

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 001148-EI

In the Matter of

REVIEW OF THE RETAIL RATES
OF FLORIDA POWER & LIGHT
COMPANY.

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PROCEEDINGS: ISSUE IDENTIFICATION CONFERENCE

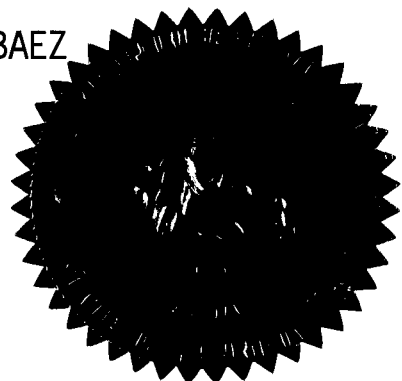
BEFORE: COMMISSIONER BRAULIO L. BAEZ
 Prehearing Officer

DATE: Monday, January 7, 2002

TIME: Commenced at 10:00 a.m.
 Concluded at 11:45 a.m.

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

REPORTED BY: JANE FAUROT, RPR
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10 Association.

11 THOMAS A. CLOUD, Gray, Harris & Robinson, P.A., 301
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1 APPEARANCES CONTINUED:

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6 ROBERT V. ELIAS and WILLIAM COCHRAN KEATING,
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8 Tallahassee, Florida 32399-0850, appearing on behalf of the
9 Commission Staff.

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P R O C E E D I N G S

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2 COMMISSIONER BAEZ: Good morning. Can you hear me?
3 We'll call this issue ID conference to order. Counsel, can you
4 read the notice, please.

5 MR. KEATING: Pursuant to notice, this time and place
6 have been set for an issue identification conference in Docket
7 Number 001148-EI, review of the retail rates of Florida Power
8 and Light Company.

9 COMMISSIONER BAEZ: Okay. And we will take
10 appearances.

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

13 MR. LITCHFIELD: Wade Litchfield on behalf of
14 Florida Power and Light Company.

15 MR. SUNDBACK: Mark Sundback for the South Florida
16 Hospital and Health Care Association. Good morning.

17 MR. HOWE: Roger Howe with the Public Counsel's
18 Office.

19 MR. CLOUD: Thomas Cloud for Publix Supermarkets,
20 Inc.

21 MS. KAUFMAN: John McWhirter and Vicki Gordon Kaufman
22 on behalf of the Florida Industrial Power Users Group.

23 MR. TWOMEY: Mike Twomey on behalf of Thomas and
24 Genevieve Twomey.

25 MR. ELIAS: Bob Elias and Cochran Keating on behalf

1 of the Commission.

2 COMMISSIONER BAEZ: Is there anyone else in the back
3 row that needs to enter an appearance? No. All right. Thank
4 you all for coming. This is an Issue ID Conference, and I am
5 holding in my hand, as I hope everyone else is, a consolidated
6 list of some sort that staff has put together. If anybody
7 doesn't have one, please let staff know.

8 I think what we want to do today is work on an
9 exceptions basis. And we are going to give the company the
10 opportunity to address whichever issues they take exception to
11 at this point. So at the end of the day what we will have is
12 some kind of, you know, generally agreed to list or other
13 instructions that we can work -- that we can work from to come
14 up with a final issues list.

15 So, Mr. Butler and Mr. Litchfield, you can take it
16 from here. I guess my suggestion is that we don't go
17 issue-by-issue. But if you do have exceptions, you know, you
18 can just lay them out and we can discuss them. The other
19 parties can jump in as we discuss the particular issues, and we
20 will take comments from whomever has them, and we will try and
21 work that way.

22 Mr. Litchfield.

23 MR. LITCHFIELD: Thank you, Commissioner Baez. We
24 appreciate the effort that staff went to to put together the
25 compiled or composite list of issues. And over the weekend we

1 had an opportunity to go through that list and actually sort it
2 into categories that I will explain in a moment that will form
3 the basis of an approach that we are advocating that you allow
4 us to take in this proceeding, and an approach that we
5 discussed at some length with the parties at a pre-issue ID
6 meeting that was held on the 21st of December. And I will ask
7 Mr. Butler to distribute that list right now.

8 And while he is doing that, let me offer some
9 background comments that I think will be helpful to provide a
10 context for not only the discussion that we had on the 21st,
11 but for the approach that we are going to be advocating here
12 this morning. And I think it will be an efficient way of
13 pursuing this, as well, Commissioner.

14 As you recall in May of last year, the staff, based
15 on its review of FPL's surveillance reports, recommended that
16 the Commission order FPL to file MFRs in order to provide
17 additional data upon which to determine to what extent, if any,
18 FPL's rates ought to be lowered. And the Commission so ordered
19 FPL to file those MFRs, and we made those filings in stages per
20 Commission-approved schedule last fall. And since that time we
21 have been engaged in responding to numerous discovery requests
22 and a couple of audits that have as their subject the MFRs as
23 filed and other supporting data.

24 Because this is not a company initiated rate case, we
25 view it as substantively and significantly different in terms

1 of the procedural posture, and it has given us some reason to
2 be concerned with respect to the breadth of the issues as
3 articulated in staff's initial list. But I think, as I said,
4 we have come up with an approach that will help us work through
5 that concern.

6 Because we haven't initiated the case, we don't
7 believe that we carry the burden of proof here, and that that
8 burden lies with a party that would advocate a reduction in
9 FPL's rates. We think this is an important point of law, and
10 it has particular relevance with respect to how the issues in
11 this proceeding would be addressed. But having said that, I
12 want to make it clear that we are not here to argue that point
13 of law today. We bring it to your attention as context,
14 really, for the approach that we are going to be advocating and
15 for the discussion that we had on the 21st with staff and the
16 other parties.

17 When we initially discussed with staff per Commission
18 directive the filing of MFRs and determining which of all of
19 the MFRs actually were required for purposes of the review,
20 staff had initially expressed a desire to have us file
21 testimony along with those MFRs. Some -- what I think they
22 characterized as explanatory testimony and sponsorship of the
23 MFRs.

24 And given the time constraints and the resource
25 constraints that we were under, we just weren't able to agree

1 on that type of a schedule. But we did agree to supply that
2 kind of testimony at a later date, and subsequently your
3 procedural order incorporates testimony filing dates, so we
4 have expected to make that kind of a testimony filing. And, of
5 course, we have expected to make a filing, a testimony filing
6 to support any changes that we would propose.

7 For example, you recognize that we had requested in a
8 separate docket an increase in the storm fund accrual and in
9 the target amount of that reserve, and that was on motion of
10 staff consolidated into this docket. So clearly we intend to
11 be filing direct testimony to sponsor or to support our request
12 for those changes and any other changes that we might propose.
13 But although we made this commitment to file sort of
14 explanatory testimony, we had not at that time agreed that we
15 were assuming the burden of proof with respect to the general
16 matters in this case.

17 Now, how does this all relate to the issues that are
18 going to be addressed in this case? When we initially reviewed
19 the proposed staff list we recognized it as very broad, in
20 fact, pretty comprehensive, and more than what we had
21 anticipated we would be filing testimony on at least on a line
22 or an item-by-item basis. And so we were concerned about being
23 able to meet the testimony schedule under those circumstances.

24 Staff's list includes a lot of issues that are sort
25 of boilerplate rate case type issues; is amount X in account Y

1 appropriate; is amount Z in account ZZ appropriate. And at the
2 21st meeting it was explained to us that these are sort of
3 boilerplate rate case type issues that the staff felt the
4 Commission would need to address in making a decision, but they
5 weren't necessarily in every case issues that staff had
6 concerns with at this time at least. And we thought that was a
7 fair comment.

8 And the approach that we discussed, and I think we
9 agreed upon in principle is that our supporting testimony --
10 excuse me, our testimony, our explanatory testimony, if you
11 will, which would sponsor the MFRs and which would contain an
12 explanation of the forecasts and the budget processes and how
13 we compiled the MFRs would in the first instance be sufficient
14 for purposes of those sort of generic rate case boilerplate
15 type issues, and that we wouldn't be expected to do a
16 justification, if you will, from ground up on each and every
17 account item which would really just be prohibitive under the
18 existing schedule.

19 And so we thought that -- and we also agreed, I
20 should note, that, again, without assuming the burden of proof,
21 that if there were other specific concerns within those issues
22 or staff or other parties identified that they had a specific
23 concern with respect to account X or account Y, that if they
24 would identify those to us by today's hearing date that we
25 would endeavor also to address those concerns in direct

1 testimony and, therefore, advance the ball a little sooner in
2 the process.

3 And so we have gone through -- and we think this
4 approach has a lot of merit for a number of reasons. One, it
5 gives us some direction in terms of what we have to actually
6 address in testimony, and it will enable us to meet the
7 testimony filing schedule. But it also, and I think more
8 importantly, also serves the interests of the other parties in
9 the sense that if we don't, for example, address something in
10 our direct testimony, no one is prejudiced by that. If anybody
11 has something to propose related to these issues, they can do
12 so in their direct testimony, which is the second round. Or if
13 we address it and we haven't addressed it to their view
14 sufficiently, they can take it on in their direct.

15 And as I said, some of the issues that we went
16 through we concluded were sufficiently clear, sufficiently
17 specific in terms of the concern expressed, so that they did
18 truly represent a material issue of fact in dispute, we would
19 endeavor to take those on and address those in direct.

20 There is a third category of issues in the document,
21 and I have just addressed categories one and two. Well, let me
22 get to those in a moment. We have another category in the
23 document you will see that includes issues that we all thought
24 or at least FPL feels are very good candidates for stipulation.
25 And we thought it was a worthy endeavor at this point to try to

1 get our arms around all of the issues that we think may be
2 susceptible to stipulation which would, again, advance the ball
3 and move things along.

4 So while staff's issue list I thought did a good job
5 of compiling everybody's issues, and there were a few that
6 dropped out as a result of our discussions on the 21st, and a
7 few that were modified, what we tried to do was to take those
8 issues and we have reworked the documents slightly in the sense
9 that we have organized all of the issues in staff's document by
10 these four categories that I have alluded to and which I will
11 repeat more clearly in a moment. And then we have also, and I
12 will touch on these, as well, we have also added a couple of
13 wording changes that we thought we had discussed on the 21st,
14 and we will point those out, and I think it may have just been
15 missed in staff's compilation.

16 There is another issue with the wording change that
17 we are going to draw your attention to that we didn't discuss
18 on the 21st, but we have a proposal. And then there was an
19 issue that was in our list that we think makes good sense to
20 include in staff's list. And, again, it may have just been an
21 oversight. It was a lot to pull together by staff in a short
22 amount of time.

23 But as you can see, by now you have the document in
24 front of you, we have got category one, which are proper issues
25 adequately defining a specific concern about our test year

1 results, and they are in a form and of a nature to which we can
2 uniquely respond in testimony. And as you notice, there are a
3 few pages that would fall into that category.

4 The second category of issues appears beginning on
5 Page 5, and these are the issues that I mentioned earlier are
6 kind of the boilerplate rate case type issues that we are
7 comfortable having remain as issues in the case so long as it
8 is clear that without further specification today we would not
9 be obliged to do anything in direct other than provide
10 testimony that would sponsor the MFRs and explain the
11 forecasting and budgeting process.

12 COMMISSIONER BAEZ: Mr. Litchfield, just let me
13 interrupt you a moment for a question.

14 MR. LITCHFIELD: Sure.

15 COMMISSIONER BAEZ: And staff can clear this up for
16 me so that I understand better where you're coming from. I
17 don't think you are obliged to address anything directly. That
18 choice has always been yours. I mean, it's not something -- we
19 are not forcing you to address any of these issues. Or I'm not
20 going to say we, but certainly staff has an expectation and the
21 Commission will be making a determination based on the
22 information provided. But you are under -- I don't believe
23 that you are under any compunction to provide information. And
24 the risk of that is always a determination that is adverse. I
25 mean, is that fair?

1 MR. LITCHFIELD: Well, and I think that goes to our
2 concern. If the issues, without the kind of -- and I should
3 note that when we discussed this with staff, they were fine in
4 concept with our supporting these types of issues simply
5 through the MFRs, sponsoring them, and the explanatory
6 testimony with respect to the forecasting and the budgeting
7 processes. And failing that kind of an understanding, it puts
8 the company in a very difficult position relative to what it
9 should take on in direct testimony.

10 Again, this goes back to the issue of who has the
11 burden of proof. If the implication is that it is going to be
12 left to us to decide what we have to address and what we don't
13 have to address, we may need to have a determination by the
14 Commission in the first instance on burden of proof. We would
15 have to file a motion and have that aired now fully. It is
16 just not a debate or a discussion that we necessarily
17 thought -- and a controversy for that matter -- that we
18 necessarily thought had to take place now and potentially delay
19 the process.

20 Our approach is really designed to finesse the issue
21 and allow us to be comfortable in what we are putting in the
22 record and to give everybody the opportunity to address these
23 same issues in their testimony dates.

24 COMMISSIONER BAEZ: To your knowledge, and I think
25 what I hear you saying is that to your knowledge there are some

1 issues that are a part of this overall list that there is some
2 general understanding have already -- perhaps have already been
3 met by the initial filings already. I mean, is that -- and
4 that your intention would be not to supplement or not to
5 address in direct --

6 MR. LITCHFIELD: Right. For example, we would --
7 Issue Number 13, is the level of working capital in the amount
8 of 63 million and change for the 2002 projected test year
9 appropriate? We would propose, you know, if the understanding
10 is agreed to we would propose that our MFRs themselves and the
11 other explanatory testimony would serve to meet that issue in
12 the first instance as far as the company is concerned. Now, if
13 somebody decides that, no, there is an issue there with respect
14 to the level of working capital, well, they will have an
15 opportunity when their testimony date comes up to actually say
16 something about it.

17 COMMISSIONER BAEZ: Correct.

18 MR. LITCHFIELD: But we are looking to avoid having
19 to feel like we have to do a ground up type of analysis on each
20 and every account here. That is just a prohibitive task at
21 this point to try to do that.

22 COMMISSIONER BAEZ: And I appreciate that. And I
23 think the procedural order was sort of drafted with that kind
24 of approach in mind. I'm curious, staff, I mean, is the -- I
25 guess that approach is not objectionable fundamentally

1 speaking, but as regards this category two that the company has
2 identified these category two issues, is there an opportunity
3 for some kind of agreement, and I'm not going to hold you to an
4 answer right this second, but I guess conceptually is there an
5 opportunity for some kind of agreement that we can walk away
6 saying, all right, the MFR filings speak for themselves and
7 they do address this category of issue?

8 MR. KEATING: If I recall correctly from the
9 discussions we had on December 21st at our informal issue ID
10 meeting, and I haven't cross-referenced what they have in their
11 category two, having just seen it to the staff list, there were
12 several issues that staff felt needed to be included as part of
13 the rate setting process and needed largely to not foreclose
14 somebody from bringing something up that they might find a
15 problem with in those particular areas.

16 But at this time, based on what we have seen in MFRs
17 and what discovery we have done, we didn't have a particular
18 problem with. And what we tried to do in our compilation is
19 identify issues that we did have a particular concern with,
20 with the understanding that what we would expect from FPL is
21 supporting -- some basic supporting/explanatory testimony for
22 the issues that we didn't have a particular concern with, and
23 perhaps more detailed testimony on those that we had found a
24 particular concern with. So, I don't think we are opposed to
25 just having that sort of --

1 COMMISSIONER BAEZ: Categorization. I mean, I don't
2 know how this all winds up getting thrown into different bins,
3 but certainly the general concept of what the company has
4 identified as this category two, there is some general
5 understanding that they have been adequately addressed with
6 what has already been filed. And the direct testimony and
7 those particular issues isn't necessary, and yet the
8 opportunity is still available for other parties to address on
9 direct if they should have an issue.

10 MR. KEATING: Yes, I believe that is true. I mean,
11 obviously it is still up to the company as you mentioned
12 earlier as to what they -- to what extent they want to address
13 these in their testimony. And as Mr. Litchfield pointed out,
14 the burden of proof issue still is out there. It may be that a
15 particular party finds or sees something they want to pursue
16 under one of these issues. And, again, that could be addressed
17 in their case.

18 COMMISSIONER BAEZ: Right. We don't know that to be
19 of the case, but the opportunity is still available.

20 MR. KEATING: Right.

21 COMMISSIONER BAEZ: Okay.

22 MR. TWOMEY: Commissioner.

23 COMMISSIONER BAEZ: Mr. Twomey.

24 MR. TWOMEY: I think -- I don't want my silence to be
25 equated with acquiescence in something here. I don't know how

1 the rest of the parties feel about it or not, but putting the
2 different issues in different categories or different bins is
3 fine to the extent you can accomplish it.

4 The company has raised as Issue 138 the issue of
5 burden of proof. Now, my view, Commissioner, is that is
6 something that you shouldn't be getting around to deciding at
7 your agenda conference following the evidentiary hearing in
8 this case. It is my view it is critically important that that
9 be understood for the benefit of the company as well as the
10 consumer parties.

11 And I don't know how you go about doing it, whether
12 the staff can do this, or is willing to do it, or if one of the
13 parties needs to file a pleading yet, or you do it on your own
14 motion. But I would urge you to consider deciding this issue
15 up front and not at the tail end.

16 My position is that the company has the legal
17 obligation to prove up its entire operations and the rates, and
18 that if that is not mandatorily by statute, you certainly have
19 the authority in my view, legally, to require them to do so.
20 And I just think it is dangerous. I think it is inefficient if
21 we go through this entire process with this thing remaining
22 unanswered. We have talked about this issue from the very
23 first conference we have had informally, and I would urge you
24 to address it up front in some fashion.

25 COMMISSIONER BAEZ: Well, Mr. Twomey, I appreciate

1 your comments. And it is not that I don't have concerns over
2 that. I think in the posture that we are and the way that we
3 have been proceeding we are under very big time constraints, we
4 are trying to move along as quickly as possible, and the whole
5 effort that everyone involved has been trying to put together
6 is ultimately going to result in something that everybody can
7 be in agreement with on how we are proceeding.

8 Because there are so many issues, I do appreciate
9 that the burden of proof issue is probably -- would probably be
10 number one -- I mean, it is probably a threshold issue on all
11 this. We are trying to do here, or at least the way that I
12 have been trying to proceed is to try and not get to that point
13 because everyone is somehow in agreement as to what we should
14 be discussing in terms of substantive issues.

15 It's not that I'm trying to sidestep the burden of
16 proof issue. I realize its importance and the effect that it
17 can have on all the rest, and how we proceed from here on out.
18 It's that as long as we can keep everybody sort of moving in
19 the same direction, regardless of their positions on the
20 substantive issues, then maybe we don't have to reach this
21 issue. As a burden of proof issue it can probably shut this
22 whole thing down for sometime. And I think that the interests
23 of everyone involved probably wouldn't be served as well if
24 that were to happen.

25 Now I will commit to you that we are going to try and

1 reach some unofficial agreement on how we are proceeding in
2 order that this burden of proof issue doesn't become, you know,
3 the elephant in the room. And to the extent that you can
4 participate in finding some solution to that, I welcome it.
5 But for now we are not -- I take your comments under
6 advisement. We are not going to get into that today. I think
7 what we are trying to do is come up with a list of issues that
8 everybody can agree with and maybe that burden of proof issue
9 doesn't come up.

10 MR. TWOMEY: Yes, sir, and that's fine. I appreciate
11 your goal, I just think -- I wanted to comment because I think
12 it is the elephant in the room.

13 COMMISSIONER BAEZ: I understand.

14 MR. TWOMEY: Thank you.

15 COMMISSIONER BAEZ: You may be right.

16 MR. CLOUD: Commissioner, if I could, please.

17 COMMISSIONER BAEZ: Mr. Cloud.

18 MR. CLOUD: Yes, sir. I guess the problem that I
19 have with this document which has just been handed out today is
20 we really haven't had a whole lot of time to review.

21 COMMISSIONER BAEZ: I have that same problem, sir.

22 MR. CLOUD: And I guess I have noticed that at least
23 two of the issues have been left out of this document
24 completely, including one of our issues which we feel is very
25 important. And so it's hard for me to agree to the

1 categorizations. For example, on Page 5 what does it mean if
2 we agree to adequately address? Does this mean that no matter
3 what a party puts into the record that what they filed is prima
4 facie the right answer? I mean, that is the problem I have
5 with this. I sort of like what the staff did in outlining the
6 issues. That's what I thought we were going to talk about this
7 morning, and we feel comfortable in agreeing to that.

8 COMMISSIONER BAEZ: Well, and I think what we are
9 seeing is a difference in styles more than anything else.
10 Because if the understandings are -- and I will direct these
11 comments to you, as well, Mr. Litchfield -- if the
12 understanding, at least from the staff's point of view is --
13 and you know this to be true as has been stated that what your
14 initial filings at least to these issues that you have outlined
15 are something that the staff at this point is comfortable with
16 what has already been filed, and you can consider them in your
17 estimation to be those that you don't need to address any
18 further, then let that be some guidance to you in order for you
19 to come up with your decision on whether to do anything further
20 or not. I would share Mr. Cloud's concerns that there be some
21 finding that changes the rest of the parties' opportunity to
22 address these issues or to raise further objections.

23 MR. LITCHFIELD: I understand the concern. And it is
24 not our intent with this approach to foreclose any party from
25 raising a concern with respect to any of these sort of generic

1 rate review type issues when they file their case. It is just
2 to give us direction as to what we would need or be expected to
3 address in the first instance in our direct case.

4 COMMISSIONER BAEZ: And, again, I think we toe a very
5 fine line as to whether the Commission staff and the
6 Commission, therefore, is giving you blessing to what -- giving
7 their blessing to whatever you have identified as an issue that
8 you are not going to provide any further direct on, and at
9 least having some informal understanding that at least in the
10 staff's estimation these are issues consistent with what you
11 are feeling have for the better part been addressed with the
12 MFRs and the supporting documents.

13 MR. LITCHFIELD: And we are not even asking staff to
14 commit itself today that they don't have -- they don't have any
15 issues at this time or concerns at this time with respect to
16 this category of issues. We are not even asking them to commit
17 that they won't by the time their testimony date rolls around
18 find an issue and want to file testimony on this issue. That
19 is not a problem as far as we are concerned.

20 COMMISSIONER BAEZ: Mr. Cloud, is that -- do you get
21 a level of comfort from -- I mean, I can tell you there is not
22 going to be any hard and fast determination that these issues
23 are foreclosed and so you are going to get your full shot to
24 raise whatever issues -- and I'm mixing terms here, but
25 whatever objections or whatever exceptions you may take to the

1 information that is filed on those issues.

2 MR. CLOUD: Commissioner, I certainly get comfort
3 from what you are saying.

4 COMMISSIONER BAEZ: What I'm saying is the only thing
5 that is going to wind up on a piece of paper. So, I mean, if
6 what I'm saying is giving you comfort, then --

7 MR. CLOUD: Yes, sir. The issues that we came here
8 today on are not, we are not missing one or two of them because
9 they didn't happen to get categorized here. And just to note
10 for the record, we will have a position on burden. I think
11 that there is case law out there that more than adequately
12 places the burden on the regulatory entity, otherwise why even
13 have a Public Service Commission. It is in the nature of the
14 appellate decisions on the show cause orders which is in
15 substance what you all did in June. So having said that, yes,
16 sir, I do take comfort in what you have said.

17 MR. SUNDBACK: Commissioner, if I could, Mark
18 Sundback for the hospitals.

19 COMMISSIONER BAEZ: I'm sorry, is it Sun --

20 MR. SUNDBACK: Sundback.

21 COMMISSIONER BAEZ: Sundback. Okay. Forgive me.

22 MR. SUNDBACK: Listening carefully to FPL, we
23 understand them to be saying that the scope of issues
24 ultimately adjudicable in this proceeding is not going to be
25 restricted necessarily by how they have characterized them, but

1 trying to listen carefully to the remarks, I'm not sure we have
2 heard yet a statement that this is not intended to have an
3 effect in any way on the burden of proof. I thought your whole
4 point was we are going to try to finesse the burden of proof
5 issue, see if we can't move things along and not have to fight
6 unnecessary wars. And from our perspective we would just like
7 to see that commitment made clear by FPL on the record, and I'm
8 not sure it has been yet.

9 In other words, we don't want to have this document
10 be used in an effort to say at some future date, no, the burden
11 of proof was clearly assigned to those folks over there by this
12 document. And we would appreciate through you if we could
13 adduce that kind of statement.

14 COMMISSIONER BAEZ: Well, and here is what I would
15 envision coming out of here. I mean, the final product, if you
16 will, is going to be some list of issues. Nowhere as a part of
17 that final product is there going to be any -- in my opinion,
18 and I would ask staff counsel's input on this after I blurt it
19 out, but nowhere in that document would I envision or would I
20 anticipate having some determination that some things are off
21 limits and other things are not.

22 This is an entire list which is subject to the same
23 due process on every issue. Every issue is the same. Whether
24 there is some understanding, whether there is some statement
25 only by staff that in their estimation at this point in time a

1 certain issue does not rise to the level of one that has
2 concern, but is merely on the list as an issue that cannot be
3 foreclosed as to the rest of the parties, you know, it is
4 always going to be the company's decision whether they pursue
5 this issue further or not. Further support, whether they file
6 direct testimony or not, I mean, I don't anticipate and I would
7 certainly not be in favor of taking the risk away on any
8 particular issue. I don't know if I'm being clear.

9 I mean, I appreciate the company's effort to kind of
10 identify for ease of treatment, if you will, what issues are
11 probably already dealt with by the MFRs and the supporting
12 documentation. To me that just says you are just giving us
13 some kind of heads up as to what issues you don't intend on
14 filing anything other than. And for the staff's part in
15 identifying specific issues which a flag has been raised, that
16 is the staff's part in giving you guidance as to what they will
17 be expecting in terms of further -- what you should be
18 addressing on direct testimony. It is somehow on an
19 informational level.

20 I mean, I don't accept any determination that all the
21 issues that wind up on this final list are not open to whatever
22 rights or whatever treatment all the parties want to give it.
23 And, Mr. Litchfield, you know, I guess that is -- I don't know
24 how that leaves you.

25 MR. LITCHFIELD: Well, I want to make sure I

1 understand what you are saying. I'm not sure that we are all
2 that far apart. We are proposing that -- and we really need to
3 talk about category three and category four, but for the time
4 being I think we are focused on what we have done in terms of
5 identifying issues that we would intend to take on in direct
6 and issues that unless otherwise rendered more specific today
7 we would be not expected to take on in direct other than our
8 MFRs and the general explanatory testimony.

9 It is important that we have a document that sort
10 of -- not sort of -- that does make those distinctions in terms
11 of the issues. At least a temporary document that survives
12 through the filing, through our direct testimony filing. When
13 the final prehearing order is issued, if the issues are listed
14 from A to Z without that type of a distinction, you know, I'm
15 thinking that we could live with that. I would like to talk
16 with the client about that.

17 But in the first instance, we really need an order
18 from the Commission, from the prehearing officer, yourself,
19 Commissioner Baez, that would give us the direction that we
20 need to prepare our direct testimony in the first instance.
21 And to give Mr. Sundback some comfort, no, it is not our intent
22 to prejudge these issues or prejudge the issue of burden of
23 proof. This is simply a matter of expediency at this point in
24 terms of helping us get our direct testimony pulled together
25 and meet the testimony filing deadline.

1 And as I have said before, we are not even asking
2 staff -- I mean, obviously people are looking at this list for
3 the first time and we would like them to take the time to look
4 at it and make sure they agree with our categorization. But we
5 are not asking, for example, that staff preclude itself from
6 later, a week down the road when they get a discovery response
7 back saying, actually I do have an issue with respect to Issue
8 X, and I do intend to take that up in my direct testimony.

9 COMMISSIONER BAEZ: Is it your understanding that any
10 categorization that takes place -- and forgive the ignorance,
11 I'm still unclear as to what kind of order is going to issue on
12 this, but I am assuming it is just an issue identification
13 order. Is that what, Mr. Elias, you --

14 MR. ELIAS: That would be my expectation is that what
15 we are deciding here is whether or not an issue is or is not
16 appropriate for inclusion in the proceeding at this point in
17 time.

18 COMMISSIONER BAEZ: Okay.

19 MR. ELIAS: And that was to give the parties some
20 certainty insofar as the preparation of testimony.

21 COMMISSIONER BAEZ: And that said, Mr. Litchfield,
22 consistent with that, I mean, do you understand it to be your
23 expectation that even any categorization, assuming for argument
24 sake that we follow your suggestions as to how to categorize
25 this -- that that has no legal significance. I mean, there is

1 nothing, there is nothing in the end that you can go back and
2 say, well, you all took this -- you know, you all took this
3 issue off the table, this issue is not --

4 MR. LITCHFIELD: It would have legal significance in
5 the following sense, which is why it is so important to us. It
6 would prevent a party from later, after the fact, with respect
7 to a generic issue is account X, is amount X in account Y
8 appropriate, to argue that we failed to, in the first instance
9 justify that from ground up and, therefore, carry our burden of
10 proof.

11 Now, the burden of proof argument issue, you know, we
12 are not going to foreclose that. If a party wants to raise
13 that issue in its direct and we will have an opportunity to
14 respond, they can still argue that we had to carry the burden
15 of proof on that issue and that we either did or didn't. But
16 with respect to what we have said in our direct testimony, we
17 don't want to hear that argument. That is what we are trying
18 to foreclose. So it does have a legal significance in that
19 sense. But it's not, I think, a consequence that impairs
20 anybody's rights in the proceeding or that prejudices the issue
21 of burden of proof.

22 COMMISSIONER BAEZ: Mr. Cloud.

23 MR. CLOUD: Yes, sir. That is exactly what I was
24 afraid of. They want you to include these categories and then
25 all of a sudden they have won their argument on burden of

1 proof. That is not what this hearing was supposed to be about,
2 it is not what it was noticed for. I think we just need to
3 stick with the issues and you can deal with the burden of proof
4 issue down the road. Otherwise you are going to be foreclosing
5 based on what he just said.

6 MR. LITCHFIELD: Well, Commissioner Baez, that is
7 exactly 100 percent contrary to what I just articulated.

8 COMMISSIONER BAEZ: How so?

9 MR. LITCHFIELD: It is not our intention to foreclose
10 the burden of proof issue or argument or discussion. A party
11 can still argue at the end of the day that we failed to carry
12 our burden of proof. What it does foreclose is a party arguing
13 that because we didn't address issue X in the first instance in
14 our direct testimony we failed to carry our burden of proof.

15 COMMISSIONER BAEZ: Clear something up for me. You
16 have already filed something on any of these issues that a
17 party could say because you didn't file anything on direct,
18 which in my mind is the second filing, I mean, is that -- I
19 don't want to confuse you, but there is a subsequent filing or
20 some supplemental filing, in essence --

21 MR. LITCHFIELD: There is a testimony filing date for
22 us, and then there are, I think, three subsequent filing dates,
23 two of which relate to intervenors and staff and then there is
24 a final round where everybody responds.

25 COMMISSIONER BAEZ: But as to what has already been

1 filed on these issues, your position is the MFRs are enough, in
2 essence, to carry your burden of proof. I mean, if that be the
3 case.

4 MR. LITCHFIELD: Along with whatever explanatory
5 testimony we provide.

6 COMMISSIONER BAEZ: Correct.

7 MR. LITCHFIELD: Correct.

8 COMMISSIONER BAEZ: And that because the company may
9 not choose to provide direct testimony on a particular issue,
10 that the argument that you didn't meet the burden of proof
11 because you have made the decision not to provide --

12 MR. LITCHFIELD: What it prevents is somebody
13 sandbagging us and not raising an issue when it is his or her
14 turn or opportunity to raise that issue and then letting it
15 slide throughout the whole hearing, and then at the end of the
16 day saying, well, you know, FPL didn't introduce any evidence
17 into the record on this issue, therefore, they haven't carried
18 their burden of proof. Well, we had no notice that it was
19 going to be an issue.

20 And that's really what this is all about, is fair
21 notice as to what is materially at issue and in dispute in this
22 case. We have no problem with -- and what we are asking for
23 here is an acknowledgment that unless it is stated as a
24 material issue in dispute and people have legitimate concerns
25 now, even though we don't accept the burden of proof, we are

1 willing to try to take that on in our direct just to advance
2 the ball.

3 It does not foreclose someone from, when his or her
4 opportunity to file testimony comes along, to take that issue
5 on and say, well, account X is overstated. There is too much
6 money in account Y, and here is the reason why. At that point
7 we are on notice, we have an opportunity to address it, and we
8 don't have any procedural or notice problems there.

9 It is the former situation that concerns us where
10 somebody decides, well, you know, I'm just going to sit back
11 and I'm going to argue at the end of the day that the company
12 had the burden of proof and because they didn't specifically
13 address amount X in account Y, I'm going to argue to the
14 Commission that they didn't carry their burden of proof.
15 That's our problem.

16 COMMISSIONER BAEZ: Mr. Cloud, how is your not
17 having -- or assuming you believe you have an opportunity to
18 raise your issue, how is that prejudicial to your client if we
19 follow this?

20 MR. CLOUD: Well, as long as -- I mean, first of all,
21 I want to put Florida Power and Light on notice. I don't think
22 they need that since we have already, that we think all of
23 these issues require direct testimony. That is Publix's
24 position. And we think they don't put forward direct testimony
25 at their peril, just like any other case under the APA. They

1 have got to put testimony on. I don't think it is the
2 Commission's job to absolve them of the responsibility for
3 carrying their case forward, and that is exactly what he is
4 asking you to do.

5 The problem I have is the way they have worded these
6 categories. If you all buy into the wording of the categories,
7 particularly three and four, it basically says you can -- and
8 under three, stipulate or defer to a generic proceeding. That
9 is similar to under the '92 rate order some of the deferrals on
10 some of the issues under there which, by the way, weren't
11 stipulated before the beginning of that rate case. And then
12 four just basically deletes out those issues and says no
13 testimony is provided.

14 So, I mean, notwithstanding the in circles argument
15 here, the fact is if you agree to the categories and put that
16 in the order, and agree to this language they have here, you
17 have foreclosed our ability to exercise our due process rights.
18 They have the job of going forward with their case. I mean,
19 it's for another day as to who had the burden. But for the
20 Commission to tell them that they don't have to put any direct
21 testimony in the record, yes, I could see where they would come
22 back in a later hearing and say these other parties didn't say
23 anything at that issues identification hearing, so you are
24 precluded from arguing that we didn't put any evidence in the
25 record. I can see them doing that. That is exactly the intent

1 of this document, why we must object to it.

2 MR. LITCHFIELD: Commissioner Baez, if I might
3 respond. I think Mr. Cloud's position again asks this
4 Commission explicitly or implicitly to decide the burden of
5 proof question now and to put us on notice that we have to
6 address everything from ground up in the first instance in
7 order to make sure we carry our burden of proof.

8 Our approach, we think, avoids that debate and that
9 controversy now and does not prejudge the burden of proof
10 issue. And with respect to categories three and four, we
11 haven't talked about those yet, but category three, again, we
12 have to start identifying issues that the parties think could
13 be stipulated to. And we either do or we don't, and those
14 issues are either stipulated to or they go back onto the
15 regular list. But people may want to add a few or subtract a
16 few, that's fine, but we need to have a category in that
17 fashion.

18 COMMISSIONER BAEZ: Mr. Cloud, I have a question for
19 you. Early in your comments you kind of tried to equate this
20 or the Commission's decision to some -- to a show cause.

21 MR. CLOUD: Yes, sir.

22 COMMISSIONER BAEZ: Now, without muddling up the
23 issue too much, isn't it -- when the Commission issues a show
24 cause, isn't there some level of specificity as to what a
25 company, what a regulated utility has to address? I mean,

1 isn't there some specificity as to the issues?

2 MR. CLOUD: Well, there can be, but the issues can
3 also be rather generic. And I think that there was specificity
4 with regard to the filing of the MFRs in the June -- I guess it
5 was the June 19th or 20th order in this case. But we are
6 not -- regardless of who has the burden of proof of any one
7 issue, that is really not what I'm arguing today. What I'm
8 saying is that they have got to take the risk if they either
9 put evidence in the record or don't put evidence in the record.
10 That's what we are talking about. And the people he is
11 referring to should be the parties in going through
12 stipulations that are then presented to the Commission. It's
13 sort of putting the cart before the horse to have these
14 categories agreed to today.

15 I can see why they would want it, but if it
16 forecloses our ability to argue there is a lack of evidence, if
17 there is no evidence in the record on an issue, and there is
18 evidence put in over here, you know, regardless of who has the
19 burden of proof, the scale is going to tip this way, isn't it,
20 if there is no evidence in there. So by definition you are
21 going to be deciding the burden if you say they don't have to
22 put anything in the record.

23 MS. KAUFMAN: Commissioner, could I be heard? Sorry,
24 down here.

25 COMMISSIONER BAEZ: I was wondering how long it was

1 going to take you.

2 MS. KAUFMAN: Well, I tried, but -- I was just going
3 to say that when we had our meeting on December 21st and we
4 discussed these buckets of issues, if you will, it was with, I
5 thought, the recognition that FPL was trying to get a feel for
6 particularly where the staff had some concerns. And I think
7 that the staff tried to address that in the compilation that
8 they distributed in which they put an asterisk by those issues
9 that are causing them greater concern than others as a way to
10 give guidance to the company as to where they should perhaps
11 focus some more of their efforts.

12 And I think to the extent that FPL is asking for
13 guidance in that regard, they have gotten it through the
14 staff's compilation, which we appreciate. And I would also
15 point out to you that the compilation of the staff is a more
16 traditional approach to the generic subject matter grouping
17 that we usually look at at rate cases, during rate cases, and I
18 would suggest to you that it is more appropriate than going to
19 this other categorization which we would agree with Mr. Cloud
20 implies that there is something different going on, or that
21 this categorization has some significance, otherwise we
22 wouldn't be doing it.

23 I think that the staff has delineated those issues
24 that at this point in the case it feels are perhaps more
25 significant than other issues. And at this point I think FPL

1 pretty much has all the guidance that it should be expected to
2 have as we move forward.

3 MR. LITCHFIELD: Commissioner Baez, Ms. Kaufman's
4 remarks are a perfect segue for me to discuss category four.

5 COMMISSIONER BAEZ: I was going to ask you to move
6 along at some point.

7 MR. LITCHFIELD: It is true that the staff's
8 compilation did provide us with some direction as to where at
9 this point they have potential concerns and where they don't
10 have concerns at this point, and they did so by placing
11 asterisks beside those issues that they think they may have a
12 concern at this point. And it was helpful to us, but only to a
13 point. Many of those issues wound up in what we have as
14 category one because they were sufficiently clear that we could
15 provide a meaningful response in direct testimony, and they
16 were identified and flagged by the staff as ones that concerned
17 them.

18 There is another group of issues which we have put
19 into category four, and the reason is because they are not
20 really generic or boilerplate rate review or rate case type
21 issues. They are issues that appear to take aim at specific
22 and select accounts, but they aren't framed in a way that gives
23 us any indication as to what the concern is. And so those were
24 the issues that because they are not really generic boilerplate
25 issues that the Commission otherwise would say yea or nay to in

1 the course of issuing a decision, that we felt we needed to
2 either have removed from the list or rendered more specific so
3 that they would go into a category one or a category two. But
4 as they stand right now it is just difficult for us to deal
5 with them.

6 COMMISSIONER BAEZ: Well, Mr. Litchfield, I can tell
7 you one thing, I mean, it seems to me looking at these issues,
8 and I have only looked at them briefly --

9 MR. LITCHFIELD: Which ones are you looking at?

10 COMMISSIONER BAEZ: Your category four, I guess,
11 beginning with Issues 40 through 50, specifically. I don't
12 think you took them wholesale. This to me is the meat of
13 what -- is the very heart of what the company has been trying
14 to request in terms of, you know, give us a target. Don't make
15 us -- you know, let us know what you have exceptions to, what
16 you are having a problem with, and where the red flags are for
17 staff so that the company can get some guidance in order to
18 fashion their direct testimony. So that you are not dealing
19 with everything, you are only dealing with the problem spots.
20 I think one of your people referred to it on an exceptions
21 basis. Let's identify where the problem spots are, where the
22 staff has specific concerns.

23 So eliminating them as an alternative I don't think
24 is appropriate. Now, we can work in the world of rewording or
25 trying to give a little bit more specificity as to the reason

1 those issues have cropped up, and I don't know how prepared
2 staff is right now to reword them, but certainly I can say
3 this, to the extent that we can be more specific as to a basis,
4 providing a basis for why the issue is there, whether it be --
5 and I have further concerns on that, and I will tell you what
6 they are. By providing a basis in writing, I fear we run the
7 risk of foreclosing all other bases in the future which may
8 exist upon subsequent review.

9 But I think in following the spirit of let's give the
10 company a target, let's give the company some guidance as to
11 where they need to concentrate their efforts, as Ms. Kaufman
12 had put it, you know, I think that the staff would probably be
13 willing to discuss with you greater specificity on these
14 issues.

15 MR. BUTLER: Commissioner.

16 COMMISSIONER BAEZ: Yes, Mr. Butler.

17 MR. BUTLER: Commissioner Baez, I would just like to
18 explain a little bit about what happened on the 21st and where
19 we are here to give you an idea of what we were looking for.
20 We discussed all of these. It's about 35 issues of a very
21 similar format with staff. And thought we understood that we
22 would be getting today some sort of particular concern with
23 respect to them and have not yet, at least. And that is really
24 the source of our concern and why they show up in this category
25 four. I mean, just take, for example, Issue 41. You know, it

1 is \$129 million. It is spread over 15 account numbers. And we
2 will either give an effectively not very useful bland general
3 description of this, or we will guess that maybe something in
4 there might be of concern and may very well be wrong as to what
5 it is that would be of concern unless we get some sort of
6 further guidance on those. That is the reason that those
7 issues in that format ended up showing up on our category four.
8 And we need something more than that in order, really, to
9 respond in a helpful way to what staff has concern about.

10 MR. KEATING: And, Commissioner, looking through the
11 document that FPL has provided, in looking at some of the
12 issues they have put in category four versus category one, I
13 see some similarities. I'm not sure -- for instance, if you
14 turn to Page 3, there is an Issue 52, three issues up from the
15 bottom, that asks -- it's worded the same way as, say, 41 that
16 we just talked about, and it covers multiple accounts and asks
17 if that level is appropriate. I'm not sure, I don't see how
18 that is more specific than any of these in category four and
19 provides any more specificity.

20 MR. BUTLER: Cochran, the sort of unspoken
21 distinguishing factor there is the fact that 51 and 52 relate
22 to really the one function that is above the Commission's
23 conventional benchmark calculation. And we, therefore,
24 concluded that it appropriately would be addressed as a
25 category one issue. Because maybe we are misunderstanding

1 where you were going, but we were assuming that what you would
2 be going for on those two issues was the fact that this is over
3 the conventional benchmark measure and, therefore, that we
4 would have an expectation to provide some sort of
5 justification.

6 COMMISSIONER BAEZ: And is that kind of specificity
7 of the concern -- is that what you're looking for?

8 MR. BUTLER: Yes. What it is that would cause them
9 to say account number X of \$80 million, whatever, is a problem
10 to us. Why? Is it because it is over the benchmark? You
11 know, these two, and then there is another two that relate to
12 the sales function that were the two we picked out, or the four
13 that we picked out of that category. The rest we just don't
14 know.

15 COMMISSIONER BAEZ: Now, and how would you -- I'm
16 sorry, Cochran, go ahead.

17 MR. KEATING: I was going to follow up and say my
18 concern was I'm not sure how specific we need to be in the
19 actual wording of the issues. I had looked to some of the
20 issues that Publix had raised and seen how they had proposed
21 certain issues that questioned a particular amount and account.
22 And if you would turn to Page 15 of the FPL document, Issue
23 143, it's about in the middle of the page, when FPL had
24 indicated to staff that perhaps they needed some more
25 specificity, I looked at that Publix issue and thought, well,

1 that may be an approach that staff could use to ask about the
2 specific increase. But I'm concerned that we couldn't be
3 specific enough if that issue, as Publix has worded it, falls
4 within category four.

5 MR. BUTLER: Let me tell you why 143 is in category
6 four, and I will just give you what we would like, but also
7 triggering in it is to some extent what I guess we would rather
8 have than nothing. 143 is in category four because it is
9 basically -- the gist of it is that from 2000 to 2002 expenses
10 went up a certain dollar amount. You know, 2000 to 2002 is not
11 the Commission's established benchmark for measuring anything.
12 What has happened here in our view is that this is what amounts
13 to implicitly some non-rule policy-making here. That suddenly
14 if expenses go up from the year 2000 to the year 2002 by some
15 percentage unstated that we would have a burden of justifying
16 the cost increases in that range.

17 We included it on the category four because we think
18 that Publix, or staff, or whoever it would be who has a concern
19 of that sort for us really to address it appropriately and to
20 have any sort of duty to address it they need to tell is
21 specifically why something is wrong in there. Having said
22 that, we would darn sure rather have at least that to know that
23 is what the problem is and we can say, you know, we don't think
24 that is a valid measure than we would to have issues of the
25 form like 40 through 75 where it doesn't say anything about the

1 measure of the concern or what caused the concern.

2 COMMISSIONER BAEZ: And I guess in addressing what
3 Mr. Keating's concern is, that any greater specificity in those
4 issues serves to foreclose certainly staff's ability to have
5 any other problems with that particular issue subsequently.

6 MR. BUTLER: Commissioner Baez, we don't intend to do
7 that. And, in fact, if you look at Page 5, Issue 136A, which
8 is one we just added, it is not a new issue, it is FPL Issue 3,
9 but it's one that had not gotten picked up in staff's
10 compilation. Our idea is that anyone can come in, you know, in
11 their round, first round of testimony, and raise anything that
12 they would like to as an adjustment. And if staff, for
13 example, initially thought that there was one particular
14 problem with other power production expenses, but upon further
15 review they decide there is another problem, all they need to
16 do is put in testimony and say we have got this new problem.

17 And this 136A, it is our intent it would pick that up
18 and they would have no problem with doing that. Our big
19 concern is just that we not have this expectation that we are
20 going to provide, you know, detailed and sufficient
21 explanations of problems that we don't really know what they
22 are.

23 COMMISSIONER BAEZ: Well, Mr. Butler, I appreciate
24 and to some degree I agree with the company not having to
25 certainly anticipate every instance that may be a problem with

1 an issue based on something so broad, but I think we have to
2 balance that with staff -- certainly staff's opportunity to
3 give it a full look, and that an issue not bind them to
4 whatever the initial red flag was.

5 And to the extent that we can come up with some
6 fashion to an issue that serves both those purposes, you know,
7 I think you all should get together and try and fashion that.
8 Whether it be in the language of the issue itself, or certainly
9 some understanding that you can come to with the staff that you
10 walk away having some particular guidance or some particular
11 specific knowledge of what the reason was that that issue
12 became a concern to them.

13 You know, I'm not saying we need to reword it. We
14 could serve to reword the issue to serve your purposes, but
15 that is not necessarily the only alternative that we have in
16 this sense. I would urge you to kind of get together and see,
17 certainly on these category four issues that you have taken out
18 of staff's list, because I think from the outset we have got to
19 find one way or another to remain them. They are not going to
20 go away. To the extent that you can get some comfort as it
21 what direction you need to take with your direct testimony,
22 that's fine. I'm not convinced that it has to be through
23 rewording the issue, necessarily, because deep down inside I
24 think that raises other problems for the staff. But I think we
25 can serve everybody's purposes one way or the other, and I

1 would urge you to get together with staff to try and work on
2 that.

3 MR. LITCHFIELD: We would need to do that very, very
4 quickly in order for us to meet our testimony deadline. But I
5 would say in theory they could all go away and everybody would
6 still have fair opportunity under 136A to propose any issue
7 with respect to those matters in their direct testimony. So in
8 theory they really could go away, but --

9 COMMISSIONER BAEZ: Well, in theory I suppose you are
10 right. Anything is possible in theory. I don't think in
11 practice it's fair to even expect that. To my mind, at least,
12 you know, this is at the heart of what the company, in fact,
13 was looking for. Some kind of certainty, some kind of
14 direction as to where the staff felt the concerns laid to some
15 extent of specificity, and I think that the staff has tried
16 very hard to give you that.

17 Whether there can be some give and take on better
18 direction and guidance or not and how we achieve that, I will
19 agree that that opportunity exists. And how we resolve that, I
20 would look to you all to get together and try and resolve that
21 on your own. I am amenable to any kind of solution that meets
22 with both of your approval. I'm not in the mood to make them
23 go away. I don't think they have to. I think they need to
24 remain. How they remain is up to you all.

25 Mr. Keating, you were getting ready to say something?

1 If you weren't, that's okay.

2 MR. KEATING: I wasn't sure if somebody else was
3 going to say something.

4 COMMISSIONER BAEZ: Someone here had raised -- Mr.
5 McWhirter had raised his hand.

6 MR. KEATING: But I did want to --

7 COMMISSIONER BAEZ: And so did Mr. Twomey, actually.
8 Go ahead.

9 MR. KEATING: I did want to add that what staff has
10 attempted to do with its issues is to specify the areas we had
11 concern in. And perhaps that is something without -- as you
12 suggested, without changing the wording of the issues, perhaps
13 we can be more specific and give the company some guidance in
14 preparing their direct testimony. I don't think that has to be
15 necessarily spelled out anywhere. But I guess another concern
16 I had was that if we were to reword the issue to staff's
17 specific concern, some of the other parties here have indicated
18 at the issue ID meeting that they would agree to staff's issue
19 list largely. They may have different concerns under these
20 areas than staff, and I wouldn't want to foreclose them the
21 option of pursuing those.

22 COMMISSIONER BAEZ: Thank you. Mr. Twomey and Mr.
23 McWhirter.

24 MR. TWOMEY: Yes, sir, Mr. Chairman. I just wanted
25 to note --

1 COMMISSIONER BAEZ: Thank you.

2 MR. TWOMEY: Well, I view -- you are the Chairman
3 here. The 136A, the new issue on Page 5 of FPL's thing, I just
4 wanted to observe a problem with what I see this issue having
5 with the traditional relationship between the taking of -- the
6 establishment of issues. The discovery process and the taking
7 of final positions at the prehearing conference. This whole
8 business here, this 136A runs amuck with that, because as I
9 understand what they are asking here, not that you would accept
10 it, but what they are asking here is that the parties basically
11 take their positions in the statement of an issue and that they
12 make that position known at the latest at the filing of their
13 testimony, which would precede the conclusion of discovery
14 wherein many parties find final issues or positions on issues,
15 broader issues, and then the final prehearing conference where
16 you would require us to take our positions on the issues as
17 opposed to coming up with issues at the last minute. So, I
18 find that portion of that issue to be objectionable.

19 COMMISSIONER BAEZ: Mr. McWhirter.

20 MR. McWHIRTER: Mr. Chairman, the last time Florida
21 Power and Light had a full blown rate case, most of the people
22 in this room were still in knee pants.

23 COMMISSIONER BAEZ: I know I was.

24 MR. McWHIRTER: I recall at that time we spent about
25 two days arguing about the need for a waterfall in the

1 principal offices, and that amounted to something like \$50,000,
2 and the rest of the issues that were of significant importance
3 were kind of passed over and handled in a very summary fashion.
4 So I think one of the purposes that faces you is to establish
5 the real key issues in this case. And what Florida Power and
6 Light has apparently attempted to do, I think, is very
7 meaningful. They said let's ferret out what the real issues
8 are. The way they have gone about it, however, gives me a
9 little bit of concern.

10 In category one, they have come up with areas which,
11 as I perceive it, they are going to present company on and
12 defend. In category two, they are not going to present any
13 further testimony on, they are going to say that the MFRs speak
14 for themselves. And while that may have an apparent beauty to
15 it in that we are narrowing the issues and that is what you are
16 supposed to do in a prehearing conference, the issues involved
17 in those other categories are quite significant.

18 Category two is a big one where they are going to
19 rely on the MFRs to support a rate base of \$9.9 billion and
20 operating revenues of \$3.6 billion. So those are big amounts
21 of money. And as they point out, the rate base and the
22 revenues are fallout issues from previous determinations. And
23 we would go over to category three, which are stipulated
24 issues, and it's a little bit hard to get a handle on exactly
25 the amount of money that is involved there.

1 Category four, these are issues that should be
2 deleted because their current wording does not define specific
3 legitimate concerns. The amount of money there is 1.6 billion
4 of the 3.6 billion. So as I perceive it in Florida Power and
5 Light's idea, maybe those issues would go away. A lot of big
6 issues would be incorporated in the MFRs without the need to
7 present testimony, and all we are going to really talk about in
8 Florida Power and Light's testimony are the things that are in
9 Issue Number 1.

10 Now, if you distinguish that to staff's preliminary
11 list of issues, staff is saying these are the things we want
12 you to talk about in your testimony. And those things --
13 although there are a lot of issues, 140 issues -- they are
14 things that Florida Power and Light needs to do a little bit
15 more than just to file their MFRs. They need to say not only
16 do we need \$137 million for some item, to explain why it is
17 they need \$137 million for that item. And staff has asked them
18 to do that at the outset.

19 I don't think that that is an undue burden on Florida
20 Power and Light to come forward with the evidence. After they
21 come forward and deal with the issues that staff has outlined,
22 then other parties can come in and say these are the issues
23 about which we have question. And they can present testimony
24 on those issues. And from those you can boil it down to the
25 issues of principal concern so that we can spend the hearing

1 time on the big issues of importance to all parties rather than
2 the minutia of detail.

3 Florida Power and Light has done a good job in trying
4 to get rid of minutia, but I think they are a little premature
5 in that effort. And if you enter an order that adopts the
6 philosophy that has come up and the thing that we got this
7 morning for the first time, I think you might be going a little
8 bit too fast, because some things may be swept under the rug
9 that need to have a little further scrutiny.

10 So I would respectfully suggest to you that in
11 today's hearing you should adopt the staff's preliminary
12 issues, we should use that to look at to see if there are any
13 issues in there that need further refinement or elaboration,
14 and then when Florida Power and Light files its testimony it
15 should address each one of these issues, if nothing more than
16 to say the MFRs have said that, those are the monies we are
17 spending, and we think that is appropriate. That way they will
18 have come forward with the evidence. And if someone disputes
19 it, then we can dispute it in our testimony.

20 COMMISSIONER BAEZ: Mr. McWhirter, do you accept the
21 notion that even staff's list of issues has at least some level
22 of acknowledgment -- and I keep coming back to this word
23 categorization, I don't want it to take on some meaning other
24 than, you know, there is some recognition that there are
25 boilerplate issues which at this point the staff has recognized

1 don't require any further attention. I mean, is that --

2 MR. McWHIRTER: Of necessity there is so much money
3 involved and so little time to deal with it that we have got to
4 refine what it is we really want to look at. Obviously, the
5 return on equity is most significant. There are major expense
6 items that need to be focused upon. And once the revenue is
7 developed, you need, of course, to focus on rate design issues.
8 But I think you can't abandon things up front. I think staff
9 has done a good job in coming up with the issue list.

10 COMMISSIONER BAEZ: But the concept of, again,
11 categorizing or at least identifying issues that are of more
12 concern than others for the purposes, if nothing else, than to
13 focus efforts on everyone's part, that is not an objectionable
14 concept to you.

15 MR. McWHIRTER: That is exactly what you want to do.
16 But you don't want to focus until everybody has been heard
17 from. You don't want to establish -- of course, the ultimate
18 burden of proof relies on Florida Power and Light. I don't see
19 why there is any dispute about that at all. They have got to
20 defend what it is they are doing to you and to the public. And
21 the idea that some intervenor would have a responsibility to
22 disprove something that he doesn't even have the facts on and
23 can't get them is appalling to me.

24 COMMISSIONER BAEZ: Mr. McWhirter, I'm going to let
25 you get away with that one. If possible, I will recognize that

1 you don't agree with that situation and we can try and avoid
2 having oral argument today. That one was free.

3 MR. LITCHFIELD: Fair enough. I do have a couple of
4 comments that are addressed to something other than the burden
5 of proof question.

6 COMMISSIONER BAEZ: Very well.

7 MR. LITCHFIELD: I think there may be -- I mean,
8 again, our whole approach, though, is predicated on the notion
9 that we haven't asked for a change in rates here. And so we
10 are really struggling to provide the Commission with the level
11 of information sufficient for them to complete their review in
12 a meaningful way and in a timely fashion, and we think this
13 approach accomplishes that without convoluting the issues and
14 complicating questions of burden of proof at this point. But
15 with respect to some of Mr. McWhirter's comments, I think he
16 may be under the misapprehension that we only plan to file
17 testimony with respect to issues in category one.

18 COMMISSIONER BAEZ: That you have identified.

19 MR. LITCHFIELD: And what we have said is that we
20 would file -- and I understand the way the category language is
21 actually drafted that it might lead to some confusion, but we
22 are intending to file and have agreed to file previously
23 testimony sponsoring the MFRs and explaining the budgeting
24 process, the forecasts, and basically the procedure by which
25 the MFRs were developed and the integrity of the process, et

1 cetera. So it's not fair to say that we would not provide
2 testimony on anything other than category one issues.

3 The other comment that kind of intrigued me is in
4 reference to one of the issues in Item 4. I think he noted
5 that there is \$137 million at issue, in quotes, in one of those
6 accounts. Well, our concern is we are not really sure how we
7 would go about addressing that in the first instance other than
8 supporting the MFRs and explaining our budgeting process, et
9 cetera. Of the \$137 million, there may be dozens and dozens of
10 individual activities or expenditures and below those dozens
11 and dozens of individual invoices, et cetera. So we are not
12 really sure what it is we would be taking aim at or trying to
13 support or defend, et cetera. \$137 million comprehends a whole
14 lot of activities and a whole lot of expenditures. We need
15 more precision in order to be able to meaningfully address
16 something like that in the first instance on direct testimony.

17 COMMISSIONER BAEZ: Anyone else have a comment?
18 Okay. Here is what we are going to do. The company has
19 provided a list and certainly provided some further step in the
20 concept that I believe staff was trying to further in the first
21 place. I'm not going to rule in terms of adopting wholesale
22 what the company has proposed, although I do realize what the
23 interests are, and I appreciate what the interests are that you
24 are trying to serve. And we will keep those in mind.

25 As for staff, I have two directions generally. One,

1 as to Issue 136A proposed by the company, I want you to take in
2 mind the comments that Mr. Twomey has taken. I'm not averse to
3 having a catch-all issue. I think it will serve some benefit
4 long-run here, however, I want you to try and work it so that
5 the process is preserved if at all possible. And we will make
6 a ruling on whether to accept that issue or not along with the
7 rest.

8 What I'm going to be looking for in terms of issuing
9 an issue list is to try and adhere to the goals of this, which
10 is certainly to give the company some guidance. If not
11 ironclad certainty, guidance. I am weary of fashioning issues
12 that may preclude further scrutiny. That's what I want to
13 avoid. What I don't want to avoid is any opportunity to give
14 the company some kind of certainty as to where they need to
15 focus their efforts, and that goes to the rest of the parties,
16 as well. All the while keeping in mind that there are other
17 parties involved and that they have due process and that they
18 need, you know, that their opportunity to address specific
19 issues or specific concerns with the issues that they may have
20 is going to be preserved at all times. Those are going to be
21 my guiding principles.

22 To the extent that the company and staff on those
23 issues, I think category four issues that we were talking about
24 where the staff has made the effort, quite an effort, actually,
25 to try and identify specific concerns that they had, I would

1 urge you both to get together and try and either solve it by
2 some further discussions so that you can walk away with the
3 information or the focus that you need; or if, alternatively,
4 the issues can be fashioned in a way that doesn't foreclose
5 staff's ability to have subsequent concerns with the same
6 issue, but at the same time gives the company at least what the
7 initial reason for making it an issue of concern was. I urge
8 you all to do that. One or the other, it's all the same to me.

9 You know, we can take care of it in writing,
10 preserving everybody's opportunities, or if the company feels
11 comfortable walking away from a meeting that they know what the
12 specific issues at this time are, if that's all right with the
13 company --

14 MR. LITCHFIELD: I apologize, Commissioner, I hate to
15 have you repeat yourself, but I was conferring and I know that
16 last item was particularly important for us.

17 COMMISSIONER BAEZ: In terms of category four issues,
18 specifically the issues that the staff had provided, I don't
19 know what the exact number is, there are about a dozen or so,
20 there may be more. The company has raised a concern that they
21 are not specific enough. To the extent that you can gain that
22 specificity, or a specific focus through further conversations,
23 further discussions with staff, and I would mention on an
24 expedited basis, I'm assuming, that could be one way to resolve
25 it.

1 To the extent that the staff can find a way to steer
2 clear of their concerns of being foreclosed as to further
3 concerns with the same issues by rewording it in such a way
4 that they don't run up against that limitation, that also, too,
5 would be an acceptable solution.

6 In my opinion, I think -- I would hope that you can
7 resolve it either way, that an informal discussion would
8 suffice. If not, I leave that to you all to resolve, but I
9 would look for some resolution on that basis. And I also said
10 136, I don't know if you were going to take care of your
11 proposed issue or if you were going to try to find something
12 that comports with what I think Mr. Twomey made some valid
13 points that, you know, we need to preserve the you first
14 process is as much as possible.

15 Although the concept that you have proposed as to a
16 catch-all issue in order to safeguard whatever might fall
17 through the cracks is acceptable, I think we need to keep other
18 due process interests in mind. And to the extent that we can
19 fashion language that comports with that, we will do it that
20 way.

21 I'm trying to remember, I have some other -- in terms
22 of the format, and I'm not -- I'm going to reserve ruling as to
23 whether there is an actual official categorization or not. My
24 reason for doing that is because I think it may cause more
25 problems than it solves. I think it may be possible to solve

1 and address your issues of specificity and certainty and how
2 you guide yourselves in terms of providing -- on which issues
3 to provide further direct testimony or not. I think we can
4 achieve -- we may be able to achieve that clarity in other
5 ways, so I'm not entirely sold on the format, or certainly the
6 determinations or categories that you are suggesting. I'm not
7 entirely against it, either. I think in principle they make
8 sense.

9 So it may be that we have some level of
10 acknowledgment to get away from that category concept, but some
11 level of acknowledgment as to certain issues that at this point
12 staff can state a comfort level with what has already been
13 provided. That may be sufficient to give the company some
14 guidance as to issues that they can feel more comfortable or
15 not addressing. I am also wary of removing all of the risk. I
16 don't think that that is entirely reasonable given our process.

17 Mr. Elias, you were going to offer something up?

18 MR. ELIAS: I was going to say a couple of things
19 that I think can maybe bring some closure to some of what has
20 been said here and focus us on the procedure that is in place
21 that I believe addresses a lot of the concerns that the company
22 has expressed here. And I need to make one other point. You
23 know, there was a suggestion earlier that what the Commission
24 had initiated in June was a show cause. And I would steer
25 clear of that categorization less I saw it in an appellate

1 argument a year from now that somehow we had issued a show
2 cause with the attendant burden of proof and the requirement of
3 specificity.

4 COMMISSIONER BAEZ: Yes, let's be clear, this is not
5 a show cause.

6 MR. ELIAS: This is not a show cause proceeding.

7 COMMISSIONER BAEZ: I think Mr. Cloud's analogy was
8 for a very certain --

9 MR. ELIAS: It's for a very limited purpose.

10 COMMISSIONER BAEZ: Yes.

11 MR. ELIAS: The second thing is there has been no
12 mention of the fact, or very little mention of the fact that
13 the utility under the current schedule and what has been agreed
14 to by Public Counsel and the utility is going to have an
15 opportunity to file rebuttal testimony addressing any issues
16 that may be raised by the intervenors that aren't specifically
17 covered, or any evidence addressed by the intervenors that are
18 not specifically covered in the utility's direct testimony.
19 Thus, the notion of surprise or not having a full and fair
20 opportunity to respond is, I believe, substantially mitigated
21 by that opportunity.

22 The other thing is that whoever has got the burden of
23 proof in this proceeding, it is a simple preponderance, 50.01
24 percent to 49.99. And anybody that chooses not to -- or to
25 rely on the burden of proof as a basis for not putting evidence

1 that they believe is relevant to a particular point on a
2 particular issue does so at the peril that the fact finder is
3 going to afford slightly different weight to it and tip the
4 scales one way or the other.

5 The third thing that I want to call attention to is
6 the fact that there is a 16-year-old case out there involving
7 South Florida Natural Gas where there was a utility put forth
8 an affirmative case demonstrating an entitlement to
9 approximately a half a million dollar rate increase. There
10 were no intervenors in the case. And after the Commission
11 rendered its decision it determined that the utility was
12 entitled to a \$50,000 per year rate decrease. Just because
13 something is in the MFRs does not mean that the Commission is
14 bound to accept that as fact. And I think in terms of
15 marshalling the proof and deciding what issues and how people
16 respond to the issues, people would do well to keep that in
17 mind, as well.

18 COMMISSIONER BAEZ: Well, and I guess, Mr.
19 Litchfield, that is the kind of risk that I'm talking about.
20 That is not something that -- that is the type of risk or the
21 level of risk that I am loathe to remove with any type of
22 categorization. And I understand that you have said time and
23 time again that that is not your intention and I guess then we
24 are in agreement.

25 MR. LITCHFIELD: It is not our intention that you

1 remove -- if I understand what you are saying correctly, it is
2 not our intention that you remove that risk. What we are
3 concerned about is the risk of somebody sandbagging and not
4 addressing anything in direct, in its opportunity for direct,
5 and then at the end of the day complaining that the company
6 should have addressed it on its direct testimony and didn't
7 and, therefore, failed to carry its burden of proof.

8 We are very comfortable, as Mr. Elias points out,
9 that if issues are raised by people in their direct case, we
10 will have an opportunity and full notice to respond in our
11 rebuttal. That's fine. We are concerned about the issues and
12 concerns that aren't raised by intervenors in their direct and
13 are just let slide, and that's why we are very concerned about
14 the expectations in terms of what we would submit in our
15 direct. And for that reason, I think -- I'm not sure which way
16 you want to go in terms of how you would dispose of our request
17 here. And I think we do need a level of comfort that would be
18 provided by a written decision that would give us guidance and
19 an opportunity to know exactly what we had to file in our
20 direct. And we would hope to be able to work with staff and
21 others over the next 48 hours to accomplish that and come back
22 to you hopefully with a proposal that meets everyone's needs.

23 I would ask, though, and this is a housecleaning item
24 that I had meant to raise earlier. Mr. Cloud had suggested
25 that we have failed to carry over two of its issues from

1 staff's compilation into ours. If that is so, that was an
2 oversight and we would just like to have those two pointed out
3 to us so that we could add them to our list.

4 COMMISSIONER BAEZ: Mr. Cloud, if that is acceptable
5 to you?

6 MR. CLOUD: Well, it is acceptable for me to try and
7 find them in here. We are against the categories, just plain
8 out against them.

9 COMMISSIONER BAEZ: Your position has been set out.
10 Thank you.

11 MR. CLOUD: I don't want there to be any confusion.

12 COMMISSIONER BAEZ: Mr. Keating, is there anything
13 else?

14 MR. KEATING: I don't know if it would -- I've got a
15 couple of other things written here, and I don't know if we
16 should do these when we perhaps meet with the parties again
17 after this Issue ID Conference.

18 COMMISSIONER BAEZ: Can we just have them for the
19 record?

20 MR. KEATING: There was some specifics, and we can --
21 Issue 87 on staff's list that is on Page 8 is one that I think
22 we are going to try to reword, and that was one we had
23 substantially reworded to be more specific, but it may need a
24 little more work, and we can do that in the next few days as we
25 hammer out the rest of the issues.

1 Flipping over to Page 12 of the staff document, which
2 is down at the bottom you see the FPL issues that staff
3 believed were not included in its issues. Issue 136, I think
4 to make that issue read a little more neutrally we would just
5 remove the word exceptional. That would be our proposal. One
6 other thing that --

7 COMMISSIONER BAEZ: I've got to tell you this is a
8 pretty loaded question. When you say, I mean, it is --

9 MR. LITCHFIELD: We can agree to removing the word
10 exceptional although we absolutely believe our performance has
11 been exceptional.

12 COMMISSIONER BAEZ: You are entitled to your opinion,
13 and let's leave it at that.

14 MR. KEATING: One thing that I don't know -- I don't
15 remember hearing it brought up is the issue list that we would
16 envision ultimately getting your approval out of this
17 conference today, what we envisioned is that that doesn't end
18 the parties' ability to identify issues. And what I mean by
19 that is additional issues could be raised through FPL's direct
20 testimony, or parties' direct testimony, or staff's, and this
21 should not be the end all be all.

22 COMMISSIONER BAEZ: And I think that should be
23 understood by all involved, if it hasn't been mentioned
24 already, and I believe it had. I think there is an
25 acknowledgment on the part of the company and the rest of the

1 parties that that is the way things will be, as always.

2 MR. LITCHFIELD: Speaking of value laden issues,
3 there was one that Publix had raised that we thought we wanted
4 to reword, so we might as well address that.

5 COMMISSIONER BAEZ: Can you point that out for us,
6 please.

7 MR. LITCHFIELD: What number is it, John?

8 MR. CLOUD: You were talking about, I think, our
9 Publix Issue 163, which is Issue 154. Would that be right?

10 MR. LITCHFIELD: 154, correct.

11 MR. CLOUD: And your suggestion was to, what,
12 delete --

13 MR. LITCHFIELD: Delete the words "to allow for fair
14 treatment," and replace the word "of" with "for." So that it
15 would read, "Should FPL's billing measurements be modified to
16 include optional totalized billing for customers with multiple
17 facilities?"

18 MR. CLOUD: Yes, I don't have a problem with that.

19 COMMISSIONER BAEZ: Show that change accepted.

20 Mr. Keating, does that do it for you?

21 MR. KEATING: I think that is about it. The only
22 other comments I was going to make, and I know you have said
23 you were going to withhold ruling on some of these areas, but
24 staff would like to use the organization that it has put
25 together for the issues. And as the issues fall into rate

1 base, NOI, rate design type issues, we think that provides for
2 a logical flow, and we would like to -- whatever issues we
3 ultimately come up with, we would like to combine all the
4 parties' issues and merge their issues into the appropriate
5 categories in staff's list. And I think I would be hesitant to
6 include a separate category for potentially stipulated issues
7 at this point because that is all they are, potentially
8 stipulated issues, although it looks like nobody has --

9 COMMISSIONER BAEZ: I'm sorry, can you say that
10 again?

11 MR. KEATING: Yes. I was going to add that I would
12 be hesitant to add a separate category for potentially
13 stipulated issues at this point.

14 COMMISSIONER BAEZ: I think that would be prejudicing
15 all the other issues, as well.

16 MR. LITCHFIELD: At least as an interim category. I
17 mean, I don't feel strongly about it, but I don't think it --
18 as an interim measure, I don't think it prejudices anybody. I
19 think it facilitates discussion.

20 COMMISSIONER BAEZ: I think it is possible, I think
21 it may be possible in an order to identify offhand some issues
22 that might be more capable of being stipulated than others at
23 this point in time with no prejudice to the others. I mean,
24 again, I'm trying to steer clear of any hard and fast
25 categorization. I don't think -- as I said before, we are

1 going to try and keep in mind the goals that you have proposed
2 and try and work with that as a concept.

3 MR. LITCHFIELD: Well, what we would envision is a
4 preliminary order that provides the categorization that we have
5 requested with the adjustments that we hope to work out with
6 staff that would inform our preparations for direct testimony.
7 Beyond that I'm not sure that we really care if the categories
8 remain in place.

9 COMMISSIONER BAEZ: And I think that is the key. If
10 the purpose is to inform or give a better sense of focus to the
11 company's efforts, then that is what we have to keep in mind
12 and try and serve those interests. Interests that I am in
13 agreement with. However, I think the notion of categorization
14 raises the downside to that. It raises concerns that going
15 forward may preclude -- you know, it raises due process
16 concerns that I'm not sure --

17 MR. LITCHFIELD: Well, going forward I think the
18 categories could be eliminated and the issues just organized
19 the way Mr. Keating has suggested.

20 COMMISSIONER BAEZ: We are probably talking past each
21 other. I think we can say, hey, these looks like this and
22 others look like that without actually giving them any --

23 MR. KEATING: It may be a matter of what gets put
24 under a category in an order versus what we have an
25 understanding or what the parties have discussed.

1 COMMISSIONER BAEZ: Exactly. I mean, I want to try
2 and achieve certainty, and guidance, and focus without saying
3 Issues 1, 2, and 3, are these kinds of issues and others. I
4 mean, I think there is a softer way of doing it even if it is
5 acknowledged to some extent in an order. What I don't want to
6 do is draw any hard and fast lines or what may be perceived
7 later on to be hard and fast lines. That's what I want to
8 avoid. I don't want to avoid the interests that we are trying
9 to serve in this, or the kind of efficiencies and whatnot that
10 we are trying to identify.

11 Let's keep the opportunities alive. Let's give you
12 some focus. Let's try not to get any of the downsides in terms
13 of the rest of the parties, whether they are going to feel like
14 they are foreclosed from raising issues, whether you are being
15 given an opportunity to argue something that you otherwise
16 wouldn't. You know, take comfort in in a legal sense. Whether
17 you have an understanding that that is something that you
18 probably don't need to -- that an issue is something that you
19 probably don't need to worry about any further than you already
20 have, then we are going to try and provide you with an
21 opportunity to marshal your forces in a certain direction or
22 not. That's what we want to try and achieve with this. But
23 certainly not close any doors that would otherwise be open.

24 MR. LITCHFIELD: I have been asked, Commissioner
25 Baez, to raise Issue 7 while we are all here. Issue 7 on

1 staff's list, should FPL be required to provide a refund to
2 retail customers incurring frequent outages. Our view is
3 that -- our understanding is that this is a question or an
4 issue that is being considered by a working group. It is not
5 even at the rulemaking stage. If something like this were
6 adopted, it would be something that we think would be
7 universally applied to the IOUs and not just unique to FPL. So
8 we think -- and, furthermore, the policy questions pertaining
9 to this issue are still being assessed and considered and
10 developed by the collaborative working group. So we think it
11 is premature to include that issue in this rate case for those
12 reasons. So we would ask that that issue be eliminated.

13 COMMISSIONER BAEZ: Let me ask you this. Does the
14 Commission have the authority to consider that outside of a
15 rule? I mean, is it something that they can -- is it a
16 requirement that they can impose because of their authority as
17 it stands now?

18 MR. LITCHFIELD: We are not sure that it does under
19 the APA. It may require a rule.

20 COMMISSIONER BAEZ: Mr. Elias.

21 MR. ELIAS: And I think if it is specific to FPL
22 clearly it is contemplated by the APA and by our specific
23 statutes that require us in setting rates to consider the
24 quality of service provided by the utility.

25 COMMISSIONER BAEZ: Okay. I'm not inclined to remove

1 the issue at this point. I would, however, like to keep an eye
2 on how that issue is moving along in a generic process.
3 Because at some point in the future it may be appropriate that
4 it gets folded into another proceeding and taken out of this
5 one for the benefit of all utilities. So your exception is
6 noted. For now the issue stays because it is something that is
7 within the Commission's authority to order specifically. But
8 subject to whatever progress is going on, I think we can
9 reevaluate whether the issue needs to stay or not at a later
10 date.

11 MR. KEATING: And it was my understanding that
12 perhaps -- and I will have to check on this, that that was
13 something that was -- that may no longer be pursued in the
14 working group's discussions. That is just my understanding,
15 and I understand that we have raised similar issues in the
16 other rate cases that are currently pending for Power Corp and
17 Gulf.

18 COMMISSIONER BAEZ: Very well. I think we are coming
19 to a close.

20 MR. BUTLER: There is one other thing that I would
21 like to raise to see whether it is --

22 COMMISSIONER BAEZ: Mr. Butler.

23 MR. BUTLER: -- appropriate for resolution,
24 Commissioner Baez. Public Counsel timely moved to reconsider
25 your order establishing procedure concerning the schedule. We

1 worked out an agreement with Public Counsel that between the
2 two of us addressed their needs and our concerns, filed an
3 agreed motion with you on December 11 for revising some of the
4 dates for testimony and other steps in the process. The first
5 of those dates would be an acceleration of the deadline for our
6 filing ROE testimony from the 28th to the 18th of January, so
7 it is only about 11 days from now. And I raise this for the
8 possibility that maybe it would be considered and resolved at
9 this time.

10 MR. ELIAS: Commissioner, may I speak to that? One
11 of the things that that agreed motion required was switching
12 the date for the prehearing conference. And we just got
13 confirmation late last week from the Chairman's office that we
14 were going to be able to do that. And but for the fact that I
15 have spent the morning on this, the order would be on the
16 Commissioner's desk right now so --

17 COMMISSIONER BAEZ: Mr. Butler has an answer, right?

18 MR. ELIAS: I would expect that if what we have
19 decided is appropriate and agreed to by the prehearing officer,
20 that the order will be issued tomorrow at the latest.

21 COMMISSIONER BAEZ: Sit tight.

22 MR. BUTLER: Okay.

23 MR. SUNDBACK: Commissioner, the South Florida
24 Hospital and Health Care Association wants to point out that we
25 filed two pleadings in which we requested that the response

1 time for discovery in the proceeding be reduced to 20 days.
2 And we just want to note in the context of this proceeding that
3 given the schedule that we see, if FPL's rebuttal testimony
4 which clearly is contemplated as being rather extensive given
5 all the discussion that we have just had is scheduled for March
6 11th, and the hearing starts April 11th, there will be
7 effectively no significant real discovery to be had on FPL's
8 rebuttal case, which will be the bulk of the case.

9 Additionally, we wanted to bring to your attention
10 the fact that we have been negotiating now for almost two
11 months with FPL to try to reach agreement on access to some
12 confidential information. Now, I'm not saying that it is
13 necessarily FPL's fault that we haven't reached agreement on
14 this, because it is a thorny issue and we understand they want
15 to maintain some information which they feel is competitively
16 sensitive. And we are not challenging that determination or
17 that assertion at this point. But that does go to the need for
18 some relief on the turnaround time for discovery.

19 We have lost two months basically trying to
20 accommodate FPL's concerns about confidential information. And
21 that, in turn, compresses the remaining follow-up discovery
22 opportunities that are available. So we don't want any order
23 to go off without consideration of the request for more
24 expedited discovery, given the rather expedited procedures that
25 we are apparently going to have at the tail end of this

1 proceeding or the bulk of FPL's justifications will, for the
2 first time, be fully in the public record.

3 MR. ELIAS: Commissioner, if I can respond.

4 COMMISSIONER BAEZ: Mr. Elias.

5 MR. ELIAS: The requests that were made in your
6 answer to the agreed motion are part of the subject of the
7 order that I spoke of earlier.

8 MR. SUNDBACK: Thank you for that clarification.

9 COMMISSIONER BAEZ: I think we are going to take care
10 of as many people as possible unless there are others
11 outlying --

12 MR. BUTLER: Commissioner Baez, I won't take your
13 time to elaborate, but I think you can expect that we don't
14 agree with Mr. Sundback's characterization of the timeliness or
15 the promptness of our responses.

16 COMMISSIONER BAEZ: Taken. Noted. Anyone else?

17 Public Counsel has been uncharacteristically quiet,
18 and don't think I don't appreciate it. I did not mean it in a
19 personal way. I think there has been enough said all over.
20 All right.

21 If there is nothing else, we are going to adjourn.
22 Before I do that, staff, Mr. Litchfield threw out 48 hours, and
23 I think that that is the kind of timing that we are looking at.
24 I would look to, and this is not a hard date, but I would hope
25 that we can have an order issued by the end of this week. But

1 please get together on an expedited basis on the things that
2 you all need to discuss so that we can have some productive
3 time to write the order.

4 MR. KEATING: I was just going to suggest that
5 perhaps while we are all here we schedule something, and this
6 can be after you have left or if you want to listen in to it,
7 that we could set something up tomorrow. Well, we are
8 reconvening an informal meeting we began this morning at 1:00.
9 I know there are some matters going on in the Florida Power
10 Corporation rate case this afternoon.

11 COMMISSIONER BAEZ: I was going to mention, I have a
12 date with Florida Power Corp a little later on. So, I'm sorry,
13 I won't be able to sit in on anything, although your invitation
14 is appreciated.

15 MR. KEATING: With the agenda and the internal
16 affairs tomorrow maybe we need to set something up for
17 Wednesday morning and that would give us time to go back and
18 see what --

19 COMMISSIONER BAEZ: I think given all the events that
20 we have scheduled that are somehow required reading around
21 here, I think you will have ample opportunity to round up
22 everybody involved and kind of get some meaningful discussion
23 going on. And I urge you to do the best you can with that.

24 If there is nothing else, thank you all for coming.
25 We are adjourned.

(The hearing concluded at 11:45 a.m.)

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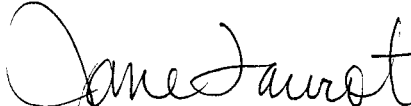
1 STATE OF FLORIDA)
2 : CERTIFICATE OF REPORTER
3 COUNTY OF LEON)

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.

9 IT IS FURTHER CERTIFIED that I stenographically
10 reported the said proceedings; that the same has been
11 transcribed under my direct supervision; and that this
12 transcript constitutes a true transcription of my notes of said
13 proceedings.

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

19 DATED THIS 9th day of January, 2001.

20
21 
22 _____
23 JANE FAUROT, RPR
24 Chief, Office of Hearing Reporter Services
25 FPSC Division of Commission Clerk and
 Administrative Services
 (850) 413-6732