of the stipulation. However, such
12 contributions would be to the advantage of both FPC and its
13 ratepayers in the form of reduced liability.

14 Since this regulatory asset was created, in each of
15 the three full years that we had the opportunity to do so,
16 Florida Power has stepped up to the plate and accelerated
17 amortization of this asset, even diverting some revenues that
18 could have gone to the wholesale side for the benefit of the
19 ratepayer. And it did so in the year 2000. And this is one of
20 the adjustments that the interim rate order takes away. It
21 says no, this is not an appropriate adjustment even though it
22 was explicitly authorized by the Commission.

23 What does the rate order say? It says, well, we
24 suggest taking this adjustment because there is no assurance
25 that Florida Power will accelerate amortization in 2001, so

1 there is a risk of overearning in 2001. Well, first, that is
2 unfounded because the company has been committed to
3 accelerating this. But more fundamentally this is a legally
4 defective reason for making this adjustment because it amounts,
5 again, not to saying that we did anything wrong in 2000, what
6 we did in 2000 was explicitly permitted by this Commission. It
7 is to predict that there may be overearnings in 2001 if this
8 isn't repeated, which is inappropriate. It is certainly not
9 justified by our last rate case.

10 In that rate case the Commission expressly authorized
11 the company to amortize regulatory assets. There is no
12 precedent in that last rate case for making this adjustment,
13 and it is directly contrary to the historic ground rules laid
14 down by this Commission for this individual utility not only
15 permitting, but encouraging us to make this amortization. That
16 is the first item is legally insufficient adjustment.

17 The second item is the \$10.7 million write-off of
18 regulatory assets. Now, this item, too, involves an
19 amortization of a regulatory asset which arises out of
20 previously flowed-through taxes and an entity component of
21 prior period allowances for funds used during construction.
22 What was going on here is this has been recurring since 1993,
23 we have been expensing these items since 1993.

24 And in one instance we were accelerating depreciation
25 more rapidly than staff thought we should be in giving the

1 ratepayers a benefit too soon, and so we needed to recapture
2 some of that. And in the other instance it was in the opposite
3 direction, it was trending in the opposite direction, so there
4 was a little bit of an offset, but not completely. And we
5 agreed with staff last year to make an adjustment to
6 essentially catch up and reconcile these items with the way
7 staff preferred us to be accounting for them. And so there was
8 a \$10.7 million increment over what we are annually amortizing
9 on both of these items.

10 So, what did the interim rate order say in this
11 instance? The interim rate order says, well, this is a
12 nonrecurring expense and so we should adjust this out. But,
13 again, this adjustment doesn't fulfill the statutory criteria.
14 To begin with there is no precedent in the last rate case which
15 is, again, the polestar under the interim rate statute for
16 making this adjustment. There was no adjustment made in our
17 last rate for nonrecurring expenses.

18 There were two instances where the Commission
19 considered making such adjustments for extraordinary items, and
20 said, no, as long as there are things that appear from time to
21 time and the amount is reasonable, that's okay, they should be
22 taken into account for ratemaking. And as I mentioned, the last
23 order also expressly permitted us to amortize regulatory
24 assets.

25 In addition, this is a recurring expense. As I

1 mentioned, it is something that we expense year in and year
2 out. And the only issue is the amount in this one particular
3 year. And, again, in our last rate case the Commission said as
4 to these apparently nonrecurring items, if they arise from time
5 to time and the amount is reasonable, then they are okay. In
6 this instance, the amount was specifically requested and
7 discussed with staff and it is, per se, reasonable under those
8 circumstances. There is certainly no showing that it is
9 unreasonable.

10 And in the last rate case on one of these items the
11 Commission said -- there was a challenge as to one of these
12 expense items that was allegedly nonrecurring and they said,
13 well, there is no showing in this record that it is an
14 unreasonable amount, therefore, we are not going to make an
15 adjustment from Florida Power's reported earnings. And that is
16 the appropriate treatment here. Again, using the statutory
17 criteria there is no basis for this adjustment.

18 The next item is a disallowance of an adjustment for
19 the CR-3 regulatory asset. The Commission may recall that we
20 experienced an extended outage of our nuclear facility in 1997.
21 And as a result of that, there was a dispute over the prudence
22 of the outage, and there were a number of parties involved in
23 the discussion and in the litigation. And we reached a
24 compromise, a settlement. And as part of the settlement
25 Florida Power agreed to step up to the plate and absorb the

1 short-term impacts, much of the short-term impacts of this
2 outage amounting to about \$106 million of expenses in the form
3 of higher fuel costs and O&M expenses incurred as a result of
4 the outage.

5 But another critical part of the settlement was there
6 would be no future impact on our earnings, because this
7 required a hit to retained earnings which would lower our rate
8 base and impact our ability to earn in the future, and there
9 was an agreement that there would be no future impact on that.
10 And the Commission was asked to approve this, and the
11 Commission did approve this stipulation. And everybody
12 understood the implications of this, that we would need to make
13 an adjustment to our common equity to avoid a double impact or
14 a recurring impact. Not only the \$100 million in expenses that
15 we incurred that year, but each year from there on out we would
16 suffer an impact on our earnings.

17 The order that was entered by this Commission in July
18 of 1997 specifically says FPC will be allowed to exclude the
19 effects of the stipulation in representing the company's
20 capital structure in its surveillance reports. Your order goes
21 on to say that the stipulation is silent with respect to how
22 long this adjustment will be made. The parties indicate it is
23 contemplated within the stipulation that this adjustment may
24 continue beyond the four-year amortization period. Remember,
25 this is a July 1997 order, so this takes us past July 2001.

1 So why did the Commission reverse this adjustment?
2 The Commission -- I'm sorry, the Commission in its order
3 approving this indicated that the adjustment might end in the
4 event there is a rate case. And, of course, if there is a rate
5 case our equity structure will be subject to review. And
6 coming out of that rate case that adjustment may or may not be
7 continued prospectively. Everybody understands that. Now, we
8 are going to put on testimony that, in fact, it should be
9 continued because the same rationale exists today as it existed
10 then to continue this.

11 But what the interim rate order says is, well, since
12 we started a rate case in July, and since that stipulation of
13 the rate freeze ends in July 2001, we are going to insist that
14 that adjustment be terminated. And if it is, then there is
15 going to be overearnings. Well, there are a number of problems
16 with this analysis. To begin with it directly contravenes the
17 statutory directive that any interim rate decision designating
18 funds subject to refund be confined to the 12-month period
19 ending February 28th, 2000 for this utility, the most recent
20 12-month period.

21 July 2001 falls outside that, so we are already
22 relying on something that falls outside the statutorily
23 prescribed period that is supposed to be used for this
24 analysis. That is reason enough right there to reverse that
25 decision because it directly contravenes the statute.

1 In addition, it is inappropriate to speculate what
2 the outcome of the rate case will be on this. This does not
3 amount to a showing that we violated the historic ground rules
4 applicable to this utility for taking our expenses. The
5 historic ground rules permitted us to take that expense, that
6 adjustment in 2000. What the interim rate order does here is
7 it is conjecturing that this may not be continued after the
8 outcome of the rate case. And as I mentioned, that is not
9 permitted under the statute or this Commission's decisions.

10 In fact, OPC in its response acknowledges this. OPC
11 says in its response that the continued viability of this
12 adjustment is not established in the stipulation and it may or
13 may not be allowed by the Commission when permanent rates are
14 established. For this reason it is not appropriately decided
15 at the interim stage. We agree completely. This is not an
16 appropriate item for consideration on this interim rate order
17 which requires the Commission to make a finding that we are, in
18 fact, overearning in that 12-month historic period and for that
19 reason the ratepayers need to be made whole out of this year's
20 revenues. This is not an historic decision, it is a projection
21 about what may happen at the outcome of this rate case, which
22 is off limits.

23 Now, one more matter on this before I move on to the
24 last item. During the hearing on this CR-3 stipulation, the
25 Office of Public Counsel conceded that the Commission could not

1 reverse this CR-3 adjustment to decide that FPC was
2 overearning, which is exactly what it has done in this interim
3 rate order. The Commission has looked at this and says, now if
4 we adjust this out, the utility is overearning, this is one of
5 the reasons that the order also launches this rate case and
6 required the filing of the MFRs.

7 Commissioner Deason asked Mr. Howe in that
8 proceeding, quote, "Do you agree if we approve the stipulation,
9 the Commission pretty much is bound to have Florida Power
10 specify booking for this entity adjustment to use that for
11 surveillance reporting purposes before we could show the
12 company was overearning to initiate a rate reduction? It would
13 have to even exceed the equity as they calculate it for
14 surveillance purposes?" Mr. Howe: "Yes, sir. We would like
15 that to be in force today."

16 The final item concerns severance payments. There is
17 an item worth \$65 million. If we are keeping count on all the
18 items so far, the other items that we have discussed are worth
19 about 90 million. There is a total of 114 million subject to
20 refund. That means if the Commission were to agree with us on
21 all the other items at most we are talking about \$24 million of
22 the severance costs that would be in the category of excess
23 earnings. I'm not suggesting by any means that those would be
24 excess earnings, but just trying to put this in perspective.

25 Now, it is not disputed that this item involves

1 severance payments made by the company as part of its merger.
2 These were payments made to displaced employees, displaced by
3 the merger, and as everybody seems to be recognizing, these are
4 going to producing benefits that are on-going for the company
5 and its ratepayers.

6 Now, why did the interim order make this adjustment?
7 Again, the assertion was that this is a nonrecurring one-time
8 severance payment item, and it shouldn't be taken into account
9 for that reason. Again, we would submit that the analysis is
10 based on a projection that if that doesn't recur in 2001 there
11 may be overearnings in 2001, which is an inappropriate
12 prediction. It's not a finding that this was an inappropriate
13 expense in the year 2000.

14 Again, if you use the polestar of what are the
15 historic ground rules in place for this utility, there is no
16 indication in the last rate case that this type of item could
17 be disapproved. The company has historically reported in its
18 surveillance reports for ratemaking purposes severance costs,
19 and, in fact, has incurred them in considerable severance
20 expenses over the years from time to time. Laid off more
21 employees in '94 and '95 and reported that on surveillance
22 reporting without objection by the staff or the Commission.

23 And so there is no basis to presume that this is an
24 inappropriate expense in the year 2000. It would be much like
25 if we were talking about the increased side if we enjoyed or

1 suffered an incredibly hot winter or -- I'm sorry, incredibly
2 hot summer or incredibly harsh winter and enjoyed extraordinary
3 revenues in the prior period, and that is the only reason we
4 made our minimum, that would not create a basis for us to come
5 in and seek an interim increase to say, well, we just made our
6 authorized minimum earnings because we had extraordinary
7 revenues. Here the interim rate order says, well, there was an
8 extraordinary expense item.

9 There is a further reason why this is an
10 inappropriate adjustment and that is that, again, this is a
11 merger-related item. In the full rate case there is going to
12 be full discussion of the impacts, the costs, and the benefits
13 of the merger that includes this item and a number of other
14 items. And it is premature as part of this interim rate case
15 decision, or interim rate order decision to say that is an
16 inappropriate expense because it's getting ahead of ourselves,
17 again, on the rate case. It is not something that can be
18 handled on a historic basis to say historically under the
19 ground rules that were in place for this utility that was
20 inappropriate in the year 2000. We know that to a certainty
21 and we can earmark these funds for refund.

22 COMMISSIONER JABER: Mr. Sasso.

23 MR. SASSO: Yes, ma'am.

24 COMMISSIONER JABER: Where does it say that any of
25 these expenses are inappropriate?

1 MR. SASSO: Well, it doesn't, Commissioner Jaber, and
2 that is exactly our point, because it needs to. Under the
3 statute in order to find funds subject to refund the Commission
4 has to find that we are overearning. The statute says make a
5 prima facie showing that the utility is overearning using the
6 grown rules in place: That would mean that we are taking
7 expenses that we shouldn't be taking or we enjoying excessive
8 revenues, but there is something demonstrative and factual and
9 historical demonstrating we are, in fact, overearning in the
10 immediately preceding 12-month period. And that is not what is
11 going on here.

12 What is going on here is a feeling as has been
13 articulated by Public Counsel that maybe the rate of return is
14 going to be going down, the ROE is going to be going down, and
15 so we need to capture as much money as we can so we will have a
16 pool available to come back and get it. That is not the
17 standard. That unfairly subjects our 2001 revenues which are
18 presumptively appropriate.

19 COMMISSIONER JABER: Let me make sure I understand
20 your point, though. You would agree that calculating revenues
21 to the maximum of the range of return is not the same as saying
22 those expenses are inappropriate.

23 MR. SASSO: That's right.

24 COMMISSIONER JABER: You are not trying to say that?

25 MR. SASSO: I'm not trying to say that. In fact, as

1 I mentioned the statute strikes a balance between retroactive
2 and prospective ratemaking. It says if you identify that we
3 have been overearning, you can essentially create a make whole
4 pool out of 2001 revenues, and that creates a cap, a maximum
5 amount that you can obtain through a refund order. But that
6 refund order is based on the ROE that you are going to set in
7 the full rate case. So there is a little bit of a mismatch.
8 It says you can't apply the new rules of the game to us, but
9 you can say that we violated the old rules of the game and we
10 have some making up to do to the ratepayers, and you could come
11 after that money under the new ROE.

12 COMMISSIONER JABER: So you take the view that by
13 including the revenues from those expenses then our calculation
14 of the interim decrease we, in effect, have said that those
15 expenses are inappropriate?

16 MR. SASSO: Yes, ma'am. And, in fact, what is
17 required is that the Commission be able to say to a certainty
18 based on what it has already adjudicated as to this individual
19 utility that we are doing something wrong in essence. I don't
20 want to put a moral tone on it, but that we are overearning.
21 And that hasn't happened, and it can't happen, and we see no
22 basis for that to happen.

23 COMMISSIONER DEASON: Mr. Sasso, let me ask you a
24 question. The use of the term the latest -- is it, what, the
25 latest 12 months, the last 12 months, what --

1 MR. SASSO: The most recent 12-month period.

2 COMMISSIONER DEASON: The most recent 12 months. Is
3 that in the context of the most recent 12 months prior to
4 putting money subject to refund, or is it the most recent 12
5 months prior to prospective new rates being set?

6 MR. SASSO: It is the utility's most recent 12-month
7 earnings period. And the staff has calculated and the interim
8 rate order accepts that that period is the period ending
9 February 28th, 2000. That is the way the analysis has been
10 conducted. That is the year that was used.

11 Now, despite that with respect to this CR-3 item,
12 effective July 2001 we have been asked to set about 16 million
13 subject to refund, but it commences July 2001 in order,
14 ostensibly, to respect the stipulation ordering a rate freeze
15 through that date. But, again, we would submit you can't mix
16 rate periods. You can't mix test years as it were and exceed
17 that 12-month period.

18 CHAIRMAN JACOBS: Does that conclude your
19 presentation?

20 MR. SASSO: Yes. Thank you, Mr. Chairman.

21 CHAIRMAN JACOBS: Mr. Howe.

22 MR. HOWE: Thank you, Chairman Jacobs, Commissioners.
23 I'm Roger Howe appearing on behalf of the citizens of the State
24 of Florida. And not surprisingly, I am here to speak in
25 opposition to Florida Power Corporation's motion.

1 Commissioners, we are here on a motion for
2 reconsideration. It is Florida Power Corporation's obligation
3 to point out to you a mistake of fact or law that if changed
4 would necessarily lead to a contrary result than the one the
5 Commission reached in its order. At it's most basic,
6 Commissioners, what your interim order did is it ordered the
7 company to hold \$114 million subject to refund. What the
8 Commission did was conclude that the company -- if \$114 million
9 were held subject to refund, essentially if the company didn't
10 have that money, the company would still be allowed to earn a
11 13 percent return on equity, the ceiling of its last allowed
12 range during the pendency of this proceeding.

13 You have not heard anything from the company
14 demonstrating that that conclusion you reached is incorrect. I
15 would submit that the company has not demonstrated any mistake
16 of fact. Essentially then what the company must be arguing is
17 a mistake of law. That you followed a process that reached an
18 incorrect result. And essentially what the company is saying
19 is there are circumstances unique to Florida Power Corporation
20 that limit this Commission's ability to set the Company's
21 earnings during the pendency of this proceeding. That is not
22 and never has been the interim ratemaking standard.

23 Now, Mr. Sasso reached this result by stating that
24 the Commission is constrained to an evaluation of solely
25 historic data. Commissioners, if you were to do that you could

1 never set interim rates during the pendency of a proceeding to
2 reach a specific earnings level. In the case of an interim
3 rate increase, you set rates to reach the bottom of the last
4 allowed return on equity. During the pendency of the
5 proceeding it is always forward-looking. In the case of the
6 overearnings, you don't order an immediate interim rate
7 reduction, but you do capture this money subject to refund.
8 Mathematically it has the same effect.

9 But, again, it is setting the companies earnings at
10 the maximum of its last allowed range during the pendency of
11 the proceeding. There is nothing unique to Florida Power
12 Corporation that would suggest to this Commission that you
13 should not be concerned with the utility's earnings during the
14 pendency of this proceeding.

15 Now with reference to the interim statute itself,
16 366.071, Sub 1, in particular, it says the Commission may
17 during any proceeding for change of rates upon its own motion
18 or upon petition from any party, and it goes on, authorize the
19 collection of interim rates until the effective date of the
20 final order. And here is the important sentence. Such interim
21 rates may be based upon a test period different from the test
22 period used in the request for permanent rate relief.

23 Commissioners, a test period is a body, a collection
24 of data normally for 12 months that with appropriate
25 adjustments and consideration is representative of the future.

1 That is how the interim statute works, that is how it has
2 always worked. I would also point out to you that by stating
3 that it can be based on a test period different from that used
4 for permanent rate relief, it suggests that interim rates could
5 even under the current statutory scheme be established based on
6 a projected test year.

7 Because in this case if you used the same test period
8 used for permanent rates, you would use a projected test year
9 to set Florida Power Corporation's interim rates. You are not
10 required to do so and you did not do so in this case.

11 Throughout this statute --

12 COMMISSIONER DEASON: Mr. Howe, you are saying that
13 the Commission has the authority to use a projected test year
14 for purposes of establishing interim rates?

15 MR. HOWE: I would have to say so, yes. And the
16 reason being this provision in the statute that says they may
17 be based upon a test year different than that used for
18 permanent rates. It suggests that you could use -- you could
19 certainly use the same test period then for both interim and
20 permanent. And, in fact, Commissioners, you have done so.

21 Again, referring back to some old history of mine,
22 the 1980 Florida Power Corporation rate case was essentially
23 established -- you established interim rates on a projected
24 test year. The Supreme Court rejected our arguments that such
25 an action was not permissible.

1 But staying with the statute for a moment --

2 COMMISSIONER DEASON: Contrast that interpretation
3 with Mr. Sasso's interpretation of the meaning of the phrase
4 most recent 12-months period in the statute.

5 MR. HOWE: I would be glad to. I'm not going to
6 pretend that I can make this interim statute consistent from
7 beginning to end. For example, as I just said, it can be based
8 upon a different test period, which is used in this case, but
9 it also suggests it could be used upon the same. When we come
10 to Subsection 5B, in particular, it says achieved rate of
11 return means the rate of return earned by the public utility
12 for the most recent 12-month period.

13 But the next sentence says the achieved rate of
14 return shall be calculated by applying appropriate adjustments
15 consistent with those which were used in the most recent
16 individual rate proceeding. So we are not talking about a per
17 books number, we are talking about a calculated number. And
18 the word calculated appears in several instances in the
19 statute. For example, back up on number one it says the public
20 utility -- the petitioning party, the Commission, or the public
21 utility shall demonstrate that the public utility is earning
22 outside the range of reasonableness on rate of return
23 calculated in accordance with Subsection 5. It is a calculated
24 number. It's not you take whatever the company was actually
25 earning.

1 Commissioners, if you were to take that approach,
2 that would mean in Florida Power Corporation's particular
3 circumstances you cannot exercise any control whatsoever over
4 their earnings during the pendency of this proceeding. That
5 Florida Power Corporation can earn whatever its current rates
6 allow it to earn during the pendency of the proceeding, and so
7 for their purposes there will be a hiatus in regulation. All
8 you can do for them is let them earn what they will and then
9 set rates prospectively at the end of the case.

10 If there is a common thread, or I should say perhaps
11 two common threads running through all the case law and
12 implicit in the statute, it is that interim rate setting is
13 part and parcel of the process the Commission follows to set
14 rates for the future. It is the appropriate level of rates
15 during the pendency of the proceeding. That is necessarily
16 forward-looking.

17 The second thread, I think, that runs through all of
18 this is interim rates are and always have been intended to
19 reduce regulatory lag. To have your prospective final decision
20 take effect as early as possible within the constraints allowed
21 by the interim process itself. By that I mean you have to use
22 the last allowed return on equity range. There is nothing we
23 can do about that. But the intent of the whole scheme of
24 regulation is to have your final decision have retrospective
25 application back to the time interim rates were set so that

1 whether it be a rate increase in which the company gets the
2 benefit as early as possible, or a rate decrease that have an
3 effect back to the earliest date possible. And it is stated
4 repeatedly in the case law that the purpose of interim rates is
5 to reduce regulatory lag.

6 You cannot reduce regulatory lag if Florida Power
7 Corporation is not subject to any regulation of its earnings
8 during the pendency of this proceeding. Now, on this point I
9 think I mentioned to you earlier at the very beginning of the
10 interim statute it uses the phrase test period. That is a very
11 important phrase. It doesn't -- by the way, the words
12 surveillance report don't appear in the interim statute. It is
13 a test period. It is an historic test period to set future
14 rates.

15 And, Commissioners, this has been addressed by the
16 Florida Supreme Court in case law. I would refer you to the
17 case of Maule Industries versus Mayo, 342 So.2d 63, Florida
18 Supreme Court, 1976. And Maule is spelled M-A-U-L-E.
19 Commissioners, in this case the Commission set interim rates
20 and at the end of the case they realized that they had set them
21 incorrectly, but the Commission decided since the interim rates
22 did not exceed the permanent rates there was no need for a
23 correction. Our office took an appeal and the court agreed
24 with us. And at 342 So.2d, Page 65, it refers to the
25 Commission's own order. And it states -- and, by the way, this

1 is the order as it referred to the setting of interim rates.
2 In its order the full Commission adopted the dissenting view
3 expressed in the interim order that unrecovered fuel costs are
4 nonrecurring and should be disallowed as an operating expense
5 in the test year computation. And then it is followed by
6 Footnote 3, and I will read part of that. Footnote 3 states,
7 "The Commission's final order on this point states, quote, in
8 ratemaking procedures --" excuse me, "in ratemaking proceedings
9 we have traditionally disallowed or adjusted out those items
10 which are nonrecurring extraordinary in nature and
11 unrepresentative of normal operations," and I will skip a
12 couple of lines. It says, "In any event, we are compelled to
13 characterize the fuel underrecovery as nonrecurring,
14 extraordinary in nature, and unrepresentative of normal
15 operations."

16 This is the standard that is used for setting interim
17 rates. Continuing on in that same case, 342 So.2d at Page 68,
18 the court said, "We now turn from the Commission's legal
19 standard for interim relief to the amount actually awarded in
20 this case. We find that the Commission allowed FPL to
21 exaggerate its operating expenses for the purpose of computing
22 a revenue deficiency by including in its computations a
23 nonrecurring item wholly inappropriate to the test year tool of
24 ratemaking. The error first occurred when the Commission
25 accepted FPL's net operating income figures as being consistent

1 with its last full rate order for the company. In fact, those
2 figures were not compatible with the prior treatment of
3 unrecovered fuel costs."

4 And I will skip to the end of the next paragraph. It
5 says, "In all such cases the excessive allowance distorts the
6 amount of revenue needed to bring the utility up to the last
7 authorized minimum rate of return."

8 Commissioners, we are in a protracted ratemaking
9 process. Early on it was established by the court, later by
10 the Legislature by the adoption of the interim statute, that
11 the purpose of interim rates is two-fold. It avoids the
12 problems of retroactive ratemaking and it reduces regulatory
13 lag. The sole issue before you is whether you did a reasonable
14 job of establishing the amount of the revenue reduction -- in
15 this case revenues captured subject to refund -- necessary to
16 bring Florida Power Corporation's earnings down to the 13
17 percent ceiling of its last allowed return on equity. You have
18 done so.

19 Now, on the particular items that the company is
20 addressing, the Tiger Bay amortization. Commissioners, if you
21 were not to make that adjustment, you would let Florida Power
22 Corporation control its earnings during the pendency of this
23 proceeding. You would set their return on equity -- if you
24 included it, they chose not to book it, they could earn what
25 they wanted. They don't have that choice. You set their rates

1 on both interim and permanent.

2 Similarly, the merger-related costs are nonrecurring,
3 not of a type necessary or appropriate to take into
4 consideration to set rates prospectively so that they earn a
5 set return during the pendency of this proceeding. By the same
6 token, I use the phrase the prior period flow-through. I think
7 that is a correct characterization of the \$10.7 million. It is
8 also nonrecurring.

9 Commissioners, to the extent that Florida Power
10 Corporation is able during this process to convince you that
11 those types of expenses should be included for prospective
12 ratemaking purposes, they will not have to refund those monies
13 but the customers will be adequately protected in the mean
14 time. The equity ratio as it falls out from our Crystal River
15 3 stipulation could be problematic, but is not. The reason it
16 is not, I agree with what Mr. Sasso read into the record that
17 if the company were brought in solely because of its equity
18 ratio, that was the only thing that led to an overearning
19 situation, he would have a good point.

20 But in this case, Commissioners, we are already here.
21 It's because of the Tiger Bay amortization, it's because of the
22 merger-related costs, it's because of the prior period
23 flow-through of the nonrecurring item that the company is
24 overearning. In that sense, they are not here because of the
25 equity ratio. In fairness to the customers, you must capture a

1 sufficient amount of revenues to reduce the company's earnings
2 during the pendency of this proceeding to 13 percent. That is
3 your statutory obligation. If you were to follow the company's
4 recommendation, you would say the company is not subject to any
5 revenues held subject to refund.

6 And, Commissioners, then you would be turning over
7 the regulation of the company's earnings during the pendency of
8 this proceeding to the company itself. It would have the
9 discretion whether it booked any additional amortizations for
10 the Tiger Bay regulatory asset. It would have the discretion
11 whether it recorded any merger-related costs. It would have
12 the discretion whether it either claimed the prior period
13 flow-through for a second time or substituted another expense
14 for it. And, Commissioners, you would be giving them the
15 discretion to determine their equity ratio during the pendency
16 of this proceeding. That is not how the interim statute works.

17 The interim statute is not backward looking. You are
18 not capturing monies from 2001 that the company may have to
19 give back. You are only capturing money, earnings as they
20 accumulate in -- since you issued your interim order, and
21 setting those aside for potential refund. It is completely
22 forward-looking, it has no retroactive applicability.

23 Mr. Sasso used the phrase retroactive. I'm not sure he meant
24 to do so.

25 But, Commissioners, the reason for interim rate

1 setting is to avoid the prescription against retroactive
2 ratemaking. The court has said several times that although you
3 cannot engage in retroactive ratemaking, and although you must
4 engage -- you must set rates to be thereafter charged, that
5 does not prevent you from capturing monies subject to refund
6 subject to a later evaluation of their reasonableness. That is
7 what you are doing right here and that is what you are doing
8 right now. And that is what you have to do to protect the
9 customer's interests.

10 With the \$114 million the company has held subject to
11 refund, you are reasonably assured that the company will not
12 earn more than a 13 percent return on equity during the
13 pendency of this proceeding. The interim statute, the interim
14 process will then have served the very purpose it was designed
15 to serve. Thank you very much.

16 COMMISSIONER JABER: Mr. Howe, may I ask you a series
17 of questions to make sure I understand the purpose of the
18 statute. Hypothetically, if we finish the rate proceedings and
19 we find, just for the sake of ease, an amount equivalent to a
20 million dollars that should be refunded, and if we don't hold
21 monies subject to refund, or a million dollars worth of money
22 subject to refund, the customers don't have recourse in terms
23 of a refund. We can't go back retroactively and make the
24 company refund to the customers what we have not held subject
25 to refund, is that correct?

1 MR. HOWE: Yes, it is.

2 CHAIRMAN JACOBS: We can do a prospective rate
3 reduction.

4 MR. HOWE: That is correct.

5 COMMISSIONER JABER: Now, one of the cases I believe
6 you cited says that the purpose of the interim hearing is to
7 fix temporary rates based upon known and easily measurable
8 changes which have caused the utility's rates to be just and
9 reasonable. How does that all fit into the argument with
10 respect to the Tiger Bay asset? It seems to me, for example,
11 that that is a known and measurable change.

12 MR. HOWE: It is. And, Commissioner Jaber, each of
13 the interim cases has been somewhat unique on its facts. I
14 think what you have here -- but in each of those cases, with
15 the adjustments or with the manner in which the Commission set
16 rates, it was with the expectation that during the future
17 period during which those rates would be in effect, the
18 earnings would be at the specific level intended by the
19 statute. That is the piece that I think is missing here.

20 In other words, the company would have you look back
21 and say we weren't overearning in the past. So, if you look
22 over the interim period, the period during which this case will
23 be processed, you don't need to look at what our earnings are.
24 You don't need to concern yourself with whether we are going to
25 book additional Tiger Bay amortizations, you don't need to

1 concern yourself with whether we have merger-related costs and
2 so forth. And that is what is fairly unique, I think, about
3 this case in that if you follow the company's approach you will
4 find this -- I think I characterized it earlier as a hiatus, a
5 period during which no rates are set for Florida Power
6 Corporation. The only reason you have agreed with your staff
7 to create this docket is that you reasonably believed the
8 company is overearning. You reasonably believed that the
9 outcome of a full rate case will be a change in rates and from
10 preliminary indications it might be a reduction in rates.

11 COMMISSIONER JABER: And aren't we -- didn't we say
12 that in the order just by making a finding that there were
13 revenues to be captured that took the company down to the
14 maximum of the ROE?

15 MR. HOWE: Yes, ma'am.

16 COMMISSIONER JABER: Okay. So then you don't agree
17 with the company that that capturing of revenues has anything
18 to do with making a finding that the expenses were
19 inappropriate, one thing has nothing to do with another?

20 MR. HOWE: I agree that one thing has nothing to do
21 with the other. You might find during the course of the full
22 proceeding that you will accept certain positions of the
23 company on a going-forward basis, and that might have
24 retrospective application to the amount of interim refunds, if
25 there are any, but you can't know that at this time.

1 COMMISSIONER JABER: Because, in fact, there are some
2 expenses that our staff didn't even look at with respect to the
3 interim calculation, I would imagine?

4 MR. HOWE: That is correct. And you will find that
5 in our responsive pleading I said that. That, in fact, it is
6 likely that the Commission has not captured nearly enough money
7 held subject to refund. Some of the things that your staff
8 pointed out in its recommendation are, for example, that the
9 company has proposed to reduce its nuclear decommissioning
10 costs by about \$11 million, I believe. That is not reflected
11 in that 114 million interim rate reduction. And I'm calling it
12 a rate reduction, I realize it is captured subject to refund.

13 The company has also proposed to the Commission that
14 it lower its fossil dismantlement accrual. In all likelihood,
15 the Commission will be accepting both of those. So it is not
16 at all unlikely that the company will earn well above a 13
17 percent ROE during the pendency of this proceeding in spite of
18 the fact that it has 114 million subject to refund.

19 COMMISSIONER JABER: Mr. Sasso, with respect to the
20 known and measurable changes that standard cited to -- I think
21 it was the United Telephone case, yes. Let me ask you the same
22 question, how does that standard fit into this situation?

23 MR. SASSO: If I may, I don't know if it is an
24 appropriate time to launch into rebuttal now, but it seems like
25 a convenient segue. I don't want to interrupt Mr. Howe to give

1 a long-winded response.

2 CHAIRMAN JACOBS: Do you have a presentation, staff?

3 MR. ELIAS: No, sir.

4 CHAIRMAN JACOBS: How far along were you, Mr. Howe,
5 were you about done?

6 MR. HOWE: I think I can conclude now, yes.

7 CHAIRMAN JACOBS: Okay. All right.

8 MR. SASSO: Let me begin by answering your question,
9 Commission Jaber, because it goes to the heart of the matter.
10 Public Counsel's entire argument is based on a legally flawed
11 premise, outdated cases, and an outdated standard. Mr. Howe
12 relies on our 1980 rate case, on the Maule case in 1976. Yes,
13 these cases did involve projected test years because not only
14 was that appropriate at the time, the Supreme Court held that
15 it was required. There wasn't the same interim rate statute in
16 effect at that time. That did not become effective until July
17 of 1980.

18 Under the prior standard, the way to get an interim
19 increase was through the file and suspend procedures where a
20 utility would file a new rate scheme with the Commission asking
21 for approval, but asking for it to go into effect immediately
22 on an interim basis. The Commission would suspend that,
23 consider what portion of it, if any, should be granted
24 immediately, relatively speaking, to provide interim relief.
25 And the court was quite explicit, in fact, in Maule, in holding

1 that because all of this was predicated on a projection, on a
2 forward-looking test year, the utility had to seek interim
3 relief as well as permanent relief on the basis of that
4 forward-looking test year.

5 In fact, the court said in Maule an interim award
6 could never be requested or granted on the basis of a test year
7 different from that used as the basis for the permanent rate
8 increase request. And in this case the court held the
9 Commission erred in allowing FPL to employ a different test
10 year for the temporary and partial portion of its permanent and
11 full request. That was based on the rationale that the interim
12 rate procedures enacted in '74 were an integral part of the
13 general and more elaborate process for obtaining rate
14 increases. That was the process that was then in effect.

15 And inherent in that process was everybody involved
16 was engaging in two things. One was conjecture, forecasting,
17 prediction about what the future would bring. And, two, it was
18 forced to rely on general ratemaking principles, not those
19 principles established as law for that utility in its last
20 individual rate case.

21 The Legislature changed all of that when it enacted
22 this statute in 1980. In fact, in the Senate analysis of the
23 new law, the section-by-section analysis provides that this
24 bill would statutorily authorize the Commission to allow
25 interim rates to be collected up until the effective date of

1 the final order on a permanent rate change request, provides
2 for the use of a test period different from that used in the
3 permanent rate case, provides the procedure for granting both
4 interim rate increases and decreases.

5 In effect, the statute overruled the prior cases
6 which forced everybody to look on a forward-looking basis and
7 adopted an historic test. A backward looking test that
8 requires the Commission to find on an historic basis on the
9 basis of the existing grounds rules that we are, in fact,
10 overearning. This Commission said in --

11 CHAIRMAN JACOBS: Mr. Sasso.

12 MR. SASSO: Yes, sir.

13 CHAIRMAN JACOBS: Is the statute that clear in
14 overruling?

15 MR. SASSO: Oh, it doesn't say on its face we are
16 overruling prior case law, but it imposes a different standard,
17 it explicitly requires the Commission to calculate whether we
18 are overearning. It says shall using the 12-month preceding
19 period. And the Commission has consistently applied it in that
20 sense. In fact, in 1989, the Commission in a Gulf Power case
21 explained some of this. It said by its enactment of Section
22 366.071, Florida Statutes, the Florida Legislature has
23 established a comprehensive and precise methodology for
24 calculating both interim rate increases and decreases.
25 Utilizing easily ascertainable and auditable historic data, a

1 party may establish a prima facie entitlement to either a rate
2 increase or decrease. The statute's comprehensiveness is
3 demonstrated by the fact that it specifically addresses areas
4 previously not touched by the law, such as the calculation of
5 interim rate increases and decreases, the specific provision
6 for refunds and the method by which they would be calculated,
7 as well as the specific provisions providing that interim rates
8 be collected under bond or corporate undertaking.

9 Additionally, we note that during a period of rising capital
10 cost rates, the interim statute mitigates -- doesn't solve, it
11 can't solve completely -- but mitigates the effects of
12 regulatory lag by including in the required rate of return
13 calculation current cost rates for fixed rate capital,
14 short-term debt, variable cost debt, except entity which is
15 included at its last authorized rate of return.

16 So this is not a panacea. It does not solve
17 everybody's problem about regulatory lag, but it helps mitigate
18 it, and that is all it is intended to do. Those are the ground
19 rules on which the staff has proceeded and the Commission has
20 proceeded on the interim rate order and those are the ones that
21 govern this case.

22 Very briefly with respect to some of the issues that
23 Mr. Howe raised as regards the particular items, they all have
24 the color that the end justifies the means. At the end of the
25 day it would be nice to be able to come back and provide some

1 refund money to ratepayers, but the end does not justify the
2 means. The means are important, too. There are statutory
3 directives that need to be followed that protect both
4 ratepayers and utilities when you are talking about increases
5 or decreases, and it is important to follow those means
6 strictly.

7 The question whether our 2001 earnings are
8 unregulated is a red herring. This rate case is not directly
9 addressing 2001 earnings; we are filing MFRs for 2002. The
10 Commission or somebody could have asked for a rate case that
11 would have addressed 2001 earnings, they were not addressed.
12 No more than 1999 or 1998. The Commission has regular
13 surveillance reporting. We are under the Commission's
14 supervision. And if somebody has a concern, action can be
15 taken and is taken. Now there may be some lag time involved
16 and, again, the solution isn't perfect, but there is a
17 solution.

18 Mr. Howe makes the point that as regards the Tiger
19 Bay asset that if we are allowed to amortize this thing we are
20 in control of our earnings. That is just a way of saying it is
21 a discretionary expense like paper clips. Yes, it is
22 discretionary. But to the extent we accelerate that
23 amortization as this Commission recognized and encouraging us
24 to do so, we bring the tail end benefit to our ratepayers that
25 much sooner. We remove that regulatory asset from our books.

1 And as soon as that happens they get an immediate injection
2 through the fuel clause which gives them relief. So we should
3 be encouraged to accelerate that. And if it is within our
4 control that is something the Commission understood and
5 permitted.

6 Merger costs. He makes the broad statement these are
7 in inappropriate expenses or could be deemed that, but that is
8 prejudging the outcome of a very significant discussion on
9 these issues, and that cannot be done on the basis of our last
10 individual rate proceeding. If we were going to launch into
11 general ratemaking principles as we will in the future, we
12 would be talking about matching principles and other things
13 which make these expenses very clear in relationship to the
14 benefits produced.

15 The \$10.7 million flow-through item, he called that a
16 nonrecurring expense. It has been recurring every year since
17 1993, it will recur in one item for 10 more years and another
18 item for 30 years. It is quintessentially a recurring expense.
19 The only question is is the amount reasonable. It was an
20 amount requested by the staff, it is reasonable.

21 COMMISSIONER JABER: So does that mean it is a known
22 and measurable change?

23 MR. SASSO: In what sense, Commissioner?

24 COMMISSIONER JABER: I'm just looking for a
25 definition of known and measurable changes.

1 MR. SASSO: It is not -- well, I'm sorry that I'm
2 confused about the context. It is a --

3 COMMISSIONER JABER: In the United Telephone case it
4 makes reference to the purpose of interim rates or the interim
5 statute to fix temporary rates based on known and measurable
6 changes.

7 MR. SASSO: Known and measurable changes is another
8 way of saying we need to be confined to historic data, not
9 making projections. That was really the beginning of that
10 concept. It is unfair to change the rules going forward to
11 current year revenues. If there is a known and measurable
12 change and we are historically demonstrably exceeding our
13 authorized rate of return, yes, you can take action. But that
14 is not the case here.

15 And Mr. Howe essentially concedes that CR-3 standing
16 alone would not be an appropriate basis for taking action. We
17 would submit it is no more appropriate because it is bunched
18 together with some other items. A deal is a deal. We reached
19 an agreement, the Commission approved it, it was seen as a
20 win/win for everybody involved. It may or may not be
21 discontinued at the conclusion of the rate case, but that is
22 not what we are doing here. We are supposed to be judging this
23 utility in the preceding 12-month period based on the ground
24 rules then in place and under those grounds rules it was
25 permissible. Thank you.

1 CHAIRMAN JACOBS: What is the impact then of the
2 language in Subsection 1?

3 MR. SASSO: About the test year?

4 CHAIRMAN JACOBS: Yes.

5 MR. SASSO: That was, Commissioner Jacobs, in
6 response to the fact that prior to the adoption of this
7 legislation the Commission could not use a different test year.
8 It was simply saying we are now authorizing you to use a
9 different test year. It goes on to say you shall use the
10 12-month preceding period in making the calculation. That is
11 mandatory language.

12 CHAIRMAN JACOBS: So in your estimation, then,
13 Subsection 5 is a restriction to Subsection 1?

14 MR. SASSO: Absolutely. It is much more specific.
15 It defines a very carefully conceived way of calculating this
16 matter as this Commission has recognized in its own decisions.
17 It gives clear guidance. The may has to be understood in a
18 historical context that we are now loosening you from the prior
19 mandate of the Florida Supreme Court that you must use only the
20 same test year on a looking-forward basis as a permanent rate
21 case.

22 CHAIRMAN JACOBS: If we do that, then what impact
23 does that have with regard to the -- we are taking a snapshot
24 here to determine as a baseline. And your argument is that
25 that baseline can only come from the last year, the prior 12

1 months?

2 MR. SASSO: That is correct.

3 CHAIRMAN JACOBS: Then our language up above becomes
4 null and void in my mind.

5 MR. SASSO: No, it is entirely consistent. The way
6 to read them in harmony is that, yes, you are authorized to use
7 a different test year, and, in fact, now in Section 5 we are
8 telling you which one.

9 CHAIRMAN JACOBS: That is exactly what I'm saying.
10 You may -- what I see in this is you may, but then down below
11 it says you may not.

12 MR. SASSO: It says shall which is essentially to say
13 that you may not.

14 CHAIRMAN JACOBS: It's null and void.

15 MR. SASSO: But, again, the context of the initial
16 authorization to use different test years is to make clear that
17 we are now in a different world from the Maule case and the
18 prior Supreme Court precedent which constricted you only to a
19 forward-looking basis. They changed the whole scheme and said
20 now you are using an historical test year, you are using
21 historical data. We have a very precise way to calculate all
22 of this. The refund is going to be something that will be
23 measured off of the new ROE, but you have got to the last ROE
24 when you are using the historical test period. It is all
25 spelled out very nicely. And it does give guidance that, as

1 the Commission acknowledged, was previously lacking.

2 CHAIRMAN JACOBS: The argument that occurs to me, and
3 I would like for you to address, is that Section 5 is more
4 specific than Section 1. Section 5 arguably could be speaking
5 to if we were to choose a test year in Subsection 1, let's say
6 the same test year as applicable for the permanent rate
7 increase, could not Section 5 be read to say, well, then if you
8 do that --

9 MR. SASSO: Well, Section 5 is fairly explicit and
10 fairly broad. It says in setting interim rates or setting
11 revenues subject to refund, the Commission shall determine the
12 revenue deficiency or excess by calculating the difference
13 between the achieved rate of return of a public utility and its
14 required rate of return applied to an average investment rate
15 base, or an end of period investment rate base. Then for
16 purposes of this subsection the achieved rate of return shall
17 be calculated by applying appropriate adjustments.

18 CHAIRMAN JACOBS: And now you are leading me down a
19 larger trail that says Section 5 may be more limited. Because
20 if I begin by calculating something, and I can look at either
21 an average or an end-of-period rate base to do it, and then I
22 get down to Paragraph 1 and I can look at what the appropriate
23 adjustments are to that, it strikes me then that I'm going down
24 into a more narrow and more restrictive -- I can agree with you
25 in that standpoint, but it doesn't sound like if I make -- that

1 it prohibited my making a choice up in Subsection 1. I could
2 have still chose a test year that was the same as the permanent
3 or I could have chosen another one. And now then based on that
4 I am now going to a more limited and a more narrow analysis
5 looking at that decision that was made in Subsection 1.

6 MR. SASSO: Well, Mr. Jacobs, you may have identified
7 an argument, and Mr. Howe has identified an argument about the
8 statute, but ultimately we are led to rely on the most natural
9 reading of the statute and principles of statutory construction
10 that the principle -- the principle being that the more
11 particular controls over the more general. And obviously,
12 also, the legislature would not have launched into a very
13 careful development of a procedure for calculating this if it
14 meant to loosen the Commission from any moorings in Subsection
15 1, which is really of an introductory nature.

16 Again, the legislative history says that this
17 provides the procedure for granting both interim rate increases
18 and decreases. This Commission in reviewing the statute
19 earlier says it establishes a comprehensive and precise
20 methodology for calculating both interim rate increases and
21 decreases. We would submit that is the most natural reading of
22 this statute. That it would be unreasonable to read this to
23 mean that while the legislature is taking great pains in all of
24 these subsections that go on for several columns to prescribe
25 how the calculation is to be done, what the criteria are, how

1 the refund is to be calculated, that then that could be all
2 swept away if the Commission just decided it was going to pick
3 a different test year entirely than that last 12-month period.

4 CHAIRMAN JACOBS: Commissioners, do you have
5 questions?

6 COMMISSIONER DEASON: No. I would have a question
7 for staff. When are we going to have this brought before us
8 for the recommendation?

9 MR. ELIAS: My thinking was the first October agenda
10 conference. The rec would be filed approximately, I believe it
11 is 16 days from now.

12 CHAIRMAN JACOBS: I had a brief question for Mr.
13 Howe. The argument seems sound that if you are going to look
14 at the most recent 12 months, something totally different from
15 what was allowed or the appropriate investment base for that 12
16 months seems the most natural to look at. How do you go beyond
17 that?

18 MR. HOWE: Well, I'm not trying to go beyond it. The
19 way I'm reading this is, fine, use the most recent 12 months,
20 but as the Commission would characterize it as being
21 representative of the future. That is what your staff did and
22 that is what your recommendation -- what their recommendation
23 asked you to do and you accepted it. It's if you look at the
24 most recent 12 months properly adjusted to represent the period
25 during which these interim rates will be in effect, you need

1 to -- a \$114 million reduction will allow the utility to earn a
2 13 percent return on equity.

3 CHAIRMAN JACOBS: So in your mind the enactment of
4 the statute didn't remove the discretion that we have, or had,
5 have or had to explore what the relevant adjustment should be?

6 MR. HOWE: No, of course not. And the reason -- and
7 that is why I had mentioned earlier the repeated reference in
8 the statute to the word calculate or calculating. For example,
9 if you go to Subsection 5, which Mr. Sasso focuses on, 5A
10 states that in setting interim rates or setting revenues
11 subject to refund the Commission shall determine the revenue
12 deficiency or excess by calculating the difference between the
13 achieved rate of return of a public utility and its required
14 rate of return. It presupposes some active participation on
15 the part of this Commission. It doesn't say show me what your
16 surveillance report said. It said let's calculate it.

17 And I'm saying within that framework the calculation
18 necessarily is to be what rates will allow you to earn no more
19 than the ceiling of the last allowed return on equity. And
20 then within that overall framework there is the question, and
21 that is can the interim rate setting process as identified by
22 this statute reasonably be interpreted in such a manner that
23 the Commission cannot order an interim rate decrease even when
24 it reasonably believes an electric utility under its
25 jurisdiction will overearn during the pendency of a proceeding

1 instituted to reduce that utility's rates.

2 I think the clear answer is no, and I believe the
3 company's position has to be, well, on their particular
4 circumstances, you can't mess with us during the pendency of
5 the proceeding. You can't be concerned with our actual
6 earnings level. And I can't believe that that is the intent of
7 this legislation.

8 CHAIRMAN JACOBS: Commissioners, any other questions?

9 COMMISSIONER DEASON: I move Issue 3.

10 COMMISSIONER JABER: Second.

11 CHAIRMAN JACOBS: It has been moved and seconded.

12 All in favor.

13 (Unanimous affirmative vote.)

14 CHAIRMAN JACOBS: Opposed. And I think I heard you
15 say October would be the time we will come back for a
16 recommendation.

17 MR. ELIAS: I believe October 2nd is the first
18 October agenda.

19 COMMISSIONER DEASON: If that is correct, October
20 2nd. And the reason I asked that question is it is helpful if
21 you can bring us the recommendation as quickly as possible
22 after we have had the benefit of oral arguments while it is
23 still relatively fresh on our minds.

24 MR. ELIAS: And, you know, we heard some pretty
25 extensive arguments here. And I'm going to have the benefit of

1 the transcript to work from and carefully work through those
2 arguments. I see the first October agenda as being the
3 earliest opportunity to really digest what was said here.

4 COMMISSIONER PALECKI: Since we have already heard
5 the arguments, I assume that parties will not participate at
6 the agenda conference?

7 CHAIRMAN JACOBS: I had expected that's why we heard
8 oral arguments today. Make sure we are clear on that, though,
9 when we come back.

10 MR. ELIAS: I will make sure that the recommendation
11 addresses it.

12 CHAIRMAN JACOBS: Thanks to both of the parties. It
13 was very instructive. Thank you.

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1 STATE OF FLORIDA)
2 : CERTIFICATE OF REPORTER
3 COUNTY OF LEON)

4
5 I, JANE FAUROT, RPR, Chief, Office of Hearing Reporter
6 Services, FPSC Division of Commission Clerk and Administrative
7 Services, do hereby certify that the foregoing proceeding was
8 heard at the time and place herein stated.

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10 IT IS FURTHER CERTIFIED that I stenographically
11 reported the said proceedings; that the same has been
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13 transcript constitutes a true transcription of my notes of said
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16 I FURTHER CERTIFY that I am not a relative, employee,
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