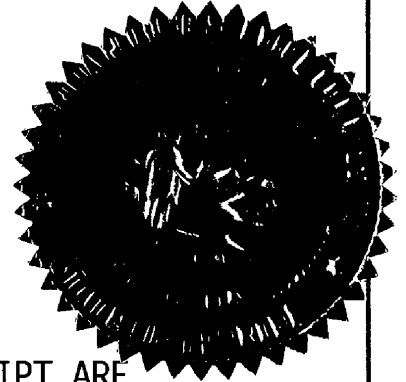


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO.: UNDOCKETED

In the Matter of

POTENTIAL REVISIONS TO RULE
25-22.082, FLORIDA ADMINISTRATIVE
CODE, SELECTION OF GENERATING
CAPACITY.



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PROCEEDINGS: WORKSHOP

BEFORE: CHAIRMAN LILA A. JABER
 COMMISSIONER J. TERRY DEASON
 COMMISSIONER BRAULIO L. BAEZ
 COMMISSIONER MICHAEL A. PALECKI
 COMMISSIONER RUDOLPH "RUDY" BRADLEY

DATE: Thursday, February 7, 2002

TIME: Commenced at 8:40 a.m.
 Concluded at 11:48 a.m.

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

REPORTED BY: LINDA BOLES, RPR
 JANE FAUROT, RPR
 Official FPSC Reporters
 (850) 413-6734

DOCUMENT NUMBER-DATE

FLORIDA PUBLIC SERVICE COMMISSION 01803 FEB 15 8

FPSC-COMMISSION CLERK

1 IN ATTENDANCE:

2 RUSSELL BADDERS, Beggs & Lane, 3 West Garden Street,
3 Suite 700, Pensacola, Florida 32576, appearing on behalf of
4 Gulf Power Company.

5 DONNA E. BLANTON, Katz, Kutter, Haigler, Alderman,
6 Bryant & Yon, P.A., 106 East College Avenue, 12th Floor,
7 Tallahassee, Florida 32301, appearing on behalf of Florida
8 Power & Light.

9 GARY L. SASSO, Carlton Fields, One Progress Plaza,
10 Suite 2300, 200 Central Avenue, St. Petersburg, Florida
11 33701-4352, appearing on behalf of Florida Power Corporation.

12 JAMES D. BEASLEY and LEE L. WILLIS, Ausley & McMullen,
13 227 South Calhoun Street, Tallahassee, Florida 32301,
14 appearing on behalf of Tampa Electric Company.

15 BILLY BRISCOE, Florida Partnership for Affordable
16 Competitive Energy, 106 South Monroe, Tallahassee, Florida
17 32301, appearing on behalf of Florida PACE.

18 JOSEPH A. McGLOTHLIN, McWhirter, Reeves, McGlothlin,
19 Davidson, Dekker, Kaufman, Arnold & Steen, 117 South Gadsden
20 Street, Tallahassee, Florida 32301, appearing on behalf of
21 Florida PACE.

22 ROBERT SCHEFFEL WRIGHT, Landers & Parsons, P.A., 310
23 West College Avenue, Tallahassee, Florida 32302; appearing on
24 behalf of Calpine Eastern Corporation.

25

1 RICHARD A. ZAMBO, Richard A. Zambo, P.A., 598 S.W.
2 Hidden River Avenue, Palm City, Florida 34990, appearing on
3 behalf of City of Tampa, Solid Waste Authority of Palm Beach
4 County and Florida Industrial Cogeneration Association.

5 JON MOYLE, Moyle, Flanigan, Katz, Raymond & Sheehan,
6 P.A., 118 North Gadsden Street, Tallahassee, Florida 32301,
7 appearing on behalf of Competitive Power Ventures and PG&E
8 National Energy Group.

9 ROBERT V. ELIAS, Florida Public Service Commission,
10 Division of Legal Services, 2540 Shumard Oak Boulevard,
11 Tallahassee, Florida 32399-0870, appearing on behalf of the
12 Commission Staff.

13

14 ALSO APPEARING:

15 TOM BALLINGER, FPSC Staff.

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P R O C E E D I N G S

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CHAIRMAN JABER: Good morning. Mr. Elias, do you have a notice to read?

MR. ELIAS: Notice issued by the Clerk of the Florida Public Service Commission advises that a workshop will be held at this time and place in the following undocketed matter, Potential Revisions to Rule 25-22.082, Florida Administrative Code, Selection of Generating Capacity. The purpose of this workshop is to discuss potential revisions to the rule, selection of generation of capacity with all interested persons.

CHAIRMAN JABER: Thank you, Mr. Elias. I think we should go ahead and take appearances, and then I have a couple of comments to make.

MR. BADDERS: Good morning. My name is Russell Badders. I'm here on behalf of Gulf Power Company.

MS. BLANTON: Good morning. My name is Donna Blanton. I'm here on behalf of Florida Power & Light.

MR. SASSO: Good morning. My name is Gary Sasso, and I'm here for Florida Power Corporation.

MR. BEASLEY: Good morning. James D. Beasley and Lee L. Willis on behalf of Tampa Electric Company.

MR. BRISCOE: Good morning. My name is Billy Briscoe on behalf of Florida PACE.

CHAIRMAN JABER: On behalf of?

1 MR. BRISCOE: Florida PACE.

2 CHAIRMAN JABER: And, Mr. Briscoe?

3 MR. BRISCOE: Yes. Billy Briscoe.

4 CHAIRMAN JABER: Spell your last name for me.

5 MR. BRISCOE: B-R-I-S-C-O-E.

6 CHAIRMAN JABER: Thank you.

7 COMMISSIONER BRADLEY: Madam Chair?

8 CHAIRMAN JABER: Yes.

9 COMMISSIONER BRADLEY: Before we move on, I'd like
10 for this gentleman here to reintroduce himself. I didn't quite
11 hear what you said, your name and who you represent.

12 CHAIRMAN JABER: Mr. Beasley, go ahead.

13 MR. BEASLEY: Yes. James D. Beasley appearing with
14 Lee L. Willis on behalf of Tampa Electric Company.

15 COMMISSIONER BRADLEY: Okay. Thank you.

16 MR. MCGLOTHLIN: My name is Joe McGlothlin. I appear
17 today also for Florida PACE, which is the Partnership for
18 Affordable Competitive Energy.

19 MR. WRIGHT: Schef Wright appearing on behalf of
20 Calpine Eastern Corporation.

21 MR. ZAMBO: Richard Zambo appearing on behalf of the
22 City of Tampa, the Solid Waste Authority of Palm Beach County
23 and the Florida Industrial Cogeneration Association.

24 MR. MOYLE: Jon Moyle, Jr., with the Moyle, Flanigan
25 Law Firm appearing on behalf of Competitive Power Ventures. We

1 also represent PG&E National Energy Group.

2 MR. ELIAS: Bob Elias representing the Commission.

3 CHAIRMAN JABER: Competitive Power Ventures.

4 MR. MOYLE: Right. CPV.

5 CHAIRMAN JABER: And PG&E? You guys are getting as
6 bad as the telecommunications industry with your acronyms.

7 Mr. Elias, and you have Tom Ballinger with you?

8 MR. ELIAS: Yes.

9 CHAIRMAN JABER: This little meeting that we've
10 called a workshop has gathered a lot of attention, and that's,
11 that's good. We have, in my humble opinion, mission
12 accomplished. We've brought you all here for a very good
13 dialogue, I hope, a dialogue that will be productive at the end
14 of the day, perhaps not figuratively the end of today, but the
15 end of the completion of this process. That's okay. That's in
16 line with what it is I told you this Commission was going to
17 accomplish. We told you we would have a collaborative process
18 with things and initiatives that this Commission will do going
19 forward.

20 Let me apologize early on if my voice doesn't last
21 too long. It is our goal today to finish our proceeding
22 hopefully by noon. Commissioner Baez and I have a flight to
23 catch and, frankly, I don't know how long my health will hold
24 out. But if, if it doesn't get complete by noon, that doesn't
25 mean we will end the proceeding, we'll go on, and Commissioner

1 Baez and I will leave and read the record later.

2 Just to give you a background of what it is we are
3 trying to accomplish, it's my understanding the bidding rule
4 was created or last revised in 1994. This is a fairly new
5 Commission with the, with the exception of Commissioner Deason.
6 A lot of us are still learning.

7 COMMISSIONER DEASON: I can continue to learn, too,
8 Madam Chairman.

9 CHAIRMAN JABER: That's exactly right. That's
10 exactly right.

11 We are learning. I want a history of what the
12 bidding rule has accomplished. Did it meet the goals that it
13 was supposed to meet? Are there, is there room for
14 Improvement? Is there room to remove barriers, if there are
15 barriers, to allowing more players into the generation market?
16 Are there incentive-based approaches to, to modifying the rule
17 and making a collaborative environment for the electric
18 generation market.

19 I am very, very interested in hearing all of your
20 feedback. This is an open invitation for you to bash the rule,
21 if you'd like, tell me it's not broken. You can tell us that
22 we have exceeded our authority and, Lila, you have lost your
23 mind. You know, this is your invitation to comment on the
24 rule. I hope that you take us up on this opportunity.

25 With that I'm going to turn it to Tom Ballinger, and

1 you walk us through the strawman proposal, which is what we
2 asked you to do, to come up with a strawman proposal for
3 purposes of engaging the companies and the stakeholders into
4 this process.

5 MR. BALLINGER: Thank you, Madam Chairman. I was
6 involved in the original bid rule, so a lot of this, I see a
7 lot of the same faces, but some new ones, too. So it's, it's
8 kind of near and dear to my heart that we've dealt with this.

9 On the sides up here I have attempted to summarize
10 the rule in a side-by-side fashion and I tried in my mind to
11 put out what I thought were significant changes that would
12 cause some controversy and other ones that I feel are
13 insignificant, kind of just minor tweaks to the rule that we've
14 seen.

15 The rule has been in place since 1994 and, quite
16 frankly, we haven't seen it used a lot. Staff believes that
17 it's a good process to go through an RFP type of process to get
18 the best price for the ratepayers. And, again, that's our, our
19 goal when we set about doing the strawman is to set up
20 something with the ratepayers in mind. We're not trying to
21 give merchant plants a bill of rights, we're not trying to take
22 away anything from the IOUs. We're looking at what's the best
23 way we can get the best product for the ratepayers, and we
24 started with that premise in mind in trying to adjust the rule.

25 There's basically three areas that I see that will

1 cause the most controversy. The first one is in the rule where
2 it requires the utilities to issue RFPs for every capacity
3 addition greater than 50 megawatts. There's nothing magical
4 about that number, but the purpose is Staff is looking to try
5 to implement the RFP process more often. Currently the
6 existing rule only applies to generating plants that go through
7 a need determination process which is very limited; therefore,
8 it has not been used very often and there's been significant
9 capacity additions over the last five years and projected for
10 the next five years that do not require an RFP process. So
11 Staff is trying to utilize this process more often, again to
12 get a good deal for the ratepayers.

13 The second point I think is going to cause a lot of
14 controversy is Staff is really just trying to make sure
15 utilities look at all alternatives and don't fundamentally
16 screen out an alternative. And that is why we put in the
17 requirement of allowing merchant plants or IPPs to bid on or
18 put forth a proposal that would be built on a utility site.
19 It's not that we're requiring or a taking of land. We're
20 looking at utilities to explore that option, not just dismiss
21 it outright.

22 The third part of this proposal which will probably
23 go to the jurisdiction and our authority is currently the
24 Commission -- when a utility comes in for a proposal for cost
25 recovery or need determination, the Commission can either give

1 it a thumbs up or thumbs down. If during that proceeding the
2 Commission finds that there is a better alternative for the
3 ratepayers, the only thing they can do is turn down the utility
4 proposal. What that may do is delay needed capacity coming on,
5 it may forego a more cost-effective alternative.

6 So in that instance the Staff has said, well, if, if
7 that's the case, let the Commission then select the most
8 cost-effective alternative at that one proceeding. It would
9 avoid duplicative regulatory proceedings and hopefully be more
10 efficient on getting the unit online.

11 Again, all of these maintain the, the management and
12 the decision making with the utility within the burden to
13 justify it before the Commission after the RFP process is
14 concluded. And that concludes the summary, and I'll, I guess
15 I'll field any questions that come forward.

16 CHAIRMAN JABER: Thank you, Mr. Ballinger. The next
17 thing on my draft agenda was that we would take up questions by
18 Commissioners. Frankly, I think, Commissioners, it would also
19 help us to hear questions by the stakeholders, so how about we
20 start there. Let the stakeholders comment on this, on the
21 strawman proposal and ask their questions. All right? Okay.

22 For the sake of simplicity, let's start from this
23 side and move -- or have you designated people to speak on the
24 proposal?

25 MR. BADDERS: We actually do have a, a spokesman for

1 the IOUs to lead off with some comments.

2 CHAIRMAN JABER: One?

3 MR. BADDERS: Yes. One.

4 CHAIRMAN JABER: Who it is?

5 MR. BADDERS: Mr. Sasso.

6 CHAIRMAN JABER: Mr. -- okay.

7 MR. SASSO: Yes. I have some comments and then also

8 Donna Blanton will be providing some legal analysis that we
9 hope will be helpful.

10 CHAIRMAN JABER: Let me do this. How many people
11 want to speak today? All right. Let's go ahead and start with
12 Mr. Sasso and Ms. Blanton.

13 MR. SASSO: Very well. Good morning, Chairman Jaber
14 and Commissioners. We appreciate the opportunity to comment on
15 the straw proposal and also to provide our views on the
16 existing bid rule.

17 I'd like to start by identifying certain facts and
18 principles that we believe are important to keep in mind as we
19 embark on this discussion.

20 First, the bid rule, the existing bid rule is
21 relatively new in the context of the time line for major
22 capacity additions, and we must consider whether it may be
23 premature to embark upon changing the rule at this time.

24 Second, the purpose of the existing bid rule is not
25 to protect IOUs, it is not to promote IPPs, but to protect

1 customers.

2 Third, the current rule is a good rule both with
3 respect to scope and design and we believe it is working.

4 And, fourth, we must be mindful of statutory and
5 constitutional constraints. These have to inform our
6 consideration and discussion of the existing rule and any
7 changes thereto.

8 Now let me expand on each of these areas. First, the
9 bid rule is relatively new. It was adopted in 1994. And that
10 may seem to be in the distant past, but in the context of the
11 time line for adding significant capacity additions it is not.
12 It was adopted in the wake of a wave of capacity additions
13 under the Siting Act. In fact, that created an impetus for the
14 adoption of the rule. We're now undergoing another wave of IOU
15 capacity additions and the rule is being used.

16 More importantly, the Commission and the stakeholders
17 have gone through quite a bit to get where we are now to have
18 the rule, to have the understanding of the rule. We're
19 beginning to have a good understanding of it. We're still
20 feeling our way along with the current rule. It took a lot of
21 effort to get where we are.

22 Before the rule was adopted there was discussion
23 about the need for an RFP rule. Utilities were using RFP
24 procedures. You may remember the FPL/Cypress case which led to
25 some discussion about the, the advantages perhaps of having a

1 bid rule, a formal RFP procedure in, in projects covered by the
2 Power Plant Siting Act to achieve some closure around the
3 bidding process. And there was a lot of discussion about that
4 and that led to a rulemaking proceeding and there was
5 discussion in the rulemaking proceeding. Then we had two bid
6 waiver requests, two rule waiver requests by Gulf and then by
7 Florida Power Corporation in our own Hines 2 project, which led
8 to further discussion and healthy consideration and debate
9 about the meaning and scope of the rule and so on, and that,
10 that led to a deeper understanding of it.

11 And we've had an occasion actually to see the rule in
12 application in the Gulf case and in the Florida Power/Hines 2
13 case, and this Commission has had the opportunity to, to see
14 the rule used and tested and actual application. And
15 importantly in our view in the case of the Gulf RFP and our own
16 RFP with Hines 2, the Commission unanimously approved the
17 outcome after an opportunity fully to consider the record in
18 those cases. So we're very much still feeling our way through
19 the process. There's been a lot of consideration, a lot of
20 deliberation, a lot of effort expended by the Commission and
21 the stakeholders to use and apply this rule. We're still
22 learning. We are still learning, too. The Commission is
23 learning. It's a good process, but we're really kind of at the
24 inception of it, so we ask whether it's premature to be
25 thinking about significant change at this time.

1 Second point which we think is critical. This rule
2 was not proposed by IOUs to protect their so-called competitive
3 position. It was not proposed by IPPs to promote their
4 so-called competitive position. Its genesis was with the
5 Commission and its purpose is to protect the customer. And we
6 take that very much to heart as IOUs when we're using this rule
7 and implementing it. And we believe that everybody needs to
8 keep that principle firmly in mind as we discuss any change,
9 and we need to be careful about making or suggesting any change
10 that would serve or promote some other purpose, whether it be
11 the so-called competitive interests of IOUs or the so-called
12 competitive interests of IPPs. That is not what this rule is
13 about, as, as Mr. Ballinger mentioned. It's not, it wasn't
14 intended to be a bill of rights for any particular stakeholder
15 other than perhaps the customer.

16 Third point. The current rule is a good rule in
17 scope and design. The purpose of the rule is to ensure as to
18 projects covered by the Power Plant Siting Act that IOUs elicit
19 good, competitive proposals that help us bring home the most
20 value to our customer. And we also develop information that is
21 beneficial to the Commission in the review process.

22 In our experience the rule is doing an excellent job
23 of achieving those objectives. It does a good job of holding
24 our feet to the fire. We, we used this rule in the Hines 2
25 case. We're in the process of another case, Hines 3, we've

1 issued an RFP and we're determining whether or not to go
2 forward with self-build or competitive wholesale proposals.

3 In our experience the rule has done an excellent job
4 of assuring a level playing field for the stakeholders. It has
5 most assuredly promoted a very rational and rigorous evaluation
6 process by the utilities. It's an open, transparent process
7 that requires that we provide information that's useful to the
8 bidders and useful to us in eliciting good, competitive
9 proposals. And very importantly, and this is critical in our
10 view, the existing rule strikes a good balance between the need
11 for flexibility, on the one hand, by the utility in looking at
12 capacity additions and managing a system and managing the
13 process of eliciting and reviewing bids and, on the other hand,
14 regulatory oversight. There's a -- the balance always needs to
15 be kept in mind and struck in the right place, and we believe
16 the current rule strikes the balance in the right place both
17 with respect to the scope of the rule and its design.

18 It is actually a fairly radical rule. We learned
19 from our expert in the Hines 2 case that in other jurisdictions
20 utilities are not expected or required to disclose to bidders
21 the details of their next planned alternative. And if you
22 think about it, in the private sector it's very rare that a
23 company soliciting bids will actually provide proprietary
24 information about their own planning process or options and so
25 on. This rule requires that and that was the subject of

1 extensive discussion when Gulf sought a waiver of the bid rule,
2 and there was good, healthy discussion in the transcript of
3 that proceeding about how this balance should be struck and why
4 that disclosure is a good thing. And it does work, in fact, to
5 provide bidders with good information that they can use as a
6 reference point. Not the be-all and end-all, we don't want to
7 encourage builders to beat that self-build proposal by a couple
8 of pennies, that's not the idea, but it's a good reference
9 point and it's a good process.

10 So in a sense it is, it's a radical innovative rule
11 that was well conceived initially, Mr. Ballinger and others did
12 a good job on it, and we do think it works.

13 We must be careful not to judge the rule by the
14 result that in some instances when it's been applied a
15 self-build option has been selected. In those cases the
16 Commission has had the opportunity to review the full record,
17 including confidential information about the process, about the
18 bids that have been submitted, and the Commission agreed with
19 the utility's choice in those cases. And the Commission soon
20 will have other opportunities to review the results of other
21 RFPs, and it's important that we not prejudge the outcome of
22 those cases just by the result. The Commission will have the
23 opportunity to look at the actual facts.

24 As I've suggested, we're undergoing another wave of
25 capacity additions, and so the rule is being used now with more

1 frequency. It's going to come and go.

2 The last point that I'd like to comment on before
3 turning to some specific concerns about the straw proposal is
4 the general point that we must be mindful of legal constraints,
5 and Ms. Blanton is going to provide more extended discussion on
6 that.

7 Fundamentally we operate in this country and in this
8 state with a system of checks and balances. And this exists
9 for the protection of us all, all of us as citizens and are
10 customers. In a democracy it can be frustrating sometimes not
11 to get things done as quickly as we'd like to get them done,
12 but that's the way our founders intended it. And intrinsic in
13 this system of checks and balances is this concept of limited
14 delegation of legislative authority to regulatory agencies.
15 All agencies are creatures of their enabling legislation. No
16 one individual in the executive branch or the judiciary or the
17 legislative branch can do what he or she wants, no agency can
18 do what it wants. The way the system works is agencies have
19 such authority that is granted to them by the Legislature.

20 And the Florida Legislature has made clear through a
21 series of amendments to the Administrative Procedures Act that
22 the rulemaking authority of administrative agencies in this
23 state is sharply constrained. There was a time when agencies
24 thought and courts agreed that they could promulgate rules that
25 were reasonably related to general authorities they had such as

1 ratemaking or cost review. No matter how reasonably a rule may
2 be related to such general authority, the Legislature has now
3 made clear that is not a sufficient basis to promulgate a rule.
4 There must be a specific grant of authority to the agency for
5 that purpose, and, as I say, Ms. Blanton will elaborate on
6 that.

7 And there is another important constraint that we
8 need to keep in mind legally, and that is, of course,
9 constitutional limitations on the ability of the government to
10 take the property of private companies. So these are all
11 important considerations and important constraints.

12 And now let me turn to our thoughts on the straw
13 proposal. We would like to express several concerns we have
14 about the straw proposal. And we certainly appreciate the
15 spirit in which it was generated to create discussion and
16 there's certainly a number of provocative concepts advanced in
17 the straw proposal.

18 The first issue that we would like to discuss is the
19 one that Mr. Ballinger identified initially, and that is the
20 proposal to extend the reach of the RFP rule to all capacity
21 additions 50 megawatts or more. This is essentially an effort
22 to extend Section 403.519, the need provision.

23 As the Commission is well aware, the Legislature has
24 provided that utilities must come before the Commission to get
25 approval, a determination of need for certain kinds of

1 significant capacity additions, power plants of 75 megawatts or
2 more steam component, and we have to demonstrate that we've
3 selected the most cost-effective alternative, that we couldn't
4 avoid constructing that through conservation measures, and it
5 is in connection with the implementation of that provision that
6 the Commission adopted the current bid rule.

7 This bid rule essentially extends 403.519 without
8 legislative authority. We have two fundamental concerns about
9 this. First, there is an absence of legislative authority.
10 The Legislature made a policy decision about the scope of
11 403.519. It is tied to the reach of the Power Plant Siting Act
12 which has provisions as to its scope which reflect a
13 legislative determination of the reach of this law.

14 Why did the Legislature draw the line there? Well,
15 it drew the line there because the Power Plant Siting Act has
16 an environmental concern and focus and the Legislature
17 understood that certain capacity additions of a certain scale
18 are more likely to have a significant impact on the environment
19 and, therefore, there's a greater need for regulatory oversight
20 and involvement.

21 Now what's the tradeoff? Why didn't the Legislature
22 extend this across the board? There's always a tradeoff when
23 we intrude a regulatory process into a decision-making process.

24 When we extend regulation into the decision making,
25 we create delay, we create risk, we create potential for

1 litigation, we compromise the flexibility of the utility to
2 manage its own business for the benefit of its customers.

3 Our planners advise me that if we have to have a
4 formal regulatory process around every capacity addition of 50
5 megawatts or more, it's going to tie the hands of the planners
6 to exercise appropriate discretion and flexibility to respond
7 to whether developments and other needs and exigencies that
8 require flexibility in managing generation capacity. So we
9 have both a legal concern about the proposed straw feature
10 exceeding the bounds of legislative authority. We also have a
11 practical policy concern that it intrudes the regulatory
12 process into an aspect of decision making in an unhealthy,
13 unproductive way ultimately to the detriment of the customer.

14 Second, we have a concern that the straw proposal
15 would impair the flexibility of utilities to put the best
16 capacity additions for its customers in other respects as well.

17 First, the straw proposal suggests that utilities
18 should not employ any criteria, absent a showing of good cause,
19 in making a decision, a capacity selection, where that
20 criteria, where those criteria are not identified in advance.
21 And there's some ambiguity about how this is drawn up, but it
22 appears to indicate that we need to identify all our criterion
23 in advance and we're not at liberty to change the criteria when
24 the proposals actually come in absent a showing of good cause.
25 Whenever you have a requirement of good cause, you have

1 litigation and you have second guessing and you have risk in
2 the decision-making process.

3 And the fact is -- and in our own experience we found
4 that it's important to be flexible in how we draw up our RFP
5 and in the kinds of bids we solicit. We cannot, we simply
6 cannot identify in advance everything that we're going to want
7 to look at, everything that we're going to want to say about a
8 proposal, we can't identify weights in advance. Different bids
9 have different optionalities, there are different packages,
10 they have different synergies among their provisions, and we
11 simply have to retain flexibility for the benefit of the
12 customer to look at the proposals on their own merit when they
13 come in and say, hey, this is innovative, this is good, this is
14 different. And maybe we didn't anticipate exactly how this
15 bidder would put together a proposal and we need to have
16 flexibility to recognize the value that is given to us by the
17 bidders. And there is danger in requiring too strict a
18 procedure where the utility is bound before it ever sees a
19 proposal by some criteria that it has announced, unless this
20 becomes a very generic kind of practice, in which event I'm not
21 sure what it accomplishes that isn't already accomplished by
22 the existing rule.

23 The proposal also appears to discourage the utility's
24 consideration of imputed debt, again, absent a showing of good
25 cause.

1 Now as we demonstrated to the Commission's
2 satisfaction in the Hines 2 case, it's necessary to consider
3 the impact on cost of capital the, the proposition we call
4 imputed debt in order to compare utility self-build options
5 with power purchase agreements on an apples-to-apples basis.
6 We simply have to do that. The recent developments that we've
7 all been reading about in the paper reflect the importance to
8 the investment community of knowing off balance sheet
9 obligations and the impact on cost of capital and we simply
10 have to take that into account. Just as we can't assume that a
11 power plant is going to be financed with 100 percent debt, we
12 can't assume that the power purchase agreements are not
13 leveraging off of the equity of the utility. We simply have to
14 have a vehicle to take into account the imputed debt
15 ramifications of the power purchase agreement, yet the straw
16 proposal suggests we can't do this absent a showing of good
17 cause. Again, that is an invitation to litigation and it is a
18 disincentive to utilities to do what they need to do and what
19 has been recognized by the Commission as important to do to
20 make an apples-to-apples comparison for the benefit of the
21 customer, to recognize the true cost of these proposals to the
22 customer.

23 Third, the straw proposal suggests, and it's been
24 confirmed by the handout today, that the intent is to require
25 utilities to negotiate with a short list of bidders even if no

1 bidder presents a facially plausible proposal. The handout
2 suggests that in the past some utilities, including ours in the
3 Hines 2 case, reached a conclusion that at some point further
4 negotiations were simply not warranted because the proposals
5 did not meet our requirements. Yet the straw proposal says we
6 shall negotiate with a short list, which seems not to serve the
7 benefit of the customer.

8 Fourth, Mr. Ballinger is correct in anticipating that
9 the straw proposal that suggests that we must make our sites
10 available for use by third parties is controversial. It
11 certainly is. We see this as an unconstitutional taking of the
12 private property of an entity. There's a difference between
13 regulation and confiscation. And even though the utilities are
14 regulated, their investors still purchase the property and
15 there is a limit under the law to what a regulatory agency can
16 do to take the property of private entities and give that
17 property to third parties.

18 Now Mr. Ballinger described this this morning in an
19 interesting way. He said the intent of this was not to take
20 the property of utilities and give it to others, but to suggest
21 that utilities should explore this option. Well, we can assure
22 the Commission that currently with the current rule we explore
23 that option. In fact, in the case of our Hines 2 proposal we
24 offered a site to third parties.

25 Utilities do explore options, all options for the

1 benefit of the customers, but right now it is committed to our
2 discretion and that is appropriately so because we are talking
3 about the property of the utilities. And we suggest that the
4 current rule takes the right approach to this, which is to
5 commit this to the utility's discretion.

6 Fifth, the straw proposal invites bidders to file
7 complaints with the Commission at any stage of the proceeding,
8 which is an invitation to paralysis. When there's an
9 invitation to file a complaint, there's a necessity for a
10 proceeding, perhaps an evidentiary hearing, delay, risk,
11 appeals. Currently whenever, again, as I say, we intrude a
12 regulatory process, sometimes very appropriately so, into a
13 decision-making process, all of those tradeoffs in here which
14 ultimately impact the cost of the project, we have to build in
15 time for all of this to occur. Time is money. It affects the
16 ability to purchase equipment, it affects the optionality of
17 contracts that we have with vendors and with bidders. All of
18 these things have ramifications for the cost of the capacity
19 addition.

20 Sixth, again, very controversially, as Mr. Ballinger
21 anticipated, the straw proposal suggests that the Commission
22 would assume the power to order a utility to enter into a
23 contract with a bidder chosen by the Commission over the
24 utility's objection. This in our view plainly exceeds any
25 existing legislative authority at the state or federal level

1 and it is a very troubling regulatory intrusion into the proper
2 prerogatives of utilities to manage their own business with
3 regulatory oversight but not receivership or management by the
4 regulator.

5 Finally the straw proposal suggests that an IOU can
6 avoid all of the foregoing as long as it enters into a
7 five-year contract with a wholesale provider with a term of
8 five years or less. In practice we suggest this does provide,
9 maybe unintentionally, in practice it does provide an
10 inducement to IOUs to prefer IPP contracts even if they are not
11 in the best interest of the customer because of the implicit
12 cost imposed on other alternatives.

13 We have to go through all the hoops with all the
14 attendant delay, risk and cost if we don't do that. So in
15 practice it does encourage utilities to enter into such
16 contracts even if not ultimately in the customers' best
17 interests.

18 In conclusion and before turning the mike over to
19 Ms. Blanton, we'd like to suggest that the existing rule is a
20 good rule. It was well conceived, it is well designed, we're
21 still feeling our way along with it. The Commission has the
22 benefit of being able to review actual applications of the rule
23 in need cases to see how it is applied, to be alert for any
24 abuses, to be alert for bad decisions and to recognize good
25 decisions. And we suggest that the 1 proposal, however well

1 intended, perhaps for purposes of discussion, if nothing else,
2 would go too far and too fast without proper legislative
3 authority. Thank you.

4 CHAIRMAN JABER: Okay. Ms. Blanton.

5 MS. BLANTON: Thank you and good morning. I'm Donna
6 Blanton representing Florida Power & Light, and I appreciate
7 the opportunity to speak to you this morning. I would like to
8 echo what Gary said. We agree with his comments, but wanted to
9 focus specifically on the issue of the Florida Administrative
10 Procedure Act and the legislative authority for the, the draft
11 rule as it exists, recognizing as we do the concerns of the
12 Commission, we believe, and the issues relating to why the
13 draft rule was developed and we understand those.

14 Particularly, I think as, as Staff mentioned, the
15 areas that generate the most concern that we have specifically
16 looked at concerning legislative authority are Section 6
17 requiring public utilities to allow competitive generators to
18 construct facilities on utility property; Section 14, allowing
19 the Commission to select the winner in the RFP process and the
20 capacity addition of, to 50 megawatts or more, requiring that
21 to go through the RFP process.

22 What we'd like to focus on a little bit today is
23 whether there's adequate legislative authority for these
24 provisions. And we would respectfully suggest that generally
25 these are policy issues that under the new APA need to be

1 debated by the Florida Legislature and there should be adequate
2 statutory authority before the Commission can adopt a rule on
3 these matters.

4 As you may know, and I'm sure many of your Staff
5 members do know, the Florida Administrative Procedure Act has
6 been significantly amended in the last few years. In 1996 and
7 again in 1999 the rulemaking requirement was significantly
8 strengthened with the effort to require agencies to have
9 greater statutory authority before they adopt a rule.

10 The definition in Section 120.52(8) of invalid
11 exercise of delegated legislative authority has been
12 significantly expanded. And recent court cases at the First
13 District Court of Appeal have upheld this strong and tight link
14 between rules and the statutes that they're intended to
15 implement.

16 Originally in 1996 when the Legislature strengthened
17 the rulemaking requirement, the courts looked at the new
18 requirement and said, the First District Court of Appeal said,
19 well, if a rule is within the range of powers statutorily
20 granted to the agency, it's okay, or if it's within the class
21 of powers and duties identified in the legislation, then it's
22 okay.

23 The Legislature came back in 1999 and said, no,
24 that's not what we meant. We expect that there should be a
25 much tighter link between rules and the statutes they

1 implement. And I would just like to read you the most
2 significant language that was added in 1996 and amended in
3 1999.

4 It says, "A grant of rulemaking authority is
5 necessary but not sufficient to allow an agency to adopt a
6 rule. A specific law to be implemented is also required. An
7 agency may adopt only rules that implement or interpret the
8 specific powers and duties granted by the enabling statute. No
9 agency shall have authority to adopt a rule only because it is
10 reasonably related to the purpose of the enabling legislation
11 and is not arbitrary or capricious or is within the agency's
12 class of powers and duties, nor shall an agency have the
13 authority to implement statutory provisions setting forth
14 general legislative intent or policy.

15 "Statutory language granting rulemaking authority or
16 generally describing powers and function of an agency shall be
17 construed to extend no further than the implementing or
18 interpreting, than implementing or interpreting the specific
19 powers and duties conferred by the same statute."

20 And, again, this language was strengthened in 1999 to
21 overrule the court decision saying that, yes, if it's within
22 the range of powers and duties, then it's okay.

23 Recent decisions interpreting the 1999 language have
24 emphasized that, yes, we, the courts, do now understand what
25 the Legislature meant.

1 And I would call your attention specifically to two
2 cases: The Trustees of the Internal Improvement Trust Fund
3 versus Day Cruise Association that can be found at 794 So.2d
4 696, and Southwest Florida Management District versus Save the
5 Manatee Club can be found at 773 So.2d 594.

6 These are both very recent decisions within the last
7 year or the last 14 months at the latest from the First
8 District Court of Appeal strongly suggesting that, yes, you
9 must have an explicit power in the statute in order to make a
10 rule. And we respectfully suggest that the three provisions
11 that I addressed as well as perhaps other provisions of your
12 proposed rule don't meet the proposed test or the new test.
13 They, they go beyond that. They may be generally related or
14 within the range of powers and duties of the statutes that the
15 rule purports to implement, but that's not enough anymore. And
16 we believe that the rule is susceptible to a challenge and
17 would be struck down by an administrative law judge at the
18 Division of Administrative Hearings were it to go forward as
19 it's currently drafted and be challenged.

20 CHAIRMAN JABER: Ms. Blanton, was the Water
21 Management District case appealed to the Supreme Court?

22 MS. BLANTON: Yes. There was -- the Day Cruise case,
23 not the Water Management District case, that's the Save The
24 Manatee case, that was not appealed.

25 The Day Cruise case, as I understand it, was heard on

1 rehearing at the First District Court of Appeal. The First DCA
2 reiterated the decision that it made. That has been appealed.
3 There's been no decision. The first brief was filed, I
4 believe, on January 31st but all the briefs are not yet in. It
5 went to the Supreme Court because the First DCA certified it as
6 a question of great public importance whether the particular
7 rule at issue in that case violated the rulemaking provision.

8 We have reviewed the statutes that you listed as the
9 specific authority for your proposed rule as well as the
10 statutes that you listed as law, as the laws implemented for
11 the proposed rule. The specific authority, Section 350.127(2),
12 366.05(1), 366.06(2), 366.07, 366.051. The laws implemented
13 are 403.519, 366.04(1), 366.06(2), 366.07 and 366.05(1).

14 Several of these simply provide a general grant of
15 rulemaking authority to the Commission, which, as I mentioned,
16 from reading the language of the new rulemaking requirement is
17 necessary but not sufficient to support a rule.

18 Several others address various powers of the
19 Commission that may be reasonably related to the proposed rule
20 but do not provide an explicit power for such a proposal, for
21 example, as the collocation requirement. There's just nothing
22 in these statutes that provide the authority for what several
23 provisions of the draft rule purports to do.

24 We have -- I would be happy to walk through each of
25 those statutes and what we think is the lack, what it addresses

1 and what it does not address in terms of your proposed rule, or
2 we would be happy to supplement our comments in writing going
3 through that analysis, if that would be helpful to you and your
4 Staff.

5 CHAIRMAN JABER: Okay. We're going to talk about
6 that at the end. I think just generally we may, Commissioners,
7 want to consider having written comments to whatever questions
8 we may have that the parties wouldn't necessarily be able to
9 address today. So why don't we keep all of that until the end.

10 MS. BLANTON: Okay. That would be fine. Just in
11 conclusion concerning the legislative authority, I would like
12 to echo Gary's point that, you know, not only is there
13 inadequate statutory authority for this rule under the Florida
14 Administrative Procedure Act, but we think in particular the
15 collocation requirement raises constitutional issues which
16 would only bolster any argument that there's inadequate
17 statutory authority under the Florida Administrative Procedure
18 Act. So you would have multiple issues to be concerned with
19 concerning that specific provision.

20 And, and finally concerning the provision that allows
21 the Commission to select the winner of the RFP process,
22 respectfully we would suggest that that moves the Commission
23 from regulating into managing, and the point being to
24 micromanaging, and that what was intended originally by the
25 proposed rule is that the utility be held accountable for its

1 decision in the end. And we think the current rule
2 accomplishes that and the proposed rule would move it too far
3 beyond the ambit of statutory authority and into
4 micromanagement.

5 I would be happy to address any questions and, again,
6 would be happy to supplement any of my analysis in writing.

7 CHAIRMAN JABER: Thank you, Ms. Blanton. Let's hold
8 all questions until the end, if that's all right.

9 Mr. --

10 MR. BRISCOE: Briscoe.

11 CHAIRMAN JABER: -- Briscoe.

12 MR. BRISCOE: Thank you and good morning,
13 Commissioners. Again, my name is Billy Briscoe and I am here
14 to speak on behalf of the Florida Partnership for Affordable
15 Competitive Energy. And forgive me, I am also losing my voice
16 today, so hopefully I can make it through this brief
17 presentation.

18 But before I proceed I want to thank you for your
19 deliberation as you begin to consider these very crucial
20 issues.

21 Florida PACE is an organization that's been formed to
22 promote full, fair and open competition in Florida's wholesale
23 power markets. We feel that such competition will benefit all
24 Florida consumers as well as the state's economy.

25 PACE commends the Commission and its Staff for

1 undertaking to amend the bidding rule so as to promote a more
2 equitable evaluation of all competing alternatives to serving
3 the bulk power supply needs of Florida's public utilities and
4 their customers.

5 Let me state at the outset that we are not advocating
6 what would essentially amount to paralysis on the
7 investor-owned utilities and other power plant producers. What
8 we are simply advocating is for a more equitable regulatory
9 environment that comports with the intended rule published, as
10 published in 1994 and as stated earlier this morning by
11 Mr. Ballinger.

12 To that end PACE commends the strawman proposal
13 released by the Commission Staff in December as a sound and
14 meaningful starting point for this rule amendment process.

15 However, we support additional changes to the
16 existing rule that will enhance the Commission's ability to
17 ensure a fair and leveled evaluation and selection process.

18 If there is one overarching consideration that the
19 Commission should have in mind as it reviews this rule it is
20 this: With respect to the choice of capacity options, an
21 investor-owned utility is not a disinterested, impartial and
22 dispassionate arbiter of competing proposals. Because its
23 return on investment is a primary source of shareholder profit,
24 we submit that the investor-owned utility is instead a
25 competitor among competitors, an advocate among advocates with

1 a strong financial interest in the outcome of the contest. For
2 that reason, we believe that the governing process should have
3 three fundamental characteristics: One, that it should be
4 comprehensive in its coverage of capacity additions; two, that
5 it should place the evaluation and scoring of proposals,
6 including the IOUs' own proposals, in the hands of neutral
7 evaluators and, three, that it should provide for Commission
8 oversight at the outset of the process.

9 I will limit my comments broadly to these three
10 considerations and there will be a more detailed account
11 following my comments by Mr. McGlothlin.

12 With respect to the existing bidding rule, we believe
13 that it is inadequate to achieve the Commission's objection,
14 pardon me, we believe it is inadequate to achieve the
15 Commission's objective of ensuring that the best, most
16 cost-effective power supply alternative is selected to meet the
17 newly identified energy needs of the state.

18 First, under the existing rule, many power plants,
19 including large plants, can be and have been built without any
20 prior solicitation of competitive alternatives and without
21 review by the Commission of either the IOU's selection process
22 or of the merits of its decision. PACE believes the strawman
23 language would remedy the inefficient scope of the existing
24 rule.

25 Second, we also believe that the scoring of proposals

1 should be placed in the hands of an independent and impartial
2 entity. And PACE believes that the rule should provide for
3 such an independent and disinterested evaluation, whether by
4 the Commission itself or by an independent evaluator appointed
5 by the Commission or whether it is subject to input from
6 interested parties with a final selection approved by the
7 Commission.

8 Third, because of the IOU's inherent self-interest we
9 believe that the investor-owned utilities should not be allowed
10 to unilaterally design the RFP package without the opportunity
11 for front-end review and approval by the Commission.

12 A bidding rule that embodies these concepts would
13 serve the best interest of the Commission in fulfilling its
14 responsibilities, the best interests of electric consumers who
15 are served by Florida's public utilities and the public
16 interest of the state as a whole.

17 This would conclude my comments and I do thank you
18 again for your consideration and I'd like to turn it over to
19 Mr. McGlothlin.

20 CHAIRMAN JABER: Mr. McGlothlin.

21 MR. MCGLOTHLIN: Joe McGlothlin, also for Florida
22 PACE.

23 I would like to begin by responding to some of the,
24 to some of the comments by Mr. Sasso and Ms. Blanton, if I may.

25 CHAIRMAN JABER: Uh-huh.

1 MR. McGLOTHLIN: I agree that the history of the
2 existing rule is instructive, but I believe the lessons to be
3 learned are far different from those that Mr. Sasso would have
4 you accept.

5 First of all, he referred to the FPL/Cypress case.
6 That did provide the impetus for the consideration of the first
7 rule but the impetus was this: It was demonstrated in the
8 course of that case that FPL had not solicited or invited
9 alternative proposals to the proposed contract between FPL and
10 Cypress. Two developers who were not invited to that party
11 intervened in the case and demonstrated the availability of far
12 cheaper options.

13 And it was in part on the basis of that type of
14 evidence and also in part on the evidence of the lack of the
15 effort by the utility to scour the universe of possibly cheaper
16 alternatives that the Commission moved to adopt the first rule.

17 It's correct that the Commission after hearing the
18 proposals of many stakeholders chose to tie the first rule to
19 its role in the Siting Act process, the determination of need.
20 But I think it's safe to say that although the, the objective
21 of closure in that process was a, was a valid concern that was
22 accomplished by that particular rule, the Commission could not
23 have foreseen all that happened in the years following the
24 adoption of that rule.

25 I doubt that the Commission foresaw, for instance,

1 that through the Ft. Myers and Sanford repowerings FPL would
2 add something like 1,800 megawatts of capacity without being
3 required by the rule to seek bids for that capacity before
4 embarking on that, could not have foreseen that Tampa Electric
5 Company could add something like 1,100 megawatts of repowered
6 capacity at its Gannon site with no requirement under the
7 bidding rule that it first seek alternative proposals, and
8 probably not foresee the advent of combustion turbines of a
9 size and in a quantity that are being used today and that do
10 not require bidding under the scope of the existing rule.

11 That's, that's the first lesson. Is the scope of the
12 existing rule adequate to achieve the objective of the
13 Commission? I submit history says the answer is no.

14 Now Mr. Sasso also alluded to what happened once the
15 bidding rule did have application. The first thing that
16 happened was that Gulf Power asked for a waiver of that part of
17 the rule that required the IOU to provide alternative, its cost
18 information to potential bidders. The Commission denied that
19 request.

20 The very next thing that happened under the bidding
21 rule on the second occasion when it had any application at all,
22 Florida Power Corporation asked for a complete waiver of the
23 entire rule and, among other things, said this was just a waste
24 of time, we, we know we're cheaper. Again, the Commission
25 denied that request for a waiver.

1 So within the context of its limited scope proceeding
2 the Commission has done what it can to, to implement its
3 objective in this policy. But the lessons of history are that
4 the IOUs will avoid the rule completely where it can and will
5 try to get out from under part or all of the rule even where it
6 does apply.

7 There are many references to the, the balance, the
8 need for balance between the flexibility of management on the
9 one hand and regulatory intrusion on the other. I believe it's
10 time or perhaps past time to recognize fully within the context
11 of capacity procurement that the selection of capacity cannot
12 be deemed purely a management prerogative. The generation of
13 electricity is not a natural monopoly and, as Mr. Briscoe said,
14 when it comes time to choose among alternatives, the IOU is a
15 stakeholder, it is a contestant. And this, these activities by
16 definition are imbued with self-interest and for that reason
17 the bidding, the scope of the bidding rule should be very
18 broad.

19 The strawman was described as an effort to extend the
20 Siting Act. That's wrong. The Commission has a role under the
21 Siting Act but it has a larger role under its ratemaking
22 responsibilities of Chapter 366. And in that context the
23 strawman and in a few minutes the additions to the strawman
24 that PACE is going to propose should be regarded as coming
25 under the ratemaking responsibilities as an effort by the

1 Commission to ensure that the practices of the IOUs that bear
2 on rates are those that are designed to result in the least
3 cost choices for the, for the ratepayers.

4 There was a reference to that part of the strawman
5 that would require a showing of good cause before this argument
6 of imputed debt could be carried, carried out. PACE's view is
7 this is an argument with which the IOUs have already gotten too
8 much mileage. And when you consider that an independent
9 developer brings its own investment to the State of Florida
10 and, for the purpose of adding capacity and contracts in a way
11 that frequently has the effect of shifting risk away from the
12 IOU and its ratepayers and on to the contracting wholesale
13 provider, it's clear on balance that, if anything, the
14 purchased power option can and does lower risk to the utility
15 and its ratepayers rather than increasing rate.

16 I attended an internal affairs meeting not long ago
17 where the general counsel of FMPA told the Commission that
18 FMPA's policy now is to over time try to achieve a balance of
19 50 percent construct power and 50 percent purchase power,
20 implicitly acknowledging the benefits of purchased power that
21 can be brought to that type of balance portfolio. And so to
22 anticipate within the rule the contention that purchased power
23 by definition is riskier or has the effect of increasing risk
24 and increasing costs simply swims against the current of common
25 sense as well as the technical expertise of those who are

1 advocating more balanced portfolios.

2 So when we, when it comes our turn to show you some
3 alternative language, we're going to suggest that that
4 reference to the ability to bring this argument on good cause
5 should be eliminated completely from the, from the strawman and
6 from future rulemaking considerations.

7 CHAIRMAN JABER: Do you have copies of that
8 alternative language, Mr. McGlothlin?

9 MR. MCGLOTHLIN: I do, Chairman Jaber. And as soon
10 as I finish these other comments, I propose to distribute it.

11 Ms. Blanton talked about the Commission's statutory
12 authority to proceed with a more extensive bidding rule and she
13 referred to the Southwest Florida Water Management District
14 versus Save The Manatees case. It's important because that is
15 something of, of a point of reference for this type of debate,
16 it's important to understand what happened in that case.

17 First of all, despite the fact that in that case the
18 court concluded that the agency has exceeded its statutory
19 authority, under the circumstances of that case it provided
20 some helpful language for future application.

21 It said, for instance, this, this tighter provision
22 of the APA is going, going to have to be decided on a
23 case-by-case basis. Is there in each case sufficiently
24 specific statutory authority that has to be implemented or
25 interpreted to support the rulemaking? It also said that

1 implementing a rule by definition is going to be more detailed
2 than the statute. If the statute is sufficiently detailed,
3 there's no reason for the rule. And so for those who would
4 argue some sort of equivalence between the rule, the degree of
5 specificity in the rule and the degree of specificity in the
6 statute, the court has already said that's, that's not the
7 comparison.

8 Also, under that case the claim was that the agency's
9 statute was sufficiently specific to enable the agency to adopt
10 a rule that would exempt the developer from the requirement of
11 first getting an environmental resource permit. Well, the, the
12 basis for the claimed exemption was a grandfather provision.
13 The argument was that it was approved before 1984; therefore,
14 based on the rule and the statute that it implements I don't
15 have to get a permit. But a close review of the statute
16 limited the agency to exemptions upon a showing of no adverse
17 impact. And so the most liberal argument cannot stretch the
18 words "no adverse impact" all the way to include a claim that
19 I'm free because of grandfathering, and that's why the claimant
20 there lost.

21 But I would like to point you to another case, one
22 that hasn't been mentioned so far, and that's the Osheyack
23 (PHONETIC) case, a PSC decision that was reviewed by the
24 Florida Supreme Court. I have a Lexis cite, 2001 Florida Lexis
25 1573, decided in June of 2001.

1 In that case the petitioner claimed that the rule of
2 the Commission was not supported by adequate statutory support,
3 the rule that directs local exchange companies to disconnect
4 service upon showing a nonpayment of long distance charges.
5 And the claim was that 364.19, which empowers the Commission to
6 regulate the terms of contracts between customers and their
7 providers, was not sufficiently specific to, to support that
8 rule, and the Supreme Court disagreed.

9 In disagreeing, the court actually cited to the Save
10 The Manatees case that I described earlier, but concluded that
11 in this context the statute was specific and that the rule
12 implemented that statute. But notice that the statute doesn't
13 say the word "disconnect" anywhere in it, and yet the court
14 concluded that the Commission was on sound footing with respect
15 to its rule under that statute.

16 And by analogy I believe you're on sound footing
17 here. Again, you're not confined to the Siting Act
18 responsibilities. You have large responsibilities under 366
19 for set rates.

20 366.06(2) says, "Whenever the Commission finds upon
21 request made upon its own motion that the rates demanded,
22 charged or collected by any public utility for public utility
23 service or that the rules, regulations or practices of any
24 public utility affecting such rates are unjust, unreasonable,
25 unjustly discriminatory or in violation of law," et cetera,

1 I'll, some of this is not pertinent, "the Commission shall
2 order and hold a public hearing and shall thereafter determine
3 the just and reasonable rates to be thereafter charged for such
4 service and promulgate rules and regulations affecting
5 equipment, facilities and service to be thereafter installed,
6 furnished and used." There's similar language that I won't
7 take the time to read in 366.07.

8 But the import is this: When the Commission
9 perceives that the practices of the utility subject to its
10 ratemaking jurisdiction are affecting rates in a way that is
11 not to the benefit of ratepayers, it has rulemaking authority
12 and can --

13 COMMISSIONER DEASON: Mr. McGlothlin, what -- the
14 language that you read, which, which section of the statute was
15 that from?

16 MR. MCGLOTHLIN: I read from 366.06(2) and referred
17 also to 366.07.

18 COMMISSIONER DEASON: And that is, that is listed at
19 the end of the strawman proposal as authority for this rule?

20 MR. MCGLOTHLIN: I believe that's correct.

21 COMMISSIONER DEASON: Yes. Thank you.

22 MR. MCGLOTHLIN: But I would refer back to the
23 revised language of the APA. Bear in mind that it says that
24 there must be a specific rule to be implemented or interpreted.
25 I submit to you that the proper interpretation of practice

1 refers to the current practice of building without first
2 soliciting bids. And, therefore, if you find that to be
3 insufficient or inadequate, it's within your statutory
4 authority by virtue of a specific statute to be limited to
5 promulgate a rule that requires bidding on a broader basis than
6 that in the current rule.

7 I'll move now to the, PACE's discussion of the
8 strawman proposal and some suggestions for areas in which we
9 would recommend the Commission start with the strawman and
10 build upon it to address other areas. And if I may take a
11 moment and ask someone to assist me in passing out some
12 handouts that we have ready.

13 CHAIRMAN JABER: That would be great. Ms. Blanton
14 and Mr. McGlothlin, while you're doing that and finishing up
15 your presentation, think about this question and we'll come
16 back to it. Is there anything in the uniform rules that give
17 us guidance on the specific statutory authority argument?

18 And also it's my understanding from 120 that an
19 agency has to once a year report to the Legislature rules that
20 are no longer necessary or perhaps don't have statutory
21 authority. Does that help us shed any light on this issue at
22 all for us?

23 All right. Mr. McGlothlin, this is a, sort of a
24 counterproposal or a second strawman proposal for our
25 consideration; right?

1 MR. McGLOTHLIN: It is. And by way of explanation,
2 we have taken the Staff's strawman and it becomes the baseline
3 for what you're looking at now because we like much about it.
4 And make no mistake about it, we commend the Staff for a
5 significant improvement over, over the status quo.

6 And also take a moment to say please don't be put off
7 when you see many underlines and strike throughs because one
8 thing we've done is simply relocate some things. And, you
9 know, the word processing interprets that as a change. But
10 it's not a substantive change, it's only been moved around some
11 because much of the strawman proposal is intact in what I've
12 distributed here.

13 CHAIRMAN JABER: All right. Now obviously this is
14 the first time the stakeholders, all of the stakeholders have
15 seen this proposal.

16 MR. McGLOTHLIN: The members of PACE have seen it.

17 CHAIRMAN JABER: Okay. So I don't expect anyone to
18 be able to comment on it. But throughout the course of this
19 morning's workshop, if you do have comments on this proposal,
20 feel free to jump in and let us know what they are. But I do
21 intend to allow for written comments after we're done.

22 MR. McGLOTHLIN: There are two parts to the handout.
23 And let me preface the entire discussion on the handout this
24 way. As Mr. Briscoe said in his remarks, we see three features
25 that should be incorporated in a bidding rule, the first of

1 which is a broad scope that captures, that casts a far wider
2 net than does the existing rule. And we think the strawman
3 does that well and have not modified the language of the
4 strawman that would amend the existing rule to broaden the rule
5 to include everything 50 megawatts and above.

6 But the second and third aspects are those that we've
7 attempted to illustrate in this handout. And they are the need
8 to place the scoring of proposals, including the utility's own
9 proposals, into the hands of a neutral and disinterested third
10 party, and the need to involve the Commission early in the
11 process, at the outset of the process when the all important
12 criteria of the RFP package are being devised.

13 The first page that has a category for "Present Rule"
14 and "PACE Proposal" is a comparison of the chief procedural
15 milestones under the status quo and under the proposal to which
16 that is, that is attached to this sheet.

17 Presently under the existing rule it happens this
18 way. If the IOU designs the RFP package, the IOU submits a
19 copy to the PSC at the same time it issues the RFP. The rule
20 does not explicitly contemplate that anything else is going to
21 happen at that point. There's no, there's no opportunity for a
22 complaint by developers who might perceive a flaw in the
23 criteria, there's no explicit opportunity for the Commission to
24 wade in at that point. It's, I think, contemplated to be
25 informational at that point.

1 The IOU receives the proposals, the IOU scores the
2 proposals, the IOU announces the winner and then files a
3 petition for determination of need. And after all that
4 happens, if a developer responded in the RFP, the rule
5 contemplates that the developer would have standing to
6 intervene at that point after all, all of those activities are,
7 are passed.

8 Here's how the PACE proposal would modify that
9 chronology. The IOU would begin with a proposed RFP package
10 and it would also at the same time choose a neutral third party
11 evaluator that we've, I've called an independent evaluator
12 within the rule, suggested rule, and as part of that package
13 would submit both the criteria and the proposed evaluator to
14 the PSC for approval before issuing the, the RFP. PSC approval
15 would be a condition precedent to going further with the RFP.

16 Under our proposed language, for a fee of \$500
17 interested developers or independents would have the ability to
18 obtain a copy of the RFP package and would have a specific
19 window of time, we think 30 days, within which to review the
20 proposed criteria, identify anything which it believes is
21 either biased or is a commercial nonstarter, starter that is
22 anti-competitive in nature and file a complaint with the
23 Commission bringing it to the Commission's attention.

24 If that happens or if the Commission on its own
25 motion sees something that it suspects is, is either biased or

1 otherwise inappropriate, there would be the opportunity for an
2 expedited proceeding to iron that out.

3 If no complaints are received and if the Commission
4 sees nothing wrong with the RFP, then it's deemed to have been
5 approved and the, and the utility can, can issue it. But the
6 IOU would submit its own proposal to the approved evaluator,
7 who also will receive the, the responses to the RFP. The
8 third-party evaluator would apply the criteria that had been
9 already approved by the Commission to those proposals and rank
10 them.

11 At that point the utility would ask the Commission to
12 confirm that selection and there would be an opportunity for
13 approach at that point, but because the criteria have already
14 been approved, a disappointed bidder would be able to contest
15 the outcome only on the grounds that the independent evaluator
16 incorrectly applied the PSC-approved criteria.

17 We also suggest that in terms of putting all players
18 on an equal footing, in view of the fact that developers who
19 submit bids are ready to be bound by them, the IOUs should be
20 in the same boat. And so there's language in our markup that
21 would bind the utility to live by the terms of its own bid if
22 it's deemed to be the winner. That's the comparative
23 chronology.

24 And if I could now walk, walk you quickly through the
25 markup of the strawman. On page one you'll see an example in

1 which we've tried to tether together the two concepts of review
2 by an independent evaluator on the one hand and prior approval
3 of criteria by the Commission on the other.

4 In the definition of request for proposal you'll see
5 that the reference there is that the RFP is designed to enable
6 an independent evaluator to screen those, those submissions,
7 not the public utility.

8 Page two, at the top of the page we've added to the
9 definition section of the rule a definition of independent
10 evaluator that again illustrates this concept. It would be
11 affirmed as qualified by virtue of being impartial and by
12 virtue of having expertise in the disciplines necessary to
13 evaluate an RFP to apply Commission-approved criteria.

14 And you'll see that there's a requirement that, that
15 the public utility conduct and complete an RFP proceeding prior
16 to constructing any capacity that's within the scope of the
17 rule and penalties for failure to do so.

18 I would like to make clear that PACE is not wedded to
19 any one particular formula for arriving at an independent
20 analysis. As Mr. Briscoe said, we'd be comfortable if the
21 Commission carried out that role either by its own Staff or by,
22 if workload is a problem, by a consultant engaged for the
23 purpose. We're also comfortable with what's illustrated here,
24 which is the idea that the utility would nominate and the
25 Commission would approve an independent third party as part of

1 the RFP package.

2 Now we've, we've illustrated two ways that can happen
3 here. This is alternative language. The first illustration
4 suggests that the Commission could have an approved list of
5 independent evaluators and the utility would be required to
6 choose from the approved list. Alternatively, the utility can,
7 could choose an independent evaluator and submit the
8 qualifications of the independent evaluator as part of the RFP
9 to be considered at the, with the other criteria.

10 The next section is where we've relocated material
11 that is in the strawman, and it's relocated simply because of
12 our provision that requires the utility to come in for a prior
13 approval. We've moved the description of the contents on the
14 RFP to that point where it becomes part of the proposed
15 package, and there are a handful of modifications that I'll
16 come back to, one of which is that we've suggested that under
17 (10) an estimate of market value is appropriate there rather
18 than cost. And I'll explain why that's there when we get to a
19 more detailed discussion of the particulars.

20 But you'll see on page five that we've added to the
21 required or prescribed content of the RFP package a requirement
22 that the independent, that the IOU identify the independent
23 evaluator and demonstrate that there's no ties that would
24 provide the appearance of bias or favoritism if that neutral
25 third, if that third party is engaged to score the proposals.

1 CHAIRMAN JABER: Who would pay for the independent
2 evaluator? How are they funded, assuming it's someone other
3 than the Commission Staff?

4 MR. McGLOTHLIN: There's an existing part of the
5 strawman that provides for application fees not to exceed
6 \$10,000. Our view is that the proceeds from that should be
7 applied to the cost of the independent evaluator. And, in
8 fact, that appears on page six under what is in our markup (h).

9 And the next page, Page 7, (7), this is the verbiage
10 that would introduce the concept of an opportunity to challenge
11 proposed criteria or proposed elements of the RFP on the
12 grounds that they're discriminatory, anti-competitive,
13 commercially infeasible, technically inappropriate or on the
14 grounds that the information provided does not pass muster with
15 the requirements of the rule.

16 All, all those grounds design to enable the
17 Commission on a showing of an effective party or on its own
18 motion to, to vent the criteria of the RFP at the outset so
19 that if there's something that's a nonstarter, if there's
20 something that tilts the scales in favor of the IOU, that can
21 be addressed early on as opposed to at the back end of the
22 process when the decision has already been made and the
23 Commission or the parties are jammed against a time line after
24 the fact.

25 I'd like to emphasize again that's there only as a

1 contingency. If there's no complaint and if the PSC sees
2 nothing about the proposed RFP that troubles the PSC, it's
3 deemed to be approved and the, and the IOU marches on.

4 At Page 9 this language illustrates the concept that
5 because the IOU is a contestant among contestants, it, too,
6 should submit its proposal to the independent evaluator and
7 that proposal should be couched in terms of the same RFP
8 package that has been sent to the other potential participants.

9 Eleven is important. (11) says that, "The
10 independent evaluator shall score the proposal submitted in
11 response to the RFP including the proposal of the public
12 utility in accordance with the criteria and parameters of the
13 approved RFP."

14 We see this as exerting some discipline on the, on
15 the independent evaluator. And I wouldn't go so far as to say
16 that its actions are ministerial, but they are, they are
17 focused by the matters that have been in front of the
18 Commission and approved at a prior step.

19 And then on Page 10 there's a description of the
20 process that would follow the selection by the independent
21 evaluator. The IOU would ask the Commission to confirm that
22 choice and disappointed bidders would have only limited grounds
23 to bring at that point. They would, they would be, they would
24 limit it to the argument that the approved criteria were
25 applied by the independent evaluator incorrectly.

1 And finally on the last page, this illustrates our
2 view that just as developers, independent developers are
3 prepared to live by the terms of their proposals, so should the
4 IOU be expected to live by the terms of its bid, if it choose,
5 if it turns out to be the winner. There should be no
6 opportunity to lowball a proposal in order to win the prize and
7 then expect to be able to place overruns or whatever happens
8 after that point in rate base and collect nonfuel expenses that
9 exceed the bid thereafter.

10 Well, that's, that's the nickel tour of what we hope
11 will be seen as a commendation of the strawman and
12 recommendations for additions to the strawman.

13 CHAIRMAN JABER: Thank you, Mr. McGlothlin.
14 Commissioners, how about we take a ten-minute break and come
15 back and finish up.

16 (Recess taken.)

17 * * * * *

18 MR. MCGLOTHLIN: Chairman Jaber, would you allow me
19 to circle back and cover one thing that I mentioned I was going
20 to address in more detail? I'm afraid that I lost my place
21 there for a second and didn't talk about the one provision on
22 Page 4.

23 CHAIRMAN JABER: I guess so, Mr. McGlothlin.

24 MR. MCGLOTHLIN: Thank you. One of the aspects of
25 the strawman that we like is the theme of requiring the IOU to

1 include all of its costs when quantifying its own proposal for
2 purposes of comparison. We think that is important because
3 when we hit one of these periods of time to which Mr. Sasso
4 alluded when IOUs require substantial increments of capacity,
5 we are talking about billion-dollar-plus investments.

6 And so to enable the ratepayers to get the benefits
7 of the least-cost options, it is important that the
8 alternatives be compared on an apples-to-apples basis. And it
9 is less than apples-to-apples if the full costs of the IOUs
10 self-build proposal are not included. One thing that we have
11 added here in (10) or Sub 10 is to change the word "cost" to
12 "market value" so that the IOU is required to provide an
13 estimate of the market value of its site. And by way of
14 explanation, it appears to us that if value has the option --
15 let's assume that the market value exceeds its cost of
16 acquisition of the site. If it receives responses to the RFP
17 and under the responses has the option of selling the site at a
18 profit which would enure to the benefit of ratepayers, and
19 purchasing power rather than building, and it chooses not to do
20 that, then that markup, the potential profit which is foregone
21 is an opportunity cost that is lost to the ratepayers and
22 should be regarded as a cost of the self-build option. That's
23 why the reference to market value there.

24 And thank you for letting me circle back and cover
25 that as I had originally intended to do.

1 CHAIRMAN JABER: Okay. Mr. Wright.

2 MR. WRIGHT: Thank you, Chairman Jaber. Schef Wright
3 representing Calpine Corporation, which is one of the members
4 of PACE. I will be very brief, I have about three things to
5 say.

6 First, in response to a point made by Mr. Sasso where
7 he seemed to assert that the opportunity for an affected party
8 to file a complaint regarding a proposed RFP on the front end
9 could add delay, appeals, extra costs, et cetera, to the
10 process. I would submit that the opposite is probably true,
11 and that by having an appropriate process to review, for the
12 Commission to review, the criteria and the weightings and the
13 whole RFP itself on the front end with an opportunity to
14 litigate that there, it will give the opportunity to get that
15 out of the way.

16 The opportunity for complaints and appeals regarding
17 deficiencies or defects in an RFP process presently exist.
18 It's just at this point in the current context any such
19 complaints have to be raised at the very end in the need
20 determination proceeding. And so you have got the same
21 opportunity there at the end for further delays and further
22 appeals and litigation on those issues.

23 With respect to the procedural and constitutional
24 questions discussed by Ms. Blanton, I want to say that I
25 completely agree with everything that Mr. McGlothlin said. His

1 analysis was right on the money. And very specifically the
2 Commission has the authority with respect under both 366.062
3 and 366.07 to determine and fix the practices of utilities
4 relating to rates to be followed in the future.

5 The determination under the APA case law is a
6 case-by-case analysis as to whether the statute is specific as
7 to the authority that the Commission has. I would submit to
8 you that the specific authority articulated in those two
9 sections of the statute is ample for you to do those things
10 which the staff had proposed to do under Sections 1B and 14
11 relating to approval of contracts and approval of RFPs and
12 projects with 50 megawatts or greater capacity.

13 As to the Commission's legal ability to require a
14 public utility to make its site available for use by an IPP, I
15 will say to you I think that is open to question. I don't
16 think it is open or shut either way. Constitutionally, I think
17 that what is required is that any taking or confiscation be
18 done pursuant to due process of law, which I'm sure you all can
19 provide, and that fair compensation be made, which I'm sure can
20 equally be taken care of. I think there is a question as to
21 whether you have the statutory authority to do it, but I would
22 suggest to you if you don't, then you have got a problem
23 because you might find yourself in a situation where the facts
24 showed that the best deal for ratepayers was a proposal where
25 an IPP would build its plant on the utility's site.

1 If that were the case, and you did have the authority
2 to order the site to be used, you could get the best deal for
3 ratepayers. If you don't have the authority, then you are
4 really left with saying up or down. And so you might have a
5 utility built option that is not the best deal for ratepayers
6 on its site versus an independent built option on the utility's
7 site that is the best deal. So what do you do, say no to the
8 IOU proposal or project? That may be the result. I think it
9 is a problem. And I do think there is at least a reasonable
10 case to be made that you can get there under your authority
11 under the grid bill and under your ratemaking.

12 CHAIRMAN JABER: Thank you, Mr. Wright.

13 MR. WRIGHT: Thank you.

14 MR. ZAMBO: Yes. Rich Zambo on behalf of the City of
15 Tampa, Palm Beach County Solid Waste Authority, and the Florida
16 Industrial Cogeneration Association. I am advantaged to have
17 been seated to the left of the three gentleman next to me here,
18 because I pretty much fully agree with everything they have
19 said, so I'm going to cut my presentation fairly short and
20 would like to focus on just two or three points.

21 I think the one point Mr. Briscoe made is very
22 important to keep in mind here, and that is there is a natural
23 tension between the utility's desire to build capacity and its
24 willingness to purchase capacity just because of the rate
25 recovery mechanisms. As you all know, self-build goes into the

1 rate base and the utility is allowed to earn a return on that.
2 Purchased power, at least under the current regulations, is
3 just a pass-through, so there is no revenues flowing to the
4 utility and the stockholders. And that is a tension that
5 exists. It creates some biases, I think, in the evaluation
6 process. And perhaps there is a way of solving that. I don't
7 know. I have been trying to figure out if there is a way that
8 a utility could rate base part of a purchased power contract so
9 that there is more of a fairness and an equanimity between
10 purchased power and self-build to take away the tendency to
11 want to build all the capacity.

12 Another point I want to make is it seems to me like
13 this rule that is currently on the books is broken. It has
14 been in place for about eight years, and to my knowledge there
15 has not been one megawatt of capacity purchased as a result of
16 a bid which was required by this rule. And yet there has
17 probably been, you know, by Joe's count I think about 3,000
18 megawatts built that were able to circumvent the rule. And I
19 think it's probably more like 5,000 if you look at the Gulf and
20 Florida Power Corp situations, as well. So the ratio of
21 capacity procured under the bidding rule to the capacity being
22 constructed that wasn't required to go through the bidding rule
23 is maybe 5,000-to-one or something like that. It's a pretty
24 good indication to me that the rule is not working.

25 I guess a point I wanted to make on the use of

1 utility power plant sites. I think the analysis may differ
2 depending on whether that property is currently included in the
3 utility rate base. If it is in the rate base, the customers
4 are paying for that property. I guess there is an assumption
5 that it is used and useful. And, you know, I haven't gotten
6 into this very deeply, but it seems like there may be a
7 difference in the analysis between rate base property and
8 property that is still being held in reserve.

9 And I think that covers my comments. I appreciate
10 the opportunity to address you this morning.

11 CHAIRMAN JABER: Thank you, Mr. Zambo.

12 Mr. Moyle.

13 MR. MOYLE: Thank you, Madam Chairman. Jon Moyle
14 from the Moyle, Flanigan law firm. And just so the record is
15 clear, I am making these comments solely on behalf of CPV,
16 Competitive Power Ventures. Most of what I wanted to say has
17 been already said, and I know there are planes to catch and
18 time is an issue, so I will try to be brief. But, you know, I
19 think historically there has been support for a competitive,
20 robust, wholesale market, and that is something that has been
21 talked about quite a bit, and I think has been even articulated
22 somewhat as something that we should strive to and try to
23 attain as a goal.

24 I think the bid rule is part of an effort in order to
25 achieve that goal of a competitive, robust, wholesale market.

1 And as has been said, if you look at the history of the bid
2 rule, and not to date everyone, but my dad, I think, was around
3 working on this originally when it was there, and most of the
4 Commissioners, I think, with one exception were not there. But
5 it has been out there on the books for quite sometime, yet to
6 date has never been used by the IOUs to award the first
7 megawatt to an independent power producer.

8 And, again, the history has been stated. First you
9 saw repowerings, then you saw waiver requests, and now you are
10 seeing RFPs in which the self-build proposal is winning the
11 competition. So that's why I believe and would argue that the
12 PACE proposal related to criteria is very, very important. I
13 think some comments were made earlier that it would be
14 difficult, and I think maybe even problematic for the criteria
15 to be identified by the investor-owned utilities in advance of
16 the evaluation process. You know, to me in terms of
17 fundamental fairness, I think that that strikes as an unfair
18 advantage if the criteria are not set and are not known, and
19 the bids are being judged but the criteria is subject to
20 change. I mean, it's a classic example of things changing in
21 the middle of the game.

22 And I don't think that it would present huge problems
23 for that criteria to be developed in advance, to be reviewed by
24 the Commission to make sure that it is fair, and then to be
25 used and applied fairly. I will tell you that we have been

1 involved in a big desal project down in Commissioner Bradley's
2 neck of woods down there, and that was a public process where
3 the criteria were developed for a very large 25 million
4 gallon-per-day desal facility where there were criteria
5 developed in advance and people could look at them and then go
6 after the project.

7 So I would urge you as you continue this process to
8 take a serious look at the criteria in trying to make sure that
9 those are something available and transparent. At a recent
10 prebidders conference I think questions were asked about the
11 criteria and that they weren't available. And I think the
12 question might have been posed as to, well, at the end of the
13 day will the criteria even be made available. I think the
14 answer was, no, that they would not. So that is an important
15 aspect of it.

16 CHAIRMAN JABER: Are you talking about the Tampa Bay
17 Water Authority desal?

18 MR. MOYLE: Right.

19 CHAIRMAN JABER: Who issued the RFP?

20 MR. MOYLE: The regional water supply authority,
21 Tampa Bay Water.

22 CHAIRMAN JABER: And who ended up winning the bid?

23 MR. MOYLE: It was a company Poseidon Resources.

24 It's now called Tampa Bay Desal. They won, but there were a
25 number of proposals and competitions and they went through a

1 long process to get there.

2 CHAIRMAN JABER: Who evaluated it?

3 MR. MOYLE: I believe they had an independent
4 engineer. I think they had hired an engineering firm to do
5 that and served as their consultant. I think they helped
6 develop it with them, and then they put it out.

7 CHAIRMAN JABER: Who agreed to the engineering firm?
8 Who ultimately gave the approval for that engineer firm?

9 MR. MOYLE: It was the Board of Tampa Bay Water.

10 A couple of other concluding remarks. First of all,
11 you are to be commended for venturing into this rule. It is
12 something I think that it is time that it is looked at and some
13 changes are made in order to fulfill what I understood to be
14 the goal and the intent of the Commission when the rule was
15 originally adopted.

16 The issue of the rulemaking authority, I think you
17 have heard debate on both sides of that issue today.
18 Ms. Blanton, who is a very good APA lawyer, suggests that maybe
19 you don't have the rulemaking authority. Mr. McGlothlin, who I
20 believe is also a very good lawyer and conversant in this, says
21 that you do. I think that is an issue that should not slow you
22 down as you go about looking at this issue. I mean, the
23 process is set up where that can be reviewed if someone feels
24 that you don't have it. You know, that is an administrative
25 law judge that can make that determination. The cases, I

1 think, that have been cited are all situations in which
2 entities -- it was a debatable question, and they pressed
3 forward with trying to fulfill their public policy objectives
4 and the process can work.

5 So I would urge you not to make a determination on
6 that, but look at the public policy issues related to the
7 desire to have a robust, competitive wholesale market and to
8 move forward. I think this will be a good debate. And, again,
9 I commend you for having the workshop and look forward to
10 working with you as the rulemaking, hopefully, moves forward.

11 Thank you.

12 CHAIRMAN JABER: Thank you, Mr. Moyle.

13 Now that Mr. McGlothlin has passed out a proposal, do
14 you want to -- Mr. Sasso and Ms. Blanton, do you want to
15 comment on that before we turn it over to the Commissioners?

16 MR. SASSO: I do have some general responses to some
17 of the comments that Mr. McGlothlin made, including a couple of
18 observations about the proposal. I can try to be brief.

19 CHAIRMAN JABER: Sure.

20 MR. SASSO: Again, just sort of tracking through some
21 of the points he made in the order that he made them. Talking
22 a little bit about history first, Mr. McGlothlin talked about
23 the FPL Cypress case. And I think it is important to dwell
24 just for a moment on this, because it does highlight one of the
25 features of the current rule. He indicated that was a case

1 where a couple of intervenors attempted to demonstrate that
2 they had projects that were better than the one FPL chose.
3 What was of interest to the Commission in that case was that
4 these proposals had not been made available to FPL. The
5 Commission saw an advantage in a process where bidders couldn't
6 sandbag the utility by intervening in the need case and trying
7 to demonstrate that they had a proposal that they hadn't
8 provided in advance to the utility. So that is the background
9 of that, so that that is not misconstrued.

10 Mr. McGlothlin talks about the Commission's authority
11 to implement its ratemaking responsibilities. And he
12 addressed, to some extent, his contention that Chapter 366
13 provides sufficient authority for the Commission to act in this
14 area, making the argument that that chapter provides the
15 Commission with the mandate to explore practices on the part of
16 utilities that may affect rates and to promulgate rules to deal
17 with those practices. Well, under that construction the
18 Commission would need no other authority. It would be able to
19 regulate utilities comprehensively in all aspects of their
20 business because everything affects rates. That is exactly the
21 kind of construction that the Florida Legislature and the
22 courts have now rejected quite definitively.

23 Mr. Moyle's proposition is quite extraordinary, that
24 this Commission should ignore its obligation to act within the
25 scopes of its duly delegated legislative authority and leave

1 that issue to an administrative hearing officer to decide. We
2 suggest that that is an invitation to this Commission to
3 abdicate its proper authority, and we would strongly urge the
4 Commission to reject that invitation.

5 Mr. McGlothlin made the argument that utilities don't
6 like power purchase agreements and they should because
7 independent power producers are accepting all the risk and
8 taking it off the shoulders of the ratepayers. Well, there are
9 two things wrong with that statement. First, utilities do
10 enter into power purchase agreements. Our utility, Florida
11 Power Corporation, has a large number of them as the Commission
12 is quite aware. And as the Commission is also aware, those
13 contracts have a great deal of risk for the ratepayers.
14 Ratepayers bear the risk of paying the terms of those
15 contracts. They bear the risk of nonperformance. They bear
16 the risk of business failures on the part of IPPs which are
17 becoming prevalent. So there are serious ramifications
18 associated with power purchase agreements and utilities have
19 shown a willingness to explore and enter into such agreements
20 in appropriate circumstances.

21 Now, Mr. McGlothlin in connection with the PACE
22 proposal has advanced the idea that we really ought to adopt a
23 different approach to this whole thing and involve an
24 independent evaluator in the process. That we shouldn't trust
25 the utilities to make good decisions for their customers

1 because they have a conflict of interest, and we need to take
2 it out of their hands and put this process into the hands of
3 third parties.

4 Well, we suggest that this is a very troubling
5 proposal. That not only does it seriously restrict the ability
6 of utilities to do their job, but it fundamentally inverts the
7 current statutory and regulatory framework. It stands it on
8 its head. The current statutory scheme starts with an
9 obligation to serve on the part of the IOUs and provides for
10 regulatory oversight of the utility's exercise of their
11 responsibilities to serve their customers.

12 What the PACE proposal would do is essentially have
13 the Commission run the utilities through their own efforts and
14 through independent third parties rather than regulate
15 utilities. This is not the first time this issue has come up.
16 This issue was addressed and debated in connection with the
17 initial adoption of the current rule, and the proposal was
18 rejected. I will bring to the Commission's attention a
19 dialogue between Commissioner Johnson and Tom Ballinger.
20 Commissioner Johnson said, "Tom, explain to me once again the
21 rationale why we don't want the Commission to actually evaluate
22 the bid? I mean, you started by saying that we would be the
23 only entity that would be unbiased, but we shouldn't be used
24 because why? Explain that."

25 Mr. Ballinger: "Basically, it is a philosophical

1 difference. I don't believe the Commission should be making
2 the management decisions; they should be reviewing them. Under
3 the statutory -- the utility has the statutory obligation to
4 serve. The Commission has the authority via the grid bill, if
5 we see something is wrong, we can mandate the utility to go,
6 not to make those decisions on the front end."

7 And we agree with Mr. Ballinger's articulation of the
8 construct of the current statute and the grid bill. We have an
9 obligation to serve. And we take that very, very seriously.
10 And the utility is accountable. The one thing missing in
11 PACE's analysis of the current scheme is that we can't go off
12 on our own in applying this bid rule and make our own decisions
13 and not be accountable to the Commission. When those decisions
14 are made, they are laid out in front of the Commission and the
15 utility remains accountable for those decisions. The
16 Commission can review and does review the outcome of the
17 decisions.

18 Now, why have self-build alternatives been selected
19 in the instances where there was, in fact, use of the bid rule?
20 Well, the Commission knows why. And we suggest that it wasn't
21 a result of a breakdown of the process or bias in the use of
22 the rule by the utility, it was because of a lack of superior
23 competitive proposals by independent power producers. It is no
24 secret that IPPs do better by competing at the upper end of the
25 market against the least efficient existing units.

1 This Commission has had a lot of argument and
2 discussion about that issue in the past several years, and the
3 case has been made that a brand new IPP unit will operate more
4 efficiently than an old inefficient existing utility unit. But
5 the case has not been made that an IPP will outbid for base
6 load or intermediate capacity utility projects with
7 state-of-the-art brand new equipment. And that has not been
8 demonstrated in this state.

9 And so we must be very careful, as I said at the
10 outset, in reaching a conclusion that the process is broken
11 because the IPPs have not stepped up to the plate and submitted
12 superior alternatives. We have seen in recent days IPP
13 projects being withdrawn from the market, being announced and
14 being withdrawn. There is some question whether IPPs and their
15 investors believe that they can compete against utility and
16 supplant utility options. And we are seeing more and more
17 recognition of that in the market, and we have seen that
18 demonstrated in Florida. Yes, there have been repowerings.
19 And repowerings are championed by many environmental groups
20 because they involve the use of an already impacted site. And
21 if we recall, the Power Plant Siting Act was designed to create
22 an opportunity for regulatory scrutiny when there would be a
23 new significant environmental impact, and that is not occurring
24 in the case of the repowerings.

25 That concludes my comments, and I appreciate the

1 opportunity to provide that brief response.

2 CHAIRMAN JABER: Ms. Blanton.

3 MS. BLANTON: Thank you. Yes, very briefly. I would
4 like to reiterate the points of Section 366.06, Subsection 2,
5 which was cited as authority, and Section 366.07. Those are
6 really general grants of rulemaking authority in the context of
7 ratemaking. They may go to the class and powers of duties
8 identified -- the rule may go to the class and powers of duties
9 identified in the statute, but the courts have rejected that
10 and the legislature has rejected that. It is just simply not
11 enough anymore. In the Day Cruise (phonetic) case, which was
12 just decided six months ago by the First District Court of
13 Appeal, one brief paragraph, "Under the 1996 and 1999
14 amendments to the APA, it is now clear agencies have rulemaking
15 authority only where the legislature has enacted a specific
16 statute and authorized the agency to implement it, and then
17 only if the proposed rule implements or interprets specific
18 powers or duties as opposed to improvising in an area that can
19 be said to fall only generally within some class or powers of
20 duty the Legislature has conferred on the agency." And I would
21 respectfully submit that these two statutes have been cited as
22 authority are just within that range of powers or class of
23 powers and duties, that there is no specific authority for this
24 rule in those statutes.

25 I would be happy to answer the two questions you

1 posed earlier, if now would be an appropriate time for that.
2 You mentioned the uniform rules and whether or not there is
3 anything in the uniform rules that would go to the rulemaking
4 authority. And I think the answer to that is no. The uniform
5 rules generally provide the procedures that have to be followed
6 by agencies and by challengers when they challenge rules. It's
7 more of a procedural mechanism rather than a substantive type
8 guidance, that the actual substance would be found in the APA
9 itself, and in the rulemaking requirement and in the definition
10 of invalid exercise of delegated legislative authority.

11 The second question you had regarded the requirement
12 that agencies submit rules to the Legislature. That was as a
13 result of the 1996 and the 1999 amendments to the rulemaking
14 requirements. The Legislature, recognizing that many agencies
15 might have adopted rules that were inadequate at the time they
16 were adopted based on the new standard, or that were adequate
17 when they were adopted, but were no longer adequate based on
18 the new standard, gave agencies the opportunity to cure their
19 rules. They could submit them to the Legislature within a
20 defined time period and say, Legislature, we don't have
21 authority under the new standard, give us the authority for
22 these rules. Many agencies did that and were given the
23 statutory authority that they needed. Many other rules were
24 repealed, and I do believe the Commission participated in that
25 process by repealing a number of rules that, based on the

1 decisions of the Commission, no longer had the statutory
2 authority that was required. So that's what those two window
3 periods were.

4 CHAIRMAN JABER: Thank you, Ms. Blanton.
5 Commissioners.

6 COMMISSIONER DEASON: I have a couple of questions,
7 but I can wait or ask them now.

8 CHAIRMAN JABER: You spoke first.

9 COMMISSIONER DEASON: Okay. Ms. Blanton, as I
10 understand your last comment, before answering the Chairman's
11 questions you indicated that -- and I'm paraphrasing, and
12 correct me if I have it incorrectly. But generally it is your
13 belief that the general grant of ratemaking authority contained
14 within the statute is not enough for us to engage in the type
15 rulemaking which is contemplated by staff's proposal?

16 MS. BLANTON: I think that is generally correct. You
17 need to have an explicit power in the statute for your rule,
18 and that is in the words of the First District Court of Appeal.
19 And I do believe that you have -- clearly you have authority,
20 ratemaking authority. You have authority to address facilities
21 in the context of ratemaking, but I would say that you do not
22 have -- I believe you do not have the explicit authority for
23 some of the requirements in this proposed rule, such as the
24 collocation requirement, such as the requirement allowing the
25 Commission to select the winner in the RFP process. I don't

1 see anything in the statutes that explicitly contemplates
2 things like that.

3 COMMISSIONER DEASON: Well, let me ask you this. You
4 have acknowledged that the statute which was cited by
5 Mr. McGlothlin does address the fact that the Commission has
6 not only the authority, but, I guess, the obligation to review
7 facilities that are used in providing service, and has to make
8 a determination that those facilities are needed and that they
9 are engaged in a prudent and cost-effective manner when we
10 establish rates. You generally would agree with that?

11 MS. BLANTON: That is correct.

12 COMMISSIONER DEASON: Okay. I guess my question is
13 if we have that obligation to conduct that review -- and I
14 guess maybe this question goes a little bit away from the law,
15 and I guess a little bit more towards policy. If we have that
16 obligation to conduct that review, from a policy perspective is
17 it not best to engage in that review on the front end when the
18 utility is contemplating adding capacity to its system as
19 opposed to not conducting that review at the front end, and
20 basically reserving it to a rate case to conduct a prudence
21 review of the decision to build that specific plant?

22 MS. BLANTON: I think from a policy standpoint the
23 Commission clearly has an obligation to review the entire
24 process and has regulatory authority to review many aspects of
25 the process, but some of the policy decisions that are being

1 contemplated by the proposed rule I would suggest belong in the
2 Legislature. There are decisions that -- there is delegated
3 power, as Gary mentioned, that agencies have, but those have to
4 be within the constraints of the statutes that the Legislature
5 has enacted. And I would suggest that some of the provisions
6 of the proposed rule go to policy decisions that are more
7 appropriate to be debated by the Legislature.

8 COMMISSIONER DEASON: Mr. Sasso, let me ask you a
9 question, and I guess this is a little bit of a variant of the
10 question which I just asked earlier to Ms. Blanton. In terms
11 of fulfilling our obligation to make sure that capacity
12 additions are the most cost-effective, we have that obligation.
13 You would agree with that, correct?

14 MR. SASSO: You have the obligation to review utility
15 decisions.

16 COMMISSIONER DEASON: Review utility decisions before
17 we allow the cost associated with that to be included in
18 customer's rates?

19 MR. SASSO: Exactly.

20 COMMISSIONER DEASON: So it is a review of utility
21 decisions, and those are management decisions and not
22 regulatory decisions.

23 MR. SASSO: That's correct. And there has to be some
24 measure of deference given to the utility in managing its
25 system, assessing its total system needs, not only capacity

1 needs, but fuel needs, diversity, operational needs, load
2 management needs. These are very complex decisions that are
3 made by the planners and operational people. And, in addition,
4 we have the aspect of delay, the need for expedition on the
5 front end by the utility to serve the customer.

6 COMMISSIONER DEASON: So there is a certain
7 obligation for the utility in making the management decisions
8 to defend those decisions when it comes to a Commission review,
9 correct?

10 MR. SASSO: Exactly.

11 COMMISSIONER DEASON: So I guess my question is a
12 little bit more on the policy end of things. Why is it that I
13 sense a reluctance to engage in an RFP process where there is
14 an independent evaluator? And you seem to be very confident,
15 and I have no reason to disagree with you, that all of the
16 decisions that have been made heretofore under the bid rule has
17 been the least-cost options, and they would have won regardless
18 if it had been subject to a third-party evaluator or not.
19 Doesn't it just add credence to your argument that, you know,
20 we submitted it to a third-party evaluator and we won. And it
21 seems like it eases your burden to demonstrate the
22 cost-effectiveness of your project in a need determination or
23 subsequent rate review.

24 MR. SASSO: There is a trade-off, Commissioner
25 Deason. On the one hand you are absolutely correct. If we had

1 an outside party participate in the process, one could argue
2 that we would have that additional fact to place before the
3 Commission to satisfy the Commission that we have met our
4 burden. But there is a trade-off. There is a cost of that.
5 One is the quality of the decision. This is a very complex
6 decision that is made by a team within the company based on an
7 assessment of the needs of the company. Educating an
8 independent third party to make that decision right would be
9 daunting. And we have no assurance that an independent
10 evaluator would necessarily make as good a decision, let alone
11 a better decision than the utility itself. So we have issues
12 about the quality.

13 COMMISSIONER DEASON: Let me interrupt for a second.
14 Is there a lack of qualified people to do that?

15 MR. SASSO: Not a lack of qualified people in the
16 sense that there aren't people out there with sufficient
17 intelligence and maybe background, but there is no substitute
18 for being inside the company and having the depth and breadth
19 of information and knowledge about the needs and operations of
20 the company in making these decisions. So it's not a lack of
21 competence, it's a difference in perspective and background.
22 Which is why, again, fundamentally, the statute is set up,
23 proposing the obligation to serve on the back of the utility
24 with some trust, with regulatory oversight that that will be
25 discharged responsibly. So you do have an issue about quality

1 of the decision. You also have an issue about the delay, and
2 the risk associated with intruding a regulatory process at the
3 outset.

4 The Commission's recent mission statement observes
5 that the Commission would like to move in the direction of
6 lightening the regulatory burden. This proposal is actually
7 reactionary. It is a step quite in the opposite direction.
8 Actually both the straw proposal and PACE's proposal is
9 intruding the command and control regulatory hand more
10 invasively into the process than ever before. And it is really
11 a step in the opposite direction from lightening the regulatory
12 burden on the operation and decision-making of utilities.

13 COMMISSIONER DEASON: Let me interrupt. Your answers
14 are quite long, and you lose my question.

15 MR. SASSO: I'm sorry.

16 COMMISSIONER DEASON: And I don't want to interrupt,
17 and I apologize for the interruption, but you disagree, then,
18 with Mr. Wright that more involvement on the front end will
19 actually lessen the burden and the delay and the risk
20 associated with subsequent bid protests or whatever that may
21 result on -- maybe bid protests or even rate case issues later
22 on when the project comes to fruition and gets included in a
23 rate case?

24 MR. SASSO: I do disagree.

25 COMMISSIONER DEASON: You disagree with that.

1 MR. SASSO: Yes, I do.

2 COMMISSIONER DEASON: Okay.

3 MR. SASSO: I can explain, if you would like.

4 COMMISSIONER DEASON: Please do.

5 MR. SASSO: I think we have seen in the need cases
6 that have come before the Commission and in other proceedings
7 that the capacity of parties to litigate is virtually
8 infinite. And when we create points of entry early in the
9 process, we basically invite imaginative lawyers to think of
10 all kinds of reasons why they can slow down, or thwart, or
11 challenge a project. And we do introduce risk on outcome, that
12 a wrong decision may be made in either direction that would
13 have to be rectified by a review in court. We have to then
14 build into our planning process additional time for all of this
15 to take place, which does have costs in terms of, again, our
16 dealing with vendors, and contractors, and options in contracts
17 and so on. And then we do run the risk of the actual delay
18 itself. How long will the proceedings take? Who will
19 intervene? What issues will be raised, and there is no limit,
20 again, to the imagination of parties to raise issues.

21 COMMISSIONER DEASON: And if you want to continue
22 when I interrupted you, please do so.

23 MR. SASSO: No, that's fine.

24 CHAIRMAN JABER: Commissioners, other questions?

25 COMMISSIONER BAEZ: I have a couple, and they may be

1 all over the place, but I did want to seize on something that
2 Mr. Sasso just said. You know, one of the recurring themes
3 that comes out of here is delay, and it is certainly something
4 that I think certainly from my personal perspective I have a
5 concern about that. And I have some questions for PACE after.

6 But to me the concept of delay is sort of a two-edged
7 sword. I mean, it's something that we want to avoid, and that
8 very thought of avoiding delay puts us in a vulnerable or could
9 put us in a vulnerable situation as a Commission approving
10 whether it is a self-build option or any other alternative
11 during a need determination, and I'm sure that it plays a very
12 big part in a review later in the process.

13 Now, I understand and share your concern with delay
14 on the front end of the process, because I guess one of my
15 questions, and you can go thinking about it for later, the
16 representatives for PACE, is that, yes, it does invite
17 interminable litigation. And in terms of the PACE proposal, a
18 question to you all would be how do you envision these
19 complaints, these interim or interlocutory complaints, you
20 know, during the process? And when is the line drawn, where
21 does it end? How final are these determinations, whether it be
22 approval of criteria for an RFP, approval of independent
23 evaluators, and so on? How final are those decisions on the
24 part of the Commission as they are made up in your proposal?

25 But going back to Mr. Sasso's comments, I guess I

1 would urge you to consider how that works both for us and
2 against us in terms of trying to avoid delay. That there is
3 some vulnerability that I sense on the back end, because once
4 the train is out of the station, once the self-build option in
5 these cases, recent cases has been made, then the issue of
6 delay works against the Commission and perhaps could place us
7 in a very vulnerable position of having to weigh that against
8 the possibility that were better alternatives available.

9 And then a real question -- I guess I haven't posed
10 question to you yet. Two things, do you believe that the
11 strawman proposal creates a process -- setting aside for a
12 moment whether we have authority or not under the APA, but do
13 you believe that it creates a separate, an independent process
14 for review by the Commission that is apart from a need
15 determination context? Are we talking about two separate
16 processes possibly, again, irrespective of the fact whether
17 there is authority or not?

18 And, secondly, when the original rule was -- to your
19 recollection, when the original rule was implemented, were the
20 opportunities for bypass present even then? And do you
21 recall -- and I guess I will put this to everyone. Does anyone
22 recall any discussion of by-pass opportunities in terms of
23 repowerings or other alternatives, were they present at the
24 time the original rule was passed?

25 MR. SASSO: To address the last question first, there

1 was always the potential for by-pass, as you put it. And I
2 hesitate to use that term because it has some negative
3 inflections.

4 COMMISSIONER BAEZ: And I don't mean anything by it.
5 If there were scenarios available even back then where the need
6 determination statute would not be applied, where the bidding
7 rule would not be applied?

8 MR. SASSO: Well, yes, and purposefully so. Because,
9 as you know, the rule was tied to the Power Plant Siting Act,
10 which initially had a 50-megawatt exemption, and then the
11 Legislature increased it to 75 megawatts. And there was a
12 recognition that that was for a reason. And, in fact, in the
13 recent merchant discussions that has been seen as an advantage
14 where plants could be built at the wholesale level in the state
15 that are not required to go under the Siting Act. So there
16 definitely is -- there always was a potential that the rule
17 would not be used for all capacity additions, including
18 repowerings. The Power Plant Siting Act is written in a way to
19 exclude repowerings. I mean, there is a definition of scope
20 that would exclude certain projects, including the repowerings
21 that have taken place. So that was always inherent.

22 And as to the first question, if I could remember it,
23 I think it had to do with the trade-off, delay now or delay
24 later. We considered the advantages of the straw proposal,
25 putting aside the issue of legislative authority and rulemaking

1 authority. Is there some advantage to the utilities to
2 extending the scope? Is there some advantage to the utilities
3 and the customer to have a review process early on and to
4 ameliorate some of the risks at the back end of it? And we
5 understand the argument that that actually does, in some sense,
6 simplify our burden and creates another opportunity for the
7 Commission to look at what we are doing. But, one, we do think
8 that it is another need process by any label. If you look at
9 the straw proposal, it provides that we have to publish details
10 about our need, we have to publish details about how we are
11 going to meet that need, invite others to meet that need, and
12 it is going to be a need determination process by any name.
13 And we have seen that need determination processes involve a
14 great deal of regulatory delay and risk. And we have reached
15 the judgment that it is just not worth that trade-off. We are
16 in an appeal right now in a matter where we don't even think we
17 should number be in an appeal in our last need case. And the
18 intervention in that case created delay and risk and cost, and
19 that was a fairly simple straightforward project, we thought.
20 The opportunities for delay are infinite. And looking at it
21 from the point of view of what he is best for our customer,
22 what is best for the utility in complying with its obligations
23 and helping the Commission comply with its duties, we think the
24 trade-off is simply too severe. We are more comfortable with
25 the current regime, with our ability to discharge our own

1 responsibilities and good faith in doing that, that we are
2 comfortable in being accountable to the Commission after we
3 have made that decision. It is simply too difficult to
4 anticipate at the front-end everything that is going to need to
5 go into that decision. Exactly how we are going to need to
6 evaluate every project, what the criteria will look like
7 exactly. We publish a great deal of criteria in the RFP, but
8 there still has to be some discretion retained through the
9 process for the benefit of the customer.

10 And we are concerned on balance that it will actually
11 ultimately compromise the best interests of the customer to
12 involve this kind of process at the front-end, even though in
13 some sense if we survive it, if somehow we survive it, it will
14 lighten our burden at the back end, perhaps. We are not sure
15 of that. We're not sure of that. But on balance we don't
16 think that it is a sensible trade-off.

17 COMMISSIONER BAEZ: And one last question. There is
18 a tension between -- you had mentioned early on in your
19 comments about having flexibility. And I think you alluded to
20 that again, having the flexibility to take in, you know,
21 whatever changed circumstances throughout the process, changes
22 in your particular needs and so on, and to have that kind of
23 flexibility. There is a tension between having that
24 flexibility, which I agree is of value, and also the concept of
25 a moving target, which some of the IPPs have raised. And I

1 guess my question -- two questions. Do you all -- and
2 enlighten me. I'm not really clear on the need determination
3 or what kind of information in total you all put, but, I mean,
4 whatever criteria there are, whether they can be changed or
5 not, even your self-build option has to meet that kind of
6 criteria I would assume.

7 MR. SASSO: Yes.

8 COMMISSIONER BAEZ: And is there a middle ground to
9 where -- I guess I'm trying to find where you can balance the
10 tension between having a moving target and -- and I think you
11 tried to characterize it, correct me if I'm wrong. You tried
12 to characterize it as an advantage to a bidder in terms of the
13 company being able to be value a bid outside the very criteria
14 in a way that would be favorable to a bidder, as well.

15 MR. SASSO: Right.

16 COMMISSIONER BAEZ: Is there any middle ground to
17 that? I mean, is there --

18 MR. SASSO: We think we're at it. And I can't speak
19 for other utilities. I can speak about our own experience with
20 Hines 2 and what we are doing with Hines 3, and I can speak
21 about what the rule requires and what it permits. But there
22 are two important points to keep in mind. One is it is not in
23 our interest to sandbag bidders. We are trying to get the best
24 proposal for the customer. And if it is a power purchase
25 agreement, terrific. If it self-build, so be it. But we are

1 looking for the best value for the customer. And we don't mean
2 or intend to sandbag bidders. When I'm talking about
3 flexibility, I'm not talking about that kind of flexibility
4 where we change the rules in some significant way halfway
5 through. We do publish the matters we are going to be looking
6 at, but we can't give weights in advance. We can't give maybe
7 the kind of precision that people are talking about in this
8 room in advance. That is, neither to the advantage of the
9 customer nor to the bidder, because we have seen that bidders
10 are creative. And we want to invite them to be creative and
11 provide us with options that maybe we hadn't thought about and
12 couldn't describe or contemplate or weigh in advance. So that
13 works to their benefit; it works to our customers benefit. But
14 we think we have the middle ground because the rule does
15 constrain us to provide a great deal of information with a
16 great deal of detail up front, but it is not a straight jacket.
17 And we think the rule achieves the proper balance. We think --
18 we strive for that in our actual RFP process.

19 And the second fundamental point that I would make is
20 ultimately we are accountable to you for that process and that
21 decision. And we have to assure you that we did not sandbag
22 the bidders. And if they think we did, they will tell you
23 about it. And they will attempt to prove it, and we will have
24 to explain what we did. And so that is the check, that is the
25 safety here that you have with the current rule. And it is

1 sort of you have the advantage of having the best of both
2 worlds. We do have a limited scope on this rule, and it
3 doesn't apply to all processes, but you can get the advantage
4 of applying it in this context and have a different approach in
5 others.

6 COMMISSIONER BAEZ: Madam Chairman, that is the end
7 of my questions, but I would like Mr. McGlothlin or his
8 associates to clarify as part of their proposal what level of
9 review our interim decisions might have under your proposal.

10 MR. MCGLOTHLIN: Under our proposal, the concept of
11 early PSC involvement is designed to provide a window of
12 opportunity for interested developers who receive the RFP
13 package and perceive that there is something about the criteria
14 in the proposed package that is either biased, or
15 anticompetitive in some nature, or possibly commercially
16 infeasible. And to have a 30-day window of opportunity to
17 bring that to the Commission's attention so that if that is the
18 case that can be eliminated at the outset. And in terms of
19 trade-offs --

20 COMMISSIONER BAEZ: Well, Mr. McGlothlin, when you
21 say eliminated at the outset, you're assuming a favorable
22 decision by the Commission. What about the instances where the
23 Commission may determine ultimately, look, we don't think it's
24 discriminatory, we don't think it is anticompetitive in our
25 opinion, and that's what we think.

1 MR. MCGLOTHLIN: In that event, the utility's
2 proposed RFP would be approved and be published and issued in
3 its original form, and the developers can participate or not as
4 they see fit. We envision, and the illustrative rule language
5 demonstrates, that the window of opportunity would be a short
6 one. We suggest 30 days in this version. And that any
7 proceeding to consider and rule on such an objection would be
8 expedited. And in this we have illustrated with 100 days from
9 the time the RFP is made available.

10 So there is an effort to be conservative both in
11 terms of time requirements and in terms of the grounds that a
12 developer could allege in order to object to the RFP package at
13 the outset. It is designed to be limited to those aspects of
14 an RFP package that would defeat the intent to provide a level
15 playing field for full competition.

16 And in terms of the trade-offs, there are trade-offs
17 in not providing that opportunity. Let's take an example.
18 Let's say that the RFP is designed in a way that says to the
19 potential developer, this is a nonstarter for me. I'm not
20 going to play. Why bother? And without early intervention by
21 the PSC, the RFP is issued and processed in that way. Well,
22 that means that because of a flaw in the RFP that was not
23 picked up and removed, at least one and maybe multiple
24 developers don't show up. The least-cost option is foregone.
25 And in terms of the opportunity to bring that to your

1 attention, because they didn't participant in the RFP, the
2 present rule says they can't intervene in the determination of
3 need as the present rule is limited to.

4 COMMISSIONER BAEZ: I'm sorry to interrupt, but you
5 used the word "nonstarter," and that to me suggests some kind
6 of negotiation. I mean, is a nonstarter for me grounds to
7 complain on the criteria or the makeup of an RFP?

8 MR. McGLOTHLIN: I didn't mean to suggest as a point
9 of negotiation. I had in mind what we -- the language that was
10 used here is commercially infeasible.

11 COMMISSIONER BAEZ: Okay.

12 MR. McGLOTHLIN: And by way of illustration, that is
13 exaggerated to make a point. Let's say the RFP issued --
14 proposed RFP says only turbines using Technology L will be
15 considered. And the developer looks into it and says, well,
16 there is only three prototypes in existence, and the IOU has
17 two of those. I can't play. Well, that might -- you know, he
18 might make the case that is an unfair and unworkable RFP
19 criterion, and he might argue that is designed deliberately to
20 preclude competition. But absent some early point of entry,
21 the Commission doesn't hear that.

22 CHAIRMAN JABER: Commissioner Bradley.

23 COMMISSIONER BRADLEY: Yes, just to follow up on what
24 Representative Baez and Representative Deason have discussed a
25 little bit, and then I have some other questions. I do have a

1 little bit of experience with RFPs and bidding and
2 construction. And one of the things I've always concluded is
3 that cheapest is not necessarily the best, for obvious reasons.
4 If you buy the cheapest pair of shoes, you may wind up buying
5 five pairs of shoes. Whereas, if you buy an intermediate
6 priced pair of shoes, you might wind up with maybe five pair
7 over a year's period of time. And if you buy a decent pair or
8 an intermediately priced pair, you may only wind up buying one
9 pair. So cheapest is not necessarily the best and in the
10 public's best interest, but I understand how government works
11 and how we throw around cheapest.

12 But my question is this: What is there that is in
13 this proposal that you have put forth that would ensure that
14 the bid is not manipulated? And when I say "manipulated," you
15 know, you come in at a very cheap price, but then all of a
16 sudden you discover that you can't build a high quality
17 generating facility for that price, and you then start to talk
18 about cost overruns, and you start to renegotiate which allows
19 bidders to get in at the cheapest price, but then, you know,
20 that is not necessarily, as I said, in the public's best
21 interest. So cost overruns, deal with that.

22 MR. McGLOTHLIN: All right, sir. First of all, the
23 strawman proposal incorporates and contemplates the possibility
24 that proposals will be scored both on price and nonprice
25 attributes. And we have included that concept in our markup of

1 the strawman. So we envision an RFP package that is based on
2 price, but also on other considerations, not price alone. But
3 it appears to me that the IOU is the entrant in this contest
4 that has, without some rule language addressing it, the
5 possibility of coming in at an artificially low price designed
6 to get the prize and then later including some greater amount
7 in rate base or some greater amount of nonfuel expenses that it
8 seeks to recover from the customers. Because when the
9 independent developers submit proposals in response to an RFP,
10 they have to be ready to sign a contract that binds them
11 contractually to the terms that they have offered, and that
12 distinguishes them from the sponsoring investor-owned utility.
13 So it is by the terms of the contract that result from this
14 contest that the independents would be precluded contractually
15 from passing through more than the terms to which they have
16 agreed.

17 COMMISSIONER BRADLEY: Thank you. And I heard what
18 you said about the ratepayers, but, you know, we had this
19 discussion about who really pays for all of these
20 improvements. I think the ratepayer ultimately pays for these
21 improvements no matter who builds the plant.

22 But I would like to ask this question, also. You
23 know, we also had a discussion about who really owns the
24 property and improvements that we use to generate energy; is it
25 the ratepayers or is it the shareholders? And I'm going to put

1 this out here for both of you to answer. If you accept the
2 position that the property belongs to the shareholders, does
3 allowing someone to use the shareholders' property without
4 their willing consent amount to confiscation or condemnation of
5 the property? And this is something -- this is a question I
6 think the general counsel for the PSC needs to answer for us.
7 If you agree with that, then has the Legislature conferred upon
8 the PSC the authority to confiscate private property? And, you
9 know, maybe this is a question -- is something that should be
10 done in internal affairs, but, you know, this seems like a very
11 complicated issue to me. And I have listened to the discussion
12 very intensely, and I have been trying to make some decisions
13 and to sort out some things.

14 You know, as it relates to rule promulgation,
15 legislative intent is always very much a part of rule
16 promulgation. And the Legislature gets upset if an agency goes
17 outside of what the legislative intent is, and if it seems to
18 them that we are taking on some implied portion of what they
19 have handed down to us as an agency. Would we be within the
20 legislative intent if we, as a body, in fact, do deal with this
21 issue of the RFP and the bid process and allowing an IPP to
22 build upon the property of an IOU?

23 MR. McGLOTHLIN: May I take that in two parts, sir?
24 I would like to answer generally and then answer with respect
25 to this idea of using the utility's property. And this is also

1 by way of response to Ms. Blanton's last comments. She said
2 she doesn't think that the existing statute is sufficient
3 authority to enable you to adopt the strawman or a variation on
4 it because it is a general class of powers as opposed to the
5 specific. But I would harken back to the language of the
6 very -- say the case to which she referred earlier. In that
7 case the court said, yes, there is a restricted ability on the
8 part of the agencies to adopt rules. The agency must have
9 specific law that is implementing their authority. But the
10 court said in that case the Legislature did not define some
11 degree of specificity. If you have got specific law, that is
12 good enough.

13 Well, Ms. Blanton can call the statutory language to
14 which I referred a general class. But my point is this:
15 Unless and until there is an absolute equivalency between the
16 wording of the statute on the one hand and the wording on the
17 rule of the other, someone is going to be able always to say
18 your statute is not specific enough, because this word is in
19 the rule and it's not in the statute. And so the Commission is
20 going to have to use judgment and apply the legislative test on
21 a case-by-case basis. And in this case where the statute says
22 the Commission has authority to review the practices that
23 affect rates and thereafter promulgate rules that define the
24 practices to be thereafter followed, we think it is in your
25 authority to interpret practices as meaning those practices

1 that increase rates unduly because they don't include a
2 competitive procurement. And so we think there is a strong
3 case there for the proposition that you would be within your
4 statutory authority to adopt a bidding rule.

5 Now, with respect to the use of the utility's
6 property, we have included the strawman proposal within our
7 markup and support it. I have not researched that question
8 specifically, and can't give you a chapter and verse response.
9 But from PACE's point of view, as important, and I think even
10 more important than the ability to park a developer's unit on
11 the utility's property, is this objective of an
12 apples-to-apples comparison. And even if, for the sake of
13 argument, it is determined at some point that a developer can't
14 require the utility to enable to us collocate, that doesn't
15 change the need to have an apples-to-apples comparison. And
16 until you have reflected in the full cost of the utility's
17 self-build alternative, the opportunity cost is foregone
18 because it chooses to retain that property rather than possibly
19 receive revenues that enure to the ratepayer, then you don't
20 have apples-to-apples, and that is our point.

21 CHAIRMAN JABER: Commissioner, I do intend to have
22 them file written answers to our questions, because there will
23 be questions they are not prepared to answer today.

24 COMMISSIONER BRADLEY: Okay. That's fine. One other
25 question. I am very new at this process, and I am

1 discovering -- I served in the Legislature for about seven or
2 eight years, and I'm discovering some things that I didn't know
3 in the Legislature as a part of this whole process of
4 competition and deregulation. How many members of your
5 organization, PACE, also -- I mean, it's apparent that you all
6 have merchants, you all function in discussing this issue from
7 the position of a merchant or an IPP, but how many of your
8 members also serve as IOUs in other states?

9 MR. MCGLOTHLIN: In the past, Reliant Energy was
10 associated with a Texas IOU, but they are in the process of
11 dividing into two separate entities, so that for our purposes
12 Reliant is no longer --

13 CHAIRMAN JABER: What was your question,
14 Commissioner?

15 COMMISSIONER BRADLEY: How many of the members of
16 PACE -- how many PACE members are also IOUs in other states.

17 MR. WRIGHT: With Mr. McGlothlin's explanation of
18 Reliant's current status, I believe the answer is two. Duke
19 Energy North America is one of PACE's members that naturally
20 has a pretty sizable investor-owned utility operating in the
21 Carolinas and Virginia. The other is Constellation Power
22 Development, Incorporated, which is affiliated with Baltimore
23 Gas & Electric. The other members -- what about PG&E?

24 MR. MOYLE: Yes. They are different companies. They
25 are different companies, but they are affiliated.

1 MR. WRIGHT: Different companies, but affiliated.
2 Calpine does not have retail IOU operations, nor does
3 Competitive Power Ventures.

4 MR. MOYLE: And just to be clear, I don't know that
5 the structure is markedly different from like Florida Power and
6 Light, the regulated utility, which is regulated here before
7 you, and Florida Power Energy Services, I believe, which is
8 their unregulated affiliate that is building merchant plants in
9 other states.

10 MR. WRIGHT: So I think the answer to your question
11 is three.

12 COMMISSIONER BRADLEY: Three. And just one follow-up
13 and I will be finished. How have they dealt with this bidding
14 rule in their respective states? Have they allowed merchants
15 to build upon their land, also, or has this even been a part of
16 the discussion? I'm just trying to get some idea of what the
17 past precedents are.

18 CHAIRMAN JABER: While you think about that, and you
19 all need to correct me if I'm wrong, but it's also important to
20 point out that this isn't just about merchants building on the
21 IOU property, it could be regulated IOUs.

22 COMMISSIONER BRADLEY: Other IOUs.

23 CHAIRMAN JABER: Right. But make sure that we are
24 clear on that. Does anyone disagree with that? This isn't
25 just about merchants.

1 MR. SASSO: Anybody can bid. And I assume the intent
2 of the proposal is to extend it to any bidder.

3 CHAIRMAN JABER: Mr. Wright.

4 MR. MCGLOTHLIN: I think that's right. As drafted
5 there is no distinction made between IOUs and others.

6 CHAIRMAN JABER: Mr. Wright, you had a response to
7 Commissioner's Bradley's question?

8 MR. WRIGHT: Yes, ma'am. We're going to need to
9 research it further. The quick poll of the nearby group
10 indicates that we are not aware of any IPPs on utility property
11 at this time.

12 CHAIRMAN JABER: Okay. Commissioner Bradley, did you
13 have a question?

14 COMMISSIONER BRADLEY: And just to clarify myself, my
15 first question, I asked one question of our legal staff. And
16 that is do we, as a Commission, have the statutory authority to
17 deal with what we are dealing with here? And that's probably a
18 question that we need to discuss in internal affairs, though.

19 CHAIRMAN JABER: Well, what I envisioned -- and we
20 will talk about this more, because I'm very interested in
21 having feedback from the Commissioners on how to go forward.
22 But just for you all to think about, what I envisioned is
23 allowing the parties to file written comments and responses to
24 all the questions that we have and to the comments made to each
25 other, respond to each other and bring it back to us in a forum

1 much like this. I want to keep it informal.

2 Commissioner Palecki, did you have a question?

3 COMMISSIONER PALECKI: Yes, I have just two
4 questions.

5 My first question relates to a desire that Chairman
6 Jaber expressed when we first started today, and that is that
7 we have a collaborative process. And I personally believe that
8 the best work and the best rulemaking that this Commission does
9 is when the parties get together and collaborate. But this
10 question is to Mr. Sasso. And the question is, can you
11 envision any circumstance or procedures wherein the
12 investor-owned utilities would be willing to submit a sealed
13 bid for their proposal along with the other bidders? And it
14 might be something that you don't want to answer right now,
15 that you would prefer to mull over and address in the brief.

16 MR. SASSO: I think I would prefer to confer with my
17 client and have the other IOUs have an opportunity to consider
18 that. But that is certainly something we can address in
19 written comments.

20 COMMISSIONER PALECKI: Because I personally feel that
21 if there was a procedure in place where the utility did submit
22 a sealed bid at the same time as the other bidders, that it
23 might satisfy a lot of the concerns that the other bidders have
24 with regard to the fairness of the process.

25 MR. SASSO: I know that issue surfaced and was

1 debated in connection with the Gulf request for a bid rule
2 waiver, and the Commission determined at that time that that
3 was not necessary or appropriate. I would probably want to
4 review that discussion, too.

5 COMMISSIONER PALECKI: My other question is for
6 Ms. Blanton, and without regard to the specific strawman
7 proposal we have here, but merely as a general matter, under
8 the Commission's general rate authority, its statutory rate
9 authority, and in order to ensure that ratepayers are afforded
10 the best possible rates, in your opinion, may the Commission by
11 rule put in place prerequisites to placing facilities in rate
12 base or prerequisites to submitting purchased power contracts
13 for cost recovery?

14 MS. BLANTON: I would like an opportunity to look at
15 that, too, and respond to it in written comments, confer with
16 my client about that.

17 COMMISSIONER PALECKI: Certainly. And that's all the
18 questions I have.

19 COMMISSIONER DEASON: Madam Chairman, if I may. You
20 know, Mr. Sasso is a very brilliant attorney and --

21 CHAIRMAN JABER: Do you have to admit that?

22 COMMISSIONER DEASON: Yes.

23 CHAIRMAN JABER: And now it's in black and white in a
24 transcript.

25 COMMISSIONER DEASON: Well, he is, and I always

1 listen very closely to what he has to say. And I took some
2 notes. And I believe in describing the current rule he
3 indicated that it was, and I may be paraphrasing a little, but
4 that it is appropriate in scope and design, it is well
5 conceived, well designed, balanced, open and transparent and
6 achieves its goal to protect customers.

7 I think I took all of that down correctly. I guess
8 my question is where were you when we first proposed the bid
9 rule, because I don't think that was Florida Power's position
10 at that time? And that --

11 MR. SASSO: I wasn't asked.

12 COMMISSIONER DEASON: You weren't asked, okay.

13 CHAIRMAN JABER: They have since then seen the light.

14 COMMISSIONER DEASON: But in a more serious question,
15 and you may wish to think about this, and if you want to
16 respond in writing, that would be fine. To the question of the
17 ability of this Commission to propose a rule, I want to put it
18 in the context of the fact that we have already proposed and
19 adopted a rule. Did we exceed our authority? And if that is
20 the case, do we have an invalid rule on our books today, the
21 current rule which you have lauded so much?

22 MR. SASSO: The current rule?

23 COMMISSIONER DEASON: Yes, the current rule.

24 MR. SASSO: Yes. It is an interesting question and
25 it is one that we considered.

1 CHAIRMAN JABER: Terry Deason is a very brilliant
2 man.

3 MR. SASSO: I have no doubt about that.

4 COMMISSIONER PALECKI: You just put that in writing.

5 CHAIRMAN JABER: That's right. Well, that's right
6 there with the short/tall thing.

7 MR. SASSO: I think it is a serious question. I will
8 say that if the Commission has authority to promulgate a rule
9 in this area it has, essentially, hit the lid on it with the
10 current rule. But I think there is a serious question whether
11 the current rule would survive a challenge.

12 COMMISSIONER PALECKI: Thank you.

13 CHAIRMAN JABER: And see, Ms. Blanton, as a follow-up
14 that's why I want an analysis and a better understanding of the
15 agency's responsibility to send over to the Legislature once a
16 year a report. And I thought -- and in answering Commissioner
17 Deason's question, elaborate on this. I thought that that
18 first year the Legislature's response to an agency sending over
19 the list of rules was -- inherent in that response was that the
20 rules on the books were valid.

21 MS. BLANTON: The rules that were sent over were
22 evaluated by the Legislature and statutory authority for many
23 of them was enacted. But that was not a blanket pronouncement
24 that all rules on the books are valid. The agency was required
25 to go through the process of sending over the ones they thought

1 they did not have authority for and repealing the others. That
2 was placed upon each agency to go through that process with
3 each of their rules, and I do know your staff did go through
4 that process in -- I believe it was around '97 or '98.

5 COMMISSIONER BAEZ: And for just for the informal
6 record, I guess, since we are in an informal process, the
7 bidding rule was not one of the rules that was sent up or
8 identified as not having --

9 MR. ELIAS: As exceeding the scope of our statutory
10 authority? No, it was not.

11 COMMISSIONER BAEZ: Okay.

12 COMMISSIONER BRADLEY: One other question. The
13 bidding rule was promulgated during which year, 1994?

14 MR. ELIAS: The hearing was in 1993, it was enacted
15 or adopted in 1994.

16 COMMISSIONER BRADLEY: Okay. And one other
17 question. To what extent had we started to deal with
18 restructuring and deregulation when the rule was promulgated?
19 Were we even discussing restructuring during that time frame?

20 MR. ELIAS: The Energy Policy Act amendments opening
21 up the wholesale market that were enacted by the Federal
22 government were passed in 1992, and they were in their
23 infancy. Some of the more significant FERC pronouncements,
24 specifically Order 888, were enacted or adopted after our
25 consideration of the bidding rule. That came along in about

1 the 1996 time frame. So the issue of expanded competition in
2 the wholesale arena was not nearly as fully developed as it is
3 today.

4 COMMISSIONER BRADLEY: Okay.

5 CHAIRMAN JABER: Go ahead, Commissioner Palecki.

6 COMMISSIONER PALECKI: I was just going to say to
7 Commissioner Bradley that a lot of competitors, independent
8 power producers were involved in the process even in 1993 and
9 '94. I was with the commission staff at that time, and I'm not
10 sure if any of the parties -- I think some of the parties that
11 are actually here today were also involved in that rulemaking.
12 So there was a desire even then by the independent power
13 producers to have a part in providing generation in the State
14 of Florida.

15 CHAIRMAN JABER: Let me ask -- Mr. Badders, you
16 thought you were going to get away without saying anything
17 today. I am aware of the Southern Company agreement with
18 Orlando Utilities Commission where Southern -- this is why I
19 wanted the clarification on the merchant plant, this isn't
20 either staff's strawman or Mr. McGlothlin's strawman isn't
21 limited to the merchant plants coming in and building on the
22 IOU land. Southern Company entered into an agreement with OUC
23 to build on OUC's property. Tell me how that worked, if you
24 are aware. If you're not, you can get back to us.

25 MR. BADDERS: I am not aware of all the details. I

1 am aware that Southern Power Company entered into an agreement
2 to operate a unit in Orlando. I'm not sure what site that is
3 at or who owns the site, the unit.

4 CHAIRMAN JABER: Staff? Tom, do you remember?

5 MR. BALLINGER: Yes. It was an affiliate of the
6 Southern Company called Southern Power, I think, Florida.

7 CHAIRMAN JABER: So it was a merchant affiliate,
8 then?

9 MR. BALLINGER: It's an independent affiliate. They
10 are building a unit at the existing Stanton site, which OUC has
11 a couple of coal units there. There will be a natural
12 gas-fired unit owned by Southern Power, but they are leasing
13 the land from OUC. And I believe it is roughly a 30-year
14 agreement with ten-year reopeners as it goes through.

15 CHAIRMAN JABER: Okay. So Southern pays OUC for
16 using that land?

17 MR. BALLINGER: Yes.

18 CHAIRMAN JABER: Now, who reaps the benefit of the
19 wholesale electric sales, or is it just enough capacity to
20 provide to OUC?

21 MR. BALLINGER: Right. The cost of the purchased
22 power is borne by OUC's ratepayers, and the revenues from the
23 lease arrangement go to OUC's ratepayers.

24 CHAIRMAN JABER: Okay. Now, was that idea put
25 through a bid process, or the parties just got together and

1 entered into an agreement?

2 MR. BALLINGER: While our current rule doesn't
3 require munis and co-ops to bid, a lot of them do. And OUC and
4 FMPA and KUA together sent out -- actually, they sent out two
5 RFPs looking at different things. So they have done it anyway.
6 So this was the result of an RFP.

7 CHAIRMAN JABER: And who evaluated that RFP?

8 MR. BALLINGER: I believe OUC hired Black and Veatch
9 to do some of the modeling, but it was basically OUC managing
10 it and making the decisions.

11 CHAIRMAN JABER: And in the RFP they included
12 criteria?

13 MR. BALLINGER: Yes. And they won't be strict
14 scoring criteria. They will be, you know, we need somebody who
15 is dispatchable, can operate long-term, certain megawatt sizes,
16 things of this nature.

17 CHAIRMAN JABER: All right. On the criteria,
18 Mr. Sasso, you said that there is a benefit to having the
19 flexibility. You acknowledge that all the criteria is
20 published. Take me back to when you start drafting what the
21 criteria should be. Who does that in your process?

22 MR. SASSO: The planning department, basically,
23 provides input. There is somebody who is managing the project
24 who collects input and prepares an RFP which includes criteria.
25 Now, the bid rule itself talks about price and nonprice

1 attributes. There is some discussion of what those might
2 include. There is a list of price and nonprice attributes, so
3 those are criteria that may be and typically are included,
4 identified in the RFP.

5 COMMISSIONER BAEZ: With not a lot of flexibility.

6 MR. SASSO: Well, they are fairly -- well, on the one
7 hand they are detailed, but on the other hand you can encompass
8 things within them. So there is some flexibility there. There
9 are categories. And the RFP will include, or at least ours
10 includes, a list of criteria that the company will consider in
11 looking at bids. Now, how they will actually apply to a
12 particular bid will depend on the bid.

13 CHAIRMAN JABER: In the areas where you want
14 flexibility, is it possible to indicate in the RFP process
15 where the company wants to remain flexible? I guess I see your
16 point; you don't want to be too rigid in the process such that
17 the bids come in and they meet exactly the criteria and they
18 are the least cost alternative, but not necessarily out of the
19 box, innovative, you know, long-term efficiency sort of
20 proposals. But if a company wanted to be innovative in putting
21 the proposal together and looking for technologies that are
22 more efficient, how would they know they could do that?

23 MR. SASSO: They will have latitude within the four
24 corners of the RFP. If it is not precluded, it is invited.

25 CHAIRMAN JABER: Is it invited specifically?

1 MR. SASSO: There are parameters. There are proposed
2 terms and conditions. Our current RFP is about this thick with
3 exhibits, and it is intended to provide a lot of guidance, but
4 there is also an opportunity for bidders to be innovative
5 within the framework of the company's identified needs.

6 It is difficult to talk about in the abstract. In
7 our last project we listed criteria, and we did get proposals
8 that the Commission reviewed that were each very different from
9 the other and different from the self-build. And that is an
10 illustration of how with a one-size-fits-all RFP you can
11 actually get different types of bids and then that can be
12 reasonably evaluated within the framework of the RFP. It is
13 difficult to address in the abstract.

14 CHAIRMAN JABER: And I guess you inspired me to think
15 about this a little bit differently. If a company has been
16 innovative in putting a proposal together -- let's say they
17 have used the most efficient clean coal technology, and you
18 like that in reviewing the bid, how would -- that is ABC
19 Utility. How would XYZ Utility know they could have even done
20 that? I mean, what if that second utility actually can do it
21 better and more efficient? That is the lack of competitive
22 solutions that I now see is a problem.

23 MR. SASSO: Well, no process is perfect. I mean,
24 maybe the answer to what you are raising would be an iterative
25 process where when we get in the bids, we put those out and

1 then give people an opportunity to make proposals then. And
2 then we give another round of opportunities after those
3 responses come in. You have to have a balance between getting
4 the job done, meeting the need in a reasonable time frame, and
5 having an opportunity to consider competitor proposals. And
6 there is always a balance that has to be struck.

7 Generally speaking, the folks at this table and their
8 clients and other IPPs around the country are fairly
9 sophisticated in terms of knowing what the technologies are and
10 what options they have available to them. And they know what
11 they think they can be good at, what they can offer up
12 profitably to them and reliably to us. And we have to count on
13 some self-selection by the bidders. Some of them submit
14 multiple proposals. They can submit alternative proposals, and
15 do. But I don't think there is any perfect solution to the
16 dilemma that you propose.

17 CHAIRMAN JABER: And, Ms. Blanton, finally, has does
18 negotiated rulemaking work?

19 MS. BLANTON: Negotiated rulemaking is authorized by
20 the APA. It was first put in in 1996. To my knowledge, it has
21 been used only once. I believe the Department of Business and
22 Professional Regulation used it at one point. It has not been
23 highly used. There is a detailed process in there about how
24 parties such as the parties at this table could get together
25 and work with a regulated agency to come with up with a rule

1 that everyone is satisfied with. I will be happy to address
2 that in my comments if you would like. I didn't review it
3 prior to coming to this meeting, but I would be glad to let you
4 know the procedures that go along with that.

5 CHAIRMAN JABER: Yes, I would like that. But I guess
6 what I'm looking for is sort of a commonsensical response based
7 on your experience and breadth of knowledge with Chapter 120,
8 and there aren't many of you around, I must say, that would
9 negotiated rulemaking be a feasible option for the situation.

10 MS. BLANTON: I can take a look at that.

11 COMMISSIONER BRADLEY: I have one.

12 CHAIRMAN JABER: Uh-huh.

13 COMMISSIONER BRADLEY: And I have asked my other
14 question about the bid process in other states and how many
15 IPPs also function as IOUs. Something else came to mind. If
16 you all -- and this is something that, you know, you can submit
17 in writing after you have done your research. I would be
18 interested in knowing if, in fact, this same issue has come up
19 in another state. And, if so, how it was resolved between the
20 two parties.

21 MR. McGLOTHLIN: Commissioner, I don't have a full
22 answer for you, but I am aware that, for instance, in Louisiana
23 that Commission is exploring the possibility of their
24 equivalent of what we call an independent evaluator. I did
25 want to make that point, that this concept of a neutral

1 third-party scorer is not a novel idea and is not something
2 that we originated. There is some experience with that. And
3 we will be glad to give you a fuller answer in writing. I am
4 told that Iowa has also looked at that.

5 COMMISSIONER PALECKI: I would like to ask that you
6 expand that to any practices in other states that are different
7 from what we have to give us some ideas for innovation, and I
8 would ask that the investor-owned utilities do the same. If
9 there are other states that have processes that you like, we
10 would like to hear about them.

11 CHAIRMAN JABER: And, staff, I don't mean to leave
12 you out, so if you have any final comments or responses to what
13 we have heard, go ahead and let us know, and then we will wrap
14 up by giving some direction for these comments that we want.

15 MR. BALLINGER: Just a follow-up. There was a lot of
16 talk about how much the bid process has been used and how much
17 has been built without need determinations, and I have some
18 numbers to put it in context for you. The rule was promulgated
19 in 1994. And what I did, is I looked at two sections of time,
20 1994 through 2000, what got installed, and whether it had an
21 RFP or not. And then what is planned to be installed between
22 now and 2005, and whether it would have an RFP or not. And I
23 will just give you the bottom line total. Both of those
24 periods of time, this is just for the three IOUs that it
25 applies to. Approximately 8,500 megawatts are either installed

1 or planned to be installed in the next five years. And of that
2 about 1,500 megawatts have gone through the RFP process. But
3 none of those are IPP, it is all IOU. It gives you a feel for
4 how much the rule was applicable because of the need
5 determination statute.

6 CHAIRMAN JABER: Thank you, Mr. Ballinger.

7 Mr. Elias.

8 MR. ELIAS: Some of Ms. Blanton's comments, I think,
9 in her initial presentation seem to infer that some of what was
10 in this rule was within the scope of those specific powers that
11 were delegated to this agency by the Legislature. And if that
12 is the case, if I understood your comments right, I would ask
13 that you address those in your written comments.

14 MS. BLANTON: That's not exactly what I said. What I
15 was saying is that we had addressed three specific elements of
16 the rule that we were concerned were not adequate-- did not
17 have adequate legislative authority. What I said was that
18 there may be other provisions of the rule that do not, as well.
19 I didn't mean to imply that they did or did not, but that we
20 had focused on those specific three areas that I think most all
21 of the discussion today has focused on, that we felt that they
22 did not.

23 CHAIRMAN JABER: But Mr. Elias' point is well taken.
24 To the degree there are changes to the rule that you believe
25 are within the statutory framework of this Commission, it would

1 be helpful to point that out.

2 MS. BLANTON: Okay.

3 CHAIRMAN JABER: And I don't know want to know just
4 what is wrong, I want to know what's right, too.

5 MS. BLANTON: Okay.

6 MR. ELIAS: Thank you, Madam Chairman.

7 CHAIRMAN JABER: Okay. Commissioners, here is where
8 I would like this process to go next, and please correct me if
9 you believe we are digressing or if you have a better idea. I
10 would like to have written comments, I'm thinking by March
11 15th. That is a good six weeks. And all of the questions that
12 we asked, Commissioners, where we asked for comments, that is
13 an offer to all the stakeholders. Just because I asked
14 Ms. Blanton about negotiated rulemaking doesn't mean I don't
15 want to hear from Mr. Moyle. So feel free to respond to any of
16 the questions that you have heard. The questions specifically
17 are just what is our legislative authority looking at the two
18 strawman proposals. And Mr. McGlothlin talked about general
19 versus specific. I think that discussion is useful. I would
20 remind all the stakeholders and staff, these are proposals and
21 absolutely we don't want to exceed our legislative authority.
22 This Commission understands what the parameters are. We are
23 not the Legislature, we are the Commission. So, Mr. Sasso, I
24 appreciated all of your points, but you have to give us a
25 little more credit than that. We are not going to exceed our

1 statutory authority. What I need to know, though, is what is
2 that statutory authority. So file comments that address
3 specifically what that authority is. And that should help us
4 at the end of the day craft what can work within the law. And
5 maybe what we have is just perfect, I don't know. But that is
6 not a reason not to go forward, it just helps us in crafting
7 what the ultimate proposal should be.

8 COMMISSIONER BRADLEY: Madam Chair?

9 CHAIRMAN JABER: Yes.

10 COMMISSIONER BRADLEY: Also, I would like for our
11 legal counsel to also give his opinion on that to us.

12 CHAIRMAN JABER: Right. Again, I have a request of
13 staff in just a minute on that.

14 The proposal offered by Mr. McGlothlin, Mr. Sasso,
15 Ms. Blanton, Mr. Badders, Mr. Beasley, please respond to that.
16 And if you have alternative language, would you please submit
17 that and submit it to each other.

18 Commissioner Baez asked about a middle ground on the
19 criteria. Is there a way to publish the criteria, maintain
20 that flexibility, where would that middle ground be? If you
21 can address that, that would be great.

22 Commissioner Deason asked about -- no, it wasn't
23 Commissioner Deason. Who asked about the sealed bid idea?
24 Commissioner Palecki. Address that.

25 Commissioner Bradley wanted to know what other states

1 have done to address similar issues, bidding practices. I
2 think you're looking for best practices, just what have other
3 states done in this issue.

4 Now, legal staff, I want you before March 15th to sit
5 down with all of the stakeholders and talk about that legal
6 issue. We want to hear back from you when we get back
7 together. But before that, Bob, get with the parties because
8 if they are absolutely right that we don't have the statutory
9 authority to do what is in the proposed strawman, let's not
10 waste our time. So, you know, you have to collaborate, as
11 well.

12 And absolutely, General Counsel and Mr. Elias, when
13 we get back together, please be prepared to address us on that
14 legal issue.

15 MR. McLEAN: Yes, ma'am.

16 CHAIRMAN JABER: Commissioners, I'm thinking March
17 15th. Were there other questions that I didn't write down that
18 you do want to address? Did I leave anything out?

19 COMMISSIONER PALECKI: Just the question that I asked
20 Ms. Blanton, and I guess I would like all the parties to
21 address that question. And that is just as a general matter,
22 under our statutory ratemaking procedure, whether we may by
23 rule put in place prerequisites to placing facilities in rate
24 base or prerequisites to submitting purchased power contracts
25 for cost-recovery.

1 CHAIRMAN JABER: Thank you, Commissioner.

2 Now, Commissioners, do we want to remain flexible on
3 when staff comes back to us rather than try to find a day
4 today? I mean, it is important that we get the written
5 comments by March 15th. And how about we allow staff to work
6 with my office on a second meeting or workshop. Sounds good?
7 That's where we are. Before we adjourn, is there anything else
8 that needs to come before us today?

9 MR. ELIAS: Just one thing. You asked us to get with
10 the parties or get with the participants. If there is anybody
11 that did not enter an appearance that wants to be part of that
12 conversation, please let me know so that you can be advised of
13 when and where.

14 CHAIRMAN JABER: Thank you for your participation
15 today. Thank you for your very good comments.

16 (The workshop concluded at 11:48 a.m.)

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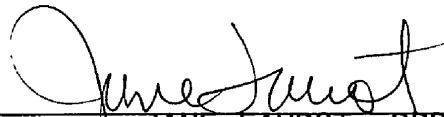
1 STATE OF FLORIDA)
 2 : CERTIFICATE OF REPORTER
 3 COUNTY OF LEON)

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

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

15 WE FURTHER CERTIFY that we are not relatives,
 16 employees, attorneys or counsel of any of the parties, nor are
 17 we relatives or employees of any of the parties' attorney or
 18 counsel connected with the action, nor are we financially
 19 interested in the action.

20 DATED THIS 15TH DAY OF FEBRUARY, 2002.

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

26 

27 _____
 28 LINDA BOLES, RPR
 29 Official Commission Reporter
 30 FPSC Division of Commission Clerk and
 31 Administrative Services