

September 17, 2002

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**VIA HAND DELIVERY**

Blanca S. Bayó, Director  
Division of the Commission Clerk &  
Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
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**Re: Docket Nos. 020262-EI and 020263-EI**

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") are the original and seven (7) copies of FPL's Motion for Official Recognition, together with a diskette containing the electronic version of same. The enclosed diskette is HD density, the operating system is Windows 2000, and the word processing software in which the document appears is Word 2000.

If there are any questions regarding this transmittal, please contact me at 222-2300.

Very truly yours,

Elizabeth C. Daley

ECD:gc  
Enclosure  
Copy to: Counsel for All Parties of Record

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition for Determination of Need )  
for Proposed Electrical Power Plant in )  
Martin County of Florida Power and )  
Light Company )  
\_\_\_\_\_ )

DOCKET NO. 020262-EI

In re: Petition for Determination of Need )  
For Proposed Electrical Power Plant in )  
Manatee County of Florida Power and )  
Light Company )  
\_\_\_\_\_ )

DOCKET NO. 020263-EI

Filed: September 17, 2002

**FLORIDA POWER & LIGHT COMPANY'S  
MOTION FOR OFFICIAL RECOGNITION**

Florida Power & Light Company ("FPL"), pursuant to Rules 28-106.204 and 28-106.303, Florida Administrative Code, and Sections 90.202 and 120.569(2)(i), Florida Statutes, hereby requests that the Florida Public Service Commission (the "PSC" or the "Commission") officially recognize the documents listed below and states:

1. FPL respectfully requests that the Commission take official recognition of the following documents, all of which are the official transcripts of prior Commission proceedings:

- a. The transcript of the Special Agenda Conference in *In the Matter of Proposed Amendment of Rule 25-22.081, F.A.C., Contents of Petition; and Proposed Adoption of Rule 25-22.082, F.A.C., Selection of Generating Capacity*, Docket No. 921288-EU, Volume I, Monday, December 6, 1993, attached Exhibit A;
- b. The transcript of the Special Agenda Conference in *In the Matter of Proposed Amendment of Rule 25-22.081, F.A.C., Contents of Petition; and Proposed Adoption of Rule 25-22.082, F.A.C., Selection of Generating Capacity*, Docket No. 921288-EU, Volume II, Tuesday, December 7, 1993, attached Exhibit B;
- c. The transcript of the Agenda Conference in *In Re: Petition By Gulf Power Company for Waiver of Portions of Rule 25-22.082(4)(a), F.A.C.*,

*Selection of Generating Capacity*, Docket No. 980783-EI, August 18, 1998, attached Exhibit C; and

- d. The transcript of the Agenda Conference in *In the Matter of Generic Investigation Into the Aggregate Electric Utility Reserve Margins Planned for Peninsular Florida*, Docket No. 981890-EU, Tuesday, July 27, 1999, attached Exhibit D;

2. These transcripts are the record of the adoption of various relevant rules and are akin to legislative history. It is well established that such materials are relevant and admissible to determine the intent behind rules or statutes. See *Miami Stage Lighting, Inc. v. Budget Rent-A-Car Systems, Inc.*, 712 So. 2d 1135, 1137 n. 2 (Fla. 3d DCA 1998); *Badaraco v. Suncoast Towers V Associates*, 676 So. 2d 502, 503 (Fla. 3d DCA 1996); *Ellsworth v. Ins. Co. of North America*, 508 So. 2d 395, 398 (Fla. 1st DCA 1987). Indeed, Florida courts have routinely relied on similar materials for interpretive guidance. See, e.g., *State v. Jones*, 625 So. 2d 821, 823, 825-26 (Fla. 1993); *White v. Pepsico, Inc.*, 568 So. 2d 886, 890 (Fla. 1990); *Ketola v. Ketola*, 636 So. 2d 850, 852 (Fla. 1st DCA 1994); *Department of Professional Reg. v. Yolman*, 508 So. 2d 468, 470 n.1 (Fla. 1st DCA 1987).

3. Pursuant to the Florida Evidence Code, and in particular sections 90.202(6) and 90.202(12), Florida Statutes, the Commission possesses the discretion to officially recognize the various agenda transcripts listed above. See *In re: Consideration of BellSouth Telecommunications, Inc.'s entry into interLATA services pursuant to Section 271 of the Federal Telecommunications Act of 1996*, Order No. PSC-97-0915-FOF-TL. Section 90.202(6), Florida Statutes, provides that the Commission may recognize the “[r]ecords of any court of Florida or of any court of record of the United States or of any other state, territory, or jurisdiction of the United States.” The transcripts of a Commission are the equivalent of such records. Recognizing this, the Commission has found that Section 90.202(6), Florida Statutes, allows for

“sworn testimony from the record of one case to be entered into the record of another case....”  
*See In Re: Application for a rate increase in Lee County by Lehigh Utilities, Inc.*, Order No. PSC-93-1023-FOF-WS; *In Re: Application for rate increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, and Washington Counties by Southern States Utilities, Inc.; Collier County by March Shores Utilities (Deltona); Hernando County by Spring Hill Utilities (Deltona); and Volusia County by Deltona Lakes Utilities (Deltona)*, Order No. PSC -93-1598-FOF-WS. In line with these prior decisions, the Commission should recognize the transcripts at issue here.

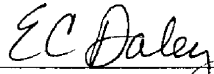
4. Moreover, section 90.202(12), Florida Statutes, provides that the Commission may recognize “facts that are not subject to dispute because they are capable of accurate and ready determination to resort to sources whose accuracy cannot be questioned.” The documents at issue are the official agency transcripts of Commission agenda conferences, and there can be no dispute that they accurately reflect the statements made at those proceedings.

WHEREFORE Florida Power & Light respectfully requests that the Commission enter an order recognizing the agenda transcripts listed above and provided in Exhibits A through D, attached hereto.

Respectfully submitted this 17th day of September, 2002.

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**CERTIFICATE OF SERVICE**  
**Docket Nos. 020262-EI and 020263-EI**

I HEREBY CERTIFY, that on this 17th day of September, 2002, a copy of Florida Power & Light Company's Motion for Official Recognition was served electronically (\*) and by hand delivery or United States Mail to the following:

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By: EC Daley  
Elizabeth C. Daley

# **EXHIBIT A**

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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| In the Matter of          | : |                      |
| Proposed Amendment of     | : |                      |
| Rule 25-22.081, F.A.C.,   | : | DOCKET NO. 921288-EU |
| Contents of Petition; and | : |                      |
| Proposed Adoption of Rule | : |                      |
| 25-22.082, F.A.C.,        | : |                      |
| Selection of Generating   | : |                      |
| Capacity.                 | : |                      |

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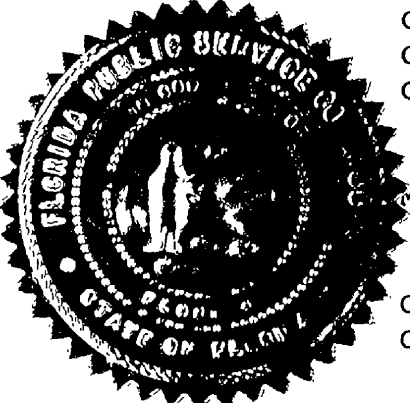
FIRST DAY - VOLUME I

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PROCEEDINGS: SPECIAL AGENDA CONFERENCE

BEFORE:

|                               |
|-------------------------------|
| CHAIRMAN J. TERRY DEASON      |
| COMMISSIONER SUSAN F. CLARK   |
| COMMISSIONER LUIS J. LAUREDO  |
| COMMISSIONER JULIA L. JOHNSON |



DATE: Monday, December 6, 1993

TIME: Convened at 1:30 p.m.  
Concluded at 3:50 p.m.

LOCATION:

|                            |
|----------------------------|
| FPSC Hearing Room 106      |
| Fletcher Building          |
| 101 East Gaines Street     |
| Tallahassee, Florida 32301 |

REPORTED BY:

|                               |
|-------------------------------|
| SYDNEY C. SILVA, CSR, RPR     |
| PAMELA A. CANELL              |
| Official Commission Reporters |

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1 PARTICIPATING:

2 WILLIAM D. TALBOTT, FPSC Executive Director.

3 MARY BANE, FPSC Deputy Executive  
4 Director/Administration.

5 MICHAEL PALECKI, FPSC Division of Legal  
6 Services.

7 MARSHA RULE, FPSC Division of Appeals.

8 TOM BALLINGER and BOB TRAPP, FPSC Division of  
9 Electric and Gas.

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I N D E X

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P R O C E E D I N G S

(Hearing convened at 1:30 p.m.)

CHAIRMAN DEASON: I believe we're here today -- this is a special agenda to consider the bidding rule proposal.

MS. RULE: Yes, Docket No. 921288-EU.

CHAIRMAN DEASON: Staff, how do you suggest we proceed?

MR. BALLINGER: Commissioners, what we've done in this recommendation is we've laid out I believe it's 11 issues that are kind of what Staff thought were arrows where there would be forks in the road, depending on which way you want to go in trying to lead you to a path to an end result of a rule. It's very difficult to take those issues one at a time because they are so intermingled, but we did our best to try to separate them.

If I could, I'd like to give just a quick brief summary of our intent and our philosophy behind it, which we also included in the written recommendation, but it might help to get things started and start discussion.

Basically, Staff went about the rule trying to find a balance between the utilities and the non-utilities, but ultimately trying to favor the

1 ratepayer. I think we tried to come up with something  
2 that, if we're going to a competitive market, the ones  
3 who should benefit should be the ratepayer. And that's  
4 what we are trying to achieve. Not to slant it one way  
5 or another with the two competing interests, but to  
6 keep the ratepayer in mind.

7           Basically, what Staff has recommended in the  
8 proposed rule is they give an existing regulatory  
9 framework. The utility should still remain the one  
10 responsible for making the decision of which generation  
11 capacity it should build or should buy. The Commission  
12 should continue its role as reviewer of those decisions. We  
13 would keep a one-step litigation process, if you will, at  
14 the need determination hearing.

15           Our rule recommended that bidding or -- and I  
16 use that term with a little bit different definition  
17 than some others. It's not strict bidding as most  
18 people know it, where you tally up a score and select a  
19 winner. I use the term "bidding" in the fact that the  
20 utilities would solicit RFPs and then negotiate for a  
21 final product.

22           With that in mind, "bidding" as I use the  
23 term would be required by both IOUs and municipalities  
24 and co-ops. And the main reason for that is our  
25 responsibilities under the Power Plant Site Act. We

1 are currently required by statutes that when a need  
2 determination comes before us we have to determine  
3 whether or not the proposed plan is the most  
4 cost-effective alternative.

5           That pretty much sums up our rule. We can  
6 start going through issue-by-issue, if you will, which  
7 will spark more discussion as we go along. I will  
8 point out, there is an alternative recommendation on  
9 Issue 5 from the legal and appeals Staff. It is my  
10 view that that issue by itself overlaps with other  
11 issues. So we may want to start there and get some  
12 philosophies out of the way before we start proceeding  
13 through the issues.

14           MS. RULE: One more thing, Chairman. Before  
15 you go into this I'd like to kind of present what  
16 options you have at this point. As you know, you're  
17 able to change the officially proposed rule according  
18 to comments or anything that was proposed at the  
19 hearing. If you make changes in the rules that are  
20 proposed, you have the choice of asking us to make them  
21 and publish them or, if you would like to see it again,  
22 we can bring it back to you before it's published. If  
23 you make major changes, we would request that you do  
24 give us the opportunity to redraft it and bring it to  
25 you again before it's published.

1           CHAIRMAN DEASON: Commissioners, what's your  
2 pleasure? Do you want to go issue-by-issue, or do you  
3 want some general discussion before we get into the  
4 issues?

5           COMMISSIONER CLARK: I have one question I'd  
6 like to ask at the outset. This particular rule, we  
7 didn't send out a proposed final draft and then get  
8 comments back, did we?

9           MS. RULE: Commissioner, the rule that Staff  
10 brought forth at the hearing is not the rule that you  
11 proposed.

12          COMMISSIONER CLARK: Right.

13          MS. RULE: The rule that you officially  
14 proposed is, of course, the thing you must vote to  
15 change. And what we've tried to do in the attachment  
16 to the recommendation is make all those changes to the  
17 originally proposed rule, not to Staff's proposed  
18 version at the hearing. So when you vote --

19          COMMISSIONER CLARK: How different is it from  
20 Staff's proposed version at the hearing?

21          MR. BALLINGER: Not very much so. We tried  
22 to clarify those in Issue 9.

23          COMMISSIONER CLARK: Okay.

24          MR. BALLINGER: And basically what we did is  
25 we clarified the definition of "participant;" we added

1 another definition or another term, "finalist;" we  
2 removed the preference for high efficiency  
3 cogenerators, solid waste facilities and renewables;  
4 and we added a notice provision, a couple notice  
5 provisions, throughout the process.

6 COMMISSIONER CLARK: Well, let me ask you.  
7 Do you see any benefit as a result of this proceeding  
8 to maybe look at -- give you our sort of agreement or  
9 disagreement on the rule as you suggested and then  
10 allow people to comment just on that rule? Give them  
11 ten days? And I would just like to see their comments  
12 on this specific language. Do you see any value in  
13 doing that?

14 MR. BALLINGER: There may be some value. I  
15 don't want to say I don't value anybody's comments, but  
16 the basic rule that we're proposing is the same that  
17 Staff proposed at the hearing. The general philosophy  
18 is there, the mechanics are there, we fine-tuned it a  
19 little bit based on the comments at the hearing. And  
20 there were comments filed specifically to Staff's  
21 alternate at the hearing.

22 MS. RULE: Commissioners, I'd like to direct  
23 your attention --

24 COMMISSIONER JOHNSON: Let me follow up on  
25 that, because I had some of the same concerns

1 Commissioner Clark raised with respect to the parties.

2 I know there are some changes with respect to  
3 the parties having an opportunity to respond. Did they  
4 have an opportunity to respond in any formal or  
5 informal manner? For instance, when we get to the high  
6 efficiency generators and renewables language that was  
7 removed, did we have a dialogue with individuals,  
8 something that perhaps in this discussion you can tell  
9 me, "Well, LEAF said X, Y and Z, or the APA said X, Y  
10 and Z, and we think A, B and C"?

11 MR. BALLINGER: That, I guess, came out  
12 through the oral presentation at the hearing and also  
13 post-hearing comments --

14 COMMISSIONER JOHNSON: Well, the only concern  
15 there is that we had the language in then, so they were  
16 saying, "Oh, this is wonderful." Now that we've taken  
17 it out, I understand our rationale, but where do we  
18 have their rebuttal as to why it shouldn't have been?

19 MS. RULE: Commissioner, I'd like to address  
20 that one. In that respect, this rule is no different  
21 than any other you deal with. The rule language is on  
22 the table, it's open for comments and it can be changed  
23 according to the way the APA allows at any point during  
24 the process.

25 COMMISSIONER CLARK: No, I don't necessarily

1 think that's what we're asking. I'm familiar with the  
2 process and I realize that we did this differently.  
3 That where we come up with a -- a hearing officer comes  
4 up with a final version, that gets sent out and you get  
5 the three side-by-sides. What the final recommendation  
6 is people's comments and then a resolution by the Staff  
7 as to why or why not -- why it shouldn't be changed.  
8 And we just didn't do that because we followed a  
9 different procedure in this rule.

10 But I feel that I might benefit from having  
11 the side-by-side done, frankly, so I don't have to go  
12 to a bunch of different documents and in some cases try  
13 to remember precisely what the comments were. It's a  
14 lengthier mental process and I just -- you know, sort  
15 of giving them one last shot. And by that, I mean  
16 you've got ten days for them to do it because I'd like  
17 to get it done before the end of the year.

18 But I'm not wedded to that, I mean I'm just  
19 throwing that out as an idea and I'm perfectly happy to  
20 go through the rule as it is, if we wanted to get  
21 something by the end of the year.

22 COMMISSIONER JOHNSON: What kind of time  
23 constraint are we under?

24 MS. RULE: No legal time constraint in filing  
25 the rule because the applicable time period will run



1 after your vote. If you don't vote on a rule today --

2 COMMISSIONER JOHNSON: But there was a reason  
3 for us --

4 CHAIRMAN DEASON: Well, no. There's no legal  
5 requirement other than months ago when this process was  
6 first starting I think that, perhaps not officially,  
7 but I as Chairman basically had a goal to try to have a  
8 rule out of here by the end of the year. Not meaning  
9 that we had to do it by then, it was just that I felt  
10 that this was of high concern, high priority.

11 There were parties before this agency which  
12 had interest in it and there are parties outside this  
13 agency that have great interest in this entire area. I  
14 just felt that it would be good for this Commission to  
15 have some sense of its general policy concerning  
16 bidding, and that it should be stated by the end of  
17 this calendar year.

18 Obviously, though, if the Commission feels  
19 that additional input is needed, I'm not opposed to  
20 that. I would just request and caution that be sure  
21 that it really is needed because I do think it would be  
22 worthwhile to have a rule adopted as quickly as  
23 possible.

24 Because I'm sure everyone is aware there is  
25 going to be consideration of a power plant task force

1 report by the Cabinet next week. That report addresses  
2 many things beyond this rule, but there are many things  
3 in this rule which have direct bearing upon that  
4 report. I think it would be helpful for the  
5 Commission, if possible, to have a general policy  
6 statement as to what our position is on bidding.  
7 Perhaps that would be useful information at some point,  
8 perhaps, for the Cabinet to consider -- if not the  
9 Cabinet, certainly for the legislature to consider.

10 So that's the general reason for trying to  
11 get a rule adopted, hopefully, by the end of this year.  
12 But that's certainly not carved in stone anywhere.

13 COMMISSIONER CLARK: We only have one more  
14 agenda conference before the end of the year, is that  
15 right?

16 MR. BALLINGER: Yes. And the issue about  
17 renewables and high efficiency cogen is a specific  
18 issue that we saw as a fork in the road, so, if you  
19 want to, we can discuss it when we get there.

20 COMMISSIONER CLARK: Okay.

21 MS. RULE: And, Commissioners, if you do wish  
22 to have other comments from the parties, I would  
23 suggest that in order to narrow the focus as much as  
24 possible that you go through the issues today, that we  
25 do redraft the rule if necessary according to your

1 instructions and send that version out. We can do that  
2 in a very short time period, I think.

3 CHAIRMAN DEASON: I think it would be helpful  
4 to go issue-by-issue; and depending on the discussion,  
5 the votes, to the extent to modification of Staff's  
6 recommendation, then we can have a better feel as to  
7 whether there needs to be additional input from the  
8 parties.

9 COMMISSIONER CLARK: I think that's --

10 MS. RULE: Before you move on to that, I'd  
11 like to direct your attention to Attachment A at Page  
12 23, and explain the coding. Anything that's  
13 highlighted is a change from your formally proposed  
14 rule. So you'll see there are pages and pages of  
15 highlighting. Anything that's underlined within the  
16 highlighting, of course, would be new. Anything that's  
17 crossed out within the highlighting would be a  
18 deletion. So the only thing that's different here than  
19 what you would normally see is the highlighting.

20 I realize what we are trying to do is show  
21 you two sets of changes here at once and I hope it's  
22 not confusing, but we figured this was the easiest way  
23 to allow you to see what you originally proposed and  
24 what Staff has changed from that in its original  
25 proposal.

1 CHAIRMAN DEASON: Attachment A is Staff's  
2 final recommended version; is that correct?

3 MS. RULE: Yes.

4 CHAIRMAN DEASON: I know we've had a  
5 suggestion that we may want to address Issue 5 because  
6 there is some disagreement between Staff and it is kind  
7 of a general policy question. I'm not opposed to doing  
8 that but it seems to me that Issue 1 would probably be  
9 the very first issue we need to address; and then, if  
10 the Commission is so inclined, then we can move to  
11 Issue 5.

12 MS. RULE: I don't think we need to take 5  
13 out of turn.

14 MR. BALLINGER: No. I can try to let you  
15 know when you get to an issue that may overlap with  
16 five. I think we can do Issues 1, 2 and 3 in  
17 sequential order, if you want.

18 CHAIRMAN DEASON: Very well.

19 MR. BALLINGER: Issue 1 --

20 COMMISSIONER LAUREDO: Let me ask a dumb  
21 question. Why is it that if we adopt a rule we just  
22 don't vote up and down the rule and make the amendments  
23 thereto directly, rather than going through the exercises  
24 and going through issues -- which only prolongs the record,  
25 prolongs the possibility of mix-ups when you start reading

1 intent, et cetera, et cetera.

2 In other words, it's a narrow construction of  
3 the rule, wouldn't it be better to just say I vote aye  
4 or nay?

5 MS. RULE: You could certainly do that, and  
6 that would normally be the process. However, in a new  
7 policy area like this, where there are several points  
8 in the road at which we turn one direction or another,  
9 for our convenience as well as for helping to organize  
10 the comments, we went through and picked out those  
11 philosophical issues that the Commission has never  
12 determined. That's why we've broken them out into  
13 separate issues.

14 COMMISSIONER LAUREDO: Well, I understand all  
15 of that. But the philosophical or otherwise, the rule  
16 speaks for itself.

17 MS. RULE: But it doesn't exactly tell us  
18 what you want to change if you vote it down.

19 We need to know what your policy is going to  
20 be. Certainly, if you vote the rule down, we know  
21 that's not your policy. But in order to help us get an  
22 organized sense what you want us to do, we've broken it  
23 down into issues like that. But, of course, --

24 COMMISSIONER LAUREDO: But if you take the  
25 rule as finally proposed and you go page by page and make

1 the changes therein as you like, you get the same end with  
2 less words and less possibility of misunderstanding.

3 MS. RULE: I don't agree.

4 COMMISSIONER LAUREDO: Okay.

5 CHAIRMAN DEASON: Well, Commissioners, I'm  
6 flexible. I kind of think that we probably do need to  
7 address some of the philosophical issues; and depending  
8 on how that vote is, then there will need to be  
9 amendments made to the rule as proposed; and then once  
10 we see those amendments, perhaps there needs to be  
11 discussion of specific language. I'm not exactly sure.

12 COMMISSIONER LAUREDO: Just so that I'm working  
13 out of the same document, because we've been inundated, the  
14 attached attachment which I think I labeled it "C" is the  
15 clean copy of the final without all the computer --

16 MR. BALLINGER: Yes, sir. I tried to provide  
17 all your assistants and you with copies of a readable  
18 version, but that should be the final product.

19 COMMISSIONER LAUREDO: And the Issue 5 is  
20 reflected of the rule as primary, right?

21 MR. BALLINGER: Yes.

22 COMMISSIONER LAUREDO: Obviously. But I just  
23 wanted to make sure.

24 CHAIRMAN DEASON: But attached to A also is  
25 the final version, but it has the highlighted and the

1 struck through, all of that?

2 MR. BALLINGER: Yes, sir.

3 COMMISSIONER CLARK: Are you ready to go to  
4 Issue 1?

5 CHAIRMAN DEASON: I'm ready to go to Issue 1.

6 COMMISSIONER CLARK: Let me ask you a  
7 question. Where in the rule is the flexibility for the  
8 utility to request a waiver from the rule if it's in  
9 the best interests of the ratepayers not to bid? Did I  
10 miss that?

11 MR. BALLINGER: No. Page 29 of Attachment A.

12 COMMISSIONER CLARK: Okay.

13 MR. BALLINGER: Section 9 of the rule, Line 5.

14 COMMISSIONER CLARK: Okay.

15 CHAIRMAN DEASON: Well, I had a question  
16 about that.

17 COMMISSIONER CLARK: Wait a minute, that's a  
18 procedural requirement. I mean, it seems to me the  
19 requirement that you bid is the substantive  
20 requirement.

21 MR. BALLINGER: Well, I think the whole  
22 process is a procedural requirement. Because it's a  
23 procedure precedent to filing for need.

24 COMMISSIONER CLARK: The procedures that  
25 we're making the utilities go through, and in that

1 sense I think it's substantive. I guess what I mean  
2 when I mean procedure, I mean the Commission procedure  
3 as to how things move through the Commission.

4 MS. RULE: Commissioner, I believe it was  
5 Staff's intention to indicate that the procedural  
6 bidding requirements. However, it was bidding that was  
7 at issue here and we can certainly clarify that if  
8 that's a problem or a concern.

9 CHAIRMAN DEASON: Well, it could be  
10 interpreted to mean that you could get a waiver, say,  
11 if there's a deadline to doing something within 30  
12 days, if you could get an extension to 45 days or  
13 something. But I think the nature of Commissioner  
14 Clark's question, and I have the same question, is that  
15 obviously what you're stating is that if the utility,  
16 which is otherwise required to bid, if they believe  
17 it's in the best interests not to have a bidding  
18 procedure whatsoever, they would have the authority to  
19 petition for such a waiver; and the Commission,  
20 depending upon the merits of that petition, could grant  
21 a waiver of the entire bidding process.

22 MS. RULE: Perhaps it would be clearer to  
23 say, "The Commission may waive any procedural  
24 requirement of this rule, including the requirement of  
25 bidding, upon a showing that the waiver is in the



1 public interest."

2 COMMISSIONER CLARK: Why can't you say, "The  
3 Commission can waive this rule." Because that's what  
4 you are waiving. I mean, it would be confusing to  
5 suggest that you're only waiving a piece of this rule  
6 on bidding when the whole rule --

7 MS. RULE: We did considered that, but we  
8 also considered that people might want part of the rule  
9 waived, and we didn't just want to specify that you  
10 could waive "the rule."

11 Tell us what your intention is and we can  
12 make it happen.

13 CHAIRMAN DEASON: Well, my concern is that we  
14 keep -- in all the comments, practically every one of  
15 the comments and I think all of the comments from  
16 investor-owned utilities, there's always the word  
17 "flexibility, flexibility, flexibility, flexibility."  
18 And my concern is that if there is a case where the  
19 utility believes and they can demonstrate that it would  
20 be a waste of time and resources, not only for the  
21 utility and the Commission but for the people that  
22 otherwise have to file a response to an RFP, to not  
23 have bidding whatsoever, that the Commission should  
24 have that flexibility; and the parties should understand  
25 that that is contemplated within the rule, that if there is

1 a certain set of facts and circumstances, that it may be  
2 best for all involved not to have a bid process whatsoever.  
3 That's what my concern is, and that it is clear in the rule  
4 that that is an avenue that the Commission perhaps could  
5 take on a case-by-case basis.

6 MR. BALLINGER: And I think our intent is the  
7 same.

8 MR. PALECKI: Perhaps alternative language  
9 could be, "The Commission may waive this rule or any  
10 part thereof," and then go with the language of, "upon  
11 a showing that the waiver is in the public interest."

12 CHAIRMAN DEASON: Well, that sounds fine to me.

13 COMMISSIONER LAUREDO: Okay. What page are  
14 you in the rule? Now, we're going to have a problem  
15 with the wonderful help that we did by having  
16 Attachment C, it's not numbered. So you're referring  
17 to Attachment A, what page?

18 MR. BALLINGER: Page 29.

19 COMMISSIONER LAUREDO: Do you have any idea  
20 what it corresponds to? Let me see.

21 MR. BALLINGER: It's Section 9 of the rule,  
22 on your Attachment C of the rule. That was just done  
23 to help you get through this in reading it, it wasn't  
24 intended to be part of the agenda conference.

25 CHAIRMAN DEASON: So Paragraph 9 would read:

1 "The Commission may waive this rule or any part thereof upon  
2 a showing that the waiver is in the public interest."

3 COMMISSIONER CLARK: Marsha, are we likely to  
4 get a comment from the APA Committee that we cannot do  
5 that --

6 MS. RULE: Yeah.

7 COMMISSIONER CLARK: -- because we don't have  
8 the standards out.

9 COMMISSIONER LAUREDO: From the what?

10 MS. RULE: JAPC, the Joint Administrative  
11 Procedures Committee.

12 COMMISSIONER CLARK: They would probably  
13 respond that you need to have the criteria under which you  
14 can waive it, and a criteria which suggests -- the criteria  
15 of the public interest may not be specific enough.

16 MS. RULE: Well, that is a problem. But  
17 we've also been dealing with that in appeals on a  
18 case-by-case basis and explaining with each particular rule  
19 why we feel the way we've drafted it is appropriate.

20 COMMISSIONER CLARK: Okay.

21 MS. RULE: They don't always stick by their  
22 guns on that one.

23 COMMISSIONER CLARK: Okay. It may be that we  
24 may need to be more specific as to what the public  
25 interest entails, and that could be on a showing that

1 the waiver will result in the least cost, most reliable  
2 electric service. I mean, wouldn't that be --

3 MS. RULE: Or "will benefit the ratepayers,"  
4 if you wanted to be more general.

5 (Simultaneous conversation.)

6 COMMISSIONER CLARK: My bottom line is that I  
7 think there should be the ability to waiver and waive  
8 it because of projects that may come along that, for  
9 reasons of financing, federal financing or some other  
10 reason, or it's pointless to bid.

11 CHAIRMAN DEASON: Well, that's my concern. I  
12 just think the Commission needs that flexibility. And  
13 I think the majority of the comments which we received  
14 certainly indicated that there may be cases where it's  
15 fairly obvious that it would not make practical sense  
16 to go through a bidding process.

17 MS. RULE: Uh-huh.

18 CHAIRMAN DEASON: And, obviously, the persons  
19 who may desire to bid do not want to go to all the time  
20 and expense of responding to a bid proposal if the  
21 conclusion is already known in advance.

22 MS. RULE: Well, it seems to me, then, that  
23 what you are saying and what might be a limiting  
24 criterion is that a utility would have to show that --  
25 I don't want to say that bidding would be useless or

1 fruitless, but, that there's something better out there  
2 than bidding. Is that the general idea?

3 COMMISSIONER CLARK: Well, the language you  
4 have, "if it can be shown that to do so would be in the  
5 best interest of the utility's ratepayers." It's a  
6 little bit more specific than "public interest."

7 MS. RULE: And would cover the situations you  
8 named plus any others, but ultimately leave the  
9 decision in your hands.

10 COMMISSIONER CLARK: If we need to get more  
11 specific, we may simply say, "provide for the  
12 requirements of the waiver of subsection (2)," because  
13 therein lies the requirement of issuance of the RFP.  
14 And once you waive (2), then none of the other sections  
15 apply, I think.

16 I think you understand what we're trying to  
17 get at.

18 CHAIRMAN DEASON: Well, the thing that comes  
19 to mind is there was an example given of the TECO  
20 project that, due to the unique funding of that, that  
21 that was perhaps an example, a situation where it  
22 probably would not have made sense to go through a  
23 bidding process. Because there were unique facts and  
24 circumstances which indicated that it was a unique  
25 opportunity and that bidding just really would not have

1 been a wise use of resources.

2 Bob, do you have an understanding of what  
3 we're trying to accomplish?

4 MR. TRAPP: Yes, sir. And I was trying to  
5 play with some language; I don't know if it's what you  
6 want, but I'll throw it out on the table. Where you  
7 have the public interest concern in the language, I  
8 would make it read: "The Commission may waive this rule  
9 or any part thereof upon a showing that bidding will  
10 not likely result in lower cost or increased  
11 reliability to the supply of electricity to the general  
12 body of ratepayers."

13 Does that capture the essence of what  
14 you're --

15 COMMISSIONER CLARK: I think it does.

16 CHAIRMAN DEASON: I don't have a particular  
17 problem with that. I think it sounds acceptable to me.

18 MR. TRAPP: Tom points out this is the first  
19 time we've used "bidding" in the rule. Maybe  
20 "selection process" or whatever word that was used in  
21 the rule should be --

22 COMMISSIONER CLARK: Yeah, whatever --

23 MS. RULE: We can easily clean that up, as  
24 long as we understand the intent you would have to  
25 waive the procedures of the rule or to waive the RFP

1 requirement entirely.

2           COMMISSIONER LAUREDO: Mr. Chairman, let me  
3 kind of indulge your patience and make sure I  
4 understand the procedure, which I always -- we're going  
5 through the issues and we jump from Issue 1 to a  
6 specific section in the rule, which is what I suggest  
7 that we do, but I guess we'll just continue this --

8           COMMISSIONER CLARK: Well, I think the issue  
9 helped us focus on the language in the rule. I mean,  
10 what we're conveying to the Staff is that we agree with  
11 this philosophy and now we're making sure it's embodied  
12 in the rule. That their interpretation of what the  
13 rule does coincides with ours.

14           COMMISSIONER LAUREDO: I was going to ask two  
15 questions on that. One is, can we use the issues to  
16 help us focus without passing them and change the rule  
17 accordingly? And two, are we today to pass or not pass a  
18 rule and then that's finite for the time being, correct?

19           MR. BALLINGER: I'll let Marsha answer that  
20 one, I'm not --

21           COMMISSIONER LAUREDO: Because there were  
22 some discussions earlier about, you know, some people felt  
23 that they were precluded from having a full response to some  
24 changes and from the proposed rule. And that is a lingering  
25 thing out there in the world that because of whatever

1 procedural reasons, however correct it was done,  
2 nevertheless, someone would have comment that had they seen  
3 the change from one rule to --

4 MS. RULE: My understanding was that that was  
5 not a procedural difficulty as much as an opportunity  
6 to get more comments from people and offer them the  
7 opportunity for input. However, the issues are here  
8 for your convenience. If you choose to deal with the  
9 rule another way, that's fine.

10 COMMISSIONER LAUREDO: No, I wanted to go  
11 back to, if this is so important, Mr. Chairman, is it,  
12 or am I wrong in even thinking that we ought to do  
13 whatever we can do today so we don't waste today? But  
14 we do have -- we're within 24 hours of having our fifth  
15 Commissioner. Since this is so pivotal, you know, I've  
16 been advocating for the last four months postponing  
17 everything that has to do with, quote, "policy." And  
18 particularly when some of this elusive butterfly called  
19 "policy" is embodied into rules, just as we're sitting  
20 here with four Commissioners and a new one coming in,  
21 it just makes me very uncomfortable.

22 On the other hand, I understand the need for  
23 the public to know what our so-called "policy" is. But  
24 I don't know, I don't want to be disruptive. I'm just  
25 not comfortable --



1           CHAIRMAN DEASON: I certainly understand  
2 that, and I think you understand also that we set this  
3 schedule not realizing whether we were going to have a  
4 fifth Commissioner in August or January or when. And  
5 we just have to set our schedule the way we see fit.  
6 And I understand that we're going to have a new  
7 Commissioner tomorrow, and that's fine, but we didn't  
8 have that luxury when we set this schedule as to  
9 knowing when the fifth Commissioner was going to be on  
10 board.

11           COMMISSIONER LAUREDO: There is no legal  
12 requirement that she sit through -- have sat through  
13 the hearings to able to vote on the rule, correct?

14           MS. RULE: No. The transcripts are --

15           COMMISSIONER LAUREDO: I'm prepared to work  
16 through the afternoon so we can clean it up. I just  
17 have an intangible and uncomfortable feeling about  
18 voting, quote, "policy," that everybody in the room is  
19 staring at us how we're going to vote when we have a  
20 fifth Commissioner who will be serving, hopefully, four  
21 full years just coming on tomorrow. I mean -- I don't  
22 know, it just --

23           COMMISSIONER CLARK: I can see the benefit of  
24 that, but she also has not had the benefit of the  
25 hearings on this rule. So, you know, I think we should

1 plow through it and see what the consensus is of the  
2 Commissioners sitting here as to what they want to do.  
3 With that, Mr. Chairman, I move Issue 1 as amended.

4 CHAIRMAN DEASON: That the amendment being  
5 the language, modified language to Paragraph 9?

6 COMMISSIONER CLARK: Yes.

7 CHAIRMAN DEASON: Do I have a motion?

8 COMMISSIONER LAUREDO: Again, new motions and  
9 old motions are what we call "first reading," or is  
10 this it? In other public bodies you have what is  
11 called "first readings" where you just pass it so that  
12 we can clean the agenda and move on and get at it  
13 again. You're suggesting, basically, let's vote on it.

14 COMMISSIONER CLARK: Let's vote on it, and,  
15 then, at the end of that, see if there's any sentiment  
16 that remains to putting the rule as we've sort of  
17 blessed it out there to fine tune it.

18 COMMISSIONER LAUREDO: And that would give  
19 the new Commissioner another crack at it?

20 COMMISSIONER CLARK: Yeah.

21 MR. BALLINGER: If I may, Commissioner Clark,  
22 you jumped ahead on Issue 1 to another meaning. The  
23 real intent of Issue 1 was to get you to decide whether  
24 you wanted to continue with the formally proposed rule,  
25 which was very flexible and just said do a selection

1 process or go to one that requires bidding.

2 COMMISSIONER CLARK: I move Staff on Issue 1.

3 MR. BALLINGER: That's fine. That was the  
4 just the intent of that. You went -- and that's fine  
5 with that, too. That cleared it up.

6 CHAIRMAN DEASON: Well, if we vote with Issue  
7 1, the rule would require bidding unless a waiver is  
8 granted.

9 MR. BALLINGER: Right. And basically what  
10 you're doing is disposing of your previously proposed  
11 rule at that point. Fine. I just wanted to be clear  
12 where we're going, so it's not illogical.

13 CHAIRMAN DEASON: I'm glad you're doing that  
14 because we need to make sure we're clear. I have a  
15 motion. Do I have a second?

16 COMMISSIONER JOHNSON: Second.

17 CHAIRMAN DEASON: Moved and second. All in  
18 favor, say aye.

19 (Commissioners Deason, Clark and Johnson vote  
20 aye.)

21 CHAIRMAN DEASON: Any opposed?

22 COMMISSIONER LAUREDO: I vote yes for the  
23 caveat that I expressed earlier that I hoped that we  
24 haven't precluded going to another vote.

25 CHAIRMAN DEASON: I think we'll probably

1 decide that at the end of whatever we do today.

2 COMMISSIONER CLARK: I, likewise, can move  
3 Staff on Issue 2. And do I understand correctly that  
4 -- and let me just give an example with respect to the  
5 FP&L purchase of Scherer -- that didn't go through this  
6 process, right?

7 MR. BALLINGER: Correct.

8 COMMISSIONER CLARK: And economy of scales  
9 and things won't go through this process. Okay.

10 CHAIRMAN DEASON: And transmission line  
11 additions would not go through a bidding process?

12 MR. BALLINGER: Correct.

13 CHAIRMAN DEASON: I have a motion to approve  
14 Staff on Issue 2. Do I have a second?

15 COMMISSIONER JOHNSON: I'm going to second  
16 that, but I need a little clarification. What was the  
17 position of the other task force's -- I'm looking at  
18 mine, side by side. What was their position on this  
19 issue?

20 MR. BALLINGER: Basically, everything should  
21 be bid from transmission lines, peaking units,  
22 intermediate units. Typically, a peaking unit would  
23 not come through the site act.

24 COMMISSIONER JOHNSON: You've refreshed my  
25 memory. I second the motion.

1           CHAIRMAN DEASON: Moved and seconded. All in  
2 favor say aye.

3           (Commissioners Deason, Clark and Johnson vote  
4 aye.)

5           CHAIRMAN DEASON: Any opposed? I think your  
6 caveat exists for all of these, Commissioner Lauredo.

7           COMMISSIONER LAUREDO: Yes, sir. The reason  
8 I was pouncing on it is because we know that you can't  
9 call for a reconsideration unless you vote for it. I  
10 don't want to be defranchised at the end.

11          CHAIRMAN DEASON: Issue No. 3.

12          COMMISSIONER CLARK: I have a question on  
13 this issue. It says -- on the issue of the clear point  
14 of entry. It says, "In a competitive market" -- the  
15 third paragraph down on Page 11 -- "the clear point of  
16 entry is obtained by providing timely notice of an RFP  
17 to sufficient number of participants." I could not  
18 conclude what the basis would be for someone to  
19 petition on the notice of an RFP. What would be their  
20 claim for some sort, and what would be the proceeding  
21 we would hold?

22          MR. BALLINGER: That is not a point of entry  
23 here. That is the point of entry into the market, if  
24 you will.

25          COMMISSIONER CLARK: Okay. So I just

1 misunderstood.

2 MR. BALLINGER: And then the complaint  
3 process would be after the RFP is issued. Then there  
4 would be a point of entry here. I was using that point  
5 of entry as a point of entry to the market from the  
6 negotiating table, if you will. I know it's been used  
7 as a point of entry here.

8 COMMISSIONER CLARK: Do you have any concern  
9 that an RFP may be written in such a way as to  
10 predetermining the winner?

11 MR. BALLINGER: If you go to a strict scoring  
12 procedure, definitely. If you have subjective criteria  
13 in there, I don't know.

14 COMMISSIONER CLARK: Well, I don't think I  
15 could conclude -- reach that same conclusion you have,  
16 that the strict scoring will result in it whereas  
17 subjective won't.

18 MR. BALLINGER: Well, they may both. And I  
19 guess in Staff's -- the rule difference here is a lot  
20 of the intervenors wanted a bifurcated proceeding to  
21 where the Commission would sign off on it, whether it  
22 was scoring or whether it was subjective in nature up  
23 front. My concern is that if you do that, then you're  
24 going to have a litigation process to manipulate the  
25 RFP to select a winner as oppose to letting the utility

1 go through and justify its decision.

2 COMMISSIONER CLARK: It seems to me I have  
3 recalled comments or even litigation, perhaps, where an  
4 argument is made that RFPs are drafted in such a way  
5 that there can only be one bidder. Once the utility  
6 has made its selection and comes to the Commission for  
7 a determination of need, could a basis upon which that  
8 need is challenged be that the RFP specifications were  
9 inappropriate?

10 MR. BALLINGER: Yes, ma'am. If you look on  
11 Attachment A, Page 27, Section 7 of the proposed rule,  
12 that requires the utility to file its RFP with the  
13 Commission. If we see a problem with it that it's  
14 definitely biased to one thing, we can raise it as an  
15 issue, either open a docket, have a hearing, decided it  
16 if an intervenor or a participant, potential  
17 participant sees that it's totally biased. They can  
18 bring forward a case. That would be under the standard  
19 complaint process. The big difference between Staff's  
20 proposal and the intervenor's is we don't have a formal  
21 proceeding every time an RFP is issued. It's more of a  
22 threat of regulation rather than always having  
23 litigation.

24 COMMISSIONER CLARK: It's your view that once  
25 that RFP is put out that either the Commission, on its

1 own motion, or somebody else could come in and say,  
2 "The RFP is not appropriate to meet their need." They  
3 don't have to wait until -- I'm not sure that No. 7  
4 does that, makes it clear. If that is what your intent  
5 is. I'm not sure it should be.

6 I'm suggesting that -- I guess, when the need  
7 is brought to us that I think at that point it may be  
8 appropriate to allow a disgruntled bidder to come in  
9 and say, "It shouldn't have been bid in that way in  
10 the first instance." And is that the only point at  
11 which that should be done, or does it have to be  
12 initially when it comes out?

13 MR. BALLINGER: I think -- let me see if I  
14 understand your question. If the RFP goes out and we  
15 don't have a problem with it, and we don't hear from  
16 anybody and they go out and the utility selects a  
17 winner, and, then, at the need determination proceeding  
18 somebody comes in and says, "Wait a minute. That RFP  
19 was biased," you know, I think we would be obligated to  
20 hear their case at the need hearing. But I think from  
21 a realistic standard, they should have brought it up  
22 sooner if they wanted to have a chance in the process.

23 COMMISSIONER CLARK: But there's no specific  
24 language that tells them that they can challenge the  
25 RFP.



1 MR. BALLINGER: It's the current complaint  
2 process we have now with any filing by a utility.

3 COMMISSIONER CLARK: All right. What would  
4 be the basis of their complaint? What would they come  
5 in and say?

6 MR. BALLINGER: The utility is asking for  
7 something that's totally bias to them building it only  
8 because it's specified in a certain county, in a  
9 certain location, and all this. Then it would be up to  
10 the utility to respond why; that is what their needs  
11 are.

12 MS. RULE: Commissioner, if I may respond.  
13 We've been round and round on how to deal with the  
14 issue of the biased RFP. On the one hand, there is a  
15 good deal of feeling among the technical Staff that  
16 under no circumstances should the Commission agree to a  
17 bifurcated procedure. That is, the technical Staff  
18 believes very strongly that a preapproval of need is a  
19 mistake.

20 We're trying to figure out some way to deal  
21 with a problem of a biased RFP without having a  
22 preapproval of an RFP each and every time. If somebody  
23 has a complaint about a utility selection procedure,  
24 they are free to bring it to the Commission. We didn't  
25 feel it necessary to institutionalize that and,

1 perhaps, encourage it by embodying it in the rule.  
2 But, of course, that does bring up the issue that  
3 you're pointing out that the rule doesn't say that you  
4 can do it.

5 MR. BALLINGER: Again, we go back to our  
6 general philosophy that we're trying to create a rule  
7 that promotes competition between the utility and the  
8 nonutility generator in order to benefit the ratepayer.  
9 To go to a preapproval just brings that to a litigation  
10 rather than an negotiation mode. And we can't avoid  
11 it. If somebody wants to litigate it and has a good  
12 cause -- and we will litigate it, but we don't want to  
13 do it every time.

14 COMMISSIONER CLARK: Let me ask. Is one of  
15 the considerations in not recommending a bifurcated  
16 proceeding is that we will -- our annual planning,  
17 which is now not annual. What is it?

18 MR. TRAPP: It's on an as-needed basis.

19 COMMISSIONER CLARK: Does this recommendation  
20 carry with it an idea that we need to be more precise  
21 or need to be -- in that planning process, we need to  
22 sharpen our pencils a little bit more. In other words,  
23 I want to maintain the balance between a very rigid  
24 process that I think the benefits to that kind of a  
25 process is that potential bidders will be well aware of

1 what's coming and can be in a position to make a very  
2 effective bid, and, hopefully, result in less cost to  
3 the ratepayer. But the tradeoff is that you may be  
4 contracting for plant that you don't need. So what I'm  
5 suggesting is that we need to do a better job of  
6 planning so there is some advance notice to the  
7 competitive bidders without sacrificing the flexibility  
8 of only going to a need at that precise -- at the  
9 latest possible moment, I guess.

10 MR. TRAPP: The rule is silent on the  
11 planning aspects that the Commission engages in. Quite  
12 frankly, I see the rule is a small piece, a small cog  
13 in the wheel of regulation of the bulk power supply in  
14 Florida. I think Staff is fully aware that there is a  
15 grid bill out there that charges the Commission with  
16 the assurance that the utilities do plan and develop a  
17 coordinated grid. I think planning is an important  
18 part of another cog in that wheel to ensure that the  
19 best thing gets built for the ratepayer.

20 I would agree with you that perhaps we do  
21 need to look at our planning functions here at the  
22 Commission and how we review plans done by the  
23 utilities and how we critically review them and how we  
24 scrutinize them. We did not attempt to put that as  
25 part of this rule, though. And as we have recommended

1 further consistency checks by spinning off the high  
2 efficiency cogeneration and renewables into the relook  
3 of the avoided cost rules to make sure that they're  
4 consistent with the competitive bidding that comes from  
5 this process, I think we would also recommend that we  
6 continue to review what we are doing in the planning  
7 areas to ensure that that result is also in a  
8 consistent policy of coordinated statewide and  
9 individual utility planning in Florida.

10 COMMISSIONER CLARK: Okay.

11 CHAIRMAN DEASON: Let me ask a question. I  
12 understand that, Staff, it's your concern that if there  
13 is bifurcation that there's going to be a loss of  
14 flexibility. There's going to be a requirement to  
15 initiate a capacity, an RFP for capacity addition  
16 before its time. Is that essentially correct?

17 MR. BALLINGER: Yes.

18 CHAIRMAN DEASON: But before the RFP begins,  
19 if it is not bifurcated, the utility has got to make  
20 that determination on their own that a capacity  
21 addition is needed. And they have to go forward with  
22 that without any guidance from the Commission as to  
23 whether we agree or disagree?

24 MR. BALLINGER: That's correct.

25 CHAIRMAN DEASON: And isn't that putting

1 additional risk into the process?

2 MR. BALLINGER: Well, that's what Staff tried  
3 to balance by not forcing a utility to live with the  
4 results of a bid, if you will. If you force them to go  
5 out for an RFP and force them to select a winner from  
6 that RFP, then, yes, they maybe assuming some  
7 additional risk. But as long as the utility still has  
8 the flexibility at the end of that and they've talked  
9 to everybody, then they make the decision of what's  
10 best for their ratepayers. They really don't have any  
11 more risk than they do today of just open negotiations.  
12 All we have done is made them go through a process to  
13 show their burden of proof that they have evaluated all  
14 possible alternatives out there before they come for a  
15 need from us.

16 So I think that's the distinct difference.  
17 If you go to a process where we require them, but also  
18 require them to select a winner from that process,  
19 then, yes, I think you have put additional risk because  
20 you may get a project before it's time, even though you  
21 haven't bifurcated and approved the need up front, but  
22 you're making them pick something from that market.

23 CHAIRMAN DEASON: The nonutility generators  
24 obviously would prefer a bifurcated approach. And one  
25 of the arguments that they present is that you're going

1 to get more participants, more competition, more fine  
2 tuning, more bids with a sharpened pencil approach if  
3 there has already been a determination by the  
4 Commission that there is, in fact, a need for X amount  
5 of capacity within a certain window of time.

6 MR. BALLINGER: I don't know if I buy that  
7 argument. We've talked about that. The nonutility  
8 industry market has changed over the last ten years.  
9 It started out with a lot of entrepreneurs when PURPA  
10 was first passed; a lot of small facilities. Now  
11 you're seeing companies who are as large, if not  
12 larger, than some of the utilities in Florida competing  
13 to build capacity. So I think sheer numbers of  
14 participants is really not going to benefit the  
15 ratepayers. And, again, it goes back to our philosophy  
16 is that we're not here to benefit an IPP or a utility,  
17 we're here to benefit a ratepayer. And I think the  
18 risk of picking a plant before its time far outweigh  
19 any perceived two or three more participants that may  
20 get you a lower price. If you've got three or four GE,  
21 Bechtel, Westing House competing for a project, they're  
22 sharpening their pencils against each other. A third  
23 or fourth or fifth participant probably won't make a  
24 whole lot of difference in that.

25 CHAIRMAN DEASON: So it's your -- then

1 there's nothing gained by bifurcation?

2 MR. BALLINGER: To be gained from both the  
3 utility and the nonutility operator, nothing for the  
4 ratepayers.

5 CHAIRMAN DEASON: And that is because there  
6 is the loss of flexibility as to the timing of  
7 additional capacity?

8 MR. BALLINGER: Yes.

9 CHAIRMAN DEASON: And why is that?

10 MR. BALLINGER: You've added another -- we  
11 see from the APH process, to go through it, our last  
12 one, which was called a mini APH, it took us 13 months  
13 to get us through. So here you are making a decision  
14 on a billion dollar power plant a year, year and a half  
15 before it's absolutely necessary. A lot can change in  
16 that time frame. Some people have proposed that you do  
17 a bifurcation and key it off of seven years. If  
18 something is needed seven years in the ten-year site  
19 plan, that's when you start issuing the RFP.

20 Well, what if the plant was a peaking unit,  
21 and it's identified seven years out? You go out for an  
22 RFP, you go through maybe a year of processing, and lo  
23 and behold, the next year you're able to get a few more  
24 thousand load management participants. That peaking  
25 unit has now been deferred, but you've signed a

1 contract with somebody to supply that capacity. So  
2 you've doubled up on that capacity.

3 CHAIRMAN DEASON: Aren't those contracts  
4 contingent upon Commission approval and wouldn't the  
5 Commission not approve a project that is not needed?

6 MR. BALLINGER: But I think it would be  
7 hard-pressed if you said in the hearing here, "Yes,  
8 it's needed. This is the type of capacity." You would  
9 go through the RFP process and select a winner. And  
10 then what if something came up? Let's say we did all  
11 that and a peaking unit only takes two years to build.  
12 What if then they were able to get load management? I  
13 think the farther out you tie yourself to a decision,  
14 the more risk you're shifting to the ratepayers. I  
15 don't know if I can give you a dollar amount of what  
16 that risk is worth, but it's definitely there.

17 CHAIRMAN DEASON: But under the current  
18 situation if there were no bidding, in fact, even if  
19 there were no competitive generators out there, it was  
20 just the utility. There's always the possibility that  
21 they would determine that they need a project to go out  
22 and obtain contracts with various vendors to do that,  
23 come to the Commission with a determination of need,  
24 and sometime during that process something happens, you  
25 know, there is a vast migration of people out of the



1 state of Florida for some reason. The plant is not  
2 needed. That's just kind of inherent in the process,  
3 is it not?

4 MR. BALLINGER: Well -- and the Commission  
5 can deal with it at that time. If you remember back  
6 when TECO built Big Bend 4, they came in for a need,  
7 got it approved and based it in part on some sales to  
8 Florida Power and Light. Well, as the process went  
9 along, Florida Power and Light found some cheaper power  
10 where their load went away and the sales went away.  
11 Then, when TECO came in for the rate case, the  
12 Commission basically gave TECO an incentive to go  
13 market that power elsewhere to help benefit its  
14 ratepayers.

15 If you do this to a nonutility generator,  
16 they're not regulated. They're going to get paid their  
17 contract. And that is where the hook is. I guess with  
18 the utility, they're still required to manage their  
19 project, delay construction, cancel construction, if  
20 you will. They have that same responsibility with  
21 contracts, but it's a little different because I don't  
22 know how much flexibility they can do if they've got an  
23 in-service date. Once that is approved all that  
24 utility generator has to do is perform by that  
25 in-service date and he gets paid. Otherwise, he's got

1 sufficient leverage to say, "No, I'm not going to  
2 defer, pay me some more money." And that's the  
3 quandary we get into with the difference. We have a  
4 regulated and an unregulated entity trying to assume  
5 the same responsibility, and they're not the same.

6 MR. TRAPP: Commissioner, let me just say  
7 that I think that perhaps some of the concerns  
8 associated with the desire for a bifurcated process, in  
9 my mind, go back to the question that Commissioner  
10 Clark raised about the planning process, and also to  
11 the concerns Staff has in our minds about processes  
12 before the Commission anyway.

13 The bureaucracy can chew you up. And maybe  
14 in our experience with APH and the way we got chewed up  
15 in that process, we've been a little skittished about a  
16 fixed binding, planning type of process that drives the  
17 need determination process, and that's really where  
18 we're coming from in this recommendation.

19 I do feel that the Commission needs to be  
20 involved with what the utilities are doing out there in  
21 the planning and construction arenas. I do believe  
22 that there has to be input to you and from you, back  
23 and forth, to ensure that utilities aren't doing  
24 something wild out there that you don't think is  
25 consistent with your vision for Florida's state energy

1 needs. And also that you be aware of what's going on  
2 out there so that you can keep track of what the needs  
3 are in Florida.

4           And for that reason, Staff is working on  
5 putting together workshops for you next year on the  
6 next series of ten-year site plans and hope to have  
7 some public workshops where the utilities can come  
8 before you in a more informal type of setting then a  
9 binding type of setting to let you know what's going on  
10 in the plans and what they see. We think that will  
11 serve also as an informational point for competitive,  
12 nonutility generators to see what's happening in the  
13 Florida market, to see how they might best play in that  
14 market; also for cogenerators to get information, as  
15 well as demand-side resources to see what the potential  
16 avoidable units are for conservational purposes.

17           So we're hoping to build on that linkage  
18 between planning and the finality of the need  
19 determination process. But to do so in a parallel path  
20 type of an approach where you have a fluid, flexible,  
21 dynamic planning process that is there -- subject to  
22 constant change -- as population growth changes,  
23 economic conditions change, as weather conditions  
24 change and as opportunities change as shares become  
25 available or new technology that IPPs can act on

1 becomes available.

2           But that process needs to flow, and it  
3 doesn't need to be bound up -- and I hate to use the B  
4 word -- but in bureaucracy. And so what we're  
5 attempting to do through this bidding rule is to limit  
6 the process, the official formal process that occurs  
7 before the Commission where you stamp "this is it" to a  
8 single, one-stop need determination process, and,  
9 hopefully, all the other processes that bill to that  
10 final decision will work also so that everyone will be  
11 informed. And we don't think in a minute that we're  
12 going to eliminate litigation. Because as long as  
13 there's money on the table, it's going to be litigated.

14           CHAIRMAN DEASON: But, Bob, at some point  
15 you've got to make a decision to build a power plant.  
16 I don't care who builds it. You just can't snap your  
17 fingers and say, "Tomorrow we're going to need X more  
18 capacity, so tomorrow we'll have it." I mean, there's  
19 vast lead times, and it depends upon the technology.  
20 And on one side there is the risk that we may have a  
21 determination of need really too soon, and we may start  
22 the process, and it may not be needed.

23           There's another risk and that is you don't  
24 determine it soon enough, and there's greater capacity  
25 requirements out there than you anticipated, and the

1 lead times are narrowed so much that you eliminate what  
2 otherwise would have been a cost competitive,  
3 cost-effective alternative, because you have no  
4 alternative. If you're going to keep the lights on,  
5 you've got to get something on line within two years.  
6 And that narrows the type of technologies you can look  
7 at.

8 MR. TRAPP: And I would attest to you that  
9 what we have in Florida is a dynamic regulatory process  
10 to go along with the dynamic utilities planning  
11 process. We have the grid bill in Florida, one of the  
12 few states that does, that says, "Commission, if you  
13 see something -- too much, too little -- you act." And  
14 you have a Staff that is supposed to be providing you  
15 with that information on when to act. So I think you  
16 always have that opportunity, if you see the utility  
17 not building enough or building too much, to interject  
18 yourselves and open a grid bill docket.

19 CHAIRMAN DEASON: Do other parties have that  
20 opportunity?

21 MR. TRAPP: We have a complaint process in  
22 Florida that's well-defined that basically says that  
23 any affected party can petition this Commission at any  
24 time on any issue pertaining to electric utility  
25 regulation. And this Commission can determine whether

1 or not there is enough probable cause, if you would, to  
2 act.

3 MR. TRAPP: So I don't think we're  
4 foreclosing any of those existing opportunities. All  
5 we're trying to do here is instruct the utilities that  
6 there's a new tool out there, because of the new  
7 competitive type of environment, for them to use that  
8 we expect them to use to find the lowest cost, most  
9 reliable power for the ratepayers who we are all here  
10 to serve.

11 COMMISSIONER CLARK: Given the fact that  
12 there is a Commission decision that the only applicant  
13 there can be is the utility, how would an individual or  
14 entity suggest that the utility is -- that the  
15 reliability of the electric system is jeopardized  
16 because there isn't enough, a couple of years from now  
17 there isn't going to be enough energy? What would they  
18 file? We've said they can't file an application for  
19 need. What would they come in and file, a petition for  
20 an investigation of the grid bill?

21 MR. TRAPP: The grid bill docket.

22 MR. BALLINGER: Yes, ma'am.

23 COMMISSIONER CLARK: Okay.

24 CHAIRMAN DEASON: Other questions,  
25 Commissioners? Motion?

1 COMMISSIONER CLARK: I'll move Staff on Issue 3.

2 CHAIRMAN DEASON: Motion to approve Staff on  
3 Issue 3. Do I have a second?

4 COMMISSIONER JOHNSON: Second.

5 CHAIRMAN DEASON: Moved and seconded. All in  
6 favor say aye?

7 (All Commissioners vote aye.)

8 CHAIRMAN DEASON: Show Issue 3 approved.

9 I agree with the recommendation. I think at  
10 some point, though, we have got to add -- and I guess,  
11 Bob, what you're referring to. At some point, the parties  
12 have to have some type of insurance that yes, it looks  
13 like there is going to be some additional capacity and at  
14 some point in the process it has got to begin so you don't  
15 preclude or diminish your available --

16 COMMISSIONER CLARK: The flexibility to  
17 choose the right generating. And I wholeheartedly  
18 agree with that.

19 CHAIRMAN DEASON: Absolutely.

20 MR. TRAPP: We will continue to work toward  
21 that goal.

22 CHAIRMAN DEASON: Issue 4?

23 MR. BALLINGER: Commissioners, this is, I  
24 think, where we might get a little sticky. I have  
25 raised this with legal Staff, but I think this is one

1 of the overlapping issues with Issue 5. They assure me  
2 it's not, but I don't understand that completely.

3 COMMISSIONER LAUREDO: Neither do I. So that  
4 makes two of us.

5 MR. BALLINGER: So we may want to talk about  
6 Issues 4 and 5 together.

7 If I can, first, let me explain Issue 5 I put  
8 in because some commentors put in the requirement in  
9 the rule that the Commission select a winner. And they  
10 basically had the envision of a well-crafted contract  
11 being part of the RFP where basically there would be  
12 very little tinkering with it at the back end. That  
13 the utility could bring its preferred project; but if  
14 there were some other intervenors who either felt  
15 begrudged or the utility wanted to bring them along as  
16 well, they were equally as good, then let the  
17 Commission select A, B or C.

18 This was an attempt basically to sidetrack  
19 the applicant issue to avoid that applicant status by  
20 not having a signed contract by making the Commission  
21 direct the utility to sign a contract with either A, B  
22 or C.

23 Legal and Appeals have brought up this issue  
24 to talk about just selecting a winner, period; that  
25 there should be some sort of end result, closure to the



1 process. It wasn't the intent of the issue, but it  
2 does go back and, I think, overlap a general philosophy  
3 of the whole rule.

4 Staff's proposed rule does envision selecting  
5 a winner out of the project. It may not be an IPP or a  
6 cogenerator, it may be a utility, but there will be a  
7 project that comes forward as a need determination.  
8 How you get there is a different story, and that's  
9 maybe where we have a little bit of difference.

10 That's Issue 5.

11 Issue 4 goes to a strict scoring procedure.  
12 And the discussion on that was more in the  
13 administrative and philosophical reasons not to have a  
14 strict scoring procedure but I think go hand-in-hand  
15 with either Legal or Appeal's view of selecting a  
16 winner. And that's where I got confused about whether  
17 they overlap.

18 COMMISSIONER CLARK: Tom, the technical Staff  
19 view is you should select a pool of possible winners  
20 and negotiate with all of them to decide on the winner?

21 MR. BALLINGER: Yes, ma'am.

22 COMMISSIONER CLARK: Why don't you queue  
23 that?

24 MR. BALLINGER: They can. It's the utility's  
25 discretion. Again, the basic intent of this thing is

1 for the utilities to beat the bushes to see what's out  
2 there of qualified generating providers; from that,  
3 develop something to screen down to a manageable number  
4 of finalists with which to negotiate the best price for  
5 the ratepayer. And it may be their other project ends  
6 up being the best one from an overall perspective.

7 COMMISSIONER LAUREDO: What do you consider a  
8 manageable number of finalists?

9 MR. BALLINGER: Maybe three or five?

10 COMMISSIONER LAUREDO: So why don't we say  
11 that?

12 MR. BALLINGER: Well, again, it goes to I  
13 think it's the utility's decision. They may go through  
14 and find only one, and even that one they may not be  
15 able to reach a negotiation with. I wouldn't want to  
16 specify a number in a rule to always have three or  
17 always have five.

18 COMMISSIONER CLARK: Do I understand Issue 4  
19 to be that we're not going to tell them that they have  
20 to select a winner and that's it?

21 MR. BALLINGER: When you say, "select a  
22 winner," do you mean select a winner out of the pool of  
23 respondents or can the winner also be the utility?

24 You have to remember, in Staff's view, the  
25 utility publishes its costs as part of the RFP, but it

1 doesn't actually submit a bid, if you will, like the  
2 others. It puts its price on the table but it's able  
3 to reject all bids if it can prove to us that it was in  
4 the best interest.

5 COMMISSIONER CLARK: What price do they put  
6 on the table, what --

7 MR. BALLINGER: Basically, what we have in  
8 the standard offer contracts.

9 COMMISSIONER CLARK: Okay.

10 MR. BALLINGER: Capital cost, O&M, fuel.

11 CHAIRMAN DEASON: That raises an interesting  
12 question.

13 Why should the utility provide that cost  
14 information up front? Why shouldn't the utility, if  
15 it's going to participate in a bid, submit the bid and  
16 if it has to be to a third party who takes the bids and  
17 makes sure nobody tampers with the bids during the  
18 process and then whoever is going to evaluate, whether  
19 it's the utility, the Commission or another third  
20 party, that that bid is opened and is reviewed and it's  
21 scored some way, and the utility wins or loses.  
22 Realizing there is going to have to be some subjective  
23 review and analysis utilizing that, we're not  
24 envisioning simply you just add up the scores and  
25 whatever the highest scores win.

1           MR. BALLINGER: In this issue there's  
2 several, and I spent a lot of time on the stand trying  
3 to explain this.

4           If you go to a mechanism, let's say the  
5 utility evaluates all sealed bids. And there is some  
6 subjectivity in there, so the utility uses its  
7 discretion and ends up selecting itself. Well, that  
8 appears to invite litigation.

9           On the other hand, what is the whole purpose  
10 of having a sealed bid? Is it to get the best price?  
11 And if that is the reason, then you have to go that  
12 step further: If the utility is bidding, are they  
13 going to be held to that price over the life of that  
14 contract? Are you going to forego, then, the  
15 opportunity to make capital additions and prove to you  
16 that they're prudent beyond the life of that contract,  
17 realizing that they have the responsibility to keep the  
18 lights on?

19           So it's a multitude of things you have to  
20 consider. It's not just whether you score or not; it's  
21 if you do this, you have to do B, C and D as well, at  
22 least in my opinion.

23           If you have an independent third-party  
24 evaluator, I don't think you can find one besides the  
25 Commission. That's my own personal opinion. I don't

1 think you can find a consulting firm. There will  
2 always be litigation over, "Well, they've done work  
3 only for utilities," or, "They've only done work for  
4 nonutilities," or whatever. The Commission, in my  
5 mind, would be an independent evaluator.

6           Again, then you've gone back to one of the  
7 reasons we didn't want bifurcation. We're not  
8 recommending that the Commission make those decisions,  
9 the utility make those decisions and we review them.  
10 All right. That's it in a nutshell. And it's a very  
11 convoluted --

12           COMMISSIONER LAUREDO: Speaking of convoluted --

13           COMMISSIONER JOHNSON: Tom, explain to me  
14 once again the rationale why we don't want the  
15 Commission to actually evaluate the bid? I mean, you  
16 started by saying that we would be the only entity that  
17 would be unbiased but we shouldn't be used because why?  
18 Explain that.

19           MR. BALLINGER: Basically, it's a  
20 philosophical difference. I don't believe the  
21 Commission should be making the management decisions,  
22 they should be reviewing them. Under the statutory,  
23 the utility has the statutory obligation to serve. The  
24 Commission has the authority, via the grid bill, if we  
25 see something is wrong we can mandate the utility to

1 go, not to make those decisions on the front end.

2 CHAIRMAN DEASON: Tom, I agree with you  
3 except that the statute under which we have to operate  
4 puts, in my opinion, a very heavy burden on the  
5 Commission. It says the Commission shall ensure it is  
6 the most cost-effective unit in the need determination.  
7 It doesn't say the Commission shall review to make sure  
8 the unit proposed is reasonable or that the costs are  
9 reasonable for ratepayers to pay, or anything like  
10 that. It says, "It is the most cost-effective."  
11 That's a pretty heavy burden.

12 MR. BALLINGER: Yes, I differ a little bit  
13 because it does say consider whether it is the most  
14 cost-effective. I don't know that you could interpret  
15 it to say that it is the most cost-effective.

16 CHAIRMAN DEASON: There are a lot of parties  
17 that come up here and say that it means the most  
18 cost-effective unit.

19 MR. BALLINGER: I'm probably in the minority  
20 on that one.

21 MR. TRAPP: And I guess the statute, as I  
22 understand it, is a determination of need, though. And  
23 I think the Commission, again, conventionally has  
24 placed the burden of proof on the utility to  
25 demonstrate.

1           It's coupled with your authority under 366,  
2 in my mind, where the burden of proof is on the utility  
3 to demonstrate what they're doing is prudent. And in  
4 this case they have an extra burden; they have to  
5 demonstrate that the power plant is the most  
6 cost-effective.

7           Again, it goes back to the reason why we  
8 think you should require bidding. Bidding is the best  
9 way I know to demonstrate that burden of proof; and,  
10 unfortunately, with it comes maybe some other issues  
11 with regard to, "Well, did you do a prudent, proper  
12 bidding instrument and procedure?" But all of that,  
13 it seems to me, should be determined by the Commission  
14 in a regulatory fashion in the need determination after  
15 the utility has made a decision.

16           CHAIRMAN DEASON: But let me ask you this: If  
17 we're going to allow parties the opportunity to  
18 challenge a decision, isn't, in essence, the Commission  
19 going to be the final determinator? So why don't we  
20 just make the decision up front?

21           MR. TRAPP: Sure. Again, because I don't  
22 think you pay me enough. (Laughter) CEOs get half a  
23 million or whatever, and that kind of stuff; vice  
24 presidents get, you know, a couple hundred grand, and I  
25 don't get anywhere near that, so I would --

1 (Simultaneous conversation.)

2 MR. TRAPP: Oh, definitely.

3 I would prefer the utility do the bulk of the  
4 work and have the hard burden of proof, and come up  
5 here and just let me ask some leading questions and get  
6 to the bottom line of the thing and then make a  
7 determination.

8 I agree with you the Commission is  
9 regulators; the buck stops here. You have to make a  
10 decision and that decision is going to carry over as a  
11 rate impact on customer bills. But, again, regulation  
12 versus management.

13 COMMISSIONER CLARK: That's right. And it's  
14 up to them to make that decision. They are charged  
15 with running the utility in the most efficient way, and  
16 our job is to review that and to make sure we agree  
17 with their conclusions or where we don't agree to  
18 require them to change it.

19 MR. TRAPP: True.

20 CHAIRMAN DEASON: I agree with that in most  
21 scenarios. But what we have here is if this is going  
22 to be a fair and open process where somebody who feels  
23 like they have not been treated fairly has a forum in  
24 which to express that concern and hopefully gain  
25 relief, the Commission is going to make the ultimate



1 decision anyway. I think it's going to be extremely  
2 rare where there is an RFP issued and the decision is  
3 made. And I don't care if the utility chooses itself  
4 or chooses another provider, a NUG. There's going to  
5 be another NUG out there who is not going to like that  
6 decision, and they're going to file a complaint with  
7 the Commission. And the Commission is going to have to  
8 look at that RFP; they're going to have to look at the  
9 scoring criteria; they're going to have to look at the  
10 subjective judgments that were made by someone who  
11 probably gets paid a lot of money to make those  
12 decisions, but ultimately the decision is going to be  
13 ours. Do you say, "Yes, it was fair, it was objective,  
14 the decision is a correct decision," or do you say,  
15 "No, it wasn't"?

16 MR. BALLINGER: I think you're right, and  
17 that decision is telling the utility whether or not  
18 they made the right decision or the wrong decision. I  
19 don't it should go further to say, "The right decision  
20 is this over here."

21 CHAIRMAN DEASON: Okay. That's a good --

22 MR. BALLINGER: That's a very fine line.

23 CHAIRMAN DEASON: All right. What happens  
24 then if we go through this long, drawn-out process,  
25 which is very complicated and expensive and

1 time-consuming and the end result is a complaint that's  
2 filed with the determination of the winner of the RFP,  
3 and the Commission makes the decision that:  
4 Complainant, you're correct, it was not done fairly and  
5 something was misscored or the subjective criteria were  
6 biased? So that just means we start all over again,  
7 and then that whole time that window of opportunity  
8 narrows and that we're just a year further down the  
9 road to where the capacity has to be on line or else  
10 the lights go out?

11 MR. BALLINGER: I would like to think that  
12 the threat of regulation is a pretty big threat to the  
13 utility that they will pursue the right job and the  
14 right plant. Because if that were to happen and we  
15 were to find, we have remedies for that situation.  
16 Whereas, on a nonutility, we don't; they're a  
17 nonregulated entity. So I think the threat of  
18 regulation over a utility is very strong for them to  
19 come forward with the best project.

20 CHAIRMAN DEASON: What is our remedy? Would  
21 you say, "Well, Utility, you really blew it. We're  
22 going to make you build it and you have to do it within  
23 two years. And so it's going to cost more because the  
24 available technologies are limited but we're only going  
25 to allow you recovery as if the other project was built

1 and you're just going to suffer"?

2 MR. BALLINGER: That's basically it. You go  
3 to the stockholders' pockets.

4 CHAIRMAN DEASON: And then the cost of  
5 capital increases for the utility and the customer is  
6 going to pay regardless? I mean --

7 MR. BALLINGER: That's possible. I agree.

8 MR. TRAPP: It's happened in other  
9 jurisdictions.

10 CHAIRMAN DEASON: There are no easy answers.

11 MR. TRAPP: No, sir.

12 MS. RULE: Well, Chairman Deason, in a sense  
13 this very question comes up whenever the utility makes  
14 a decision that the Commission must approve. The  
15 utility might not make the right decision. What are  
16 you going to do? You can either take away that  
17 decision-making capability and make that sort of  
18 decision yourself, or you can take whatever regulatory  
19 action is available to you to show that that is not a  
20 prudent decision and you cannot approve it for rate  
21 recovery.

22 This happens to be one specific type of  
23 question that's come before the Commission recently in  
24 a very public fashion, but it's involved in almost  
25 every decision that comes to you for approval.

1           MR. TRAPP: Let me offer you a potential out,  
2 although the Staff has somewhat argued against it in  
3 the recommendation.

4           One of the benefits associated with defining  
5 a number of finalists in the bidding process is that,  
6 if you don't agree with who they select as the winner  
7 from that list of finalists, at least you have  
8 fall-back options which you can instruct the utility to  
9 deal with or guide the utility or out-and-out recommend  
10 certification for. We don't think you're precluded  
11 from doing that. Staff has recommended that you don't  
12 put that in the rule as this is what we will do, keep  
13 it as an option.

14           But again, one of the benefits of having  
15 finalists is at least you will have a group of people  
16 that the utility themselves have said, "We've got these  
17 two or three objects here, all of which look to be  
18 viable, doable, and cost-effective, and we picked this  
19 over here and we negotiated a contract with them. If  
20 you don't like it, Commission, maybe you can look at  
21 some of these others." So that at least may answer  
22 some of the timing problems associated with the denial  
23 that have been faced in the past.

24           CHAIRMAN DEASON: All right. Let's assume we  
25 have that scenario and we have three finalists. The

1 utility picks one as the primary finalist and  
2 negotiates and comes up with what they believe to be a  
3 workable project, one that's cost-effective, reliable,  
4 all those other good things. (Pause)

5 At some point the Commission has got to say,  
6 "Yes, go forward." But also at some point the other  
7 finalists would have an opportunity to protest that,  
8 would they not?

9 MR. TRAPP: Yes, sir. I mean, we're thinking  
10 under the American system, you can always have your day in  
11 court --

12 CHAIRMAN DEASON: Okay. If that happens and  
13 there is a protest and the Commission starts looking at  
14 it in greater detail, I guess I would envision what I  
15 probably would really not look forward to it, but it  
16 probably would be a full-blown hearing where all three  
17 finalists would say, "Here's all of the great things  
18 that I'm going to do, and here's all the experience I  
19 have, and here are some special benefits which are  
20 really going to benefit the ratepayers of Florida." Do  
21 we have the authority to say, "Utility, we're  
22 convinced, it's not Finalist A, it's Finalist B which  
23 has the best project, go sign the contract with them"?

24 MR. TRAPP: It would depend on the record in  
25 the case. And think this is what you were faced with

1 in Cypress. You had three parties basically in there  
2 saying their project is the best. You had to make a  
3 determination.

4 I think the Commission did what was right,  
5 and said, "No, Power and Light, if you don't have the  
6 most cost-effective project, go back and do your  
7 management job again and pick a better one." As it  
8 turns out, planning being dynamic, they found other  
9 alternatives.

10 CHAIRMAN DEASON: Then it was fortunate in  
11 that situation. What if the things that changed where  
12 there were different facts altogether and the needed  
13 capacity was needed a year earlier than first  
14 anticipated?

15 MR. TRAPP: We'd build peaking units.  
16 Sometimes you're forced into an uneconomic decision. I  
17 mean, it's happened in Florida before. The nuclear  
18 program in Florida caused delays that forced peaking  
19 units probably a little before their time. I'm sure  
20 there are other examples. The circumstances being what  
21 they are, I guess your concern is that the Commission  
22 not cause those circumstances.

23 COMMISSIONER LAUREDO: Before you go on much  
24 further, could you try to bring this conversation to a  
25 focus as to what issue we're talking about?

1 COMMISSIONER CLARK: Issue 4.

2 COMMISSIONER LAUREDO: Because if the basis  
3 for this discussion is we're going to try to find a way  
4 for this rule or any other to preclude the prolonged  
5 proceedings before this Commission, I think it's  
6 impossible on this or any other issue, particularly  
7 with things of this kind of magnitude and these kinds  
8 of profit possibilities; that there is no humanly  
9 designed rule that can prevent the redundancy and the  
10 rehearing and rethrashing of the record.

11 I have been here almost two years, I know  
12 that's impossible. Lord knows, I pray every night to  
13 hope that we can come up with a way to do that; but I  
14 don't see, unless you deny due process to a lot of  
15 people, that's just the way it is.

16 But I wonder, we started talking, because I  
17 have some questions about the scoring system are we on  
18 Issue 4 or 5 or what?

19 MR. BALLINGER: Both. And let me offer one  
20 example, too, to show the dynamic about getting caught  
21 short basically and having to go peaking plants.

22 That happened a few years ago exactly to  
23 Florida Power Corporation. They reassessed their needs  
24 and their loads grew or whatever, and they needed  
25 capacity quick. What they did is they went out for a

1 bid; and they priced that bid based on a 1991 coal  
2 unit, which couldn't physically be built, but they had  
3 the capacity payments of a coal unit in order to  
4 attract cogenerators to get the capacity on line  
5 quickly. Because these were some were existing  
6 industrial facilities that could add on a generator.  
7 Some of them were existing as available cogenerators.  
8 So they responded that way in the market.

9           The justification of that was the net present  
10 value, the difference between a coal unit and a peaking  
11 unit, were negligible. They were within about a half a  
12 percent of each other, when you consider both fuel and  
13 capital, which you will find typically between  
14 competing alternatives.

15           So in that way they responded and went to the  
16 market when they were caught short and attracted  
17 nonutility generation in. Whether that was for the  
18 benefit of the ratepayers or not, I don't know. But,  
19 you know, the Company is not always going to go back  
20 and build peaking units and just say, "We're going to  
21 build it because it's in such a short time frame."  
22 There's ways around that.

23           COMMISSIONER LAUREDO: Now, can I ask you a  
24 question?

25           MR. BALLINGER: Yes.



1           COMMISSIONER LAUREDO: On Issue 4, when you  
2 were voting on whether or not we'll have a scoring  
3 system. Is that the same as in your other outline -- I  
4 don't know what document this is -- the summary of the  
5 task force when they describe self-scoring systems, are  
6 we talking the same thing?

7           MR. BALLINGER: Yes.

8           COMMISSIONER LAUREDO: What is a self-scoring  
9 system?

10          MR. BALLINGER: Basically, where there is no  
11 subjectivity involved, you give weights to everything.  
12 So when you submit your bid, you know you're going to  
13 get 90 points or 80 points. I mean, you can do it  
14 yourself. You know where you're going to fall and the  
15 one with the most points wins.

16          COMMISSIONER LAUREDO: Okay. So basically,  
17 Issue 4 is to adopt the recommendation of the task  
18 force in this issue. Is that a short summary?

19          MR. BALLINGER: No, just the opposite, I  
20 think. It's not to have a strict scoring system.

21          COMMISSIONER LAUREDO: Well, no, that's your  
22 recommendation --

23          MR. BALLINGER: Right.

24          COMMISSIONER LAUREDO: -- but the issue is  
25 whether or not to adopt it.

1 MR. BALLINGER: Yes.

2 COMMISSIONER LAUREDO: Okay. And your  
3 recommendation is no. Okay.

4 Let me ask you, you talked about finalists  
5 and I'm confused. Under this rule is the utility  
6 required to pick finalists of which to pick a winner?

7 MR. BALLINGER: No.

8 COMMISSIONER LAUREDO: Huh?

9 MR. BALLINGER: No. I don't believe so,  
10 because I think we have --

11 COMMISSIONER LAUREDO: Oh, I know it doesn't.  
12 You look at (6), and it says, "If you pick finalists,  
13 if any."

14 MR. BALLINGER: Right.

15 COMMISSIONER LAUREDO: So explain to me how --

16 MR. BALLINGER: If they feel that based on  
17 their project nobody can meet their screening criteria,  
18 then they can come to us and say, "We don't even have  
19 viable projects that responded to us."

20 COMMISSIONER CLARK: They can choose  
21 themselves.

22 COMMISSIONER LAUREDO: Well, that was my next  
23 question.

24 MR. BALLINGER: Yes, they can choose  
25 themselves, but I don't --

1           COMMISSIONER LAUREDO: They looked at all of  
2 them and the only one that can really do it is my  
3 subsidiary. Is that a possibility?

4           MR. BALLINGER: If they can prove it, yes.  
5 They have to come to us and prove it.

6           COMMISSIONER CLARK: Wait a minute, he used  
7 the term "subsidiary."

8           COMMISSIONER LAUREDO: Or affiliate. But I  
9 mean that in the legal sense.

10          COMMISSIONER CLARK: That's a legal question.  
11 That's different than the utility building itself.  
12 Take Florida Power and Light, there's a difference in  
13 my mind between when they reject all the bids and elect  
14 to build them themselves. It is FP&L that's building  
15 it and not ESI. Okay.

16          MR. TRAPP: In my opinion ESI should be made  
17 to bid.

18          COMMISSIONER CLARK: It's just a bidder.

19          MR. TRAPP: Right.

20          COMMISSIONER LAUREDO: All right. So the  
21 argument of the duality between unregulated IPPs and  
22 those owned by or affiliated by investor-owned, that  
23 bias is taken care of because those who are affiliated  
24 with or subsidiaries of IOUs have to go through the  
25 bidding rule?

1 MR. TRAPP: Yes.

2 COMMISSIONER LAUREDO: So that poses an  
3 interesting practical proposition. Then you can  
4 conceive of a bidding process by which the utility will  
5 disqualify its own IPP.

6 MR. BALLINGER: Yes, sir.

7 COMMISSIONER LAUREDO: Are you comfortable in  
8 this rule that you're proposing that the arguments that  
9 have been expressed in the hearings and in the  
10 summaries and stuff from CEPA, that the rule is not  
11 biased towards the utility?

12 I know you premised this whole meeting by  
13 saying you didn't care about the parties, you care  
14 about the public, as we do. But just on a fairness  
15 thing, I just wonder, I'm asking you honestly because I  
16 don't know whether, is this you think a very open  
17 process by which abuse cannot be -- or at least if  
18 abuse is committed by the utility that we can easily  
19 flag it?

20 MR. BALLINGER: I think so. I think it goes  
21 a step beyond where we are today in that --

22 COMMISSIONER LAUREDO: That's a good point.  
23 Is this a step towards the IPPs, this rule?

24 MR. BALLINGER: I think so, especially the  
25 IPPs. Because current regulation does not require a

1 utility to even talk to an IPP, unless you want to  
2 carry it that they have the burden of proof to select  
3 the most cost-effective alternative. But there's no  
4 federal regulation as there is with QFs that they must  
5 pay them avoided costs or anything of that nature.  
6 There's no guaranteed market for IPPs.

7           So this has gone a step forward to at least  
8 make the utility solicit offerings and justify to us  
9 why they rejected such offerings, if they do, as  
10 opposed to just doing it all behind closed doors. This  
11 at least makes it a formal process before the  
12 Commission that they have to justify to us.

13           COMMISSIONER LAUREDO: And a reversible  
14 process.

15           MR. BALLINGER: Yes.

16           COMMISSIONER LAUREDO: Because my whole  
17 philosophy about this thing is I want to make sure that  
18 we move in a direction to accommodate the new forces  
19 but not fast enough to dismantle those which have  
20 served us so well up to today. That's the bottom line  
21 for me. And the rest is all legal jumbo wordage and  
22 all that kind of stuff.

23           You feel comfortable that this is a prudent  
24 and cautious step to accommodate new forces while, at  
25 the same time, preserving the integrity of all the

1 other catch phrases we've been using, you know, duty to  
2 serve and reliability --

3 (Simultaneous conversation.)

4 MR. BALLINGER: You've heard the term "level  
5 playing field," we're not quite level. It may still  
6 tilt a little bit to the utility, but they have the  
7 responsibility. It's nonregulated --

8 COMMISSIONER LAUREDO: But this rule tilts it  
9 a little bit towards the IPP.

10 MR. BALLINGER: Yes.

11 COMMISSIONER LAUREDO: Let me ask you. On  
12 the question of the finalists, you don't think in light  
13 of the discussion about the efficiency of the process  
14 that we can name -- I mean we can demand a number, a  
15 finite number of finalists so that we don't have, say,  
16 ten people apply? And the way we're going, we may very  
17 well have ten people apply, ten companies. And if the  
18 company decides to select them all, it wouldn't be in  
19 the interest of the company, would it, in my scenario,  
20 to just -- in other words, as a delay tactic? Because  
21 the presumption is we do need the capacity.

22 MR. BALLINGER: Right. I think also from the  
23 IPP perspective, if you had the requirement of, let's  
24 say, five finalists; and let's say there was really  
25 only four who wanted to go through the rest of the

1 process and the fifth one was happy with the results  
2 and wanted to go away, well, you would drag him into  
3 the process that would cost him money to come and  
4 present before the Commission and all that, so --

5 COMMISSIONER LAUREDO: Who? Cost who money?

6 MR. BALLINGER: The IPP.

7 COMMISSIONER LAUREDO: Oh, no. If you don't  
8 want to be a winner in a contract in the market I know,  
9 you don't have to.

10 MR. BALLINGER: Well, if you make it to the  
11 finalist stage --

12 COMMISSIONER LAUREDO: You can say you drop  
13 out. "Thank you. I'm not interested anymore."

14 MR. BALLINGER: Okay. That was my only  
15 concern. I don't like tying in a number to how many  
16 people have to participate on through.

17 COMMISSIONER LAUREDO: My God, that would be  
18 a whole new twist on American jurisprudence. We force  
19 people if they are picked, you have to go through and  
20 spend the money even if you don't want it.

21 Can you point me to Issue 4? Your  
22 recommendation obviously has no language in the rule  
23 because that's the recommendation.

24 MR. BALLINGER: Correct. This is a  
25 philosophical thing. Do you want to require them to do

1 such a strict procedure that there would be basically  
2 no subjectivity involved, or do you want to leave that  
3 subjectivity with the utility or with the Commission?

4 COMMISSIONER LAUREDO: Well, you call it  
5 "subjectivity," but it may very well be objectivity.  
6 There may be out there in the industry some criteria  
7 that are in fact objective. It's just we're not making  
8 that judgment; somebody else is making that judgment.  
9 Because, as you point out, we don't want to be in the  
10 business of micromanaging. But it doesn't mean that  
11 it's subjective in that I don't like "IPP-X" as versus  
12 "IPP-Y," which is my question. When they refer to it,  
13 is there any more substantive description of the  
14 scoring system in the task force recommendation or is  
15 it just a statement like the one you just made?

16 MR. BALLINGER: It's just a statement.  
17 It's a --

18 COMMISSIONER LAUREDO: Nobody out there has  
19 told us here's what the five objective scoring systems --

20 MR. BALLINGER: No. They gave some broad  
21 criteria, but it says, "Shall include weighting and  
22 scoring for each one," and then it goes on to an  
23 independent evaluator and they announce the winners and  
24 this kind of thing. But it doesn't get specific --

25 (Simultaneous conversation.)



1                   COMMISSIONER LAUREDO: That's what I was  
2 going to ask you. I don't know if you were going to  
3 answer it, but in your experience is there such a  
4 readily obtainable list?

5                   COMMISSIONER LAUREDO: Is there an industry,  
6 professional association right now that we can take a  
7 ten-minute break and I can go to the library and say,  
8 "Here it is"?

9                   MR. BALLINGER: No. And it's going to change  
10 as the utilities' needs change.

11                   COMMISSIONER CLARK: But you've listed the  
12 areas to be addressed.

13                   MR. BALLINGER: Right, yes.

14                   MR. TRAPP: Those are the areas we're most  
15 familiar with are the areas that need to be addressed.  
16 And it's basically what you need to build a power  
17 plant. You need land, water, air rights. You need  
18 fuel, fuel supply, transportation, transmission, those  
19 types of things. And there are techniques that the  
20 utilities use to evaluate each of those, and we expect  
21 those techniques to be explained in the RFP.

22                   CHAIRMAN DEASON: I think you've just hit a  
23 key. What you're saying is you're going to leave it to  
24 the person who has the responsibility to provide the  
25 service, which is the utility, to establish the scoring

1 system under the guide -- the broad guidelines, which  
2 we've set forth. But the participants in the RFP have  
3 to know what those criteria are and how they're going  
4 to be scored; is that correct?

5 MR. TRAPP: Yes, they have to have an  
6 understanding of what it takes.

7 COMMISSIONER LAUREDO: You better point me to  
8 that because I didn't get that sense. Show me where  
9 that is.

10 MR. BALLINGER: Page 24 of Attachment A.

11 COMMISSIONER LAUREDO: I think it's  
12 corresponding on your clean copy. 24 of what section?  
13 Under 4 you mean?

14 COMMISSIONER CLARK: Uh-huh.

15 COMMISSIONER LAUREDO: We maybe talking -- if  
16 you go through a grant process, it is extremely rigid.  
17 So when you say "scoring system," it's not what you're  
18 describing in the rule. These are parameters. The  
19 scoring system is extraordinarily rigid. It says you  
20 have to have five copies, three in blue and one in  
21 white. It comes in; one read, you're out. 20 points.  
22 No matter if at the end of the process you are the best  
23 grant for this particular application. You fail  
24 Criteria A. There's no flexibility. Are we talking  
25 about the same thing?

1                   COMMISSIONER CLARK: I think you may have  
2 just illustrated why we want to leave it to the  
3 utilities.

4                   (Simultaneous conversations.)

5                   MR. BALLINGER: That's the utilities' option,  
6 if they want to do that to such a detail to put a  
7 waiting on a specific criteria and we want this and  
8 can.

9                   COMMISSIONER LAUREDO: But you didn't get my  
10 point. My point is I agree with you, Commissioner, and  
11 he in answering Commissioner Deason's question said  
12 that they would -- well, we don't put it in the rule  
13 that the Company has to have this criteria, this  
14 so-called scoring system, that we would then have to  
15 pass judgment, subsequent when a dispute comes up. And  
16 I don't think I read it that way.

17                   In other words, we are letting them have a  
18 much more flexibility than the normal scoring system.  
19 We're requiring them to describe with some detail the  
20 criteria, but we do not impose on them a requirement to  
21 come back and say, "Show me how you scored everything."  
22 See what I'm saying?

23                   MR. BALLINGER: There is. And I think where  
24 that phase comes in is an all forgotten -- another  
25 amendment we're doing is to rule 081. And this may get

1 us there.

2 Look at Page 31 of Attachment B. And this  
3 gets to -- they have to come us with all the finalists  
4 that they selected and why they picked the one they  
5 did. I think that's answering your question, I'm not  
6 sure.

7 COMMISSIONER LAUREDO: Point to the section  
8 because I'm looking at --

9 MR. BALLINGER: Attachment B.

10 COMMISSIONER LAUREDO: Okay. Page 31. Line  
11 what?

12 MR. BALLINGER: Yes, sir. Line 22. All the  
13 addition there is basically describing the alternatives  
14 proposed by each finalist, so they have to go through  
15 in detail what the finalist proposed and why it was  
16 good or bad or indifferent. That coupled with Page 26  
17 is where the utility provides a detailed description of  
18 the methodology to be used to evaluate each  
19 alternative. That's Line No. 14 on Page 26.

20 CHAIRMAN DEASON: Let me ask you this  
21 question. At some point somebody who's not pleased  
22 with the outcome of this process, there basically can  
23 be two general types of objections. One is that the  
24 RFP criteria were wrong. They put too much weight on X  
25 and not enough on Z. Basically, challenging the RFP

1     itself.

2                     The other would be a challenge to the extent  
3     "Well, we agree with the criteria, but they scored it  
4     wrong." I mean, they didn't apply what they told us  
5     they were going to do, step one, two, three in making  
6     an evaluation of this criteria but they didn't. They  
7     skipped to two and that way it biased our proposal. I  
8     mean, I'm trying to talk in generalities here, but I  
9     think there is two. One is the RFP was not right, two  
10    is the RFP was not applied correctly.

11                    MR. BALLINGER: Correct.

12                    CHAIRMAN DEASON: When are those going to be  
13    determined? When are those going to be litigated?

14                    MR. BALLINGER: Hopefully, the first one --  
15    well, I don't want to say, "hopefully." Staff is not  
16    envisioning that one being litigated every time. The  
17    opportunity is there when the utility files its RFP.  
18    If a potential participant sees a problem or the  
19    Commission sees a problem on its own motion, we can  
20    initiate a proceeding to straighten the RFP out.

21                    The second part would be if it wasn't --

22                    CHAIRMAN DEASON: Now, is there going to be  
23    an opportunity for someone to petition the Commission  
24    and say, "This RFP is all screwed up. It's biased and  
25    the result you're going to get is a nuclear plant"?

1 MR. BALLINGER: Yes.

2 CHAIRMAN DEASON: And we're going to say,  
3 "Yeah, you're right. This RFP is wrong, we're going  
4 change it before any responses are filed to the RFP"?

5 MR. BALLINGER: Yes. And I think it would be  
6 prudent on a participant, if they feel it was that  
7 biased, to stop the process, basically, up front and  
8 not let it continue to bring it to your attention or  
9 for Staff to bring it to your attention. That's  
10 totally biased. And air those issue out up front  
11 before we waste all that time of going through the  
12 solicitation process.

13 COMMISSIONER LAUREDO: The word "methodology"  
14 used in that section is not the same, and it's not  
15 synonymous with scoring system?

16 MR. BALLINGER: No. We're not recommending --

17 COMMISSIONER LAUREDO: I'm saying it on the  
18 record so we don't have a problem, because words have a  
19 way of just evolving. To me, I mean, it's a big  
20 difference. That's what I was trying to illustrate in  
21 much less eloquent terms that their scoring system is a  
22 very rigid thing and methodology is a little bit more  
23 flexible. And your suggestion, including that  
24 language, is the flexible approach and not the scoring  
25 system rigidity that at least I interpreted?

1 MR. BALLINGER: Yes. And it may envision a  
2 combination of scoring and subjectivity.

3 COMMISSIONER LAUREDO: We just better hope  
4 that we just have all this great conservation take  
5 affect because this is going to require a whole new  
6 Public Service Commission Staff of 300 just to deal  
7 with this.

8 MR. BALLINGER: If it gives you any comfort,  
9 we tried to model this rule after some bidding  
10 procedures that have gone through already in Florida  
11 with very little controversy. We tried to mimic what  
12 the utility did on its own initiative and learn from  
13 that experience. There was, you know, few, if any,  
14 disgruntled losers in the process, and it went through  
15 fairly smoothly. And it was pretty straightforward.  
16 So that's what we're trying to model with something  
17 that's really already going on in the industry, just  
18 making it a formal requirement now.

19 COMMISSIONER JOHNSON: Let me ask a couple  
20 more questions. If in the RFP process a party feels  
21 that the process or the scoring or the whatever was  
22 used is biased, they then can petition the Commission.  
23 You stated earlier that if they didn't raise the  
24 complaint or the petition at that stage, they could --  
25 there is another opportunity to raise it later. Where

1 is that written in here, and, if so, why?

2 MR. BALLINGER: It would be at the need  
3 determination. I don't know how good an argument they  
4 could put forward just from a practical standpoint. If  
5 somebody knew of something a year ago and didn't bring  
6 it your attention and then they wanted to bring it up  
7 at the eleventh hour, I don't think we can preclude  
8 them, but I don't know. I'm just giving you my  
9 opinion. I'll let the lawyers answer that.

10 COMMISSIONER JOHNSON: Why couldn't we  
11 preclude them?

12 MS. RULE: I don't think we can preclude  
13 people from filing a complaint when we, by our actions,  
14 affect their substantial interest and take -- when we  
15 take an action that may be adverse to them, we have in  
16 place already a complaint procedure. You see before  
17 you every week complaints for which there is no  
18 specific rule. There is no specific rule that says you  
19 can file a complaint about X, Y or Z, but people come  
20 to you when they are grieved by the actions of the  
21 Commission or utility. That would be the procedure  
22 they would use. We have not included that,  
23 specifically, in the rule. We feel there's already  
24 that avenue of redress.

25 Let's assume that somebody sends out an RFP



1 and say an IPP feels that it's unfairly slanted in some  
2 fashion. That IPP already has the option right now  
3 under our present rules of filing a complaint. So  
4 let's assume you get that complaint before you. You  
5 can decide to hold a hearing on it. You can decided to  
6 hold a hearing in conjunction with the ultimate need  
7 determination hearing. You can decide to issue a PAA.  
8 You have the normal range of options available to you  
9 depending on what you think the appropriate remedy is.  
10 We just didn't include it as a specific in this rule.

11 COMMISSIONER CLARK: I think what the  
12 Commissioner is suggesting is why shouldn't we.  
13 Because we would have the same problem we had with the  
14 open season that one utility elected to use instead of  
15 the first in time where a person who would have  
16 benefited by the first in time took issue with a notice  
17 of providing a two week period or whatever it was. And  
18 I think what Commissioner Johnson is suggesting is why  
19 shouldn't they have to protest the RFP within a certain  
20 number of days after it comes out or forever hold their  
21 peace on the RFP.

22 MS. RULE: That is certainly a viable option,  
23 but to tell you the truth --

24 COMMISSIONER CLARK: I'm asking you, why not?

25 MS. RULE: We could not come up with the

1 standard that we felt they would have to meet. We're  
2 not even aware at this point of the range of problems  
3 they might point to. We came up with various different  
4 phrases. We couldn't settle on anything that sounded  
5 reasonable enough to put in a rule. It maybe that  
6 after we have some experience with what people come up  
7 with, then we'll know what they would have to show in  
8 order to have a hearing.

9 COMMISSIONER LAUREDO: But she's talking  
10 about time.

11 COMMISSIONER CLARK: All I'm saying is that  
12 if --

13 MS. RULE: Time to show what? To show that  
14 it's unfair? To show that it does not allow them to  
15 bid? We had no problem with the time period, it's what  
16 they would have to show in order to get a hearing  
17 before the Commission. We couldn't come up with  
18 anything uniformed.

19 COMMISSIONER LAUREDO: You've convinced me  
20 that we were so flexible and so nonbureaucratic that  
21 everybody out there, notwithstanding a rule, can come  
22 and complain to us. You've convinced me of that.

23 MS. RULE: And if we put it in a rule, we  
24 preclude a lot of complaints. We were not certain that  
25 we could come up with a standard that we felt

1 comfortable with that wouldn't preclude perhaps viable  
2 complaints.

3 COMMISSIONER LAUREDO: But, I mean, we'll  
4 make the judgment whether or not it's viable, but I  
5 thought I heard an idea of the time possibility. We  
6 can do that legally like X number of days after --

7 MS. RULE: You're saying exactly what we were  
8 saying. We started writing it out. We started writing  
9 it out how long a period of time would be reasonable,  
10 and, then, when it came to the very specific words, it  
11 would be reasonable to do what? To protest? Well,  
12 protest on what grounds? File a complaint for what?  
13 Unfairness?

14 COMMISSIONER CLARK: I don't think you need  
15 to be that specific. I think all you should do is say  
16 something to the extent within the applicant --  
17 something similar to what they do with the APA. You  
18 can't object to the economic impact statement unless  
19 you do it within a year after it's put out, and I guess  
20 the criteria for the objection to it is the elsewhere.

21 MR. BALLINGER: But you're objecting to just  
22 a utility filing, not a Commission decision and maybe  
23 that's a distinction. We're not recommending that the  
24 Commission bless the RFP.

25 The IPPs had language in theirs that if no

1 hearing was requested within ten days, the Commission  
2 would issue an order and it's final and go on. And it  
3 was premised, though, on the Commission rubber stamping  
4 in issuing an order in a Commission decision of which  
5 to protest. There's really nothing here that is a  
6 Commission decision to protest. It's a complaint.

7           COMMISSIONER CLARK: One thing you would say,  
8 I think, the bottom line would be that the RFP will not  
9 result in a most cost-effective reliable service to the  
10 ratepayers. I mean, that seems to me that you would  
11 have to make a showing that the parameters they've set  
12 out, because of the way they did it, won't result in it  
13 because a bias towards a particular fuel.

14           MR. TRAPP: Commissioner Clark, again, our  
15 intent here was not to foreclose any party from its due  
16 process rights that it currently had before the  
17 Commission and any other area. And it also was not our  
18 intent to build a procedure that was automatically  
19 litigated at every step. So if you would like  
20 additional steps in this to foreclose --

21           COMMISSIONER CLARK: I don't think that's  
22 necessarily --

23           COMMISSIONER JOHNSON: So you think that's  
24 adding a step?

25           MR. TRAPP: I think that's restricting what

1 the parties currently have in their complaint rights  
2 before the Commission. Again, I believe that a party  
3 can complain on anything at any time as long as they  
4 demonstrate that they were effective and have probable  
5 cause, I guess is the legal term. I'm not a lawyer.

6 MS. RULE: They have to prove their  
7 complaint.

8 COMMISSIONER JOHNSON: No matter where we are  
9 in the process?

10 MR. TRAPP: And in any process. Anything  
11 dealing with an electric utility, consumers can  
12 complain.

13 COMMISSIONER CLARK: The arguments of  
14 equitable estoppel and laches and things like that may  
15 still be appropriate.

16 MS. RULE: On Page 28, Line 22. The attempt,  
17 and it is just an attempt, that we may try to contain  
18 that situation as by saying, "The Commission shall not  
19 allow potential suppliers of capacity who were not  
20 participants to contest the outcome of the selection  
21 process." Surely, that does not answer your earlier  
22 question. It does not contain the -- you might say --  
23 bid protest situation. But what we were attempt to do  
24 here is prevent a Cypress-type situation where new  
25 players come to the table at the need determination

1 procedure and then say, "We now want you to hear what  
2 we can do."

3 COMMISSIONER LAUREDO: But I was looking for  
4 that, and thank you for pointing it out, Section 8.  
5 What I think is attractive, or at least what the  
6 discussion is on the procedure itself, on the  
7 evaluation or criteria or the RFP itself that we have a  
8 finite period of protest. Because I am from the school  
9 if you play the game, you've got to play by the rules.

10 And I've seen a lot in my life where people  
11 say it's fine enough. I'm not saying anything because  
12 I may get it, but if I don't get it, I've got about  
13 four things that I have to object to. And I think if  
14 there's a cut off, we would preclude at least that,  
15 then we can litigate other factors. But you can't go  
16 in and put in and play by the RFP rules, be silent,  
17 lose and say, "By the way, I think the RFP rules, you  
18 know, the reason I lost is because the RFP rules to  
19 begin with are bad." Is there anyway to accomplish  
20 that?

21 MR. TRAPP: I think we can add that provision  
22 in there, if you would like it in there. I think  
23 Marsha's right. We need to put some kind of criterion  
24 in there to avoid gratuitous litigation because that  
25 might be seen as a threshold by some parties, "My gosh,

1 if we don't do something, we've lost our rights here so  
2 let's do something even if we don't have a good  
3 argument."

4 COMMISSIONER LAUREDO: That's absolutely  
5 right.

6 MR. TRAPP: But if you want to add something,  
7 we would be happy to add it.

8 COMMISSIONER LAUREDO: And the thing that  
9 bothered me about Section 8 when I first read it is  
10 what if you feel that way from the starting block? The  
11 only way to preserve my right is to go ahead and apply  
12 which entails \$200,000 or \$300,000 worth of work, when  
13 I can say right off the bat, this is really not good,  
14 Commissioners.

15 MS. RULE: You're absolutely right, and we've  
16 discussed that because the intent is clearly to get  
17 more people -- to give more people the option to  
18 provide a low-cost alternative rather than allow  
19 somebody to skew the process and therefore the outcome.

20 COMMISSIONER LAUREDO: I mean, I'm taking it  
21 to extreme. It has to be the highest degree of  
22 duplicity for it to happen. I mean, it has to be an  
23 RFP so blatantly, I guess, biased that you can actually  
24 look at it as a business and say, "I cannot invest  
25 \$400,000, \$500,000 in engineering and legal costs when

1 it's stacked against me." I can't imagine that our  
2 utilities would do that, but, I mean, that person does  
3 not have any protection.

4 MS. RULE: I think that is a concern in any  
5 bid process, I mean, without speaking specifically --

6 COMMISSIONER LAUREDO: Well, that person  
7 under Section 8 waives his rights. It doesn't apply,  
8 correct?

9 MS. RULE: That's correct, and that is a  
10 problem.

11 COMMISSIONER CLARK: Mr. Chairman, I kind of  
12 think that this maybe one thing that we should not  
13 decide now and see if this becomes a problem, because  
14 it will be up to the potential bidders to sort of make  
15 a determination as to whether or not they should bring  
16 it to the Commission's attention through some vehicle  
17 or maybe even talk to the Staff. They can call up the  
18 Staff; and if the Staff is sufficiently concerned about  
19 it, we can do it on our own motion.

20 I share the Staff's concern that by putting  
21 it in the rule, you invite a litigation. In the  
22 rulemaking, you know, where they always through in a  
23 challenge to the EIS when they really aren't  
24 challenging the EIS, and it will shift some of the risk  
25 to the bidder to make a judgment. Does he want to go



1 ahead and bid? And if he loses, makes that an issue  
2 and have to counter an argument of not raising it early  
3 enough, were there justifications of him not doing it,  
4 And so I think we can sort of let that be for now and  
5 see how it works.

6 CHAIRMAN DEASON: Let me ask a question. I  
7 still have a little bit of difficulty with the rule as  
8 proposed by Staff, which would require the Utility to  
9 provide cost information on its proposal. Nonbinding.

10 And there's even a statement in your analysis  
11 that says that most people who are experts in this  
12 industry, when a utility says we need X megawatts in  
13 this time frame and in this location, they pretty well  
14 know what the utilities' costs are going to be anyway.  
15 So why do we go through this exercise of having the  
16 utility provide cost information?

17 MR. TRAPP: I think they do it anyway,  
18 Commissioners, to define an avoided unit for  
19 conservation purposes because we use the next unit in  
20 plan for conservation cost-effectiveness calculations.

21 MR. BALLINGER: We also may use it for  
22 standard offer contracts, which are still on the books  
23 for small QFs, which may or may not continue. I don't  
24 know, but current regulation, we have a standard offer.  
25 So hiding avoided cost is nothing -- I don't see

1 anything to benefit unless you're going to hold a  
2 utility to that cost over the length of plant and total  
3 deregulate that plant.

4 MR. TRAPP: Remember that the utility has a  
5 veto right, basically, in this rule at any point in  
6 time. They can say, "No, we've decided that we're the  
7 best and we can build cheaper and better than you can.  
8 So we're closing down or stopping or not doing the RFP  
9 process." We would like the information up front to  
10 know what the utility thinks their cost is on what  
11 their making that decision to go or stop the process on  
12 so that we know from the front end on.

13 CHAIRMAN DEASON: But if this is going to be  
14 a level playing field, isn't that a bias against the  
15 utility?

16 MR. TRAPP: I don't think so because, again,  
17 this is a regulated entity, which we're regulating, and  
18 because we're regulating, they're publishing this cost  
19 anyway in the other regulatory arenas that we have.  
20 You would have to be a pretty naive competitor not to  
21 be able to go dig up these costs, so why not just  
22 publish them since they're being published anyway.

23 MR. BALLINGER: And the real competition is  
24 between the other IPPs. They're going to be competing  
25 amongst themselves to get in that lowest bid to get to

1 the negotiating table with the utility to show them  
2 that it's a good cost.

3 CHAIRMAN DEASON: Well, are they going to be  
4 competing with the utility with those people because  
5 these costs are not binding in any way.

6 MR. BALLINGER: I understand. They're  
7 competing with them, but they are also, in my opinion,  
8 their main competition is each other.

9 COMMISSIONER CLARK: Well, also the utilities --

10 MR. BALLINGER: Because then those people are  
11 on a level playing field with each other. They're all  
12 nonregulated, they can structure their financing  
13 virtually anyway they want, so they are the ones  
14 competing. The utility has so many other different  
15 constraints that, yes, they do compete with them but  
16 there's so many other factors that may make a good  
17 competition.

18 So I think the competition, as far as getting  
19 a good price for the ratepayers, will still happen  
20 because you have the nonutility industry competing  
21 amongst itself. What you're doing is making the  
22 nonregulated entities compete amongst themselves to be  
23 providers of electricity for a regulated utility.

24 CHAIRMAN DEASON: Commissioners, what's your  
25 pleasure on Issue 4?

1 COMMISSIONER CLARK: I move Staff on Issue 4.

2 COMMISSIONER JOHNSON: Second.

3 CHAIRMAN DEASON: Moved and seconded, all in  
4 favor say, aye.

5 (All Commissioners vote aye.)

6 CHAIRMAN DEASON: Any opposed? Let's just  
7 say that, and I think this probably goes for all of us,  
8 this process is probably going to be changed a thousand  
9 times during its evolution. And I'm not exactly  
10 convinced that everything Staff is recommending is the  
11 way to go, but I certainly think it's a step in the  
12 right direction.

13 Issue 5.

14 COMMISSIONER CLARK: I would move the primary  
15 recommendation on that because I do think it is  
16 consistent with the recommendation on 4.

17 COMMISSIONER JOHNSON: Second.

18 CHAIRMAN DEASON: Is there anyone to speak on  
19 the alternative? I want to give Staff its due process.

20 (Laughter)

21 MS. RULE: Well, I think it comes down to a  
22 question of what you intend to do at the end of the  
23 process. And there is also a difference of opinion  
24 here between legal and appeals, so I'm going to try and  
25 speak carefully to the areas in which we agree.

1           The way the issue is written, it's whether  
2 the Commission should be required to select a winner.  
3 Legal and appeals Staff don't believe that the  
4 Commission should do that, but we do believe that the  
5 process should end up with a winner, for lack of a  
6 better word, that out of the pool of applicants the  
7 utility should select the best one and present it to  
8 the Commission.

9           COMMISSIONER CLARK: This rule allows them to  
10 do that if that is how they choose to structure their  
11 RFP process.

12           MS. RULE: Yes, ma'am. It allows but not  
13 require.

14           COMMISSIONER CLARK: If they choose to do it,  
15 they can do it. If they choose not to -- so they're  
16 going to have a figure out the most efficient way for  
17 them to do it.

18           MS. RULE: The part that, basically, the  
19 lawyers object to is using the RFP process to select  
20 finalists and then to negotiate with them. It seems  
21 that all it does is reduce a number of people with whom  
22 the utility has to negotiate. We believe it will bring  
23 the utilities back to the exact same problems that the  
24 Commission experienced in the Cypress stuff.

25           COMMISSIONER LAUREDO: Why is that? Explain

1 that to me. I'm sorry, I wasn't on the Cypress case.  
2 I don't believe, thank God.

3 MS. RULE: Well, at this point I think we  
4 start to get into a difference of opinion among  
5 lawyers.

6 COMMISSIONER LAUREDO: Let's forget about  
7 your opinions and let's just look at the real world.  
8 What is wrong with the concept of having a criteria by  
9 which we eliminate what normally is called "obvious  
10 rejects." There is a number of -- any process.

11 Take for example college admissions for law  
12 school admission. There is what they call "obvious  
13 rejects" and "obvious admits." It's the first thing  
14 you do, so that you don't spend too much time on either  
15 one of them. Some people are so offstanding that  
16 they're in, and some people are clearly not in. And  
17 then you focus your time and energy in the middle.  
18 What's wrong with that?

19 COMMISSIONER CLARK: We're just not telling  
20 them to do that, right?

21 MS. RULE: Right. The way the rule is  
22 written, it tells the utility to use an RFP process.  
23 However, once they do that, they don't have to do  
24 anything with the results of it.

25 COMMISSIONER LAUREDO: I'm sorry, I

1 misunderstood what you said. But they could use that  
2 as a process to eliminate those, who are not worth in  
3 the sense that they don't qualify, to continue to  
4 devote the time and energy and resources to negotiate  
5 with them. And in that sense is an efficient  
6 management, too, and I thought you said you don't.

7 MS. RULE: The difference is what you think  
8 should happen after you eliminate the obvious rejects.

9 COMMISSIONER LAUREDO: You negotiate with  
10 them.

11 MS. RULE: I believe you should choose one  
12 that your RFP should be sufficiently detailed to allow  
13 you to choose one, not to take three or four of them  
14 and then negotiate against each other. And, perhaps,  
15 even negotiate it into a different type of project than  
16 it was to begin with where other people would have bid  
17 differently. The problem I see with allowing too much  
18 negotiation at the end is that the project could  
19 mutate.

20 COMMISSIONER CLARK: But if it mutates then  
21 the utility runs into an allegation that they  
22 negotiated and selected the wrong bidder that they  
23 allowed a given bidder more advantage, and to me, those  
24 sort of consequences will shape what they do with their  
25 finalists. And they ought to be able to make that

1 determination just as we allowed the utilities to do  
2 first in time or an open season. I see that as part of  
3 the management process by which they select, and they  
4 may select finalists and conclude none of them are ones  
5 that, even after they get through negotiations, they  
6 don't feel any one of those finalists are the best  
7 choice, and, then, they will have to defend it in front  
8 of us.

9 COMMISSIONER LAUREDO: Or actually select  
10 somebody internally, go through the process and find  
11 the best qualifier. And circumstances, circumstances  
12 change by which they don't want to go forward with the  
13 project anymore and if you put in that they have to  
14 pick a winner, then it follows that you're going to  
15 build a plant even if you don't need. Or am I being  
16 too simplistic?

17 MS. RULE: No, but given that, I'm just not  
18 sure then what the rule offers you at all.

19 COMMISSIONER LAUREDO: What's that?

20 MS. RULE: I'm not sure what the rule offers  
21 you at all.

22 COMMISSIONER CLARK: It requires them to bid.

23 MS. RULE: No, it doesn't require them to bid  
24 because that's not what bidding is. It requires them  
25 to publish notice if they want to negotiate and that's



1 about it. And then they get to choose a few with whom  
2 they want to negotiation.

3 COMMISSIONER LAUREDO: Well, I don't  
4 understand where you got this concept of bidding as a  
5 precontractual arrangement that is triggered by the  
6 actual publishing of the bid that you're bound to do  
7 that act or purchase that good.

8 MS. RULE: I'm not understanding what you  
9 were talking about. You, the utility or you, the --

10 COMMISSIONER LAUREDO: Let's forget about the  
11 utility. Just in the other nonregulated world of  
12 whatever you want to buy, airplane parts. Where in the  
13 business world is there a parallel that you, by the  
14 very act that you asked for a bid on a merchandise that  
15 you want to buy or service that you want to acquire,  
16 that you bound contractually to do that act because you  
17 have opened a bid.

18 MS. RULE: Construction.

19 COMMISSIONER LAUREDO: Construction?

20 MS. RULE: In construction law. If I'm a  
21 contractor and a subcontractor bids a job for me and I  
22 used that bid, turn it in, that person is bound to me  
23 for the price in the bid.

24 COMMISSIONER LAUREDO: Absolutely. But if I  
25 am the solicitor of the bid, if I want to build a

1 50-story building, I go out to bid. And, then, the  
2 contractors, through their subsequent subcontracted  
3 bids, I as the person who requested the bid, can at any  
4 time pull back from the project or my lender can tell  
5 me that you can no longer go back and build that.

6 MS. RULE: Absolutely.

7 COMMISSIONER LAUREDO: So, therefore, what  
8 are we talking about?

9 MS. RULE: Well, I think we're talking in  
10 parallel tracks but not on the same issue.

11 COMMISSIONER LAUREDO: No. It seems to me  
12 if, going back to the philosophy, if we accept -- you  
13 know, I have been voting with Staff all along on one  
14 very, very simple thing -- because all this stuff you  
15 know what I feel about it -- is that, one, we're moving  
16 in a direction to accommodate emerging forces but we're  
17 doing it very cautiously, we're doing it very  
18 carefully, we're doing it incrementally, and we're on  
19 the other hand trying to maintain flexibility, key  
20 word, so that we don't become micromanagers of this  
21 process. I think that underlies your whole  
22 recommendation.

23 Am I misreading it in the most simplistic  
24 terms?

25 MS. RULE: Where I differ from the technical

1 Staff --

2 COMMISSIONER LAUREDO: And if you accept that --

3 MS. RULE: -- is that I believe it does not  
4 go far enough in that direction.

5 I certainly agree that technical Staff's  
6 proposal is a step in the right direction, and from  
7 that aspect I have no quarrel with it. However, I do  
8 believe some of the problems we saw in the Cypress case  
9 would not be alleviated by the Staff's approach.  
10 Utilities already have the obligation to negotiate in  
11 good faith; the allegation before you in the Cypress  
12 case was that the utility was not doing that.

13 CHAIRMAN DEASON: Let me ask. Under Staff's  
14 primary, the utility could have the option of selecting  
15 a winner if they chose; and if they wanted to do some  
16 fine-tuning negotiations for the contract or whatever,  
17 do that and bring it to the Commission in a need  
18 determination. Or if they wanted to, they could select  
19 three finalists and they could simultaneously negotiate  
20 with each one of those three. Or they could select  
21 three finalists and queue them, and start negotiating  
22 with the first one; and if that doesn't work out, then  
23 they could start negotiating with number two; if that  
24 didn't work out, they could negotiate with number  
25 three. It would be strictly it would be structured the

1 way they want to have it structured under the primary  
2 recommendation. Is that correct?

3 MR. TRAPP: With the burden always being that  
4 they have to demonstrate to you that what they decided  
5 to do was in the best interest of the ratepayers.

6 CHAIRMAN DEASON: Now, do you envision that  
7 they would have to when they issued the RFP designate  
8 how they envisioned to operate, that they were going to  
9 choose one winner to negotiate or they were going to  
10 choose finalists to negotiate?

11 MR. TRAPP: I don't know if I have an opinion  
12 on that. Part of me says it would be prudent to --

13 (Simultaneous conversation)

14 CHAIRMAN DEASON: Well, I think you may be --

15 MR. TRAPP: Another part of me says if you  
16 are really trying to negotiate the best deal you can,  
17 there's a certain amount of card holding you would want  
18 to do. So I guess I would have to see the merits of  
19 the case put before me.

20 CHAIRMAN DEASON: Well, I would think  
21 obviously a bidder would want to know, Do I have just  
22 to make the final three or do I have to be the final  
23 one? And should I structure my bid so I can just make  
24 the finalists list and then I can really get out there  
25 and negotiate and convince them, or do I have to at the

1 very front end have to put out the very best deal  
2 knowing I have one shot and one shot only?

3 Don't you think, I mean, shouldn't a bidder  
4 know that before they go in?

5 MR. TRAPP: They should have a certain  
6 threshold understanding of what it takes to get a  
7 winning bid. And I think our rule does require that by  
8 requiring a detailed description of the methodologies  
9 used to determine who the winner is and what the  
10 criteria is they're going to be judged on. But, again,  
11 we have not been overly prescriptive in the rule and  
12 because we want --

13 CHAIRMAN DEASON: Well, I agree with not  
14 being overly prescriptive. I guess my bottom line  
15 philosophy is that, if you want to put it in very  
16 simple terms, is the utility has the responsibility,  
17 let them structure it, realizing it is going to be  
18 reviewed at some point and they've got to be able to  
19 prove up what they did. But at the same time, let the  
20 bidders know what process is going to be followed so  
21 that everybody is starting on the same footing and they  
22 know what the process is going to be and they can put  
23 together the very best bid.

24 MR. BALLINGER: True. And that's a process  
25 that has happened. And typically a utility will do a

1 very detailed RFP; and after it is out, they will have  
2 a bidders conference and invite all potential bidders;  
3 and they'll explain what they meant by this language  
4 and have a dialogue go on, so everybody knows. I mean,  
5 it's not always something you can always put down in  
6 black and white, so they have used it to that  
7 flexibility.

8           COMMISSIONER LAUREDO: And we are -- I mean,  
9 we are aware that this goes on all the time in the real  
10 world. Okay. But, you know, I want to make sure I  
11 understand. Because the alternate recommendation is  
12 kind of a real right -- I mean a turn away from that  
13 philosophy articulated. And you bring me on  
14 flexibility up to 5 and then you take a turn. Is that  
15 how --

16           MR. BALLINGER: That's why I said I thought  
17 they overlapped, I couldn't see why it was a distinct  
18 issue, but --

19           COMMISSIONER LAUREDO: Oh, okay. I respect  
20 the opinion but I think it is not consistent with the  
21 philosophy that underline 1 through 4, see what I am  
22 saying? Or one of the philosophies, namely,  
23 flexibility, and that we -- because if I understand  
24 "alternative," it means you go into this process and  
25 you're going to have to go through the expenditure and

1 you're going to build a plant no matter what. You've  
2 got to select a winner.

3 MS. RULE: No, that's not necessarily that  
4 you have to choose one of them but that you do not then  
5 -- you don't just use the RFP process as a way to  
6 select those with whom you will negotiate. It may turn  
7 out that you get no projects you think are going to be  
8 more cost-effective than you as a utility can do  
9 yourself, in which case you don't select any of them.

10 COMMISSIONER LAUREDO: Or conservation. I  
11 mean, what if we don't have the demand anymore?

12 MS. RULE: Yes, sir, that's certainly another  
13 reason why you wouldn't select a project.

14 But it seems to me that in the past the  
15 problems that the Commission has had deal with the  
16 negotiation phase. There's nothing at all that has  
17 precluded utilities from engaging in a process like  
18 this or any other process they want that ends up with  
19 negotiation. Where the complaints come before the  
20 Commission is in the negotiation phase.

21 There are many ways that a utility can kill a  
22 project through negotiation. That's why I think the  
23 shared belief among the attorneys is that the utilities  
24 should look at the bids and pick one. That does not  
25 preclude fine-tuning. It does not preclude them from

1 rejecting them all as being unneeded or not low enough  
2 cost. But the only thing we are trying to do is avoid  
3 those demonstrated problems with the negotiation phase.

4 CHAIRMAN DEASON: Commissioners, what's your  
5 pleasure on Issue 5? I have a motion?

6 COMMISSIONER LAUREDO: There was a motion,  
7 right?

8 CHAIRMAN DEASON: Was it a motion for  
9 primary?

10 COMMISSIONER CLARK: Yes.

11 CHAIRMAN DEASON: Okay. Was there a second  
12 for primary?

13 COMMISSIONER JOHNSON: Yes.

14 CHAIRMAN DEASON: Moved and seconded Staff  
15 primary. All in favor say aye?

16 (All Commissioners vote aye.)

17 CHAIRMAN DEASON: Opposed? Issue 6.

18 MR. BALLINGER: This is the issue about  
19 having a preference or a set-aside for high efficiency  
20 cogen, solid waste facilities and renewable. Looking  
21 at the comments, there was two things: First, I think  
22 it was misconstrued that when Staff first put out a  
23 preference for these types of facilities that we were  
24 talking about a price preference. That was not our  
25 intent. Our intent was a preference to get them to the



1 negotiating table easier, not to give them a subsidy in  
2 any way; that they should be paid no more than full  
3 avoided cost.

4           Upon further reflection and looking at it,  
5 we're not sure whether a set-aside may be good or  
6 whether we want to have a preference, but basically all  
7 of these facilities are qualifying facilities. We have  
8 rules on the book now that deal with purchases from  
9 qualifying facilities, standard offer contracts, and  
10 they must negotiate in good faith. We think that, as  
11 another recommendation, whatever bidding rule we end up  
12 with, we will go and revisit our cogen rules to try to  
13 get them in line with the negotiated rules.

14           We basically have two different markets; we  
15 have a competitive market over here with the bidding  
16 rules, and we have a qualifying facility rule, if you  
17 will -- I don't want to say noncompetitive, but an  
18 avoided cost market and administrative avoided cost  
19 market over here, and we need to go and try to  
20 reconcile those two. I think that would be the more  
21 appropriate place to deal about a preference or a  
22 set-aside for these types of facilities.

23           CHAIRMAN DEASON: Do you have a motion for  
24 Issue 6?

25           COMMISSIONER CLARK: I move Staff.

1 CHAIRMAN DEASON: Do I have a second?

2 COMMISSIONER JOHNSON: I guess what I need to  
3 better understand is how those issues will be addressed  
4 in the cogen rule. If you could explain that, how you  
5 think the renewable issues, the solar energy, how does  
6 that all fit in?

7 MR. BALLINGER: Well, like I said before,  
8 they're all qualifying facilities. I think what we're  
9 going to have to do when we open the cogen rules is  
10 modify those rules so that they mesh with the  
11 competitive rules we have over here now.

12 Even if these were approved today, it  
13 wouldn't preclude QFs from bidding. In fact, they have  
14 two markets they can play in now, they can play in the  
15 avoided -- the administrative-determined avoided costs  
16 or the competitive market. What we want to do is try  
17 to focus or refine those to see where the Commission  
18 wants to go with larger QFs, those maybe 75 and greater  
19 or even those up to 75.

20 These fall in that pool of qualifying  
21 facilities. They have a special status in the market  
22 in that by federal law the utilities are required to  
23 purchase their energy at avoided cost. So they're  
24 guaranteed a market, whereas an IPP is not, and that's  
25 why there's the two distinctions and we have to try to

1 get those two rules to work together.

2 COMMISSIONER LAUREDO: Well, how do you get  
3 on this issue, "No, it is not appropriate at this  
4 time"? So when are we going to catch it? I mean I  
5 agree with that, but when are we going to catch all the  
6 information and the analysis of what's embodied in that  
7 issue it's at that docket? Is that an open docket or  
8 do you need a motion or how do we get to that?

9 MR. BALLINGER: Well, I guess by adopting the  
10 recommendation we would open the rules up after these  
11 rules are approved, we would go in and revise the cogen  
12 rules.

13 Frankly, we really probably should have done  
14 both the cogen rules and the bidding rules at one time.  
15 I think that really would have been a nightmare, so  
16 we're forced to do them sequentially to get them to  
17 work together because they are so intertwined. So I  
18 think soon after we can close on the bidding rules, if  
19 that ever happens, we will look into the cogen rules to  
20 try to modify those to fit the bidding rules.

21 COMMISSIONER LAUREDO: So if you wanted to  
22 have an exposure to the pros and cons -- the cost, the  
23 state of the industry, the state of the technology on  
24 renewable technologies and all that -- you would vote  
25 for Staff recommendation and not apply it to this

1 docket and immediately it would trigger opening of  
2 another docket?

3 MR. BALLINGER: Yes.

4 COMMISSIONER LAUREDO: Okay.

5 COMMISSIONER JOHNSON: But would there be a  
6 need to -- how would we go about, and this is a new  
7 Commissioner kind of issue, how do we go about  
8 initiating that docket? Whether it should be an  
9 investigative docket if we're looking at renewable  
10 resources or whether it should be somehow combined to  
11 the cogen? How do we do that?

12 MR. TRAPP: Staff is recommending that we  
13 open up the cogeneration rules, which means that our  
14 first action probably would be some workshops and  
15 things to decide what we were going to propose to you.  
16 But we would bring a proposed rule to you saying,  
17 "Here's what we would like to do in the area," and you  
18 would either tell us yes or no and redirect us. Or you  
19 can give us direction now and we'll act on it. Or once  
20 we open the docket, since it is a rulemaking docket, if  
21 you would like to discuss it with Staff, we will be  
22 happy to come and get your direction.

23 COMMISSIONER JOHNSON: I think the issue that  
24 Commissioner Lauredo is raising and one of the concerns  
25 of mine is that we keep hearing from a number of

1 parties that we need to thoroughly address the issue of  
2 renewable resources and how that fits into the Public  
3 Service Commission, and my concern is when and how do  
4 we go about doing that? Will that concern -- in a  
5 broad sense, looking at other states, what are they  
6 doing, that kind of thing -- will that be addressed in  
7 the cogen docket or do we need something separate?

8 MR. TRAPP: No, ma'am, I think it will be  
9 addressed in the cogen docket.

10 COMMISSIONER JOHNSON: Okay.

11 COMMISSIONER LAUREDO: Particularly if we  
12 tell you to do it today.

13 MR. TRAPP: Yes, sir.

14 COMMISSIONER LAUREDO: So I would second the  
15 motion with that caveat. There was a motion, right?

16 CHAIRMAN DEASON: Yes, there was a motion.  
17 It's been moved and seconded. All in favor say aye?  
18 Aye.

19 (All Commissioners vote aye.)

20 CHAIRMAN DEASON: Any opposed? Issue 7.

21 COMMISSIONER CLARK: I can move Staff on  
22 Issue 7 as well.

23 CHAIRMAN DEASON: We have a motion.

24 COMMISSIONER CLARK: Yes.

25 COMMISSIONER JOHNSON: Second.

1           CHAIRMAN DEASON: Moved and seconded. All in  
2 favor say aye. Aye.

3           (All Commissioners vote aye.)

4           CHAIRMAN DEASON: Any opposed?

5           Issue 8.

6           COMMISSIONER CLARK: Do we have the legal  
7 authority to require municipals and cooperatives to do  
8 this?

9           MR. BALLINGER: I'll give you a nonlawyer's  
10 opinion. I think we do via the statute of the Power  
11 Plant Siting Act that whoever comes before us for a  
12 need determination we have to make that finding --

13           (Simultaneous conversation)

14           COMMISSIONER CLARK: -- approve their case,  
15 they have to go through a bidding process.

16           MR. BALLINGER: Yes, ma'am. In my opinion,  
17 if they want to get out of it, they need to go change  
18 the statute.

19           MS. RULE: This is another one that we kind  
20 of went round and round on. And there are good  
21 arguments on both side but ultimately where we all  
22 agreed was that anybody who has to come before the  
23 Commission to show they have the most cost-effective  
24 plant should probably be able to show it through  
25 bidding.

1           COMMISSIONER JOHNSON: So it is also then  
2 your legal opinion that we don't have a choice in that  
3 regard. Whereas Commissioner Clark asked if we had the  
4 legal authority to ask, it seems as if you're saying we  
5 have the legal obligation to.

6           MS. RULE: No, the Commission has the  
7 obligation to determine that a plant is the most  
8 cost-effective alternative. You do not have to require  
9 munis or co-ops to bid it out in order to show that if  
10 you are convinced that they could show it to you  
11 otherwise.

12           COMMISSIONER LAUREDO: Doesn't that violate  
13 our discriminatory clause that overrides all our  
14 statutes? Are we applying several different standards  
15 to --

16           COMMISSIONER CLARK: The statute already --

17           MS. RULE: We regulate them differently and  
18 for different reasons, so, therefore, there are good  
19 reasons to exempt them from this. But, as I said,  
20 where we came down on was that if your job under the  
21 Power Plant Siting Act is to approve the most  
22 cost-effective alternative, this seems to Staff to be  
23 the best way to get at that alternative.

24           COMMISSIONER CLARK: What would be wrong with  
25 exempting them from this?

1           CHAIRMAN DEASON: Nothing. Do you want to  
2 make that motion?

3           COMMISSIONER LAUREDO: What would be wrong  
4 with what?

5           CHAIRMAN DEASON: Exempting them from --

6           COMMISSIONER CLARK: Can I ask, do you want  
7 me to make that motion?

8           CHAIRMAN DEASON: Yes, I do.

9           COMMISSIONER CLARK: I so move. I would move  
10 to deny Staff on that issue.

11          COMMISSIONER JOHNSON: Second.

12          CHAIRMAN DEASON: It's been moved and  
13 seconded. All in favor say aye. Aye.

14          (Commissioners Deason, Clark and Johnson vote  
15 aye.)

16          CHAIRMAN DEASON: Opposed?

17          COMMISSIONER LAUREDO: Nay.

18          CHAIRMAN DEASON: Issue 8 is approved on a  
19 three-to-one vote. Issue 9?

20          COMMISSIONER CLARK: It's denied on a  
21 three-to-one vote.

22          CHAIRMAN DEASON: I'm sorry, it is denied on  
23 a three-to-one vote. Issue 9?

24          COMMISSIONER CLARK: I think we have to vote  
25 no. We want the alternative rule as we've just



1 discussed as a fallout from these issues, so I move  
2 Staff on Issue 9.

3 CHAIRMAN DEASON: That's correct. It's been  
4 moved and seconded?

5 COMMISSIONER JOHNSON: Yes.

6 CHAIRMAN DEASON: All in favor say aye?

7 (All Commissioners vote aye.)

8 CHAIRMAN DEASON: Any opposed? Now, that's  
9 with the indicated modification on Paragraph 9?

10 UNIDENTIFIED SPEAKER: Right.

11 MS. RULE: And also exempting munis and  
12 co-ops.

13 UNIDENTIFIED SPEAKER: Right.

14 CHAIRMAN DEASON: Absolutely.

15 COMMISSIONER LAUREDO: That's why I really  
16 wanted to have spent little more time -- and obviously  
17 we're now late and rushing -- into the actual language  
18 of the rule rather than all the time we spend on the  
19 issues because this is where the little words and the  
20 commas get right past me. Or I can offer my suggestion  
21 of what I was going to do of a second reading, which  
22 you told me we'll get to the end. When we get to the  
23 end of all the votes.

24 MS. RULE: I might suggest a break here. Now  
25 that the philosophical issues have been discussed, you

1 may wish to take a few minutes together over the  
2 language of the rule.

3 CHAIRMAN DEASON: Commissioners, what's your  
4 pleasure?

5 COMMISSIONER CLARK: I'm ready to move Issues  
6 10 and 11, move Staff and then go to the rule if we  
7 want to make any changes in the rule.

8 COMMISSIONER JOHNSON: Second.

9 COMMISSIONER LAUREDO: I want to have --  
10 before I vote, I want to have one document I'm voting  
11 on. The rest are kind of wonderful and important  
12 issues but this is the stuff that's gonna stay,  
13 correct? We already made --

14 CHAIRMAN DEASON: Can we do this? Can we  
15 dispose of Issues 10 and 11 with the understanding that  
16 the final rule is going to be brought back to us  
17 tomorrow as the last item on tomorrow's agenda and  
18 we'll vote it out? Is that legally correct to do that  
19 procedurally, to have one final say on it once we can  
20 see the final version with all the final language?

21 MS. RULE: I think you can adjourn today's  
22 agenda and continue it tomorrow, yes.

23 CHAIRMAN DEASON: Okay. Does that satisfy  
24 your needs?

25 COMMISSIONER LAUREDO: That accomplishes

1 having the other Commissioner having the opportunity to  
2 look at it.

3 CHAIRMAN DEASON: If she wants to.

4 COMMISSIONER LAUREDO: If she wants to.

5 MS. RULE: I'm not so certain about that. I  
6 would need a few minutes to look at that.

7 COMMISSIONER LAUREDO: I don't think it  
8 would, obviously, given the votes, change anything.  
9 But I just think as a matter of, one, courtesy; and,  
10 two, if it is in fact the Commission policy.

11 COMMISSIONER CLARK: Mr. Chairman, can I  
12 suggest an alternative procedure?

13 CHAIRMAN DEASON: Sure.

14 COMMISSIONER CLARK: I would like to finish  
15 with 10 and 11. I don't think there are that many  
16 changes to the rule. We could take ten minutes and  
17 look at it again; and then I think, once we are  
18 satisfied with the language, then we could discuss the  
19 possibility of sending it out as the proposed final  
20 version and letting people comment on it back again.

21 CHAIRMAN DEASON: Let's take things one at a  
22 time.

23 COMMISSIONER CLARK: Okay.

24 CHAIRMAN DEASON: I think we have concluded  
25 all issues through 9.

1 COMMISSIONER CLARK: I move 10 and 11.

2 CHAIRMAN DEASON: Issues 10 and 11 have been  
3 moved. Do we have a second?

4 COMMISSIONER JOHNSON: Second.

5 CHAIRMAN DEASON: Move and seconded. All in  
6 favor say aye? Aye.

7 (All Commissioners vote aye.)

8 CHAIRMAN DEASON: Issues 10 and 11 are approved.  
9 Now, how do we wish to proceed at this point?

10 MS. RULE: I have a suggestion.

11 Commissioner, you wanted one version, why don't you  
12 give us a half hour, let us go back and change all the  
13 coding and give you one version that clearly states  
14 what you voted on? And then if you have changes to the  
15 language it will be much easier to see where you are  
16 going to make it.

17 COMMISSIONER CLARK: If that's the case, I  
18 would say put it at the end of tomorrow's agenda then.  
19 What are we changing besides the last --

20 MR. BALLINGER: It shouldn't take but a few  
21 minutes.

22 COMMISSIONER CLARK: I mean, are we changing  
23 anything beyond 9?

24 MR. BALLINGER: And making it investor-owned only.

25 COMMISSIONER CLARK: That's right.

1           CHAIRMAN DEASON: Those are the only changes  
2 that I recall that we've made to Staff's recommended  
3 version. Which means we can just take it up tomorrow,  
4 a simple thing to do.

5           MS. RULE: Or we can bring you something in  
6 15 minutes and you can decide, it's up to you.

7           COMMISSIONER LAUREDO: I think we'd like to  
8 do it tomorrow.

9           CHAIRMAN DEASON: We're going to do it  
10 tomorrow.

11           COMMISSIONER CLARK: Mr. Chairman, can we at  
12 that time discuss the possibility of putting it out for  
13 one comment back again?

14           CHAIRMAN DEASON: Yes. Once we see the final  
15 version, then we can discuss as to whether we think  
16 that it would help the process to issue that for one  
17 last round of comments. We can decide that tomorrow.

18           COMMISSIONER CLARK: I like that.

19           CHAIRMAN DEASON: Thank you.

20           (Thereupon, hearing adjourned at 3:50 p.m.,  
21 to reconvene Tuesday, December 7, 1993, after  
22 completion of the regular agenda conference.)

23           (Transcript continues in sequence in Volume II.)

24                               - - - - -

25

# **EXHIBIT B**

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION  
TALLAHASSEE, FLORIDA

IN RE: Proposed amendment of Rule 25-22.081, F.A.C.,  
Contents of Petition; and proposed adoption of Rule  
25-22.082, Selection of Generating Capacity.

DOCKET NO. 921288-EU

VOLUME II

Pages 120 - 174

BEFORE: CHAIRMAN J. TERRY DEASON  
 COMMISSIONER SUSAN F. CLARK  
 COMMISSIONER LUIS J. LAUREDO  
 COMMISSIONER JULIA L. JOHNSON  
 COMMISSIONER DIANE K. KIESLING

PROCEEDING: SPECIAL AGENDA CONFERENCE

DATE: Tuesday, December 7, 1993

PLACE: 106 Fletcher Building  
 Tallahassee, Florida

REPORTED BY: JANE FAUROT  
 Notary Public in and for the  
 State of Florida at Large



ACCURATE STENOTYPE REPORTERS, INC.  
 100 SALEM COURT  
 TALLAHASSEE, FLORIDA 32301  
 (904) 878-2221

DOCUMENT NUMBER-DATE  
 13455 DEC 20 93

FPSC-RECORDS/REPORTING

P R O C E E D I N G S

1  
2 CHAIRMAN DEASON: This is a continuation of  
3 yesterday's Special Agenda on the proposed bidding  
4 rule. And we have been provided by Staff a final  
5 version which reflects the decisions which we made  
6 yesterday.

7 COMMISSIONER LAUREDO: Is there a difference  
8 between the 9:00 a.m. version?

9 MS. RULE: Yes.

10 COMMISSIONER LAUREDO: There go my notes on the  
11 9:00 a.m. version.

12 MS. RULE: Actually, we will have to know.

13 MR. BALLINGER: Do you need another copy?

14 COMMISSIONER LAUREDO: No, it's just that I had  
15 worked my notes from the 9:00 a.m.

16 MR. BALLINGER: The changes aren't substantial, so  
17 I think your notes are probably carry forward. The  
18 only change between the 9:00 a.m. version and probably  
19 the 9:30 was --

20 CHAIRMAN DEASON: How do we tell which version we  
21 have?

22 MR. BALLINGER: On Page 5 --

23 MS. RULE: You should only have the second  
24 version.

25 MR. BALLINGER: Right.



1           COMMISSIONER LAUREDO: I got on them early in the  
2 morning.

3           MR. BALLINGER: Your assistant got an earlier  
4 version that morning.

5           COMMISSIONER LAUREDO: Okay.

6           MR. BALLINGER: On Page 5 was the only change to  
7 Section 9 that we reworded a little bit. It was a  
8 little awkward on the early version.

9           COMMISSIONER LAUREDO: Oh. Well, that's where my  
10 notes were, so let me read that quickly.

11           COMMISSIONER JOHNSON: How does it read, just to  
12 make sure we have the right version.

13           MR. BALLINGER: Section 9 should read, "The  
14 Commission may waive this rule or any part thereof upon  
15 a showing that the waiver would likely result in lower  
16 costs or an increased reliable supply of electricity to  
17 the utility's general body of ratepayers."

18           COMMISSIONER LAUREDO: I have just two questions  
19 or suggested changes that may not be necessary. But on  
20 8 on that same page, to substitute the words potential  
21 suppliers of capacity to say any parties, "The  
22 Commission shall not allow any party who were not a  
23 participant to contest the outcome of the selection  
24 process."

25           MS. RULE: And there were two reasons we did not

1 take that approach, and one is when you use the term  
2 party in connection of a rule, particularly a rule  
3 regarding a legal proceeding, it sounds like you mean a  
4 party to that proceeding, and what I assume you mean is  
5 any person. The second reason we didn't do that is we  
6 weren't sure we could cut off any rights of people who  
7 were nonparticipants and perhaps could show that they  
8 did not effectively receive notice. For example,  
9 suppose the utility was supposed to give notice -- I'm  
10 trying to think back to the rule language we actually  
11 used for that -- and did not give notice in accordance  
12 to the rule. Somebody who was not a participant  
13 perhaps should be allowed to come in and complain that  
14 notice was inappropriately given.

15 COMMISSIONER LAUREDO: I'm trying to draft this  
16 more restrictive so that we don't have abuse of it, and  
17 I thought the way I was proposing was better than --

18 MR. BALLINGER: I think --

19 COMMISSIONER LAUREDO: Remember we had a long  
20 dialogue at the end yesterday about how -- for example,  
21 it was my second suggestion, how can we put, if we  
22 could put language in there about the RFP process  
23 itself. In other words, that the parties out there who  
24 don't participate, who don't object off the starting  
25 block about the RFP, and go in and do the application

1           and lose, and then say, "Well, I lost, but that's  
2           because the RFP was biased." And that's what I wanted  
3           to be able to cut off. How do I do that?

4           MR. BALLINGER: I think this does, and let me give  
5           you an example. Let's say there is an ESCO, which is  
6           an energy service company out there, a DSM supplier,  
7           okay. By virtue of your earlier votes, where this is  
8           only generation selection, they can't be a participant  
9           to the bidding process. But, they may want to protest  
10          at the need hearing, saying they could do it instead  
11          of. That is one reason why we chose the phrase  
12          potential suppliers of capacity to phrase it that  
13          people who could participate, but choose not to, they  
14          can't come in at the last hour.

15          MS. RULE: In addition, the Commission has  
16          traditionally allowed parties other than capacity  
17          suppliers to intervene in these proceedings. LEAF has  
18          participated in the last couple of need determination  
19          proceedings. The language that you proposed would  
20          prevent LEAF from contesting the outcome, because they  
21          didn't participate in the selection process.

22          CHAIRMAN DEASON: I think one of the primary  
23          intents is to prevent a party from attempting to bypass  
24          the bidding process and then trying to get their foot  
25          in the door at the last minute. That's, I think, the

1 kind of equity and fairness argument. If they think  
2 they have a viable alternative, let them compete with  
3 everyone else during the RFP and the evaluation stages,  
4 not protest the end result.

5 MR. BALLINGER: Exactly. But if you say any  
6 person who was not a participant, you may preclude  
7 someone who couldn't be a participate anyway, and  
8 that's why --

9 COMMISSIONER LAUREDO: Yes. But on the other  
10 hand, look -- maybe I'm misunderstanding it. You want  
11 to do the commercial side of it first, you don't want a  
12 company, a business entity like in the previous case  
13 that has been cited, from coming in after the process  
14 and saying, "Yes, I can build it cheaper in cost, what  
15 it costs in that docket." That is taken care of with  
16 this. But I also want to prevent other parties from  
17 using or abusing the process by -- I mean, I don't  
18 know, let me see if I can think of an example without  
19 offending somebody. Who are, for example, against  
20 building any extra capacity, period. And they will let  
21 the whole processing go through, all of that time  
22 clock, and that process could be perfectly fine. They  
23 are not a potential supplier, but they say, "Well,  
24 let's file such and such an objection," and it triggers  
25 a whole series of another year of hearings.

1           CHAIRMAN DEASON: Let's take an example. If we  
2 put parties in there, could that prevent, for example,  
3 Public Counsel from coming in, and saying, "Well, you  
4 know, we have let you all do your process and we are  
5 not bidding, we aren't participating, but we see the  
6 final result, and we think that's wrong. And here is a  
7 case to show you why it's wrong."

8           MS. RULE: I guess I'm confused by the use of  
9 parties, when you're saying they can't be parties,  
10 essentially.

11           MR. BALLINGER: I think you're exactly right, I  
12 think that's the reason that we were so sensitive about  
13 the use of the words. The sole intent of this language  
14 is limited to those people that have alternate  
15 projects, supply-side projects that they want to  
16 compete against the utilities --

17           COMMISSIONER LAUREDO: How about people with a  
18 social agenda? Let's be blunt about it.

19           MR. TRAPP: They currently have access to the need  
20 determination process, and this would not foreclose  
21 that access.

22           MS. RULE: If they are substantially affected  
23 parties, I don't believe we can by rule deny them a  
24 point of entry into the process.

25           COMMISSIONER KIESLING: I beg to differ. I

1 believe that if you allow them a point of entry into  
2 the formulation of the RFP and the items that will go  
3 into determining who is going to win, and how it's  
4 going to be weighed, then as in any other bidding type  
5 proceeding, then only people who participated in the  
6 bid have the right to come in and protest the award of  
7 that bid.

8 MS. RULE: This rule does not allow that point of  
9 entry, however.

10 COMMISSIONER KIESLING: I understand that. It's  
11 one of my problems with this rule, which I have not --

12 MS. RULE: So the only possible way they could  
13 come in is in the need determination process, because  
14 we have not opened the door to --

15 COMMISSIONER KIESLING: Right.

16 MS. RULE: So if we close this door we are closing  
17 the only remaining door.

18 CHAIRMAN DEASON: And that's because we don't have  
19 a bifurcated approach?

20 MS. RULE: Yes, sir.

21 COMMISSIONER LAUREDO: Well, it opens up a  
22 possibility for a lot of abuses, and it worries me. I  
23 don't know how to fix it. I'm at a loss. I mean, the  
24 abuse from the commercial point is already taken care  
25 of by the way you drafted that. That I accept, and I

1 would like to expand it to the -- if we could at all  
2 expand it to any objections to the RFP itself, it needs  
3 to be voiced early. Is that something we can put in  
4 there?

5 MS. RULE: You did not vote to do that yesterday,  
6 and the discussion you had then was that it would  
7 bifurcate the process in a way that the rule does not  
8 now require.

9 COMMISSIONER LAUREDO: Well, I don't remember the  
10 second part of that statement. I think we left it that  
11 -- for you to think about, at least from my point of  
12 view, how can we prevent people from playing by the  
13 rules and if they lose in basketball, say, "Yes, but we  
14 should have been playing under football rules, because  
15 the RFP, I don't agree with." But they went through,  
16 they applied under the RFP, and they threw their hat in  
17 the ring, and if they win, great rules; if they lose --

18 CHAIRMAN DEASON: He's not talking about  
19 bifurcation. He's talking about bifurcation being a  
20 determination of need in one segment, and then once the  
21 need is determined, then having a selection process to  
22 fill that need. He is talking about just in filling  
23 the need, you've got basically two stages; you have the  
24 RFP, and then you have the evaluation under the RFP.  
25 It's one of the points I tried to raise yesterday. And

1 we have got basically two areas of protest. Somebody  
2 could say the RFP is all wrong, it's biased; or  
3 somebody could say the RFP was right, but when the  
4 utility made the evaluations under the RFP, they  
5 applied it incorrectly.

6 MR. TRAPP: And, again, this goes back to the very  
7 long discussion that we had yesterday about what the  
8 intent of this rule is. The intent of this rule is for  
9 the utilities to do their job, and for us to review it,  
10 and if there is a problem at any point in the process  
11 with the job that the utility is doing, we believe it's  
12 the Commission's responsibility on their own motion to  
13 detect that problem and correct it. Or if another  
14 party brings that to the Commission, and shows just  
15 cause as to why the process should be halted, stopped,  
16 or amended, that the Commission should take action on  
17 that in the Commission's conventional complaint type  
18 treatment. Again, I think the discussion yesterday was  
19 that Staff's viewpoint in drafting this rule was not to  
20 take away any of the rights that parties currently have  
21 under the need determination process to come in and  
22 make their case. It's up to the Commission then, I  
23 think, to review the record, weigh it, evaluate it on  
24 its merits, and make a determination as to whether or  
25 not that party has a valid position or case that would



1 influence how you would view the outcome.

2 CHAIRMAN DEASON: Well, under this rule if there  
3 is a party out there who is a potential supplier of  
4 capacity, and they get the RFP, and they look at that  
5 and they say, "This RFP is wrong for reasons XY&Z, and  
6 we are not even going to participate because the RFP  
7 process is wrong." Then they have no standing to  
8 contest, because they are not a participant, they chose  
9 not to participate. All right. When do they have an  
10 opportunity, then, to come to the Commission and say,  
11 "The RFP is wrong"?

12 MR. TRAPP: Commissioners, we do not regulate  
13 IPPs. We are not their mothers and fathers. It's up  
14 to them, as responsible business people, to determine  
15 whether or not to raise a complaint. I can assure you,  
16 though, that when Staff gets in a complaint, either  
17 informally, or the Commission gets one formally, those  
18 complaints are treated seriously, or looked at, and a  
19 determination is made in an informal case at the Staff  
20 level as to whether or not to bring it before the  
21 Commission, or to advise the complainants that perhaps  
22 we don't feel it is a proper complaint.

23 CHAIRMAN DEASON: So, you're saying those parties  
24 have an opportunity, it's just not specifically spelled  
25 out in this rule?

1           MR. TRAPP: Certainly. It's not in this rule,  
2           it's in the broad regulatory practice that currently  
3           exists before the Commission. It's called the  
4           complaint process.

5           COMMISSIONER LAUREDO: Which is highly  
6           inefficient.

7           MR. TRAPP: Perhaps.

8           COMMISSIONER LAUREDO: And so I beg to disagree  
9           with you the intent of this rule is that which you  
10          said, and whatever else we decide today. And one of  
11          the things I'm striving for is to see if we can draft  
12          something that can make the system a little more  
13          efficient, so that if an IPP goes through this process,  
14          qualifies, and is selected as the winner, we don't have  
15          at the 11-1/2 hour -- I mean, on the one hand either a  
16          competitor or a potential competitor claiming something  
17          based on the RFP to throw out to have another time at  
18          bat.

19          COMMISSIONER CLARK: Well, that's what Number 8  
20          does. It says potential. So the potential supplier  
21          cannot come in and say --

22          COMMISSIONER LAUREDO: But on Number 8, what I  
23          wanted to add is that (inaudible) to the RFP itself.  
24          I'm making a cut off completely in the RFP and the  
25          selection process.

1           COMMISSIONER CLARK: And I think we pretty much  
2           discussed that yesterday, and the concern being that  
3           you invite a separate proceeding to litigate the RFP,  
4           and that puts you further down the line. And what my  
5           view of it is, was that if they have problems with the  
6           RFP, they can always talk to Staff, as they have not  
7           been bashful to do before, and they can always raise it  
8           at the end. And, of course -- or file a complaint with  
9           the Commission that the RFP isn't appropriate. And I  
10          thought we had concluded yesterday we were not going to  
11          put that in because we didn't want to invite another  
12          stage.

13          COMMISSIONER LAUREDO: What I'm saying, I don't  
14          remember concluding it, maybe I'm wrong. What I'm  
15          saying is we should have a mechanism that you waive, in  
16          essence, and I'm not a lawyer, but you waive your right  
17          to challenge the RFP if you apply under the RFP. If  
18          you're going to play the game, here are the rules, and  
19          don't try to go through the rules, and then if you  
20          lose, use it as an excuse to knock off the guy who is  
21          the winner. Or at least delay the process. That's  
22          what concerns me.

23          COMMISSIONER CLARK: Yes, I agree with that,  
24          Commissioner Lauredo. And I think what we talked about  
25          was the trade off between putting it in the rule and

1 making it clear, and thus inviting people to do it, or  
2 relying on sort of a legal analysis such as laches and  
3 estoppels, to say to them, "You know, why didn't you  
4 raise it early on, even if it was just to the Staff?"  
5 And what comes to mind, and I think it was Ark Energy  
6 who said, you know, on the open season, you shouldn't  
7 have allowed an open season, it should have been first  
8 in time. And it put us in the real difficult position  
9 of saying why didn't you -- you should have said  
10 something earlier.

11 COMMISSIONER LAUREDO: And my concern is two-fold,  
12 and they are separate and they are similar in a way.  
13 That is that one, the commercial end. People spend a  
14 lot of time and money to apply. And if we are  
15 providing them a fair and equal level playing field,  
16 then they should be bound by the winner, assuming there  
17 isn't any problem with a selection process that was  
18 biased, and the execution of the selection process.  
19 And on the other hand, the other concern I have is now  
20 that we have gone through all of this process and the  
21 commercial elements involved don't have a problem with  
22 the selection of IPP X, and they are getting ready,  
23 they get their financing, and everything is ready to  
24 go, and the whole business world moves, plus the fact  
25 that we need the thing, and then somebody with a very

1           laudable cause, very socially acceptable, or at least  
2           from their group just files some petition and delays  
3           the construction of the (inaudible). We have got to  
4           face -- and I'm just struggling to see if we can  
5           prevent that, and you are saying that we cannot. That  
6           we cannot defranchise somebody's rights to protest any  
7           -- I mean, the only one that really throws the curve at  
8           me is Public Counsel. See, that's where you disarmed  
9           my argument. But I always have a separate statute for  
10          Public Counsel, because he represents the public in a  
11          disinterested way, rather than in a more narrow  
12          philosophical or social cause.

13                 COMMISSIONER KIESLING: Commissioners, while I  
14                 don't want to replot ground that you have been over,  
15                 since this has been an open docket for quite awhile, I  
16                 have some concerns about some things I simply don't  
17                 understand in here, and then others that reflect a  
18                 philosophical difference on where and at what point in  
19                 the proceedings things should be considered and then  
20                 cut off. And if I could perhaps just ask some of my  
21                 questions, that may help me.

22                 CHAIRMAN DEASON: That's fine, and your questions  
23                 will probably help the rest of us, as well.

24                 COMMISSIONER KIESLING: Well, one of my questions  
25                 begins on Page 1, where it says that the RFPs are

1           supposed to be the document that solicits and screens  
2           competitive proposals for supply-side alternatives.  
3           And then when I start getting over here to what has to  
4           be in it, and what the utility will be determining  
5           before the RFP is issued, we have things such as  
6           location, fuel type, technology, fuel costs, a  
7           discussion of the actions necessary to comply with  
8           environmental requirements, et cetera. And I don't  
9           understand how there is a competitive process for  
10          proposals where all of those items are already decided.  
11          That just confuses me something terribly. It seems to  
12          me that an approach by which there is a determination  
13          that there is a need for additional generating  
14          capacity, followed by the crafting of an RFP which  
15          addresses the needs of the utility as well as the  
16          concerns of the environmental groups, this Commission,  
17          Staff, everyone, that these kinds of things ought to be  
18          left open in the RFP. And how can it be a competitive  
19          process if we are telling them, or if the utility is  
20          telling them in the RFP where they want the thing  
21          built, what fuel type they have to use, what technology  
22          they are supposed to use? I guess I just don't  
23          understand the whole process here. I don't understand  
24          where it is that people with environmental concerns or  
25          conservation concerns have an opportunity to have input

1           into the crafting of the RFP so that those items are  
2           considered.

3           CHAIRMAN DEASON: I think, and I may be reading  
4           this rule entirely wrong, but I think that information  
5           is on what the company's plant would be. That if they  
6           were going to build, they would build this type plant,  
7           this size, this location, with this type technology,  
8           and fuel. And they are basically putting that out on  
9           the table and saying, "Look folks, this is what we  
10          think that we would end up doing, or something very  
11          similar to this." Now, that's just the information to  
12          the bidders, and the bidders can come in, and they were  
13          not obligated. They can come in with something  
14          entirely different, perhaps something that is so  
15          different and costs so much less that it makes the  
16          utility's plan look like they were foolish at one  
17          point. But they are not bound in any way by that.

18          COMMISSIONER KIESLING: Well, that's not what I  
19          see on Page 2 in Subsection 4(a), where it says each  
20          utility's RFP shall include at a minimum, and it goes  
21          through the technical description --

22          MS. RULE: Commissioner --

23          COMMISSIONER KIESLING: -- primary and secondary  
24          fuel types.

25          MS. RULE: It talks about a detailed technical

1 description of that utility's next planned generating  
2 unit.

3 COMMISSIONER KIESLING: Right. Well, doesn't that  
4 include whether it's going to be a combined turbine,  
5 or --

6 MS. RULE: That's what the utility would plan, not  
7 necessarily what anybody else would propose. It puts  
8 the parties, any participants on notice of what the  
9 utility intends to do unless somebody else comes up  
10 with something better. It does not restrict the depth  
11 and breadth of proposals that could be made in  
12 response.

13 MR. TRAPP: If I could, the philosophy, I think,  
14 is what is important behind this rule. And the  
15 philosophy is that the utility under Florida law has an  
16 obligation to serve its customers. And in order to do  
17 that it must plan and acquire resources. What this  
18 does, basically, it says, "Absent any alternatives in  
19 the competitive marketplace, utility, what is your best  
20 project in terms of reliability and cost to the  
21 consumer, and put that on the table, and we are going  
22 to use that as a comparative plant to gauge  
23 alternatives against." In order to determine if  
24 something is better, you have to compare it to  
25 something. So what we are comparing it to is what the



1 utility would otherwise build. They put that up front  
2 in the RFP, saying, "This is what we plan to do, unless  
3 you can show us something better." Then it's incumbent  
4 upon the bidders in responding to the RFP, to respond  
5 to the same types of information with regard to  
6 location, water, air, the basic things necessary for a  
7 power plant to operate, and then you compare all of  
8 those nonpriced parameters and all the priced  
9 parameters to the avoided unit to determine whether or  
10 not one of the bidders has a better project than what  
11 the utility would otherwise build. If they do, that's  
12 a winning bidder.

13 COMMISSIONER KIESLING: When you say you would  
14 compare, don't you mean the utility would compare?

15 MR. TRAPP: The utility would make a management  
16 decision and bring it before the Commission for the  
17 Commission's approval and judgment.

18 COMMISSIONER KIESLING: Well, all I can tell you  
19 is that having heard bid protests and been involved  
20 with bid cases for more than the last ten years, this  
21 is the most peculiar bid process I have ever seen in my  
22 life. There is no RFP. There is, "I'm going to build  
23 this, unless someone comes in and proves that I should,  
24 you know, use another proposal." That's not a bid  
25 process.

1           MR. TRAPP: And, again, the philosophy, it was  
2           discussed yesterday about this rule, that it is  
3           somewhat different, is that because of the utility's  
4           obligation to serve in Florida, and because they are a  
5           regulated entity, we are suggesting that this rule  
6           should be used, or bidding should be used as a tool by  
7           the utilities to fulfill their statutory obligations.  
8           And it probably does look different than other  
9           conventional bid packages.

10          MR. BALLINGER: It's not a conventional bid. It's  
11          a semantical term. We use bidding, and we explained  
12          this at the beginning, it's a request for proposals, is  
13          what it's making them do. And people can send in a  
14          variety of things trying to respond to that proposal.  
15          It's not a strict bid where you have specifications out  
16          there, meet these specifications, and the best price  
17          would win. We use that term bidding interchangeably.  
18          But the purpose of this is a tool for the utilities to  
19          go out there, beat the bushes with an RFP, saying, "If  
20          I build it, I'm going to build it here, this and such,  
21          look like this, and costs this much. Show me what you  
22          want to propose, and then we'll talk." So it's the  
23          mechanism to get them out into the market, solicit from  
24          IPPs proposals from which to make an informed decision.

25          COMMISSIONER KIESLING: Well, I have to differ

1 with you; that's not what an RFP is, either. And I  
2 think there is a big range of cases that define RFP and  
3 what one is. And whether you want to define yours  
4 differently or not, you know, that certainly is an area  
5 for confusion. If you are using the same term that is  
6 used in Florida Statutes for RFPs, then yours is not an  
7 RFP. An RFP, as it's generally used, and used in  
8 statute, is simply a description of what you would like  
9 to end up with, and a request that people make  
10 proposals to do that. It doesn't allow you to come in  
11 and bid for yourself, or to have a proposal of your own  
12 that is going to be the default winner.

13 MR. TRAPP: And it may be the difference lying in  
14 that it is a regulated entity as opposed to a  
15 government agency going out for a service.

16 COMMISSIONER CLARK: An entity that has the  
17 obligation to provide the end product to the customer  
18 at the lowest possible cost.

19 MR. BALLINGER: It may not be the best choice of  
20 words, that's why we put in a special definition for  
21 request for proposals, and we made our own definition,  
22 if you will. It may not be conforming with the  
23 statutes, but we had to use some buzz word to go  
24 through it and we have created the definition.

25 COMMISSIONER LAUREDO: Commissioner, I have some

1 of the same different -- not as profoundly based on  
2 knowledge that you have on the technicalities of RFPs,  
3 but we went over yesterday, or whenever it was, over  
4 what this really meant was a step, however tentative  
5 step, in the direction of accommodating new forces in  
6 the market. And assuring some degree, it isn't a lot  
7 of degree, I have to admit, of fairness to those new  
8 players, namely the IPPs, so that those -- that the  
9 utility, which is the one asking and making a lot of  
10 the decisions, don't basically wind up controlling the  
11 system. And at the same time maintaining two basic  
12 principles; one is a principle of flexibility in terms  
13 of managing of utilities, because they are the ones who  
14 have the social and legal responsibility to serve,  
15 reliability and all of those kinds of things. That  
16 certainly weighs heavily on me to make sure that, you  
17 know, my theory is I want to leave here and make sure  
18 the lights work. I have lived a lot of places in the  
19 world where the lights don't work. And so how do we  
20 move away as we -- and so I've kind of went along with  
21 this rule only in that it was a tentative, almost  
22 interim step to see how things would work, and make it  
23 a little bit more open, and a little bit more fair.  
24 And at the same time, trying to hold onto that which  
25 works, which our system now works. Maybe we can by

1           doing this and injecting competitive forces, it may  
2           work better and it may work cheaper for the ratepayer,  
3           we don't know yet. But my dilemma is don't dismantle  
4           something that is working at the expense of some theory  
5           that it may work better and cheaper. And so I was just  
6           moving in a direction of accepting this rule. But, I  
7           mean, there is a lot of -- you're right, there is a lot  
8           of contradictions, and parties holding a lot of the  
9           cards.

10           MS. RULE: In connection with that, what Staff has  
11           tried to do here is require utilities to put their  
12           cards on the table. A lot of the problems that people  
13           have told Staff about in the past have been involved  
14           with utilities not being forthcoming about their need.  
15           Not being forthcoming about the planning process. So  
16           it's not meant to be a "beat this or else" kind of  
17           request for proposals on the part of the utilities, so  
18           much as a requirement that they honestly state the  
19           parameters of their need so that people can craft a  
20           decent bid.

21           COMMISSIONER KIESLING: Well, then what's wrong  
22           with an approach, or why did this approach get  
23           discarded? I don't want to say what's wrong with it,  
24           but an approach where the utility does have to put its  
25           cards on the table by coming out and saying we are

1           going to have a need for 500, you know, megawatts of  
2           generating capacity in the year 1998 in this area of  
3           the state, and, you know, we would like it to meet  
4           certain criteria. We would like to have, you know,  
5           flexibility of fuel, we would like to have, you know,  
6           all of those kinds of things, and also then say, "And  
7           we are going to bid for that ourselves, also."

8           MR. TRAPP: That, we believe, is exactly what this  
9           system does. And, again, the system is more broadly  
10          encompassing than just this isolated rule. We have a  
11          planning process in Florida, we are required, the  
12          Commission is required by statute to ensure that the  
13          utilities in Florida do coordinated planning.

14          COMMISSIONER KIESLING: Right.

15          MR. TRAPP: And they publish annually ten-year  
16          site plans which contain --

17          COMMISSIONER KIESLING: I'm absolutely aware of  
18          that.

19          MR. TRAPP: -- which contains all of the  
20          information that you are alluding to, in addition to  
21          identifying this avoided unit that is in the RFP. So  
22          that information exists out there for competitors to  
23          see, and there are a multitude of forums before this  
24          Commission where planning gets discussed and published,  
25          that the informed competitor can certainly see the

1 market in Florida. So we feel that in whole that  
2 system does exist.

3 CHAIRMAN DEASON: I asked this question yesterday,  
4 and you basically told me that information is out there  
5 anyway. I mean, I was questioning, if you are going to  
6 have a fair bidding process, why have the utility  
7 divulge anything other than what their basic essential  
8 need is? Well, what you're saying is the planning  
9 process, the ten-year site plan is avoided, unit cost  
10 of avoided units, and evaluation and conservation  
11 programs, all of these things, that information is out  
12 there anyway because they are a regulated utility.

13 COMMISSIONER KIESLING: But my problem is, and I  
14 still don't have an answer that I understand. You may  
15 have given me an answer and I just don't have the  
16 sophistication to understand it yet, but what is wrong  
17 with having an RFP that is crafted and includes both  
18 what the utility says it needs and wants in terms of  
19 location and a diversity of fuels, et cetera, and also  
20 contains criteria that would be offered from, you know,  
21 DEP, or environmental groups, or conservation groups,  
22 in order that all of those considerations, all of those  
23 criteria are part of the RFP. And then the utility, as  
24 well as anyone else that wants to come in and submit a  
25 proposal under that RFP, does it.

1           MR. TRAPP: Again, we think that information, all  
2 those criterion are basically required by this rule to  
3 be contained in the RFP. The RFP basically says you  
4 have got --

5           COMMISSIONER KIESLING: Let me stop you. Where in  
6 this rule does it say that?

7           MR. TRAPP: Page 3, Line 18 calls for a  
8 description of the priced and nonpriced attributes to  
9 be addressed by each alternative generating proposal,  
10 including technical and financial viability,  
11 dispatchability, deliverability, which are  
12 interconnection and transmission, fuel supply, water  
13 supply, environmental compliance, performance criteria,  
14 pricing structure. And then we asked the detailed  
15 description of methodology to be used to evaluate  
16 alternative generating proposals on the basis of priced  
17 and nonpriced alternatives. Those are all the elements  
18 that make a power plant.

19           COMMISSIONER KIESLING: Well, let me just ask you  
20 this. Where you say the detailed description of the  
21 methodology to be used to evaluate alternative  
22 generating proposals, by that you mean the methodology  
23 by which the utility will determine whether any of the  
24 other proposals are as good, or better than theirs?

25           MR. TRAPP: Yes, ma'am.



1           COMMISSIONER KIESLING: Well, who decides the  
2 methodology to value the utilities?

3           MR. TRAPP: The utility has to make a management  
4 decision; and the Commission, as economic regulator,  
5 has to determine the validity of that decision.

6           COMMISSIONER KIESLING: Well, then I, again, would  
7 just say that is not an RFP, and that is certainly to  
8 me not a level playing field.

9           CHAIRMAN DEASON: And the reason for that is that  
10 the utility is the one making the decision? Or could  
11 you explain why that's the case in your opinion. Is it  
12 not fair because the utility is the entity making the  
13 decision, basically evaluating their own proposal  
14 against other proposals?

15           COMMISSIONER KIESLING: Absolutely. And because  
16 there is no opportunity for input into methodology,  
17 criteria, weighing of the criteria, how that  
18 methodology is going to be carried out, from anyone  
19 except the utility.

20           MR. BALLINGER: That gets us back to bifurcation,  
21 and the preapproval of these things. A strict scoring  
22 mechanism; is that attainable? I agree with you. I  
23 mean, it leaves the subjectivity to the utility. But,  
24 on the other hand, you have to weigh, can you make it  
25 so nonsubjective that it can be scored by someone other

1           than the utility, or by the Commission, or have a  
2           preapproval by the Commission. Staff's intent in this  
3           was to not really level the field between the IPP or  
4           non-utility generator and the utility, because I don't  
5           think it will ever be until we totally deregulate at  
6           least generation, because the utility has the  
7           obligation to serve. It may only stay slightly tilted.  
8           Our intent in the rule is to recognize that slight  
9           tilt, but to try to get a better deal for the  
10          ratepayer. To try to do something to force the  
11          regulated entity that we have some jurisdiction over to  
12          go out and get a better deal for the ratepayer. The  
13          IPPs will compete amongst themselves, they are going to  
14          give their best shot to get a price in to sign with the  
15          utility. The utility has the responsibility to  
16          evaluate those proposals now, and justify to the  
17          Commission why they chose A or chose themselves. And  
18          those three are really intertwined, and that's a long  
19          series of discussions.

20                 COMMISSIONER CLARK: And it has to do with your  
21          basic philosophy.

22                 MR. BALLINGER: Yes, ma'am.

23                 COMMISSIONER CLARK: And one of the things the  
24          Governor said this morning sort of has a bearing on  
25          this case. The utilities have the responsibility of

1 providing electricity at retail to everyone in their  
2 service territories. They ought to have the authority  
3 to decide what is the least cost, at least initially,  
4 and then we review it. I, myself, am uncomfortable  
5 making that decision and then forcing them to live with  
6 it.

7 CHAIRMAN DEASON: I agree with you, but here again  
8 we plowed this yesterday, but the practicality of it is  
9 we are going to make that decision, because somebody is  
10 going to protest it. I think it is inevitable that  
11 every one of these -- Cypress is an example. Every one  
12 these decisions are going to be protested, and at some  
13 point along the line we are going to have to substitute  
14 our judgment for that of the utility.

15 MR. TRAPP: So, shall I bring up my salary issue  
16 again?

17 COMMISSIONER CLARK: I disagree with you, because  
18 we have had cases where we have had successful  
19 negotiations, have we not?

20 MR. TRAPP: Yes.

21 COMMISSIONER CLARK: And the person who loses out  
22 is going to have to make a decision, do they think they  
23 have a strong enough case that they can show  
24 unequivocally that they should have been chosen.

25 CHAIRMAN DEASON: I hope you're right, I really

1 do. And maybe you are. Maybe I have a bad taste in my  
2 mouth from the Cypress case, I don't know. And, of  
3 course, the Cypress case, that decision was not made  
4 according to this rule. This rule did not even exist.  
5 And perhaps this rule will go a long way in avoiding --  
6 in fact, that was the impetus, the genesis of this rule  
7 was the experience we had in Cypress.

8 COMMISSIONER KIESLING: Let me just add one more  
9 thing. If I was representing one of either the  
10 competitors or the conservation groups, I would believe  
11 that having my first opportunity to challenge this  
12 being at the tail-end like that is almost meaningless.  
13 Because at that point people have gone through huge  
14 costs; putting together their proposals, doing all the  
15 engineering studies, et cetera, et cetera, and I think  
16 that that is too late in the process to consider, for  
17 example, you know, things that might arise under the  
18 Energy Efficiency and Conservation Act, and things of  
19 that nature.

20 COMMISSIONER CLARK: Well, I think we should  
21 address that from the standpoint that we have sort of  
22 taken that out. That's going to be done first.  
23 Conservation and the things that we could meet through  
24 conservation, it's only when we know that we need  
25 generation that we are going to do it through the

1 bidding process. Conservation is going to be done  
2 first as part of the goal setting.

3 MR. TRAPP: Conservation and cogeneration is part  
4 of the cogen rules that we have to now revisit.

5 COMMISSIONER CLARK: This is only for the  
6 generating, choosing the generating supply option, not  
7 for demand options.

8 COMMISSIONER KIESLING: Okay. And if I understand  
9 this, the only entities that will have standing -- to  
10 throw in one of your favorite legal terms, Commissioner  
11 -- are those parties who participated, who made a bid  
12 under the RFP, and the Public Counsel?

13 COMMISSIONER CLARK: Well, I would go along with  
14 the way the Staff has the rule, that if they are a  
15 competitive supplier, they should have bid. But if  
16 they are Public Counsel, they are not precluded from  
17 coming in on some other issue. And another party that  
18 is not a generating supplier would have an opportunity,  
19 although I'm at a loss to think what their basis for  
20 having a standing would be.

21 MR. TRAPP: They can show -- I think what Marsha  
22 said earlier, I don't think we can preclude anyone  
23 whose substantial interest is affected by the plant;  
24 the Public Counsel, the public in general, other  
25 environmental concerns who are not generating

1 suppliers.

2 COMMISSIONER CLARK: Which they do now.

3 MR. TRAPP: Which they do now, and I think their  
4 contention would be that the utility didn't meet its  
5 conservation goals, and, you know, here is what they  
6 didn't do. And, therefore, you know, they don't need  
7 the plant. Those types of things. Or their analysis  
8 is wrong. The only intent of this was to limit  
9 potential suppliers from not coming in at the eleventh  
10 hour that we had in Cypress, basically, was the problem  
11 there, with another proposal, a generation proposal,  
12 not something contesting the need actually from a  
13 reliability standpoint or the cost of the plant.

14 COMMISSIONER LAUREDO: I mean, you're right,  
15 Commissioner, the problem is this is an imperfect  
16 world. We are being pushed into a revolutionary  
17 movement in the energy -- and those of us who are a  
18 little cautious and kind of hang onto this rule as an  
19 interim rule of sort, and that brings me to my  
20 question, do the rules generally have sunsets, can we  
21 impose a sunset, or can we impose some sort of review,  
22 or is there anything out there that would trigger this  
23 rule that you know of?

24 MS. RULE: At any time you may direct Staff to  
25 open a docket and revise it.

1           COMMISSIONER LAUREDO: But that's different with  
2           the 100,000 things we have in our head than having a  
3           date certain where we know that it comes up. That's  
4           why legislators put a sunset on it, so they don't have  
5           to --

6           MS. RULE: I haven't noticed Commissioners having  
7           too much time not to direct us to make rules or revise  
8           them.

9           COMMISSIONER LAUREDO: I'm against rules, and you  
10          know that.

11          MS. RULE: Oh, yes, sir.

12          COMMISSIONER LAUREDO: Because I think policy is  
13          an evolving concept embodied in five human beings from  
14          different backgrounds appointed at different times,  
15          staggered terms, representing a general public good.  
16          So the idea of an embodiment of a policy and rule to me  
17          is -- I don't accept it. I'm beginning to accept it a  
18          little more just to be part of the group, and that's  
19          why I held up the vote yesterday so that the new  
20          Commissioner would have her input, as well. But I  
21          think the idea -- you have to grant me that these are  
22          unique times, and these are uncertain times. Ideally,  
23          if what one party, namely the independent power  
24          producers would come -- if someone can certify that  
25          they were absolutely true, A, that the reliability

1 would not suffer, the duty to serve would be -- somehow  
2 they would inherent that mantle and lower costs, then I  
3 would just say fine. But I don't know that. Nor do  
4 you, nor do they. And so our quest is how do we move a  
5 little bit towards their position, which I think this  
6 rule does, without dismantling this system that has  
7 worked so fine. That's the way I look at it, very  
8 simplistic, Commissioner, with 100 reservations that I  
9 have.

10 COMMISSIONER JOHNSON: As I look at this rule, and  
11 I understand, Commissioner Kiesling, your concern,  
12 because I had the same first reaction that, "Well, this  
13 doesn't level the playing field. This isn't a fair  
14 bidding process." And it's not. But, admittedly it's  
15 not. Admittedly, that was not the goal. Admittedly,  
16 after discussing the issues with Staff, and their  
17 expression that the investor-owned utilities have the  
18 obligation to serve, they are the ones that are  
19 regulated by us, and, therefore, the circumstances  
20 dictate that the field isn't level. And in looking at  
21 that, and understanding that we do need to take this  
22 first step, I think this is a good start. I share the  
23 concern of Commissioner Deason that, well, the way we  
24 have this process laid out, we are just pretending. We  
25 are saying, "Well, we will give the utility the first



1 shot, but at the end it's going to be appealed, and we  
2 are going to have to look at the issue." That's true.  
3 However, I think, again, we have skewed it, because  
4 once they have made a determination, our level of  
5 review will be different. Our level of review -- and I  
6 can't put a standard of review on it -- but if we  
7 started off in the beginning and we set the rules and  
8 the criteria, it would be a fairer process. Tom, you  
9 stated yesterday that you thought the Commission would  
10 be the unbiased arbiters. However, that's not exactly  
11 what we want, and that all we are doing here is taking  
12 -- and I hate to state this so bluntly, but this is  
13 what I have been hearing from Staff, and that this is  
14 the first step, the utilities have the obligation to  
15 serve, and that if we truly believe that, then this is  
16 the approach that we should take.

17 MR. BALLINGER: And I'm not convinced that even if  
18 Staff did that level of detail, and did the computer  
19 simulation, that we would have different results. We  
20 have very competent staff that knows how the computer  
21 models work, the planning process works, knows how to  
22 question, what assumptions change. And it's not only  
23 the one-time review when you get a petition, it's the  
24 day-to-day that you see cases go on in utilities, and  
25 every day events happening that give you a feel with

1           what is going with the utility. So I can't say for  
2           certain that we would get different results if the  
3           Staff did it all, and we came up with the plan, the  
4           statewide plan.

5           COMMISSIONER LAUREDO: But, you know, beyond the  
6           letter of this rule, what I think is the most important  
7           thing, if we pass it, is the message of the rule.  
8           Which this Commission is saying, A, we are moving in a  
9           direction towards more competitive opening, however  
10          tentative. B, no more Mickey Mouse, utilities. We  
11          know all about the things you can do. We haven't been  
12          able to grab onto them in this rule in every little  
13          letter here, but don't play any more games. The notice  
14          is out, we would like to have a fair process, and the  
15          test will come with the doing. I mean, if we find that  
16          they -- practices have been alleged in the past have  
17          been less than fair to new entrants, then -- but  
18          clearly that is the message I would get if I were on  
19          the other side of this Commission. We have taken  
20          notice that we don't want those practices to continue.  
21          We grant you flexibility, we grant you the tremendous  
22          burden you carry with the duty to serve and all of that  
23          kind of stuff, but that we are struggling to draft some  
24          sort of fair play. It's not perfect, it's interim, but  
25          it's a movement in a certain direction. That's the way

1 I look at it. And I support it. I just have a lot of  
2 problems with that Section 8 and 9, because I hate to  
3 see very viable projects delayed for, you know -- but  
4 that's just my nonlawyer tendency. I just know that  
5 the process in this country is abused all the time,  
6 however justified the cause. But, you know, if we said  
7 that we have a need for X amount of power, and we went  
8 through a process and we got somebody to build it, and  
9 they get everything lined up, you know, somebody shows  
10 up and files something, and there is another year. And  
11 I think that's unfair. But that's the American way, I  
12 guess, nowadays. And I was just trying to close that  
13 loophole. You are telling me we can't close that any  
14 more than it already is under Section 8 and 9?

15 MR. BALLINGER: I believe so.

16 MS. RULE: To tell you honestly, we tried like  
17 hell to keep everybody we could out of the process  
18 after Cypress.

19 COMMISSIONER LAUREDO: Other than the legitimate  
20 players and let the commercial interests --

21 MS. RULE: Our concern is that everybody who is a  
22 substantially affected party should be able to come and  
23 play here at some point. We have tried moving the  
24 point around. Commissioner Kiesling, you have talked  
25 about allowing them to come in at the very beginning

1           and litigate what the RFP or bid specs would be. That  
2           was one approach that Staff considered, but the  
3           technical staff are very strongly against any  
4           bifurcation of the process, so that went out the  
5           window. But that would be one way to allow people to  
6           come in early, have their say, and then it would narrow  
7           the issues that could be litigated later on. But for  
8           reasons that the technical staff explained, they chose  
9           against that process and did not recommend it. Given  
10          that, we are left having to have an open door for  
11          substantially affected parties. The people we have  
12          been naming now are mostly conservation groups or  
13          citizens who don't want a power plant built in their  
14          area. I know of no way to keep them out. I don't  
15          believe we should be trying to keep them out of the  
16          process, if this is their only open door.

17                 MR. BALLINGER: It goes back to a basic  
18                 philosophy. Staff believes competition works, and  
19                 that's where we want it to work, at the negotiating  
20                 table, not at the litigating table. And I think with  
21                 that we are trying to send a message that these are the  
22                 rules, you know, however --

23                 COMMISSIONER LAUREDO: That takes care of the  
24                 commercial side of the problem.

25                 MR. BALLINGER: Yes, we cannot alleviate due

1 process and allow someone in in another process, I  
2 agree. But where there is competition, where the  
3 generating community is competing with each other, we  
4 want them to be at the negotiating table, not at the  
5 litigating table. That's what we are intending,  
6 because we think competition works for the benefit of  
7 the ratepayers.

8 COMMISSIONER LAUREDO: Let me ask you one last --  
9 it's kind of tangent to this thing, but how do we in  
10 the real world protect it from -- there is two  
11 possibilities of abuse. I use that word, I should  
12 probably use a diplomatic word. But the utility  
13 itself, if it wants to build the capacity, and/or its  
14 wholly-owned subsidiary, how do we protect them, how do  
15 we protect the other IPPs from utility-owned IPPs  
16 through this rule? We don't, do we?

17 MS. RULE: I don't think it's an issue of  
18 protection; it's an issue of getting the lowest rate  
19 for the ratepayers.

20 COMMISSIONER LAUREDO: When I say protection, I  
21 mean fairness. I mean, making that all of a sudden the  
22 subsidiary's IPP just meets all the criteria.

23 MS. RULE: If the subsidiaries can come in with a  
24 price that's lower than anybody else, then the  
25 ratepayers should be able to take advantage of that.

1           COMMISSIONER LAUREDO: Okay. That's an academic  
2 question. I guess it's going to come up sooner than  
3 later.

4           CHAIRMAN DEASON: Further questions,  
5 Commissioners? Do I have a motion?

6           MS. RULE: It's not clear to me what you're voting  
7 on. You voted out all the issues yesterday. My  
8 understanding was that you are approving the language  
9 today. But, judging from the discussion, I'm not clear  
10 if that is still your intention.

11          CHAIRMAN DEASON: I think we took a number of  
12 votes yesterday, but it was with the understanding that  
13 we were going to come back with this final version, and  
14 we were going to either say yea or nay, or we were  
15 going to modify this. And I believe that's going to  
16 necessitate a vote. That was my understanding.

17          COMMISSIONER LAUREDO: You better believe it.  
18 This is the meat and potato; the rest was a little  
19 distraction. I didn't even want to deal with it.  
20 Wonderful philosophical discussions we have, but this  
21 is the language that is binding.

22          COMMISSIONER CLARK: I had a question about the  
23 waiver language on the last page. Well, before I get  
24 to that, it has been suggested to me that it might be  
25 unfairly discriminatory not to include the municipals

1           and the cooperatives. I'm comfortable with it.  
2           Because this is -- what we are telling the  
3           investor-owners is this is the way you show to us that  
4           this is the least cost method.

5           MR. TRAPP: The burden exists also for the munies  
6           and co-ops to demonstrate that in the need  
7           determination process, and that's the reason that the  
8           Staff recommended that munies and cooperatives be  
9           included in the rule.

10          COMMISSIONER CLARK: That's true, but is it a  
11          valid basis to take into account the fact that  
12          cooperatives and munies very often are not generating  
13          utilities, and that they have access to lower cost  
14          financing?

15          MR. TRAPP: This only applies to generation that  
16          they are going to build, so it would only be those  
17          cases where they were building. There is perhaps some  
18          valid point about competitive advantage with respect to  
19          the cost of money, but it seems to me that that would  
20          be a real good way to come in and get a waiver.

21          COMMISSIONER CLARK: Yes. I'm just concerned  
22          about -- there is a cost involved in going through this  
23          process, and I'm concerned about visiting that on  
24          cooperatives and municipals.

25          MR. BALLINGER: I agree. And Staff was basically,

1 we said include them because of our statutory  
2 requirement. The cost issue, I haven't seen any  
3 numbers that shows that the cost is prohibitive when  
4 you have got possibly \$2 million worth of permitting  
5 costs already going through the Site Act. And this  
6 would only apply to plants going through the Site Act,  
7 not every generation. So the incremental costs of  
8 doing a bidding process, in my mind, would not kill a  
9 project, because you have already got a lot of money  
10 you've got to spend on permitting to go through the  
11 Site Act. It is an additional cost, grant you.  
12 Whether it would kill a project or be burdensome on a  
13 municipality or cooperative, I really don't know, or  
14 haven't seen the numbers to get a feel for it. I don't  
15 think it would be.

16 CHAIRMAN DEASON: Well, I think we had testimony,  
17 though, that where the municipals and co-ops felt like  
18 bidding was a good idea, they were going to do it  
19 anyway. And that when they felt like it was not a good  
20 idea, they usually had very good reasons. Now, I know  
21 that's perhaps putting some faith in their judgment,  
22 but let's face it, we have less regulatory jurisdiction  
23 over those entities than we do the IOUs. The theory is  
24 that their membership through the board of directors or  
25 the city council are going to make those decisions that



1 are in the best interest of the customers of that  
2 utility. And I think there is some merit to that  
3 argument. And I think that until we see otherwise, I'm  
4 willing to exempt them from requiring to bid. They  
5 certainly are free to bid. If they think they can meet  
6 their burden easier by bidding, and they can meet all  
7 of their requirements under REA loans, and they can  
8 meet the city charters, and their indentures, or  
9 whatever requirements they have to meet, if they want  
10 to bid, and they think that's the best way to go, I  
11 certainly would encourage them to do that. But this  
12 rule requires it, except for the waiver. But there was  
13 also testimony in the hearing where it was anticipated  
14 that every time they would be coming in and requesting  
15 a waiver for good cause, and why put them to the time  
16 and expense of requesting a waiver?

17 MR. TRAPP: That may or may not be true, I don't  
18 know. I know that Seminole has been very receptive to  
19 the bidding, it has bid two projects out and has  
20 contracted to have somebody else build two projects for  
21 them.

22 CHAIRMAN DEASON: And maybe they will continue to  
23 bid. I hope they do.

24 MR. TRAPP: I hope they do, too.

25 COMMISSIONER CLARK: Let me ask a question about

1 9, the waiver provision. The way it's worded, it seems  
2 to suggest an increased reliable supply, where I  
3 thought what it should be addressing is increasing  
4 reliability. It's not necessarily supply, and I think  
5 it should be worded this way, I think. "The waiver  
6 would likely result in a lower cost supply of  
7 electricity, and/or increase the reliability of the  
8 supply of electricity to the utility's general body of  
9 ratepayers."

10 MS. RULE: Could you read that again?

11 COMMISSIONER CLARK: Yes. I'll read the whole --  
12 the way I would change it. "The waiver would likely  
13 result in lower cost supply of electricity, and/or  
14 increase the reliability of the supply of electricity,"  
15 and then I think you need a comma, "to the utility's  
16 general body of ratepayers."

17 COMMISSIONER LAUREDO: Is this waiver supposed to  
18 be broad or narrow? It's supposed to be narrow as to  
19 least cost, because I had originally made a note -- I  
20 didn't want to muddle the water any more by putting in  
21 -- or otherwise in the public interest.

22 COMMISSIONER CLARK: Well, you know --

23 COMMISSIONER LAUREDO: So that we can reserve the  
24 broadest power.

25 MR. TRAPP: I think that's probably pretty wise,

1           because there are certain things known as strategic  
2           concerns that may not exactly hit on with reliability  
3           and cost. For instance, fuel mix may be something that  
4           would sway your decision. Fuel mix may be something  
5           that would sway you one way or the other.

6           COMMISSIONER LAUREDO: We don't want to flesh out  
7           my arguments against rules, but rules should not be a  
8           substitute, nor should they be a tool to take away the  
9           powers that I have by being a Commissioner. So, in  
10          that sense I always like to throw in those, "Or  
11          otherwise in the public interest," because that is  
12          really what I'm here for. And it may not be those  
13          three things, it may be --

14          CHAIRMAN DEASON: But doesn't that get us back to  
15          yesterday, where the discussion was concerning whether  
16          it was just too broad of a waiver, and that we would  
17          probably get some type of an objection from the persons  
18          who review rules, the Joint Administrative Procedures  
19          Committee.

20          MS. RULE: That was the discussion. But I also  
21          said that we have had some success over there  
22          explaining the reasons why perhaps some of our rules  
23          retain that broad authority.

24          COMMISSIONER LAUREDO: What does that mean? Are  
25          you in --

1           COMMISSIONER CLARK: Can we do public interest and  
2 get away with it?

3           MS. RULE: I say let's try it.

4           COMMISSIONER CLARK: Okay. If you want to suggest  
5 an amendment that would just say the waiver --

6           COMMISSIONER LAUREDO: Or after everything else is  
7 said and done, just say or otherwise --

8           COMMISSIONER CLARK: Upon a showing that the  
9 waiver is in the public interest.

10          MS. RULE: Commissioner Clark, would that --

11          COMMISSIONER CLARK: That would substitute  
12 completely --

13          MS. RULE: Substitute for? Okay.

14          COMMISSIONER CLARK: -- what I suggested.

15          CHAIRMAN DEASON: Would it be better to have all  
16 the language, kind of showing that we have got some  
17 things that we're going to look at?

18          COMMISSIONER CLARK: That sounds great to me.

19          MS. RULE: I would suggest that, not only because  
20 it's better rule drafting to give people an idea of  
21 what you have in your mind, and what it is that you  
22 intend to consider as a waiver, but also because it  
23 would indicate to the Joint Administrative Procedure  
24 Committee that you're not intending to exercise  
25 unbridled authority here. But, with that in mind,

1 Commissioner Clark, I'm not sure that we need and/or, I  
2 think or does it.

3 COMMISSIONER CLARK: I think so.

4 CHAIRMAN DEASON: Let's have a final reading, as  
5 Commissioner Lauredo would say. Do we have the final  
6 language?

7 MS. RULE: I can tell you what I've got written  
8 down here. "The Commission may waive this rule, or any  
9 part thereof, upon a showing that the waiver would  
10 likely result in a lower cost supply of electricity or"  
11 -- I think it's increased reliability of --

12 COMMISSIONER CLARK: No, increase the reliability.

13 MS. RULE: Okay. Increase the reliability of  
14 electricity --

15 COMMISSIONER CLARK: "Of the supply of  
16 electricity."

17 MS. RULE: Thank you. Comma, "To the utility's  
18 general body of ratepayers, or as otherwise in the  
19 public interest."

20 COMMISSIONER KIESLING: Where was that comma? I  
21 got lost when you put the comma in.

22 MS. RULE: Well, I remember Commissioner Clark  
23 wanted a comma there, and I think I put it at the right  
24 place.

25 COMMISSIONER CLARK: Yes. And I'm not the

1           greatest at grammar and punctuation, but I think you  
2           put a comma there so that that last clause, "To the  
3           utility's general body of ratepayers", applies both to  
4           the supply of electricity and the reliability. But if  
5           that's in error, please fix it.

6           MS. RULE: It's beastly hard to draft rules under  
7           pressure.

8           COMMISSIONER LAUREDO: That's the most fun, under  
9           pressure.

10          COMMISSIONER CLARK: With that, Mr. Chairman, with  
11          that amendment, I would move the adoption of the rule.

12          COMMISSIONER JOHNSON: Second.

13          CHAIRMAN DEASON: It has been moved and seconded  
14          as amended. All in favor say aye.

15          COMMISSIONER LAUREDO: Aye.

16          COMMISSIONER CLARK: Aye.

17          COMMISSIONER JOHNSON: Aye.

18          CHAIRMAN DEASON: Aye. All opposed?

19          COMMISSIONER KIESLING: Nay.

20          COMMISSIONER LAUREDO: One last question. Is  
21          there a problem that you can briefly tell me about my  
22          idea of a sunset provision, is that completely out of  
23          whack, does it cause any of the parties, you think, a  
24          problem? Just so that we know that we need to review  
25          this.

1           COMMISSIONER CLARK: Well, I can tell you, I'm not  
2 interested in that. If you want to at a later time  
3 suggest the rule revision, I think that's the vehicle  
4 to do it. I don't think we need to -- if the rule is  
5 working, let it work. If it's not working, we will  
6 change it. I'm not generally in favor of compulsory  
7 review of rules.

8           COMMISSIONER JOHNSON: On one last issue. I know  
9 yesterday that I had raised the issue of whether or not  
10 Staff thought that the renewable resource issue could  
11 be handled in the cogen docket, or whether we should  
12 have a separate investigative docket. I think that  
13 perhaps it would be better that we do set it apart,  
14 because if we are looking at the renewable issue, and  
15 I've talked to different people that are interested in  
16 us exploring more renewable and solar issues, we can  
17 look at both supply and demand, we can look at what  
18 other states are doing, we can look all sorts of  
19 barriers to the renewable issue, and if we are going to  
20 do that it's too much to do it with the cogen rules.  
21 And if we can separate them out, and do the  
22 investigative docket, I think that would be better to  
23 separate it out from that docket and handle the two  
24 separately.

25           MR. TRAPP: Here is the logistical problem I have

1 with that proposal. We have now two dockets open  
2 already that are going to be addressing the issue of  
3 renewables. One is the conservation goals docket,  
4 which will treat the demand side of the equation, and  
5 one is the now reopening of the cogeneration rule  
6 docket. Each of those deals with a comprehensive  
7 policy area, of which renewals is just a subpart of the  
8 total picture. If you now open a third docket that  
9 just looks at that little subset, how then do I remesh  
10 it back in with the primary docket when I'm reviewing  
11 all three of these; the bidding, the conservation  
12 goals, and the cogen rules for consistency? I have a  
13 real problem logistically with trying to figure out how  
14 to schedule a third spin-off docket on renewables  
15 without delaying the conservation goals docket and  
16 delaying our review of the cogeneration rulemaking,  
17 because they are comprehensive reviews, and they  
18 address all issues, renewables just being one issue out  
19 of several. But we will do what you want us to do.

20 COMMISSIONER CLARK: I think what the concern  
21 would be was that renewables and that issue may get  
22 lost in the bigger picture. It's like in fuel  
23 adjustment, when you spin things off to look at them  
24 more closely.

25 COMMISSIONER JOHNSON: And when you're looking at



1 subsets -- it would be better, I think, as a better  
2 educational tool for the Commissioners if we didn't  
3 have all of these spin-offs. If we could look at it in  
4 a consolidated manner. I know it would be harder for  
5 you.

6 MR. TRAPP: Can I just promise to make separate  
7 issues in each of those dockets that specifically  
8 addresses renewables in detail?

9 COMMISSIONER JOHNSON: I tell you. And I get the  
10 feel like I got from the water and wastewater rules, we  
11 just get overwhelmed, and then we start prioritizing  
12 it, and that will get prioritized and put to the bottom  
13 again. That's my concern.

14 MR. TRAPP: Well, again, I caution you that the  
15 next people we will come to see will be the high  
16 efficiency cogenerators and wish to have their dockets  
17 spun off.

18 COMMISSIONER JOHNSON: Then we would have to  
19 address that.

20 MR. JENKINS: Commissioner Johnson, one thing to  
21 do is -- I don't know how procedurally to go about this  
22 -- but in the June conservation goals hearings you can  
23 elect not to set any goals for renewables and solar,  
24 and do it at a later time in your spin-off docket. But  
25 that just delays the matter further, if that's what you

1 would like to do.

2 COMMISSIONER JOHNSON: And what you're saying is  
3 we wouldn't have time to do a comprehensive review  
4 before then?

5 MR. JENKINS: I think we are going to have a quite  
6 comprehensive review for that goals docket. There are  
7 people all over this state, hundreds of them studying,  
8 what, 212 conservation programs. And to then have  
9 another docket where we look at it in a different  
10 manner, it interacts with the first docket in a manner  
11 I just don't understand how it would work. And I think  
12 the only way to make it work is just make the decision  
13 you will not set conservation goals for solar and  
14 renewables. And that's not a very attractive proposal,  
15 but --

16 COMMISSIONER JOHNSON: No, I don't want to do  
17 that.

18 MR. JENKINS: -- but it's a way to avoid confusion  
19 of too many intertwined overlapping dockets.

20 COMMISSIONER KIESLING: If I could, Commissioner  
21 Johnson, I think as long as you and I are in agreement  
22 that we are not going to let it get pushed to the  
23 bottom of the pile, it's a high priority for me also,  
24 and, you know, I intend to make sure that it is  
25 explored in the conservation docket. And I would agree

1 with this gentleman, that it's just going to get out of  
2 hand if we start splitting off dockets for every area  
3 of concern. But I can tell you that you have my  
4 commitment to make sure that it stays a priority for  
5 consideration in the conservation goals docket.

6 COMMISSIONER LAUREDO: And me, too.

7 COMMISSIONER KIESLING: Okay. That makes three of  
8 us, so hopefully it --

9 MR. JENKINS: What you can do, if you see  
10 shortcomings in the outcome of the June hearings, then  
11 spin it off. That would be a logical procedure.

12 COMMISSIONER CLARK: Well, Joe, we have your  
13 assurance that you are looking at it, and I think the  
14 concern is that it not be given short shrift, and be  
15 treated, as my aide would say, a red-haired stepchild.  
16 I think we want to make sure that it's something we  
17 look at.

18 MR. JENKINS: We are pushing the utilities hard,  
19 as the prehearing officer is well aware.

20 COMMISSIONER LAUREDO: Mr. Chairman, I just want  
21 to make a comment on the rule before we go. I really  
22 appreciate, and I would hope and pray that our process  
23 allows more of the -- it really helped me a lot to get  
24 the parties nonlegal filings after all the stuff that  
25 we went through. I guess it's becoming more and more

1 relevant as less and less of us are not lawyers. Those  
2 summary letters that we all got from the principal  
3 parties outlining in two of three pages their salient  
4 points to me was really helpful and focused in  
5 understanding their concerns, notwithstanding. And I  
6 thank them for it, because it helped me reach a  
7 decision. And I hope it becomes a pattern of this  
8 Commission.

9 CHAIRMAN DEASON: Anything further? This  
10 concludes the Special Agenda.

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1 F L O R I D A )  
2 :  
3 COUNTY OF LEON)

CERTIFICATE OF REPORTERS

4 We, SYDNEY C. SILVA, CSR, RPR; PAMELA A.  
5 CANELL, Official Commission Reporters, and JANE FAUROT,  
6 Notary Public, State of Florida at Large;

7 DO HEREBY CERTIFY that the rule hearing in  
8 Docket No. 921288-EU, was heard by the Staff of the  
9 Florida Public Service Commission at the time and place  
10 herein stated; it is further

11 CERTIFIED that we stenographically reported  
12 the said proceedings; that the same has been  
13 transcribed under our direct supervision, and that this  
14 transcript, consisting of 173 pages, Volumes I and II,  
15 inclusive, constitutes a true transcription  
16 of our notes of said proceedings.

17 DATED this 20th day of December, A. D., 1993.

18 Sydney C. Silva

19 SYDNEY C. SILVA, CSR, RPR  
20 Official Commission Reporter

21 Pamela A. Canell

22 PAMELA A. CANELL  
23 Official Commission Reporter  
24 (904) 488-5981

25 - and -

26 Jane Faurot

27 JANE FAUROT, Notary Public  
28 State of Florida at Large  
29 (904) 878-2221

30 STATE OF FLORIDA)  
31 :  
32 COUNTY OF LEON )

33 The foregoing certificate was acknowledged  
34 before me this 20th day of December, 1993,  
35 by SYDNEY C. SILVA, PAMELA A. CANELL and JANE FAUROT,  
36 who are personally known to me.

37 Patricia A. Church

38 PATRICIA A. CHURCH  
39 Notary Public - State of Florida  
40 COMM. NO. CC-90785

41 *Notary Public, State of Florida*  
42 *My Commission Expires April 20, 1995*  
43 *Bonded thru Troy Four - Insurance Inc.*

# **EXHIBIT C**

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION  
TALLAHASSEE, FLORIDA

IN RE: Petition by Gulf Power Company for waiver of  
portions of Rule 25-22.082(4)(a), F.A.C., Selection of  
Generating Capacity.

DOCKET NO. 980783-EI

COPY

BEFORE: CHAIRMAN JULIA A. JOHNSON  
COMMISSIONER J. TERRY DEASON  
COMMISSIONER SUSAN F. CLARK  
COMMISSIONER JOE GARCIA  
COMMISSIONER E. LEON JACOBS

PROCEEDING: AGENDA CONFERENCE

ITEM NUMBER: 8\*\*PAA

DATE: August 18, 1998

PLACE: 4075 Esplanade Way, Room 148  
Tallahassee, Florida

JANE FAUROT, RPR  
P.O. BOX 10751  
TALLAHASSEE, FLORIDA 32302  
(850) 561-5598

## APPEARANCES:

Jeffrey Stone, Esquire, representing Gulf Power Company  
Joe Cresse, representing TECO  
Jon Moyle, Esquire

STAFF RECOMMENDATION

Issue 1: Should the Commission waive the requirements of Rule 25-22.082(4)(a), Florida Administrative Code, as to Gulf Power Company (Gulf)?

Recommendation: No. Application of the rule will not create a substantial hardship for Gulf. Given the increase in wholesale competition, the possibility that bids will converge around the utility's avoided cost if this data is disclosed in the RFP is less likely today than when the RFP rule was implemented. Further, a substantial portion of the data required by subsection 4a of the RFP rule was recently published by Gulf in its 1998 revised Ten-Year Site Plan.

Issue 2: Should this docket be closed?

Recommendation: This docket should be closed if no person whose substantial interests are affected by the proposed action files a protest within the 21-day protest period.



P R O C E E D I N G S

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CHAIRMAN JOHNSON: Item 8.

MR. KEATING: Commissioners, Item 8 concerns Gulf Power Company's petition for a waiver of the requirements of Rule 25-22.082(4)(a), Florida Administrative Code.

Gulf contends that application of the rule will create a substantial hardship on Gulf and its customers. The premise of Gulf's argument is that:

One, if Gulf is required to release its avoided cost information to potential bidders, then the prices offered by those bidders will tend to converge around Gulf's avoided cost.

And, two, that given this convergence of bid prices and given the increase in wholesale competition since the rule was adopted, Gulf's RFP may not result in the lowest cost power alternative.

Staff disagrees with Gulf's argument. We believe that the increased number of potential bidders in today's competitive wholesale market provides more incentive for bidders to present their lowest price. Given the increase in wholesale competition, we believe that the possibility of bids converging around Gulf's avoided cost, if that data is published in its RFP, is less likely today than when the rule was

1           adopted.

2           I should also point out that a substantial  
3           portion of the information required by the rule is  
4           already publicly available through Gulf's 1998 revised  
5           Ten-Year Site Plan.

6           For these reasons, we do not believe that Gulf  
7           has demonstrated that it and its customers will suffer  
8           a substantial hardship, and it is not clear whether  
9           the purpose of the underlying statute will be achieved  
10          by the means suggested by Gulf.

11          I have two final points. First, staff is  
12          concerned that granting such a broad waiver would set  
13          a precedent that would effectively gut the rule.  
14          There are no circumstances in this case that set Gulf  
15          apart from any other investor-owned utility that would  
16          be required to provide this information under the  
17          rule. We believe that if you accept Gulf's arguments  
18          and grant this waiver, a precedent will be set that  
19          would require persons to look not only to the RFP, but  
20          to the waiver in order to determine the state of the  
21          law on RFPs.

22          And, finally, this exact issue was discussed in  
23          detail at the hearing regarding the RFP rule some  
24          years ago. And the Commission rejected that argument,  
25          and we believe should reject it again now.

1           I believe Ms. Harlow has a few brief comments on  
2 the history of the rule and the rationale behind the  
3 rule.

4           COMMISSIONER GARCIA: Before we finish up on the  
5 legal aspect, what if we approve this waiver, what  
6 effect does that have on -- because this is the first  
7 time we're going -- the rule has yet to be used,  
8 right?

9           MR. KEATING: That's what I understand, yes.

10          COMMISSIONER GARCIA: So if we approve this, does  
11 this have an effect on the other companies in the  
12 state and how they may view this rule?

13          MR. KEATING: I think it will. I think there is  
14 nothing really that's unique about Gulf's situation  
15 here that sets them apart. Basically, I think if you  
16 accept their argument, you've accepted the argument  
17 that the rule should be repealed.

18          CHAIRMAN JOHNSON: Any other questions before we  
19 hear from the industry group?

20          COMMISSIONER GARCIA: Well --

21          CHAIRMAN JOHNSON: Oh, you wanted to add the  
22 legal analysis.

23          MS. HARLOW: Commissioners, I've looked over the  
24 transcript from the hearing on this. It was an  
25 extensive transcript, a three-day hearing, with

1 several intervenors. And I wanted to discuss just  
2 briefly what we believe the intent of the rule was  
3 prior to your discussion.

4 Prior to adoption of the bidding rule, utilities  
5 were not required to negotiate with independent power  
6 producers, except in the case of qualifying facilities  
7 as required by PURPA.

8 The bidding rule requires investor-owned  
9 utilities to issue an RFP for new capacity which is  
10 subject to a need determination. This provides IPPs  
11 with a point of entry into the generation selection  
12 process. Utilities may then select finalists and  
13 negotiate to determine the least cost alternative.

14 Based on comments made at the hearing, the  
15 primary rationale behind the rule was to encourage the  
16 selection of least cost generation. Providing IPPs  
17 with a point of entry gives utilities an added  
18 incentive to sharpen their pencil when making their  
19 own proposal.

20 According to the hearing transcript, the intent  
21 of including avoided cost data in the RFP was to  
22 provide some basic information for potential bidders  
23 and also acts as a sanity check for the Commission  
24 itself when utilities file a need determination. It  
25 was not the intent of the rule to hold utilities to

1 the avoided cost data provided in the RFP for cost  
2 recovery purposes.

3 And as a final note, I'd like to mention the  
4 staff uses avoided cost data extensively, as well as  
5 the Commission, in our analysis of conversation  
6 programs. Also, this information is used in standard  
7 offer contracts for cogenerators. And as Cochran  
8 mentioned earlier, it's published, to a large extent,  
9 in the Ten-Year Site Plan, and the Commission uses  
10 that information to review those site plans now that  
11 data is our primary responsibility.

12 COMMISSIONER GARCIA: What information that they  
13 don't want others to have is it that we don't -- that  
14 no one would have? In other words, the company  
15 provides all this information in one form or another,  
16 except what?

17 MS. HARLOW: Well --

18 COMMISSIONER GARCIA: And you listed in the rec,  
19 it was like 13 points or something like that, if I'm  
20 not mistaken.

21 MS. HARLOW: Yes, sir.

22 COMMISSIONER GARCIA: What is required and -- of  
23 those 13, which precisely aren't provided?

24 MS. HARLOW: As required by the rule, a detailed  
25 technical description is required. And it says, "At a

1 minimum, the following information," and 13 points are  
2 listed. Now, it's difficult to tell from Gulf's  
3 filing which things they objected to. Because their  
4 primary argument concerns the avoided cost data, yet  
5 there is very much of these -- many of these 13 items  
6 here are not concerning cost at all. They're  
7 concerning the type of unit, the technical description  
8 of the unit that would be placed and where would it  
9 be, what's the megawatt size, what's your fuel. These  
10 things were not addressed in Gulf's filing.

11 Staff agrees with LEAF on this point. LEAF said  
12 that Gulf did not address the technical description.  
13 They only addressed in their argument of what it cost.

14 If you look down the list of the 13 items,  
15 virtually all of these items are included to some  
16 degree in the Ten-Year Site Plan, except for Item 6,  
17 an estimate of annual revenue requirements. Many of  
18 the things that you need to calculate revenue  
19 requirements, however, are included in the Ten-Year  
20 Site Plan.

21 No. 10, almost all of No. 10 is in the Ten-Year  
22 Site Plan, except minimum load and ramp rates.

23 No. 12, a discussion of the actions necessary to  
24 comply with environmental requirements. That is not  
25 extensively discussed in the Ten-Year Site Plan, but

1 it is discussed to some degree.

2 And No. 13, a summary of the major assumptions  
3 used, that is not required in the Ten-Year Site Plan.

4 COMMISSIONER GARCIA: Just so that I understand  
5 it, so --

6 MS. HARLOW: I would say that the bulk of the  
7 information is in the Ten-Year Site Plan.

8 COMMISSIONER GARCIA: I'd say more than the bulk.  
9 I would say pretty much, except -- you're saying 13 is  
10 a summary, and --

11 MS. HARLOW: Six is revenue requirements. A  
12 portion of 10 --

13 COMMISSIONER GARCIA: But you're saying that  
14 that's provided in other places. The formula  
15 necessary to calculate it is provided in other places.

16 MS. HARLOW: Yes, sir.

17 COMMISSIONER GARCIA: Mr. Bal -- I'm just getting  
18 a confirmation from Mr. Ballinger, who couldn't help  
19 himself.

20 And No. 10 is -- No. 10 is only a part of that,  
21 correct?

22 MS. HARLOW: Yes, sir.

23 COMMISSIONER GARCIA: So, in essence, 6 is pretty  
24 much provided for. You're saying only a small part of  
25 10 and then the summary of 13 is. And you're saying

1 that the summary of 13 could probably be assumed from  
2 other things they've filed at this Commission?

3 MS. HARLOW: I believe so, sir. And, also -- to  
4 some extent, at least. And, also, No. 11.

5 Excuse me, but I neglected to mention that a  
6 description of the associated facilities is required,  
7 such as transmission lines, is required by the  
8 Ten-Year Site Plan. We don't necessarily have a  
9 direct estimate of the cost, which is required by the  
10 bidding rule. However, in the case of Gulf, they have  
11 listed no associated transmission. And so I guess the  
12 cost would be zero or close to that.

13 CHAIRMAN JOHNSON: Any other points you want to  
14 add?

15 MS. HARLOW: I would share Mr. Keating's concern  
16 that this is the first time that the rule has been  
17 used by any of the investor-owned utilities, and that  
18 any action that the Commission makes in this waiver  
19 should, as mentioned by LEAF in their comments, be as  
20 limited as possible, and that you should also consider  
21 the potential effect that it would have on future use  
22 of the rule.

23 CHAIRMAN JOHNSON: Thank you.

24 MS. HARLOW: Thank you.

25 CHAIRMAN JOHNSON: Gulf Power.



1 MR. STONE: Thank you, Commissioners.

2 Good afternoon. My name is Jeff Stone, with the  
3 law firm Beggs & Lane, and I represent Gulf Power  
4 Company in this proceeding.

5 We have come before you with a request for a  
6 waiver of the rule. And we have both utilized the  
7 provisions within the rule itself that the Commission  
8 itself reserved its right to waive the rule upon a  
9 proper showing and the provisions of chapter -- of the  
10 APA with regard to the standard for waiver.

11 And I think it's important to remember the  
12 purpose of the underlying statute. And that is when  
13 it comes time for a need determination proceeding by  
14 this Commission, you will be able to determine whether  
15 or not the plant is the most cost-effective  
16 alternative.

17 When this rulemaking was undertaken several years  
18 ago, FERC 888 had not been issued. There was a  
19 fledgling wholesale -- a competitive wholesale market.  
20 And the concern was raised in that extensive  
21 discussion about whether or not there needed to be a  
22 jump-start, if you will, towards encouraging utilities  
23 to negotiate with wholesale providers. I think we can  
24 all recognize that in the passage of time a lot of  
25 things have changed. And whether or not you need this

1 rule any longer is something that warrants  
2 consideration.

3 We did not come to seek rulemaking, primarily  
4 because we don't have time to go through a rulemaking  
5 process. We have a need for capacity that we need to  
6 be moving on with the request for proposals  
7 immediately. And so we sought the waiver request  
8 because we wanted to bring to your attention that the  
9 circumstances have changed.

10 We have provided expert testimony in the form of  
11 affidavits attached to our petition that document the  
12 manner of competitive bidding that is used in other  
13 industries as well as in the wholesale market at large  
14 -- the wholesale electric power market at large. And  
15 this rule requires a deviation from the standard, both  
16 in our industry and in other industries. We think  
17 that is important for this Commission to acknowledge.

18 The question is, who is this regulation designed  
19 to protect? We submit that --

20 COMMISSIONER DEASON: Mr. Stone, what is the  
21 deviation that this rule requires, and it's a  
22 deviation from what?

23 MR. STONE: In other competitive bidding  
24 situations, whether in our industry or in other  
25 industries that are not regulated by the Commission,

1 it is the judgement that potential bidders should make  
2 their own independent judgement as to what their price  
3 ought to be, and they are not given the kind of  
4 detailed financial information that this rule  
5 requires.

6 And I'd like to address at this juncture it is  
7 specifically the annual revenue requirements portion  
8 of the rule that gives us the greatest concern. And  
9 Item No. 13, which talks about the detailed  
10 assumptions that lead to that, it is those two  
11 provisions in and of themselves that give us the  
12 greatest concern. To the extent that we're talking  
13 about --

14 COMMISSIONER GARCIA: Which one of them -- I'm  
15 sorry. Again, I'm sorry. I picked up on you as you  
16 were finishing. Which two issues give you the most  
17 major concern?

18 I'm sorry, Commissioner Deason, I was just --

19 MR. STONE: It was indicated that Item No. 6 is  
20 not directly in our Ten-Year Site Plan filing, the  
21 annual revenue requirements.

22 COMMISSIONER GARCIA: What part of it is it that  
23 you don't want --

24 MR. STONE: The annual revenue requirements  
25 that's required by Item No. 6.

1           COMMISSIONER GARCIA: Right. But staff states  
2 that parts of the form -- elements that are necessary  
3 to reach that are already provided. What parts of  
4 those elements don't you want to give?

5           MR. STONE: Commissioner, make no mistake, there  
6 is a lot of public information that someone who does  
7 the analysis they can get very close to that and make  
8 that target. We do not want to provide the road map  
9 to that target. We want them, if they are a serious  
10 bidder to --

11           COMMISSIONER GARCIA: Why wouldn't -- and that's  
12 a question maybe I'll ask you for a second before Mr.  
13 Cresse corrects me on all my incorrect assumptions.  
14 But before he gets there, why -- why is that, that you  
15 wouldn't want that information out there? Won't that  
16 produce a lower bid for you and for the ratepayers?  
17 The more information that a bidder has, the better --  
18 the better able he will have to have a price. Once  
19 that price is out there, I don't think it's a question  
20 of converging around the price, because it costs a lot  
21 of money to enter a bid on a project. So if I know  
22 what the -- if I and everyone else knows what that  
23 price is. And I think that staff used that also as a  
24 terminology so people wouldn't miss the boat  
25 completely. In other words, we know what we're

1 shooting for. Yeah, they're going to no where that  
2 is, but they know their competitors for bidding that  
3 price know what it is, and they're going to be  
4 undercutting each other.

5 MR. STONE: And, Commissioner, that's exactly  
6 what I want to try and address. In other industries  
7 not regulated by this Commission, when they go out for  
8 competitive bid they do not give that kind of detailed  
9 financial information and yet they get competitive  
10 bids and they go through the process to determine the  
11 most cost-effective alternative for whatever project  
12 they're taking bids for. And, in fact, not only --

13 COMMISSIONER GARCIA: But isn't this different?  
14 Isn't this industry a little bit different? Because  
15 there is all sorts of recovery that's based into this  
16 system. There is all sorts of recovery for you, as  
17 well as for the ratepayers, on the assumptions made in  
18 entering one of these agreements. And on top of that,  
19 if I'm not mistaken, this comes before this Commission  
20 eventually, anyway. Further, you get to negotiate  
21 with whoever wins that bid on very specific details  
22 and facts about the bid that was entered. So you get  
23 several cracks at them. We get a crack at them. So  
24 because there is a general or public policy issue out  
25 there, we're sort of, I think, all working toward the

1 same ends, which is a better price and a more  
2 knowledgeable public as well as private in your case.

3 MR. STONE: Commissioner, if I may, an  
4 independent power producer who is not regulated by  
5 this Commission, their goal in submitting a bid is to  
6 submit the highest possible bid they can submit and  
7 win the business, not the lowest. To the extent that  
8 we give them a target to shoot at --

9 COMMISSIONER GARCIA: Let me ask you something.

10 MR. STONE: -- we will move some of that  
11 incentive lower --

12 COMMISSIONER GARCIA: Can't you beat that bid,  
13 though? When they come in with the bid, if you think  
14 that that bid is too high and you can do better, can't  
15 you do better?

16 MR. STONE: Yes, Commissioner, but I thought our  
17 goal in the whole course of this thing was to ensure  
18 that we got the most cost-effective alternative.

19 COMMISSIONER GARCIA: Well, that's my point, but  
20 within reason. And that's one of the -- the rationale  
21 that staff used. And I'm trying to remember the words  
22 that staff used, but it was so that all bids would be  
23 reasonable. Because we don't want -- we don't want  
24 people to fail, I mean, in this program. So if we  
25 reach -- if we reach a price which is out of whack,

1           which your experts think is out of whack or you can do  
2           better, you can always do better, can't you?

3           MR. STONE: And we certainly will do our best to  
4           make sure that the best deal is achieved for our  
5           ratepayers. But the question is does this rule favor  
6           ratepayers or favor potential bidders? And we submit  
7           that we think in the current framework of the rule it  
8           favors potential bidders rather than the ratepayers.  
9           And that's all we're seeking, is to try and do the  
10          best job for our ratepayers.

11          COMMISSIONER GARCIA: Let me ask you, under our  
12          present system and this rule if we were -- and now  
13          looking into the future, the future which some see  
14          with great fright of competition, and you were to put  
15          out to bid exactly as the rule is, and it was -- and  
16          you found that someone came out and bid at a price  
17          that was better than some Southern Companies could do,  
18          and that bid comes back to this Commissioner, right?  
19          If I'm not mistaken. Once you approve that project,  
20          that still comes through this Commission one more time  
21          before you start off on that project.

22          MR. STONE: Presumably it would still have to  
23          come before this Commission to determine --

24          COMMISSIONER GARCIA: How would we -- wouldn't we  
25          deal with them as we would deal with anyone else in

1 terms of recovery? In other words, if we were to move  
2 to a competitive model, and this was a stranded  
3 investment, we'd deal with them the same way we deal  
4 with anyone else, wouldn't we? We'd deal with them  
5 through you in terms of cost recovery with that  
6 contract. If we wanted to move to a competitive  
7 scenario, we'd deal with them just like we deal with  
8 any other generation unit within your company?

9 MR. STONE: I don't think that you would look  
10 behind their price to see how they came up with their  
11 price.

12 COMMISSIONER GARCIA: No, we'd look at your  
13 price. We'd look at the price that they gave you, and  
14 then we'd give you recovery of that as a stranded  
15 investment, wouldn't we?

16 MR. BALLINGER: Yes.

17 COMMISSIONER GARCIA: Good. Thank you.

18 Mr. Ballinger was the only one shaking his head  
19 yes.

20 We'd look behind that. We wouldn't look behind  
21 them, but we'd look at your cost in terms of making  
22 you whole in this contract, I guess, because that's  
23 what it would be; it would be a contract of some sort  
24 for energy, wouldn't it? Am I mistaken, or for  
25 building a generation unit. It would be a stranded



1 investment.

2 MR. STONE: It could take any form, Commissioner.  
3 We're not presupposing that it would be a purchased  
4 power contract. But that is certainly one aspect,  
5 that it could come through this RFP process.

6 COMMISSIONER GARCIA: Let me ask one more  
7 question, and then -- and then -- when you put this  
8 out for bid, is it possible that someone would come  
9 in, let's say a Duke Power, and say to you, "With what  
10 you need here, I'm going to build a" -- what do they  
11 call it -- "a merchant plant to supply the need for  
12 your power here as opposed to going through your  
13 process. You're going to get all the power you want  
14 from us, and there has to be no guarantee to the  
15 ratepayers of picking up that cost." Could that be  
16 done in this bid scenario?

17 MR. STONE: There is no restriction that would  
18 prohibit that.

19 COMMISSIONER GARCIA: Okay. All right. Thank  
20 you. I'm sorry for interrupting you.

21 COMMISSIONER DEASON: Well, there certainly would  
22 have to be requirements for there to be committed  
23 capacity and a first right to that capacity. All that  
24 would have to be worked out, I guess, in the contract  
25 negotiations.

1 MR. STONE: I'm sorry, Commissioner, I could not  
2 understand everything you just said.

3 COMMISSIONER DEASON: Obviously, if there is a  
4 need for capacity, you've got to have dedicated  
5 capacity and the first call on that capacity. So that  
6 if there were a merchant plant situation and there was  
7 a contract that was finalized in that regard, it would  
8 have to be with that understanding. It couldn't be  
9 that you just pay whatever our market asking rate is.  
10 It would have to be at a stated price for a stated  
11 amount of capacity and there to be a guarantee that  
12 that capacity would be available.

13 MR. STONE: Yes, Commissioner. And in terms of  
14 the difference between the question that you just  
15 asked and the question that Commissioner Garcia asked,  
16 there is no prohibition in our RFP process that would  
17 prevent consideration of a merchant power plant. But,  
18 clearly, the burden would be on us to ensure that we  
19 have protected out ratepayers in terms of the contract  
20 this is ultimately negotiated.

21 COMMISSIONER GARCIA: And most probably this  
22 Commission would want you to put that burden on,  
23 because this is a plant that you need to serve the  
24 ratepayers of the state. So, certainly, it would be a  
25 requirement that we would want you to include in that.

1 MR. STONE: Certainly. And our waiver request  
2 does not do harm to either of those considerations.

3 COMMISSIONER GARCIA: No, no. That was for my  
4 own edification.

5 MR. STONE: And I think it's important to  
6 remember that our request for waiver does not affect  
7 the delivery of information to this Commission when it  
8 comes time to review. Our request for waiver only  
9 affects the timing of the delivery of information and  
10 prevents giving it to the bidders on the front end;  
11 just as if they were bidding in any other industry,  
12 they would not have that kind of detailed information  
13 from the customer, in this case Gulf Power Company, on  
14 the front end.

15 COMMISSIONER CLARK: I want to ask you something  
16 about that. What other industries are you comparing  
17 it to? Are you comparing it to industries where the  
18 person asking for the bid is also a potential supplier  
19 of that need?

20 MR. STONE: Commissioner, I'm comparing it -- and  
21 I'm referring particularly to the affidavit that was  
22 submitted by Hugh Gower when he was referring to his  
23 experience in monitoring other companies that were not  
24 regulated in terms of how they go through a  
25 competitive bidding process. And in his view, based

1 on his experience, that it's important for potential  
2 bidders to make their own independent judgment. Now,  
3 in terms of do I have a specific industry in mind, no,  
4 I do not. I was referring to his comments.

5 COMMISSIONER GARCIA: Because I would assume that  
6 in --

7 COMMISSIONER CLARK: You haven't answered the  
8 question.

9 MR. STONE: Well, I apologize.

10 COMMISSIONER CLARK: And it's just that do you  
11 know if those industries are one where the customer  
12 who has put the item out for bid is also potentially a  
13 supplier of what he is seeking a bid on?

14 MR. STONE: I don't have specific knowledge of  
15 that, but I don't preclude that from being a  
16 possibility, either.

17 COMMISSIONER CLARK: Okay.

18 MR. CRESSE: Commissioner, I think you could put  
19 General Motors in that category. They have the option  
20 of farming out their parts or manufacturing them  
21 themselves. And they do it on a routine and regular  
22 basis. All major automobile manufacturers do that.

23 COMMISSIONER GARCIA: But, Mr. Cresse, you would  
24 agree that there is a public interest factor that we  
25 have and that you have when you're operating in a

1 regulated system that grants the fact that there has  
2 to be a little bit more public information. And when  
3 you're looking at a bid, for example, put out by a  
4 county government or a state government, those bids  
5 are very specific, very detailed. They include all  
6 sorts of information that the bidder is made aware of,  
7 because we are holding them to a different standard,  
8 because they're bidding for sort of -- well, they're  
9 bidding for a government agency. In our type of case,  
10 the government is involved because we're serving the  
11 public interest and you're serving the public  
12 interest.

13 COMMISSIONER DEASON: Well, maybe that's a good  
14 scenario. I'm not that familiar with local  
15 governments, but, for example, if there were a local  
16 government that was either contemplating doing garbage  
17 collection themselves or having a contractor do it, if  
18 they issued an RFP, would they be required to put in  
19 that bid, "And we think we could do it ourselves for X  
20 dollars?"

21 MR. CRESSE: I don't think they're required to  
22 put in their bid, nor do I think they put in their bid  
23 what they think they can do it themselves for.

24 COMMISSIONER DEASON: They probably want to keep  
25 that a secret so that they can probably get the best

1 bid from the bidders.

2 MR. CRESSE: If I was in a municipality --

3 (Simultaneous conversation).

4 COMMISSIONER GARCIA: If you will excuse me for a  
5 second, Commissioner Cresse.

6 But, Commissioner, they do tell you what it costs  
7 them to do it, and what the previous contractor had to  
8 pay for it. And they disclose those facts of what the  
9 county either was paying for it themselves or the  
10 previous bidder paid. And that contract is part of  
11 the public record so that they are able to look at  
12 that and glean from that all sorts of costs that  
13 probably General Motors never puts out.

14 COMMISSIONER DEASON: And the same way with the  
15 utility. It's public record of what they paid for  
16 their last generating unit, what is in rate base, what  
17 is the depreciation rate, what is the allowed rate of  
18 return, what is the operating and maintenance expense.  
19 All of that is public record, but it is past  
20 performance, not future.

21 MR. CRESSE: And the Ten-Year Site Plan is a  
22 public record. It contains an awful lot of this same  
23 information.

24 CHAIRMAN JOHNSON: Mr. Stone, were you finished?

25 COMMISSIONER CLARK: So why not provide it?

1 MR. STONE: No, ma'am, but --

2 MR. CRESSE: I'll get to that in just a good  
3 minute.

4 CHAIRMAN JOHNSON: Okay, Mr. Cresse, we're going  
5 to let Mr. Stone finish up.

6 MR. STONE: I will try to be brief. The question  
7 was the intent behind the rule. Ms. Harlow outlined  
8 it to say to provide certain basic information to the  
9 potential bidders. We are doing that. As we  
10 indicated in our petition, we are complying fully with  
11 the requirement in Paragraph 3, which in large  
12 measure, duplicates Paragraph (4)(a), the first three  
13 or four items. We have already acknowledged that we  
14 intend to give the location, the general size, the  
15 type of technology. All that information will be in  
16 our RFP package. Quite frankly, it's the nature of  
17 the detailed technical and financial information we  
18 feel like is best left in the hands of the utility  
19 until after the bids are in. And then we will all be  
20 able to look at it at the same time and evaluate what  
21 is the best, most cost-effective alternative.

22 In terms of the sanity check, the Commission will  
23 have that opportunity when a need determination is  
24 brought to it. It doesn't need to have the  
25 information given to the bidders on the front end.

1           We expect to be held accountable to get the best  
2 deal for our ratepayers. That's what we're here for,  
3 and that's the motivation in our filing this waiver.

4           And, finally, one last point, the requirement of  
5 the statute says that it -- the underlying purpose of  
6 the statute has to -- either has been met or will be  
7 met. We submit to you that since the passage of the  
8 rule, the underlying purpose of the statute has been  
9 met by the opening up of the wholesale market. And it  
10 will be met by the fact that we have an RFP out there,  
11 that we expect to have out there that will make use of  
12 that market.

13           And then finally, you mentioned other utilities  
14 -- well, you mentioned other government entities.  
15 It's interesting that municipal utilities and  
16 cooperatives are not subject to this rule. And they  
17 would not have to give out this kind of detailed  
18 technical and financial information in their process,  
19 although they very likely would go through an RFP  
20 process. And we think that that is a distinction that  
21 is of merit, too.

22           When you passed the rule, you specifically  
23 reserved yourselves the right to not require any  
24 provision of the rule to be implemented if  
25 circumstances had changed and a showing was made to



1           you. We're submitting to you --

2           COMMISSIONER DEASON: Is there a specific  
3           provision within -- is that a specific provision  
4           within the rule itself as adopted?

5           MR. STONE: Yes, Commissioner.

6           COMMISSIONER DEASON: Can you point that to me?

7           All right. I'm sorry, I don't have the rule.

8           MR. STONE: It is Paragraph 9. And I can quote  
9           it to you in part. It says, "The Commission has  
10          reserved itself the right to waive" -- and I'm quoting  
11          -- "the rule or any part thereof upon a showing that  
12          the waiver would likely result in a lower cost supply  
13          of electricity to the utility's general body of  
14          ratepayers, increase the reliable supply of  
15          electricity to the utility's general body of  
16          ratepayers or is otherwise in the public interest."

17          And we submit to you that at the time you were  
18          passing the rule the concern was that there were not  
19          enough players on the wholesale side to really give  
20          life to the requirement that we negotiate. That has  
21          changed. We believe the public interest is met by the  
22          current wholesale market, and all we're asking is that  
23          you recognize that and give us the opportunity to  
24          proceed in the best interest of our ratepayers.

25          We believe that it is appropriate to grant us a

1 waiver of the rule, but if you find it more  
2 appropriate to give us a partial waiver of the rule  
3 and that we be limited to giving out that information  
4 that has been submitted as part of our Ten-Year Site  
5 Plan information, that would give us the comfort level  
6 to be able to proceed with our RFP process. We  
7 believe that that is consistent with what the staff  
8 has said. It is narrowly drawn. And so to the extent  
9 that there is information available in our Ten-Year  
10 Site Plan filing as it has been given, we would be  
11 happy to provide that as part of our RFP. We don't  
12 think it's appropriate, we think you should grant us a  
13 total waiver, but to the extent that you would be more  
14 comfortable with a partial waiver that allows us to  
15 proceed by attaching the Ten-Year Site Plan  
16 information itself and no derivations therefrom, then  
17 we would be prepared to proceed on that basis.

18 Thank you. That completes my comments. I would  
19 like the opportunity to respond in case there are  
20 questions raised.

21 CHAIRMAN JOHNSON: Sure. Any other questions for  
22 Mr. Stone?

23 Mr. Cresse.

24 MR. CRESSE: Commissioners, I'm Joe Cresse. I'm  
25 here on behalf of Tampa Electric Company.

1           I want to discuss another issue which you were  
2 concerned about when you adopted this rule back in  
3 1993. I think three of the present Commissioners were  
4 involved in adopting that rule. You were concerned  
5 about the fairness of the issue where one of the  
6 parties that may be contracting or may be willing to  
7 construct or can construct and operate this plant had  
8 to put their bottom-line price out first. And I think  
9 it's unfair to require a utility to put its  
10 bottom-line price out and let other people bid against  
11 it.

12           The fairness issue you were concerned about. On  
13 Page 70 of the transcript, Commissioner Clark says,  
14 "What I'm trying to deal with is the notion that they  
15 sort of have to put their bid on the table, and the  
16 advantage the other parties have to saying, I know all  
17 I have to do is just beat that price."

18           You will get a better price if the potential  
19 bidders do not know what the bottom-line price is of  
20 the utility. The utility will have to compete for  
21 this service in the same manner as the independent  
22 power producer with one exception. Their price does  
23 not have to be revealed up front. And we think this  
24 rule requires that to happen.

25           COMMISSIONER GARCIA: But, Joe --

1 MR. CRESSE: You ought not do it.

2 COMMISSIONER GARCIA: -- in the present system we  
3 have, which is -- you said this was passed in '93.  
4 Today we have a lot more people out there trying to  
5 provide power and trying to build generation plants.

6 MR. CRESSE: Yes, sir.

7 COMMISSIONER GARCIA: Don't you think that if we  
8 provide that price, what it would cost the utility --  
9 I agree they're going to -- they're going to start  
10 with that price as a point, but I doubt Enron wants to  
11 be beaten out, or Enron or Duke or the Southern  
12 Company by any specific price. When they're out there  
13 competitively bidding, they're going to try to  
14 undercut each other because the process of bidding is  
15 an expensive proposition.

16 MR. CRESSE: But should the utility be placed at  
17 a disadvantage in providing that service to  
18 themselves? There is no provision --

19 COMMISSIONER GARCIA: Well, doesn't the utility  
20 have an advantage --

21 (Simultaneous conversation).

22 MR. CRESSE: Let me finish, if I might, sir.

23 COMMISSIONER GARCIA: Okay.

24 MR. CRESSE: There are some advantages and some  
25 great benefits to consumers for the utility generating

1 plant to be owned and operated by the utility. And I  
2 wrote a letter to the Commission in 1993 pointing out  
3 some of those advantages. You don't need to place the  
4 utility at a disadvantage.

5 COMMISSIONER GARCIA: Well, why don't you tell me  
6 some of those advantages.

7 MR. CRESSE: All right, sir. At the end of the  
8 contract period who owns the land and the air emission  
9 standards --

10 COMMISSIONER GARCIA: I'm sorry.

11 MR. CRESSE: The price and what --

12 COMMISSIONER GARCIA: I'm sorry. I didn't hear  
13 you, Joe. Start again.

14 MR. CRESSE: At the end of the contract period  
15 who owns the emission standards, the emission  
16 allowances? What price will the plant be continued to  
17 serve the ratepayers, it will continue to serve at  
18 market price, not at average embedded cost, which  
19 would be substantially lower after a contract period  
20 of 20 years. What happens if fuel prices decline  
21 below the estimates used for the bid? That benefit  
22 will go to the owner of the power plant. If it's the  
23 utility, that benefit will flow to the utility  
24 ratepayers. If it's a contractor, that benefit will  
25 flow to the contractor.

1           What happens if the cost of capital changes? And  
2           we're at a point now where cost of capital we think is  
3           lower than it's ever been. But I have to tell you,  
4           it's not lower than it's ever been. Thirty years ago  
5           you could borrow money to build a house at five and a  
6           half percent. Now, it isn't like it has been. The  
7           cost of capital is lower than it has been in the past  
8           ten years. But if it goes even lower, who will  
9           benefit from it? If the utility owns that plant, the  
10          ratepayers will benefit from it. If it goes higher,  
11          if the cost of capital goes up, the money that you've  
12          borrowed, you're not -- you just go ahead and keep it  
13          at the lower rate. So you can't -- that's a one-way  
14          street on cost of capital.

15          The ratepayers cannot benefit on lower cost of  
16          capital under a contract. They will benefit on lower  
17          cost of capital under a utility owned plant. So it's  
18          not just these cost factors that you need to face.

19          COMMISSIONER GARCIA: But you would probably  
20          agree with me that the industry is heading towards  
21          competition, so we're probably -- we're probably, to  
22          some degree, looking at that future, that we're not  
23          going to get that --

24          MR. CRESSE: I think the industry is heading  
25          towards competition in the generation of electricity,

1 but not in the transport and distribution of  
2 electricity, only in the generation. We have had a  
3 competitive generation environment in Florida for a  
4 good long while. So what's happening in the rest of  
5 the country, they may be catching up with us --

6 COMMISSIONER GARCIA: Right.

7 MR. CRESSE: -- as opposed to leading us.  
8 Because these things, these experiments that are going  
9 on haven't all been that smooth.

10 COMMISSIONER GARCIA: Right. No, I would agree  
11 with you there.

12 MR. CRESSE: The great benefits that were  
13 promised in California have yet to materialize.

14 COMMISSIONER GARCIA: Right.

15 MR. CRESSE: And I don't know if they have  
16 materialized anywhere. I know that they're in this  
17 transition process. Always the benefits are oversold.

18 COMMISSIONER GARCIA: But if you -- aren't we  
19 talking about generation here, though, Joe?

20 MR. CRESSE: Yes, sir, we're talking about  
21 generation.

22 COMMISSIONER GARCIA: I mean, isn't this about  
23 generation? And do you think our ratepayers are going  
24 to benefit 20 years from now by Gulf owning this, or  
25 is it very possible that 20 years from now all

1 generation is going to be in separate hands or is  
2 going to be a competitive issue across-the-board. And  
3 if I were a holder of that generation contract, I --  
4 and it probably won't be Gulf, and it probably won't  
5 -- or it may be Gulf, but the way we're going to  
6 acquire that power is going to be through a  
7 competitive bidding process?

8 MR. CRESSE: If I was the owner of 500 megawatts  
9 of power that was combined cycle as is proposed in  
10 this particular offer, I would want you to deregulate  
11 it entirely. Because I can put it on the market and  
12 make a whole lot money --

13 COMMISSIONER GARCIA: Twenty years from now,  
14 right.

15 MR. CRESSE: -- than I can in a regulated  
16 environment. That doesn't mean that the price of  
17 electricity is going to be cheaper. It means that I  
18 can make more money in a nonregulated environment.  
19 And I have to tell you if you're in the business of  
20 generating electricity, your primary responsibility is  
21 your fiduciary responsibility to your shareholders.  
22 You're going to try to maximize their income. You're  
23 going to try to maximize the profits as much as you  
24 possibly can. And there is nothing wrong with that.

25 COMMISSIONER GARCIA: Right.



1           MR. CRESSE: I'm not criticizing that at all.  
2           That's just the way it does work, that's the way it  
3           should work.

4           The fairness issue, if you require the utility to  
5           put their price up front does not give the utility the  
6           opportunity to compete as fair as it would be for an  
7           independent power producer. And I think that's the  
8           issue. When you require them to put the annual  
9           estimate, and the annual revenue requirements and all  
10          of the assumptions used in developing that estimate,  
11          you're saying, "Put your cards on the table, and we'll  
12          shoot at it." And I would much rather think that it  
13          would be best for the independent power producers to  
14          make their best shot without knowing what the  
15          utility's bottom line is.

16          Ultimately they've got to come back to you.  
17          They've got to come back and justify to you. And the  
18          burden of the utility is to justify to you the  
19          decision they make as a result of this RFP. So you're  
20          not getting their last shot at it today.

21          COMMISSIONER GARCIA: Right.

22          MR. CRESSE: If there is ever a power plant built  
23          in Florida under the present process that doesn't wind  
24          up being litigated in front of this Commission, then  
25          I'll be the most surprised guy in the country. So it

1 will be back, and you'll have the opportunity to  
2 evaluate what Gulf Power does or what any utility does  
3 if you waive this rule.

4 If you were concerned about the fairness of it  
5 when you adopted it, since that time, on Page 3 of the  
6 staff recommendation, justification for a variance  
7 under 125.42, which was enacted in 1996, includes,  
8 "For the purpose requested -- for the purposes of this  
9 section, principals of fairness are violated when  
10 literal application of a rule affects a particular  
11 person in a manner significantly different than the  
12 way it affects other similarly situated persons who  
13 are subject to the rule."

14 How would you like to be a contractor and have to  
15 put your price up front that everybody else can bid  
16 against? I think that's what you're asking the  
17 utility to do.

18 COMMISSIONER CLARK: But, Joe, in this case Gulf  
19 is being treated like every other regulated utility.  
20 Those are the similarly situated entities to whom this  
21 rule applies.

22 MR. CRESSE: Gulf is not being treated like any  
23 other potential bidder for this project.

24 COMMISSIONER CLARK: I agree with that. But  
25 that's not what -- this rule is aimed at the regulated

1 utility. And to that extent --

2 MR. CRESSE: No, it's not aimed at regulated  
3 utilities. This is a statewide rule.

4 COMMISSIONER CLARK: Yes. It is the rule that  
5 the regulated utilities have to comply with when  
6 adding new power, so that it applies to regulated  
7 utilities. Those are the similarly situated entities,  
8 not the people making the bid.

9 MR. CRESSE: Well, I read it differently. I  
10 thought that the people making bids were similarly  
11 situated, those people in the process of trying to  
12 acquire capacity were similarly situated.

13 COMMISSIONER CLARK: I understand your  
14 distinction is as to what -- that it puts them at an  
15 unfair advantage. But they are not at an unfair  
16 advantage. These are the other regulated utilities  
17 who have to --

18 MR. CRESSE: I would agree with that. It puts  
19 them at an unfair advantage with the other potential  
20 bidders. That's the point I'm trying to make. I'm  
21 sorry I wasn't clear.

22 COMMISSIONER JACOBS: How do you respond to the  
23 statements that the essence of this information is  
24 already in the public record at the time the RFP is  
25 entered? Even if this requirement weren't there.

1           MR. CRESSE: I would respond to it in the  
2 following way: If it's already in the public record,  
3 then there is no need to repeat it here. Not all this  
4 information is in the public record. And I've pointed  
5 out the two areas that are extremely critical.

6           Actually, Issue 7, which is the discounted cash  
7 flow method, is also critical. You have to have the  
8 revenue requirements in order to arrive at avoided  
9 cost.

10           So, 6, 7 and 13 are extremely critical in my  
11 opinion, that we ought not to have put that on the  
12 table up front.

13           COMMISSIONER GARCIA: Joe, let me ask you  
14 something. Doesn't the utility also have an advantage  
15 that other competitors don't have? In other words,  
16 the utility is sitting there as these bids are made.  
17 It clearly has shown all it's cards, but the utility  
18 gets a crack at it, too. And it's going to get a  
19 crack at it before this Commission if it thinks it can  
20 do better. I mean, if you were sitting up here, and I  
21 can say that to you because you have sat up here,  
22 aren't the ratepayers going to benefit from the fact  
23 that the utility is going to get another crack at it  
24 and we're going to get another crack at it? And by  
25 showing its cards, the utility may be able to draw

1 some different conclusions by what's out there and  
2 still say, "We can do it better and cheaper."

3 MR. CRESSE: If the utility is not held to these  
4 prices --

5 COMMISSIONER GARCIA: Uh-huh.

6 MR. CRESSE: -- is what I hear you say, does that  
7 provide any benefit? I don't think so, because then  
8 the information that you put out may not be the best  
9 cost estimate.

10 COMMISSIONER GARCIA: No, what I'm saying is when  
11 this process is over, the utility looks at it. In  
12 other words, when our rule goes out there, all the --  
13 you know. And you're right, we're asking the utility  
14 to show pretty much all its cards. When it shows its  
15 cards, and it gets back a series of bids, and it gets  
16 to pick the lowest bid, the utility still has the  
17 option, if I'm not mistaken, to beat that price,  
18 doesn't it?

19 MR. CRESSE: Sure, it does. I would assume it  
20 would have the option to beat that price. That's a  
21 clarification that I think needs to be made.

22 COMMISSIONER GARCIA: Am I mistaken in that, Joe?

23 MR. JENKINS: I think that's correct. And by way  
24 of perspective on the matter of fairness, we thought  
25 it was -- it was not an issue of fairness so much,

1 because the utility also evaluates the bid. If you  
2 want it to be truly fair, we'd have the bidders  
3 evaluate the bids.

4 COMMISSIONER GARCIA: All right.

5 MR. JENKINS: That's another distinction. It  
6 makes no sense, but that's --

7 COMMISSIONER GARCIA: And, Joe, we're not going  
8 to take you there just yet.

9 MR. CRESSE: I'm not worried about Jenkins having  
10 the comment about having the bidders evaluate the  
11 bids, and so forth. Let me tell you who is going to  
12 ultimately evaluate the bids. You are.

13 COMMISSIONER GARCIA: But I'm just saying, and  
14 changing places, if you were sitting up here, clearly,  
15 you've got a -- we've got -- I mean, it is causing  
16 competition. It is causing -- it is causing an  
17 aggressive look at the numbers. And it's an  
18 aggressive look at the numbers by outsiders who want  
19 to get into this business, who want to do more of this  
20 business.

21 And that done, when they look at this  
22 aggressively, and you look at -- you, as a  
23 Commissioner, you've going to be pleased by the fact  
24 that Gulf Power comes -- after all this process, we  
25 evaluate -- Gulf Power evaluates that bid, and then

1           they can say, "And I can do it even better." And if  
2           the concern was everyone was going to be hovering  
3           around that number, I agree with you, Gulf Power is  
4           going to want to beat it, or the Southern Company is  
5           going to want to beat that because it has certain  
6           advantages with it being its own generator.

7                     And the ratepayers have that advantage if we --  
8           and our comfort level would probably be greater when  
9           Gulf Power comes in under everyone else. And as a  
10          regulator, so be it. I mean, I've got a tremendous  
11          benefit because we've forced the price even lower than  
12          what Gulf thought it could do. It will have to come  
13          even lower than what it thought it could do.

14                    COMMISSIONER DEASON: Well, then what benefit is  
15          there of there being any cost information being  
16          provided on the front end? To me, it could work just  
17          the very opposite. If Gulf doesn't -- if they present  
18          cost information that is really not their very best  
19          bottom line, and they didn't sharpen their pencil a  
20          great deal, they could be luring people to come in  
21          with high prices, realizing they're going to undercut  
22          them. And they're going to guarantee that they're  
23          going to be the ones providing the power.

24                    COMMISSIONER GARCIA: Well, here -- and you can  
25          correct me if --

1           COMMISSIONER DEASON: And if they are required to  
2 have their very best bottom-line price and be held to  
3 it when they present their RFP, then they are placed  
4 at a competitive disadvantage.

5           MR. JENKINS: I don't think they're held to their  
6 RFP price.

7           COMMISSIONER DEASON: Okay. Then what is the  
8 necessity of having any of this cost information  
9 provided up front?

10          MR. JENKINS: Just so we don't get high prices.  
11 The idea of revealing that information of Gulf Power  
12 or utilities showing their cards, showing a card is  
13 that they give some idea to the bidders of what they  
14 have to beat. Don't forget, Gulf Power will get to  
15 draw a second card; the bidders won't.

16          CHAIRMAN JOHNSON: What does that mean?

17          MR. JENKINS: That means that Gulf puts out its  
18 number in the RFP, the bidders respond, they know they  
19 have to beat that price. And when all of those prices  
20 come in through the passage of time, say, in about two  
21 or three months, then Gulf Power can come out with  
22 still another number. They're not held to that  
23 number.

24          CHAIRMAN JOHNSON: Then tell me again why they  
25 put that number -- why we're making them put that



1 number on the table in the first place.

2 MR. JENKINS: To prevent, like we saw in  
3 Tallahassee, some real high prices coming in. And  
4 Tallahassee did not reveal in its bid RFP, its number.  
5 When the bids came in, there were -- I would say most  
6 of them were higher.

7 COMMISSIONER GARCIA: Commissioner, what we're  
8 doing is saying where the price, more or less, is now  
9 so that everyone is aware of where that price is, so  
10 that they -- no one is going to come in to bid against  
11 Gulf which has said the price is here above them.  
12 They're going to have to sneak in.

13 And on top of that, under that price -- on top of  
14 that, we're going to have other competitors who know  
15 that Duke is bidding for it, that Louisville is  
16 bidding for it, that -- hopefully, someday we'll have  
17 other state providers bidding it who have a knowledge  
18 of that. And so it just keeps forcing them all to go  
19 lower. Likewise, I hope that to some degree this also  
20 puts the -- you know, you don't have someone do a  
21 crazy bid. Because then the company would come to  
22 this Commission and say, you know, "Joe Jenkins Power  
23 is saying that they can provide all this at a  
24 ridiculous price, and there is no way Joe Jenkins  
25 Power can survive." And this Commission will say,

1 "Well, because we need reliability, because this is  
2 for making sure that the ratepayers are served, we may  
3 not take a crazy bid. We may not take someone who is  
4 low-balling just get into the process and not being  
5 serious."

6 It requires a serious look at the number with  
7 serious numbers and then -- then you've got to effect  
8 your bottom line. You've got to say, "How much do I  
9 want my shareholders --"

10 COMMISSIONER CLARK: It's not your shareholders.

11 COMMISSIONER GARCIA: I'm sorry?

12 COMMISSIONER CLARK: He was trying to talk --

13 COMMISSIONER JACOBS: It was a left-hand joke.

14 It was a left-hand joke.

15 COMMISSIONER GARCIA: I'm sorry. It just  
16 requires them to keep pressing the bottom line.

17 And I'm sorry, Madam Chairman, I have a tendency  
18 of usurping dead space with my voice.

19 CHAIRMAN JOHNSON: Really?

20 (Laughter)..

21 COMMISSIONER JACOBS: Commissioner, I want to get  
22 back to the point. I guess, Joe, you raised it, but  
23 it kind of ties on to something that was said earlier.  
24 This is a sophisticated industry. And it baffles me  
25 to think that there will be such -- such a reliance,

1           blind reliance when the kind of dollars are at stake  
2           for these kind of plants, we're not talking about  
3           mincemeat here. They're coming in with multiple  
4           millions of dollars riding on the line. And it  
5           baffles me to think that they're going to sit back and  
6           risk winning this contract on the gamesmanship of the  
7           company. I can't believe that these companies won't  
8           be astute enough and sophisticated enough to  
9           understand what the prevailing market statistics are  
10          and make a reasonable reliable bid. And if they  
11          don't, then the company can come back in on the back  
12          end and say, "There's some aberration here. These  
13          guys aren't playing by fair rules, and so we now have  
14          a legitimate opportunity to direct you, Commission, to  
15          a reliable price."

16                         Why doesn't that happen, Joe?

17                         MR. JENKINS: All I can tell you is that in the  
18          Tallahassee case where Tallahassee's price was not  
19          revealed, per se, we had a number of bidders to come  
20          in much, much higher than Tallahassee's ultimate  
21          price. The one bidder that may have been close, you  
22          had to get down into not so much the price, but the  
23          details of what was included along with the price,  
24          such as whether the natural gas was a fixed price or  
25          whether it had escalators.

1           And, again, I come back to Gulf Power will get to  
2 draw from the deck again after it -- you know, a  
3 second time. And as far as fairness goes, if you  
4 wanted to be totally fair, at one time we discussed  
5 where the Commission would evaluate the bids and not  
6 the utility. The bids would be submitted to the  
7 Commission, and we would open them and evaluate them.

8           We wanted to get out of that, so the compromise  
9 was for the utility to issue a target for people to  
10 shoot at, knowing -- and they're not held to it. And  
11 then later on the utility gets to draw from the deck  
12 again with a new number and come in and justify it.

13           It forces the utility to rethink and become more  
14 efficient. Let's say initially Gulf proposes \$100 a  
15 kilowatt. And all the bidders come in at, you know,  
16 95 or 90. And Gulf says, "Aha, if I want the  
17 business, I've got to do better than 95 or 90. I've  
18 got to go down to 85." And that's what we see in  
19 these bidding processes.

20           COMMISSIONER GARCIA: But conversely, Joe, they  
21 can come in and say, "These 90 or 95 aren't in the  
22 best interest of Florida, because they are not as  
23 reliable. You can't count on them. We're going to  
24 have all sorts of problems." And we could still  
25 settle on their 100.

1           MR. JENKINS: And, frankly, if the bids were  
2 close, I would prefer that Gulf build it, because it  
3 goes in the rate base and not through a cost recovery  
4 clause.

5           COMMISSIONER GARCIA: Which addresses  
6 Commissioner Cresse's point.

7           MR. JENKINS: See, we have an asymmetrical  
8 treatment of costs -- or money flows and cost recovery  
9 here.

10          CHAIRMAN JOHNSON: Thank you. Does that answer  
11 your question, Commissioner Jacobs?

12          COMMISSIONER JACOBS: Pretty much.

13          CHAIRMAN JOHNSON: Commissioner Clark.

14          COMMISSIONER CLARK: I have a question.

15          Mr. McGee, you're here to speak on behalf of Gulf  
16 Power, is that right? No, Florida Power, sorry.

17          MR. MCGEE: I'm here to speak on behalf of  
18 Florida Power in support of Gulf Power.

19          COMMISSIONER CLARK: All right. Where are the  
20 independent power producers? I don't see anyone else  
21 here that doesn't like -- is opposed to the rule  
22 waiver.

23          Mr. Moyle, I see you in the audience. Are you  
24 here just to listen or do you have a view on it? And,  
25 you know, that's up to you as to whether or not you

1 want to come up here.

2 (Laughter).

3 Well, you know, let me just put it this way, it  
4 makes me curious as to, you know, it would seem that  
5 maybe you all don't need this information. And if you  
6 don't need this information, why are we going through  
7 this exercise?

8 I can see that maybe -- what I'm concerned about  
9 is maybe the information doesn't have to be publicly  
10 disclosed, but maybe I want to see it at the front  
11 end, so that I know or I can make an assessment as to  
12 whether any gamesmanship is going on. You know, you  
13 give us an avoided cost, and then when you get the  
14 bids, you see, well, you could beat that. And if that  
15 -- if that occurs, then I don't think we'll have a  
16 robust wholesale market. Because the independent  
17 power producers will probably say, "Why should I come  
18 in and make the effort, when they're always going to  
19 have the opportunity to beat my bid?" But if you're  
20 required to give us the information, then we ask you  
21 some hard questions as to why you didn't sharpen your  
22 pencil to begin with.

23 You know, I think there are advantages one way or  
24 the other, and I'm curious as to why apparently only  
25 LEAF has taken issue with this. Do the independent

1 power producers really not need this information?

2 MR. MOYLE: You kind of put me on the spot on  
3 this one, but let me tell you my personal view on it,  
4 okay? And that is, that you all went through a  
5 rulemaking procedure where there was a lot of back and  
6 forth, a lot of debate, a number of years ago. I  
7 understand my dad was involved in that. And it went  
8 back and forth, and you came up with a rule. The rule  
9 has never been used.

10 Now, this is the first time you're going to use  
11 the rule. And I don't know that the independent power  
12 industry has to come up and say, "Yeah, tell them what  
13 you really meant and the rule has to stick today."  
14 You know -- I mean, I don't know that we've got to be  
15 here saying that. I mean, I'll say it. I think that  
16 the rule, that your rulemaking process ought to be  
17 adhered to. And the first time somebody comes in and  
18 is going to use the rule, you ought not to grant a  
19 waiver that really guts the whole rule. I mean,  
20 that's my personal view. And I don't know that I've  
21 got to be here, you know, saying it, but that's -- you  
22 ask me that's what I'd say, you know, on a personal --  
23 COMMISSIONER DEASON: Well, Mr. Moyle, let me ask  
24 you about the provision in Section 9, which talks  
25 about there being a waiver if it can be shown that it

1 would likely result in the lower cost supply of  
2 electricity, and all the other rule provisions which  
3 require there to be a procedure set forth and there to  
4 be certain information provided. And that what's at  
5 issue here is just the providing of detailed cost  
6 information.

7 MR. MOYLE: I guess with respect to that  
8 provision -- I mean, I would feel -- again, this is my  
9 personal view. I would feel much more comfortable --  
10 they talk about what every other bidding situation --  
11 you know, we don't have to put our card on the table.  
12 But in just about every other bidding situation, you  
13 know, if the Department of Management Services goes  
14 out for a bid, they get everybody's bid, and then they  
15 select one of them. That's not the case here. It's  
16 the power company making the selection.

17 I mean, if you all want to make the determination  
18 as to what -- what the best bid is, then let them put  
19 their bid in, put it in a Mason jar on the same day  
20 that we put it in the Mason jar and give everybody  
21 that at the same time and you all can make your  
22 selection, would be the way the bidding process  
23 normally works. I mean, you know, we're talking  
24 about, "Well, we can come back in later on."

25 And I say the "Mason jar," that was what the



1 Tallahassee situation was, when you came in and they  
2 said, "Well, we want everybody's bid. We'll put ours  
3 in a Mason jar." But, you know, these guys are going  
4 to get the bids, and they're making the ultimate  
5 decision. That doesn't seem very fair to me.

6 COMMISSIONER GARCIA: I get a feeling, Mr. Moyle,  
7 that your client didn't send you here, so you're just  
8 giving your personal opinion, so maybe I should just  
9 ask someone else.

10 MR. MOYLE: Well, I guess my point is that when  
11 we went through the rulemaking process a number of  
12 years ago, we never thought that you would come in and  
13 the first time you're enacting the rule that, you  
14 know, we've got to stand up and say, "Yeah, let's go  
15 back three years ago and make sure you really meant  
16 what you said then."

17 COMMISSIONER CLARK: Mr. Moyle, I appreciate that  
18 I put you on the spot, and I understand that it is  
19 your personal view.

20 . I do have one of two other questions. I don't --  
21 this was a pretty broad recommendation, and from what  
22 I understand from the staff, so was the petition. I  
23 guess what I'd like to see from you all is, "Here is  
24 the information we think we shouldn't provide, and  
25 here is why." Do a matrix. "I don't think I should

1 provide this information, and this is why. And I  
2 don't think I should provide this information."

3 I disagree with you, Mr. Cresse, with respect to  
4 what is already on file. I think there is an  
5 advantage in terms of efficiency in getting the bids  
6 to put information that is already public information  
7 in a form -- in one single spot so there isn't any  
8 debate while we read -- we used this, you know, maybe  
9 the 1998 version of the Ten-Year Site Plan as opposed  
10 to the 1999 version. I think you should be saying  
11 these are -- this is the public information we're  
12 relying on. But this is the information we don't want  
13 to provide and here is why. Have they done that?

14 MS. HARLOW: No, ma'am, not in my opinion. In  
15 fact, today is the first day I've gotten the  
16 indication that it was specifically Items 6 and 13  
17 that concerned them. We had a discussion with Mr.  
18 Stone and asked him, "Okay, if you got the waiver and  
19 filed an RFP" -- we expressed to him that staff cannot  
20 understand what information of the 13 items would be  
21 included in your RFP. And so we asked him to address  
22 that.

23 MR. STONE: Commissioner, I'm sorry that I did  
24 not communicate very well with staff. That's my  
25 feeling. And my client should not suffer from that.

1 I thought I had made it clear that in terms of what we  
2 were seeking waiver of, we were seeking waiver of  
3 those types of detailed information. And I thought I  
4 had said this earlier today, Item 6, annual revenue  
5 requirements. And if you'll bear with me a moment,  
6 I'll turn back to that.

7 COMMISSIONER GARCIA: Mr. Stone, maybe you should  
8 address exactly why it is that -- I mean, in the  
9 broader context, if I might, Commissioner Clark -- why  
10 it is you don't want to give that information. Maybe  
11 you've got to be more specific. Because in the  
12 broader context, I think it's tough for us to  
13 rationalize why you don't want to give it.

14 I mean, I do understand that you are now under  
15 competitive pressure. Is it something for the overall  
16 system that bothers you that you have to give this  
17 information? Does this include the Southern Company  
18 information that altogether is going to give  
19 competitors an advantage across the nation to beat you  
20 somewhere? Is that what worries you? I mean --

21 MR. STONE: No, sir. I'm here on behalf of the  
22 ratepayers of Gulf Power Company. And in our view,  
23 putting out the target, the annual revenue  
24 requirements allows potential bidders to sit there and  
25 target their bid at that number rather than giving us

1           their best possible proposal. And that's all we're  
2           after, is to ensure that they are under the pressure  
3           to do their own independent evaluation of what the  
4           lowest amount of money they're willing to accept in  
5           order to give us what we need in order to serve our  
6           customers.

7           MS. HARLOW: Commissioner Garcia, that assumes  
8           that the potential bidders are only competing against  
9           the utility. That is not the case. They are  
10          competing against each other to get to the negotiating  
11          table.

12          And to go back to -- I almost said Chairman  
13          Deason's point earlier about the garbage, the garbage  
14          disposal, think of that instance. And say that we  
15          were four years ago, and there were three potential  
16          bidders. Well, then in a sense they are bidding  
17          against the city. But say today, four years later,  
18          there are 50 potential bidders. Well, that increases  
19          their incentive to bid against each other. So today,  
20          more so than at the time of the rulemaking hearing, we  
21          have Enron competing against Duke, not just competing  
22          against Gulf.

23          And I would also go back to Joe Jenkins' point --

24          COMMISSIONER GARCIA: But I add to that. But  
25          their bid has to even be sharper than that, because

1 one more shot Gulf gets at it or the Southern Company.  
2 The truth is, no matter how good the bid is -- and I  
3 think Mr. Moyle made that point, no matter how good  
4 the bid is, Gulf Power is going to look at it one more  
5 time. And, clearly, with all the advantages that Joe  
6 spoke about. If I can meet your price, I'm going to  
7 say good-bye Duke, because it's Gulf, because I know  
8 them, because it's part of the system, because we feel  
9 comfortable with that. And I think the staff  
10 recommendation would probably go with them, correct?

11 I mean, that's what Joe said. I don't want to --  
12 I don't want to prejudice you because we're going to  
13 look at these things. But I think that's where Joe's  
14 argument was made.

15 Let me give you my -- I would probably feel more  
16 comfortable -- all things being equal, I'd probably go  
17 with Mr. Stone's company, all things being equal.  
18 Because for the ratepayer, Joe Cresse stated there are  
19 certain advantages in the long run.

20 MS. HARLOW: Yes, sir, there are. But there is  
21 nothing in the rule that requires that the selection  
22 be made based on price alone. In fact, the Commission  
23 considered that extensively in the hearing. Should we  
24 make the determination based on price? Should we make  
25 it based on this list of 15 different criteria? And

1 the Commission decided that that was making a  
2 management decision for the utility, and that the  
3 Commission was here to review management decisions.

4 And I'd also, while I have the floor, go back to  
5 Subsection 9 of the rule, which Commissioner Deason  
6 referred to in which the Commission specifically  
7 states in the rule that the Commission may waive the  
8 rule. If you read the transcript, the primary thing  
9 that was discussed in this case and, in fact, I would  
10 say the only thing that was discussed, and it was  
11 discussed by Commissioner Deason, was why would we  
12 want to put this in here? And he came up with an  
13 example, and he used it several times.

14 What if we were in a situation where we knew  
15 ahead of time before an RFP that the utility could  
16 build a plant cheaper? And he came up with the  
17 example of government funding for a new technology.  
18 And when he addressed this, he looked at the rule as a  
19 whole. And I think that's very important to look at.

20 Gulf's primary argument is based on hardship.  
21 And their argument says, "You are putting as at  
22 hardship by requiring this information in the RFP.  
23 Because if we put this in the RFP, it will give  
24 bidders the incentive to cluster their bids around our  
25 -- what's not really a bid, but our avoided cost

1 information." That is less likely today than at the  
2 time the Commission passed the rule. And the  
3 Commission considered this argument at that time.

4 COMMISSIONER GARCIA: Commissioner Clark, I would  
5 echo some of your sentiment about certain things being  
6 private. I mean, if this was something that we were  
7 asking the company to put out information which  
8 affected them in their ability to buy power off the  
9 grid because certain people had certain knowledge that  
10 a competitor would need, I could understand them  
11 wanting to keep that from being public. But that  
12 isn't what the company is arguing. It is arguing this  
13 specific process before us about competitors, about  
14 this specific -- they're not arguing, "Well,  
15 Commissioners, if I give you what my power needs are  
16 in Florida, I'm going to be giving Duke a tremendous  
17 advantage in the future when we're competitively  
18 bidding for power, because they know exactly what my  
19 need is. They'll be able to price -- they'll be able  
20 to sell me things more expensively and they'll be able  
21 to beat me on another level."

22 This isn't information that is going to hurt  
23 them, at least that's what Mr. Stone is telling us,  
24 that this isn't private information that's going to  
25 hurt them competitively as a company elsewhere.

1           COMMISSIONER CLARK: Can I ask a question? Is  
2 the annual revenues requirement, that's essentially  
3 cost?

4           COMMISSION STAFF: Yes.

5           COMMISSIONER CLARK: Okay. And then what is the  
6 other thing they don't want to provide?

7           MR. STONE: I'm sorry. I have -- when you say is  
8 the annual revenue requirements essentially cost, I  
9 don't believe that's the case.

10          MR. BALLINGER: No, you have components in it as  
11 far as return, what fuel prices go into it. If I can  
12 say --

13          COMMISSIONER DEASON: Well, I don't understand.  
14 Those are costs. It's the cost of fuel, it's the cost  
15 of capital. Why isn't -- revenue requirements is  
16 really, it is just the tabulation of costs.

17          MR. BALLINGER: Yes.

18          COMMISSIONER CLARK: Thank you. Now, what is the  
19 other thing you don't want to provide?

20          MR. STONE: Commissioner, may I --

21          COMMISSIONER CLARK: No, you can't respond to  
22 that. Answer my other question. What is the other  
23 thing you want to provide --

24          MR. STONE: It is particular details in Paragraph  
25 13 that allow you to calculate annual revenue



1 requirements from the cost of the facility.

2 COMMISSIONER CLARK: And what are those?

3 MR. STONE: Rate of return, depreciation rates,  
4 those things that may change over time but that we  
5 would be giving out our forecast of that.

6 COMMISSIONER CLARK: All right. Let me ask this  
7 question, are those costs -- is that information we  
8 use in determining avoided costs for other purposes,  
9 such as conservation and those sorts of things?

10 MR. BALLINGER: Yes. If I can, this is kind of  
11 as Yogi Bera would say, deja vu all over again. We  
12 had these same arguments when the rule was developed  
13 about the type of process to do. What staff wanted to  
14 do was try to strike a balance. As the utility has  
15 the obligation to serve, we wanted them to hold the  
16 cards for the ratepayers of Florida. They have the  
17 right to reject all bids even if they are less than  
18 theirs for various reasons.

19 As Mr. Cresse pointed out, there are some  
20 benefits of a utility owning a generating unit today  
21 in a regulated environment. If we go to competition  
22 things may change, if we totally deregulate  
23 generation. But the rule as it stands envisions a  
24 regulated environment.

25 The cost information that is out there that is

1 required is basically what we would require in a need  
2 determination. To look is it the most cost-effective  
3 alternative. We are forcing the utilities, if you  
4 will, to put their best foot forward so the bidders  
5 know -- the Duke and Enrons of the world know what it  
6 takes to build a combined cycle unit.

7 COMMISSIONER CLARK: Okay. Let me ask Mr. Stone  
8 one thing. How would you feel about not putting that  
9 information out initially, but you have to submit a  
10 bid with all that information at the same time and  
11 that is the bid that you are going to evaluate  
12 everybody else's bid by, and you are going to have to  
13 say why despite the fact that you are not the lowest  
14 bidder you think you are still the best. Would that  
15 be satisfactory?

16 MR. STONE: Well, I think Mr. Ballinger has  
17 already covered that, and he said that would put --  
18 take out our role as management to be able to do the  
19 best interest of our ratepayers. I think we need to  
20 have the opportunity to evaluate those bids on  
21 nonprice attributes and make those determinations.  
22 And we can't tell you what that is going to be until  
23 we have been able to evaluate each bid.

24 COMMISSIONER CLARK: What I have said to you is  
25 you have to decide what is the best Gulf Power can do

1 to meet that requirement, and you have to submit that  
2 at the same time as other bidders. Let me finish.  
3 And then you can -- if you have a bid for \$100, one  
4 for 95, and you are at 105, you nonetheless can come  
5 in and say we still think we are the best because of  
6 these reasons, and then you come justify it to us.

7 But the point at which -- you only get the same  
8 shot they do to do your best deal. What would be  
9 wrong with that?

10 MR. STONE: I think there are some practical  
11 limitations on that. We have to undertake this RFP  
12 process, we are still in the process of getting the  
13 detailed site-specific type of information that would  
14 be used in a need determination proceeding. We don't  
15 have all of that information available to us today,  
16 yet we need to go out with the RFP.

17 Quite frankly, I've got some system planners  
18 telling me I needed to have issued this RFP last month  
19 in order to meet the time lines to be able to come  
20 before you with a need determination proceeding in  
21 order to be able to meet the on-line requirement in  
22 2002 in a timely fashion. If we were to wait until we  
23 had the kind of detailed information that you are  
24 talking about, we would have to put in at the same  
25 time. I'm not sure how we can assure ourselves that

1 we are going to be able to meet that 2002 need  
2 because, quite frankly, we are having to push things  
3 further out before we can even issue the RFP.

4 The RFP is a process by which we gain additional  
5 information about what the market is out there. We  
6 are not prejudging that we are going to build this  
7 capacity. We know what we have out there for planning  
8 purposes right now. We want to know if somebody else  
9 can do a better deal for our ratepayers, and if so, we  
10 want to snap that up. The only reason we were here  
11 before you with this waiver --

12 COMMISSIONER CLARK: If you haven't done all of  
13 that how are you going to be able to evaluate the  
14 bids? How long do you -- maybe I'm not understanding.  
15 How long after you put something out do you require  
16 them to bid?

17 MR. STONE: They are going down parallel paths,  
18 Commissioner. We are trying to get the information  
19 from the potential bidders at the same time we are  
20 doing our site-specific development of information.  
21 And at the same time when we get to the point that all  
22 the bids are in, the process is closed, then we start  
23 evaluating. We hope to have better information than  
24 we have available today.

25 COMMISSIONER CLARK: But you can't do that at the

1 same time they are required to -- in other words, all  
2 the information -- they have the same problems to some  
3 extent. They are making estimates, but on a date  
4 certain they have to decide to go with their  
5 estimates. Why shouldn't you be required to do that?

6 MR. STONE: They don't have the obligation to  
7 serve that we do. They don't have the need to have  
8 capacity on-line in 2002. If they don't succeed in  
9 our project, they succeed someplace else, so be it.  
10 Our problem is we have to not only --

11 COMMISSIONER GARCIA: Wait a minute. Can't that  
12 be part of what they bid for?

13 MR. STONE: It's a timing issue, Commissioner.  
14 It's a question of if we were to be in the position to  
15 give that kind of detailed information, precise  
16 information, site-specific information, before we even  
17 issued the RFP, then we either have to start that  
18 process earlier or we have to find other means to meet  
19 the need that we have already identified in 2002.

20 Quite frankly, we filed a ten-year site plan  
21 proposal in April that did not include this project.  
22 We continued our evaluation, and this project came to  
23 the forefront. We amended our ten-year site plan  
24 information in June in order to give you the best  
25 information we had available. We are still in the

1 process of developing even better information. But  
2 the time frame is such that we need to go out for the  
3 RFP now in order to meet that 2002 need. Given the  
4 fact that in order to meet that 2002 need we very  
5 likely are going to have to come before this body with  
6 a need determination petition which will have the best  
7 information available to it at the time we file that  
8 petition, not necessarily the best information  
9 available to us today.

10 We have taken a great deal of time today. Quite  
11 frankly, our petition was to recognize the fact that  
12 when you passed this rule there was a great deal of  
13 discussion on this. There was a divergence of  
14 opinion, and the Commission made a decision in order  
15 to take advantage or that relied on the environment as  
16 it existed when the rule was passed.

17 A lot of time has passed. The rule has not been  
18 used. I suspect that Mr. Moyle's comments would be  
19 such that no one expected there not to be an RFP  
20 issued under this rule for four years. But that has,  
21 in fact, been the case, and the reason that has been  
22 the case is changes in the marketplace, the  
23 uncertainty in the marketplace. No one has been  
24 building capacity.

25 We now find ourselves in a position to need to

1 build capacity, we are getting ready to come before  
2 you in a need determination proceeding, and we want to  
3 be able to do the best thing for our ratepayers. We  
4 believe that either granting us the waiver we have  
5 asked for or granting us a partial waiver that will  
6 allow us to give the ten-year site plan information  
7 that we put out in June as part of the RFP meets the  
8 best interests of our ratepayers, and that's what we  
9 came before you asking for.

10 CHAIRMAN JOHNSON: Thank you, Mr. Stone. Mr.  
11 Cresse, could you answer the question that  
12 Commissioner Clark had posed about why you shouldn't  
13 be required to put all the bids on the table at the  
14 same time?

15 MR. CRESSE: Would you repeat that question,  
16 please.

17 CHAIRMAN JOHNSON: Why the utilities shouldn't be  
18 also required to put their bid on the table at the  
19 same time?

20 MR. CRESSE: My opinion is it's not in the best  
21 interest of the consumers.

22 CHAIRMAN JOHNSON: And why not?

23 MR. CRESSE: The reason it's not in the best  
24 interest of the consumers is if you request bids  
25 people are going to bid against one another. The

1 utility then is going to analyze that bid and they  
2 have the opportunity, as you said earlier, to  
3 determine whether or not they can beat those bids that  
4 came in. They have that opportunity. I think that  
5 opportunity should be preserved because that is what  
6 will wind up getting you the lowest price.

7 The utilities have the desire to own and operate  
8 their own plants. There is benefits to the consumers  
9 for them owning and operating their own plants as  
10 opposed to purchasing from independent power  
11 producers. So if the price is the same or close to  
12 the same, I think that the utility has to come to you  
13 and justify the decision they make. And that  
14 justification may include owning that plant as opposed  
15 to operating it. So they shouldn't have to put their  
16 bid in with everybody elses.

17 Nobody does it. How would a contractor that was  
18 going to build his own house, why would he have to put  
19 his price up front? Why couldn't he negotiate it?

20 COMMISSIONER CLARK: Well, Mr. Cresse, let me ask  
21 it a different way. As I understand your main  
22 objection is why should they have to put their bid on  
23 the table to begin with?

24 MR. CRESSE: Right.

25 COMMISSIONER CLARK: It's not fair.



1 MR. CRESSE: Right.

2 COMMISSIONER CLARK: Well, by advocating what you  
3 are, that they should not have to put the bid in at  
4 the same time, well, then they are the ones who are  
5 getting the opportunity to see everybody else's bid  
6 and then put theirs on the table.

7 MR. CRESSE: That's correct.

8 (Simultaneous conversation).

9 COMMISSIONER CLARK: And that is fair why? And  
10 that is --

11 MR. CRESSE: That is in the public interest.

12 COMMISSIONER CLARK: And why is that in the  
13 public interest?

14 MR. CRESSE: Because it will result in a lower  
15 price than you would get otherwise if they were  
16 required to put their price on the table and bid  
17 simultaneously with everybody else. The opportunity  
18 to negotiate with multiple bidders is foregone under  
19 what you just described.

20 COMMISSIONER CLARK: What does that do to a  
21 potential competitive bidder? Why would he ever put  
22 in a bid if the utility is always going to be able to  
23 beat it? Why would he go to that expense?

24 MR. CRESSE: I don't know why -- he would do it  
25 because he thinks he could make some money in the

1 process.

2 COMMISSIONER JACOBS: I agree with that theory of  
3 the extra measure of reliance on what the company, the  
4 utility will provide. But that takes me back to the  
5 rule, because that means on the first shot the utility  
6 is going to have done a fairly decent job of  
7 sharpening its pencils, but I understand it's because  
8 there is going to be some gamesmanship.

9 But whatever gamesmanship gets played, for those  
10 very reasons I would expect when they come with that  
11 second shot at the apple that the extra card that Joe  
12 keeps speaking of they are going to be right on. And  
13 whoever they can't beat when they come with that  
14 second one, well, there are going to be some pretty  
15 legitimate reasons why they can't. At that point in  
16 my mind the gamesmanship is gone because they are very  
17 serious at that point.

18 MR. CRESSE: I think that's correct.

19 CHAIRMAN JOHNSON: Any other questions,  
20 Commissioners? Mr. Vandiver, did you -- to this item?

21 MR. VANDIVER: I was going to discuss a  
22 procedural matter with Mr. Elias.

23 CHAIRMAN JOHNSON: Okay.

24 COMMISSIONER GARCIA: Well, I guess I will move  
25 staff, unless our lawyers have another issue. But I

1 will say this to the company, if there is something  
2 that you don't want anyone to know because it is going  
3 to affect your competitiveness, even outside of  
4 Florida markets, if there is something that affects  
5 you that you say, "Well, Commissioner, by providing  
6 this information Gulf Power is not going to be able to  
7 be competitive, we are giving our competitors an  
8 advantage --" in this case I think we are giving your  
9 competitors an advantage to beat your price and that's  
10 good. And that being the case, I think staff is  
11 absolutely right in its rationale, and I support  
12 staff, and I will move staff.

13 COMMISSIONER CLARK: Let me ask one more thing,  
14 Mr. Stone. Why can't -- why won't we ultimately serve  
15 the ratepayers doing this, because once you get the  
16 bid you can always say we can do it for less and here  
17 is why?

18 MR. STONE: Commissioner, again, when we  
19 submitted our waiver request, we had talked with  
20 experts in the area and they said to us it is  
21 generally better, you get better bids, you get more  
22 competitive bids if each bidder is required to do its  
23 own independent analysis. That there is the risk of  
24 price convergence if we give that kind of target out  
25 there.

1           Having been advised of that potential risk, we  
2           thought it was in the interest of our ratepayers to  
3           file this waiver request. And that's all we were  
4           seeking.

5           COMMISSIONER CLARK: Well, let me ask you from  
6           the standpoint of your analysis of it, why, if you  
7           have to put this information out there and then you  
8           get bids, and you still have the opportunity to come  
9           in lower, it seems to me that the ratepayers are then  
10          served.

11          MR. STONE: But if the bids that come in are  
12          lower because of that extra degree of uncertainty, if  
13          you will, that they don't have a target to hit, then  
14          we are forced even lower still.

15          COMMISSIONER CLARK: Good news, right, for the  
16          ratepayer?

17          MR. STONE: But that's all we were asking for  
18          with the waiver request, is to not put that number out  
19          there other than what is already in the public record.  
20          And, again, a partial waiver of the rule gets us where  
21          we are trying to get in the fact that the ten-year  
22          site plan information could be all that is required.

23          COMMISSIONER CLARK: Mr. Cresse, can you answer  
24          that? If the fact of the matter is that the utility  
25          always has the opportunity to beat it, then ultimately

1 the ratepayers are served by this rule.

2 MR. CRESSE: I think what you just described  
3 modifies my fairness argument. I don't think it  
4 changes the basic argument of how it would effect  
5 bidders that Mr. Stone said, but I'm somewhat  
6 satisfied that the fairness issue has been somewhat  
7 modified by a clear understanding that I did not have  
8 that we get a second shot, a second bite at the apple.

9 COMMISSIONER CLARK: Is that true, they do, in  
10 fact, get a second shot?

11 COMMISSIONER GARCIA: Yes.

12 MR. BALLINGER: Yes, ma'am. That was the whole  
13 intent. Since the utility does have the obligation to  
14 serve, they would be the ultimate surveyor, if you  
15 will, of the bids. They could even have a higher  
16 priced bid and come in and convince you that their's  
17 is the best deal for other reasons.

18 COMMISSIONER CLARK: Or they could come in with a  
19 lower price.

20 MR. BALLINGER: Or they could come in with lower.

21 COMMISSIONER CLARK: Well, then, I think we have  
22 solved our problem.

23 COMMISSIONER JACOBS: Let me ask this, just  
24 because I'm interested, to staff, really. What does  
25 having -- what does the bidders who are going to come

1 after this project, what does Item No. 6 give them in  
2 preparation of the bid?

3 MR. BALLINGER: You're saying what does Item No.  
4 6 give the bidders?

5 COMMISSIONER JACOBS: Yeah. Actually, my real  
6 interest is what detriment is there to them if they  
7 don't have it up front?

8 COMMISSIONER GARCIA: What detriment is it, you  
9 mean, to the bidders? What detriment does a bidder  
10 have by not having that information, correct?

11 COMMISSIONER JACOBS: Up front, yes.

12 MR. BALLINGER: Quite frankly, these same  
13 arguments, again, like I said, were done at the rule  
14 hearing, and from a truly competitive nature, you're  
15 right, you get better bids if nobody sees each others  
16 price, you seal them all, throw them in a Mason jar  
17 and you pick the lowest one that way. We don't live  
18 in that world.

19 COMMISSIONER GARCIA: Wait. Mr. Ballinger,  
20 though, don't you agree that this is even better than  
21 that process, because --

22 MR. BALLINGER: I was getting there. I was  
23 getting there.

24 COMMISSIONER GARCIA: Okay. All right.

25 MR. BALLINGER: Since we are in a regulated

1 environment, I think this is a better process, because  
2 we force the utility to put its best foot forward. I  
3 can't tell you the number of phone calls I had prior  
4 to this rule from IPPs and even QFs saying that on one  
5 day avoided cost was \$100, the next day it was 50, the  
6 next day it was 75. It was bouncing all over the  
7 place.

8 They would get different people of who they were  
9 negotiating with. One week it would be these two  
10 people, the next week it would be these two people.  
11 We are trying to force the utility to be fair and up  
12 front with its negotiating practices.

13 This rule was envisioned to get the IPPs now into  
14 the market, which were a new entrant. The way to do  
15 this was to make the utility put forth the information  
16 that it knew at that time, the best information it had  
17 available, much like it would do in a need  
18 determination proceeding, so we, as the ultimate  
19 judge, can decide whether it is the most  
20 cost-effective alternative. These are the types of  
21 thing we look at in evaluating that. A bidder such as  
22 Duke or Enron knows how much it takes to build a  
23 combined cycle unit.

24 COMMISSIONER DEASON: So you're saying they don't  
25 need the information, but we do.

1           MR. BALLINGER: From a true sense, no, I think we  
2 do in order to keep the utility in check. We use this  
3 information --

4           COMMISSIONER DEASON: Well, we need it, but the  
5 sophisticated bidders, they know what they can build a  
6 plant for, they don't need Gulf's cost information,  
7 they know what they can build it for, and if they want  
8 to be competitive with other bidders and Gulf, they  
9 are going to submit their best bid right of front.

10          MR. BALLINGER: Right. Because ultimately we are  
11 going to evaluate the bid versus the utility, we are  
12 going to look at these things to see which is the most  
13 cost-effective.

14          COMMISSIONER GARCIA: This is a backstop for us,  
15 though.

16          MR. BALLINGER: Exactly. If there was a bidder  
17 out there who needed this information to submit a bid,  
18 I don't think I would want them selling in Florida.  
19 They are not sophisticated enough. The people out  
20 there know what it costs and what a utility can  
21 probably build it for.

22                 This is for us to keep a check on the utility  
23 not only in generation, but in conservation, as well.  
24 We use this stuff day in and day out.

25          COMMISSIONER DEASON: Well, now, how have we been



1 getting that information for the last four years,  
2 since there has not been an activation of this rule.  
3 requirement?

4 MR. BALLINGER: We get it in individual dockets  
5 when we look at cogeneration contract approvals. We  
6 ask for these runs. We ask for comparison of revenue  
7 requirements. Whenever we have a need determination,  
8 which we haven't had, either, we look at this as far  
9 as revenue requirements from different alternatives.

10 In conservation, we look at the avoided unit, we  
11 look at the revenue requirements and other expenses in  
12 evaluating a conservation program. So we do it on a  
13 case-by-case because avoided cost changes from  
14 month-to-month, basically.

15 COMMISSIONER CLARK: You know, I would agree with  
16 the idea that sophisticated bidders probably don't  
17 need that information, but I would indicate it  
18 probably does give some necessary information, such as  
19 -- and I would assume Gulf Power would take the same  
20 advantage of the bids they put in. That they may say  
21 we have negotiated this kind of deal for fuel, and it  
22 may be that Gulf has done it one way, when they see  
23 Enron's bid or Duke's bid, they say, aha, we could do  
24 it the same way and we can get it at a lesser price.

25 So that some of that detail I think is going to

1 be helpful to even the sophisticated bidder. But I  
2 will admit that it gives the person who has the last  
3 opportunity the ultimate advantage. And in this case,  
4 if I understand it, it's the utility.

5 MR. BALLINGER: And I think they should. As long  
6 as we have a regulated environment in generation and  
7 as long as they have the obligation to serve I think  
8 they should have that second advantage.

9 COMMISSIONER JACOBS: Let me try this and see  
10 what happens. I would like to move staff with the  
11 exception, so I would amend the original motion, to  
12 Item 6, which would require that that information be  
13 filed with the Commission, but not be put in the RFP  
14 up front.

15 CHAIRMAN JOHNSON: So you're offering a friendly  
16 amendment to the motion?

17 COMMISSIONER JACOBS: I don't know if it's a  
18 friendly amendment or not. I will leave that to  
19 interpretation.

20 CHAIRMAN JOHNSON: Well, there is an outstanding  
21 -- let me entertain, then, the outstanding motion.  
22 There is a motion to approve staff --

23 COMMISSIONER GARCIA: I'm not going to accept  
24 that.

25 COMMISSIONER JACOBS: I didn't think it would a

1 friendly amendment.

2 COMMISSIONER GARCIA: I think -- and let me just  
3 state it, since I made the motion. I think that staff  
4 is right here. I think that, you know, if there is  
5 anything that has weakened my feeling for staff was  
6 Mr. Ballinger's argument towards the end, because I do  
7 think you are right, Mr. Ballinger, this is not  
8 essential for the sophisticated customer, but it  
9 allows a ballpark entry, and we want people to be  
10 interested.

11 I think Mr. Cresse's point was well taken, but I  
12 think Mr. Cresse also admits that the fact is that  
13 this provides for a more competitive bid on down the  
14 line because the incumbent is going to get a chance to  
15 look at it. And I do think that it provides us a  
16 safeguard.

17 That being said, this Commission looked at it, I  
18 did not have the benefit of being on this Commission,  
19 but we had the benefit of three of the sitting  
20 Commissioners, and I feel comfortable that this rule  
21 is in the best interest of the ratepayers, of this  
22 Commission, and of this state.

23 CHAIRMAN JOHNSON: Okay. There is a motion.

24 COMMISSIONER CLARK: I would second it, and I  
25 would point out that because I don't think the

1 argument that bidders will converge around the price  
2 put out has been borne out by the discussion. I think  
3 what has been -- and that is the basis on which the  
4 waiver was asked for, that it will be adversely  
5 affecting the ratepayers.

6 And I think the discussion has indicated two  
7 things; that is, first of all, that there are multiple  
8 bidders. There will be bidders besides Gulf Power,  
9 and while they may know the preliminary bid in effect  
10 of Gulf Power, they will not know it of the other  
11 potential bidders, so it will give them the incentive  
12 to come up with the right bid.

13 Secondly, the last evaluation will be Gulf  
14 Power's, and they will have an opportunity to put in  
15 yet another bid showing that they can meet the price.  
16 And in the end that will result, in my view, at least  
17 under the scenario we have been presented, with the  
18 least cost to the customers. So a need for the waiver  
19 which was to benefit the ratepayers has not been  
20 demonstrated.

21 CHAIRMAN JOHNSON: There is a motion and a  
22 second. Any further discussion?

23 COMMISSIONER DEASON: Well, let me just say that  
24 I agree with a lot of the discussion that has been had  
25 here today, and I disagree with some. I think what we

1           need to do is put ourselves in the place of what was  
2           contemplated when this rule was first adopted. And  
3           what we wanted to do was to create a competitive  
4           environment, to try to stimulate that, to have bidders  
5           who would provide bids that fully responded to what  
6           was needed in the time frames in which it was needed  
7           in, and that they would present their best method of  
8           providing that need and their best price for doing  
9           that. And we felt that the ratepayers would benefit  
10          from doing that.

11                 We also agreed that it would be best -- that it  
12          was not our place to be the substitute of management  
13          and to evaluate those bids ourselves, and as long as  
14          there was rate base regulation that we could hold the  
15          regulated utility accountable for their decisions, and  
16          ultimately whatever their decision was as a result of  
17          the bidding process it had to come to the Commission  
18          for final approval.

19                 But I would submit that some things have changed  
20          since that time, and that we do know there is a more  
21          competitive market out there than what there was when  
22          this rule was first adopted. I'm having difficulty  
23          with the concept that this information -- it seems to  
24          me that we need to have the utility provide all  
25          essential information so that there will be the

1 maximum amount of bidders who will respond, fully  
2 respond with an acceptable alternative, and that they  
3 will present their most competitive price for doing  
4 so. But we don't need any more information than that.

5 I question whether the detailed cost information  
6 as envisioned within Item 6 is necessary for there to  
7 be that type of response. I think that the  
8 sophisticated bidders who we want to come and  
9 participate in this bidding process, they fully know  
10 generally what the essential starting point is, and  
11 this information is not needed for that. I think that  
12 there is some danger that if we put this information  
13 out that there could be a tendency for that to be the  
14 starting point and that perhaps that the bidders would  
15 not sharpen their pencil quite as much as they could  
16 otherwise. Perhaps not. I think that's kind of a  
17 philosophical debate as to whether that would happen  
18 or not.

19 What we want to do is to have the bidders come  
20 in, as many as possible. I don't think this  
21 information is necessary to do that, and for that  
22 reason, I would tend to agree that the provision  
23 within Paragraph 9, which says the rule or any part of  
24 the rule could be waived on a showing, I think that  
25 that showing has been made, so I would disagree with

1 the motion.

2 CHAIRMAN JOHNSON: Any further discussion? I  
3 see the arguments on both sides of this particular  
4 issue, but -- and I tell you at first in reading the  
5 initial petition I was more inclined to rule with Gulf  
6 Power given that the markets have changed and we are  
7 seeing more competition in this particular area. But  
8 as we have had the dialogue, and to the extent that  
9 staff is sure, and Mr. Elias and Mr. Jenkins have also  
10 agreed that this process lends itself to allowing the  
11 IOU to put in yet a second bid.

12 So when Gulf Power made their argument as to what  
13 putting this bid out there would do and the fact that  
14 that would start the bidding process higher, and that  
15 the independents would come in right under Gulf, to  
16 the extent that that is true, that is ameliorated by  
17 the fact that Gulf can then come back in. And in my  
18 mind if we do have a lot of providers in the market  
19 and we are dealing with a competitive market, I'm  
20 hopeful that that would not happen, that is that the  
21 bids all come up right under Gulf's.

22 But we have a check in place, because if it does  
23 you get another opportunity. That I was not clear,  
24 and when Mr. Jenkins said that I thought, well, okay.  
25 But it has been repeated several times in such a way

1           that I find some comfort in knowing that we are  
2           probably going to get to the lowest price because,  
3           Gulf, you have to provide us with all this delineated  
4           information, you're going to put it out there on the  
5           table as to cost, the companies are going to come in,  
6           and yet you get to come in one more time. And to my  
7           satisfaction I think that that will lead to the lowest  
8           price for the ratepayers. So for that reason I will  
9           support the motion and second. Any further  
10          discussion?

11                 COMMISSIONER JACOBS: Well, I think I'm pretty  
12           much -- first of all, I withdraw my other motion if  
13           that wasn't clear. My sentiments are pretty much in  
14           line with Commissioner Deason's. I really doubt that  
15           the sophisticated bidders will need that information.  
16           I do think it may have a tendency to taint the early  
17           rounds. But I'm comforted, because I think by the  
18           time the utility comes back in most of that  
19           gamesmanship is gone. But I do think that it may have  
20           a tendency to obscure some of the early bidding  
21           process.

22                 CHAIRMAN JOHNSON: There is a motion and a  
23           second. Any further discussion? Seeing none, all  
24           those in favor signify by saying aye.

25                 COMMISSIONER CLARK: Aye.



1 COMMISSIONER GARCIA: Aye.

2 COMMISSIONER JACOBS: Aye.

3 CHAIRMAN JOHNSON: Aye. Opposed?

4 COMMISSIONER DEASON: Nay.

5 COMMISSIONER JACOBS: I said aye.

6 CHAIRMAN JOHNSON: The motion is approved on a  
7 4-to-1 vote.

8 COMMISSIONER GARCIA: Madam Chairman, I just want  
9 to state to the company that if there is something in  
10 here, and I think there is no reluctance on the part  
11 of the full Commission, if there is something that you  
12 are providing that gives a competitor an unfair  
13 advantage to your company and its standing in the  
14 competitive market as a whole, you should point that  
15 ought to staff and I think they are going to be  
16 understanding as we would be. I just don't think you  
17 made those arguments here today.

18 MR. STONE: (Inaudible, microphone not on).

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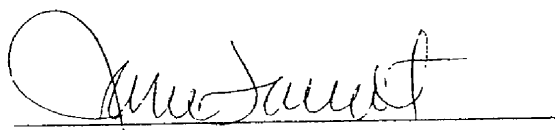
## CERTIFICATE OF REPORTER

STATE OF FLORIDA )

COUNTY OF LEON )

I, JANE FAUROT, RPR, do hereby certify that the foregoing proceeding was transcribed from cassette tape, and the foregoing pages number 1 through 83 are a true and correct record of the proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED THIS 29<sup>th</sup> day of August, 1998.

JANE FAUROT, RPR  
P. O. Box 10751  
Tallahassee, Florida 32302

# **EXHIBIT D**

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of : DOCKET NO. 981890-EU  
:   
Generic investigation :   
into the aggregate :   
electric utility :   
reserve margins planned:   
for Peninsular Florida :   
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PROCEEDINGS: AGENDA CONFERENCE  
ITEM NO. 13

BEFORE: CHAIRMAN JOE GARCIA  
COMMISSIONER J. TERRY DEASON  
COMMISSIONER SUSAN F. CLARK  
COMMISSIONER JULIA L. JOHNSON  
COMMISSIONER E. LEON JACOBS, JR.

DATE: Tuesday, July 27, 1999

TIME: Commenced at 12:15 p.m.  
Concluded at 1:30 p.m.

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

REPORTED BY: KIMBERLY K. BERENS, CSR, RPR  
FPSC Commission Reporter

1 PARTICIPATING:

2 GARY SASSO, Carlton Fields, P.O. Box 3239,  
3 Tampa, Florida 33601, appearing on behalf of Florida  
4 Power Corporation.

5 JON MOYLE, Moyle, Flanigan, Katz, Kolins,  
6 Raymond & Sheehan, 210 South Monroe Street,  
7 Tallahassee, Florida 32301, appearing on behalf of  
8 PG&E Generating Company.

9 CHARLES GUYTON, Steel, Hector and Davis, 215  
10 South Monroe Street, Suite 601, Tallahassee, Florida  
11 32301-1804, appearing on behalf of Florida  
12 Power & Light Company.

13 ROBERT J. SCHEFFEL WRIGHT, Landers &  
14 Parsons, 310 West College Avenue, P.O. Box 271,  
15 Tallahassee, Florida 32302, appearing on behalf of  
16 Duke Energy Power Services and Utilities Commission of  
17 the City of New Smyrna Beach, Florida.

18 JAMES D. BEASLEY, Ausley and McMullen, 227  
19 South Calhoun Street, Tallahassee, Florida 32302,  
20 appearing on behalf of Tampa Electric Company.

21 DEBRA SWIM, Legal Environmental Assistance  
22 Foundation, 1115 North Gadsden Street, Tallahassee, Florida  
23 32303, appearing on behalf of Legal Environmental Assistance  
24 Foundation (LEAF).

25

1 PARTICIPANTS CONTINUED:

2                   LESLIE PAUGH, FPSC Division of Legal Services, 2540  
3 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850,  
4 appearing on behalf of the Commission Staff.

5                   JOE JENKINS, FPSC Director, Division of Electric  
6 Gas.

and

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1 P R O C E E D I N G S

2 (Hearing convened at 12:15 p.m.)

3 CHAIRMAN GARCIA: We are now on Item No. 13;  
4 is that correct?

5 MS. PAUGH: Commissioners, before we  
6 commence Item No. 13 I'd like to make a correction to  
7 the recommendation. There is a rule citation in Issue  
8 1 to Rule 25-22.058 that is incorrect. The correct  
9 citation is 25-22.0376. I apologize for any confusion  
10 I may have caused.

11 This comes to you as motions for  
12 reconsideration of the prehearing officer's order  
13 following the status conference in this docket; status  
14 conference, preliminary prehearing conference. That  
15 conference was held at the request of FP&L, FPC and  
16 TECO motions for the conference. It was held on  
17 June 30th. The Order was issued on July 1st.

18 The Order essentially denied everything that  
19 the utilities were claiming were procedural due  
20 process problems with this and stated very clearly  
21 that this proceeding is appropriate as an  
22 investigation that proceeds as a formal evidentiary  
23 hearing. That is the challenge.

24 The parties say we cannot investigate as a  
25 formal evidentiary proceeding. The prehearing officer

1 disagreed with that and Staff thoroughly disagrees  
2 with that in the recommendation. That is an incorrect.  
3 analysis of the law frankly.

4           With respect to the motions for  
5 reconsideration, they should be denied because they  
6 simply reargue all of the issues raised in the motions  
7 for the status conference and at that long and  
8 difficult status conference. That is not a basis for  
9 reconsideration. Reconsideration has to establish a  
10 mistake of fact or law or something the Commission, in  
11 this case the prehearing officer, overlooked. The  
12 parties have not done that. Staff's recommendation is  
13 to deny the motions for reconsideration.

14           There is also motions -- request for oral  
15 argument. The Commissioners have the discretion to  
16 grant that or not.

17           COMMISSIONER CLARK: Mr. Chairman, you know,  
18 I've read the briefs and I understand the highly  
19 legalistic sort of arguments that we're probably about  
20 to hear and I really think that -- you know, I don't  
21 disagree with the conclusions with respect to the law.  
22 But I want to ask, I just sort of want to explore as a  
23 Commission how we want to proceed with respect to not  
24 only margin of reserves, but merchant plant issues and  
25 those sorts of things. And if you would indulge me



1 for a minute, I would like to sort of indicate how I  
2 think the process should go and what I was  
3 envisioning.

4 I don't disagree with Staff that I think  
5 most of the issues that have been identified have to  
6 be resolved at some time. But I was looking at this  
7 docket to answer the question that Joe Jenkins has  
8 continued to say to us that he's uncomfortable with,  
9 and that is; what is the methodology we are going to  
10 be comfortable with in determining how much reserve  
11 margin we do have. Is it an LOLP and --

12 MS. PAUGH: LOLP.

13 COMMISSIONER CLARK: -- is it a strict  
14 percentage? And let's focus on that issue and decide  
15 what we can live with; what is the appropriate  
16 methodology for making that determination.

17 Then once we make that determination I think  
18 it is appropriate for us to decide how much are  
19 companies who have the obligation to serve customers  
20 should be required to carry and should be allowed into  
21 the rate base. I think we need to make that decision.

22 Then the next decision ought to be, to what  
23 extent, what further margin of reserve and what impact  
24 on the required margin of reserve is -- flows from  
25 allowing merchant plants in Florida.

1           In other words, you might say with respect  
2 to the incumbent companies, it's okay to carry 5% of  
3 your reserve as demand side management as  
4 interruptible rates or load control, because we could  
5 rely on a wholesale market that for those people who  
6 may not decide to be interrupted and maybe there would  
7 be an opportunity for a buy-through.

8           Whereas, if you don't have the opportunity  
9 for a buy-through and you have some 100-degree days  
10 like they've had up north, I don't think that's  
11 satisfactory for the people of the state of Florida,  
12 and we experienced that about a year ago.

13           So, what influence does a merchant plant  
14 have on the required margin of reserve, and would you  
15 limit merchant plants to say, providing a 20% -- 10%,  
16 20% cushion? And that factors into our developing  
17 policy on merchant plants.

18           I would indicate that I think it's very  
19 important to make sure that if we decide to have --  
20 well, we have decided to have merchant plants.

21           One of the issues I think we need to make  
22 sure of is that we, in fact, have a robust wholesale  
23 market, because if you look at what we had to decide  
24 with respect to the fuel and purchase power cost, one  
25 of the -- at least what Gulf Power has alleged is

1 because people are getting higher prices on the  
2 wholesale market, their costs have gone up to  
3 regulated customers and we need to be aware that  
4 because you now have that wholesale market, your price  
5 is being determined by the market and not by embedded  
6 cost to serve of other incumbent utilities, which you  
7 could rely on to holding that cost down somewhat. It  
8 will be whatever the market bears. And if that's  
9 true, we have to make sure that there is robust  
10 wholesale market.

11 I am concerned with respect to this that it  
12 appears we're trying to make all the decisions at once  
13 and I would feel more comfortable with a step-by-step  
14 decision. I would like us to be clear on the  
15 methodology we're going to use; find out what that  
16 produces with respect to our margin of reserve; are we  
17 comfortable with that margin of reserve.

18 And then, I guess, there are decisions with  
19 respect to individual companies and how much they're  
20 carrying for their margin of reserve, and then a  
21 recommendation as to should we limit the number of  
22 merchant plants or should we let the market decide,  
23 and what do we do if the market does not produce  
24 enough plants.

25 I would direct your attention to an article

1 I think that was forwarded to all of you about the  
2 reserve margins in California. They're getting  
3 extremely tight, notwithstanding the fact that they  
4 have had retail and wholesale competition.

5 They were relying on power coming from other  
6 states and as other states restructure their market  
7 that power is no longer available and it is driving up  
8 prices.

9 So we have to be concerned that when there  
10 is a demand for that power we have, in fact, fostered  
11 a wholesale market that will be there to provide that  
12 demand at a reasonable rate.

13 I just see it as more a step process. I  
14 don't think I disagree with the notion that we could  
15 do it all at once. And I think we ought to decide how  
16 we want to handle it. You know, I just throw that out  
17 for your discussion on how we should proceed and I --  
18 we could do it all at once, but to that extent, do  
19 you -- do you get the focus you need on each issue?

20 CHAIRMAN GARCIA: You're not disagreeing  
21 with the prehearing officer's ruling. You're simply  
22 saying, do we break this up a little bit.

23 COMMISSIONER CLARK: Because clearly I think  
24 what we wanted -- as I recall that internal affairs,  
25 what we were concerned about was what the issue Joe

1 raised in how they were figuring margin of -- their  
2 reserve margin was not the way we had done it in the  
3 past; is that correct, Joe?

4 MR. JENKINS: Yes. Somewhat, yes. What was  
5 happened, the LOLP calculation has no longer become  
6 the driver and what happened now is they've used a new  
7 methodology which they then arrive at the 15%.

8 COMMISSIONER CLARK: I wanted to have a  
9 decision that this is the methodology we agree with  
10 that we are comfortable with. In fact, gives us the  
11 correct reserve margin, or gives us the correct method  
12 of determining what our reserve margin is.

13 MR. JENKINS: My only concern is, with  
14 looking at the methodology, maybe you're saying the  
15 same thing, and then looking at the result. I'd like  
16 to have some idea of what are the consequences of that  
17 result that we come up.

18 COMMISSIONER CLARK: I agree with that, but  
19 I don't want us to focus on the consequences and not  
20 do a good job making those, what I would call base  
21 decisions first.

22 MR. JENKINS: I think the two are  
23 intertwined.

24 CHAIRMAN GARCIA: All right.

25 COMMISSIONER JOHNSON: That was -- Susan, to

1 your point, and your point is well taken, because as I  
2 looked at this I was trying to determine and I kept  
3 saying to Staff, are we biting off more than we can  
4 chew anyway, and are there too many issues here and  
5 how do -- not getting to procedurally how we handle it  
6 because I think the process that would allow for  
7 discovery and those kind of things need to happen.

8           But with respect to the primary question  
9 being the methodology for determining margin reserve,  
10 and as I discussed it and would continue to discuss it  
11 with Staff, how do you bifurcate out that one issue.

12           The first thing that crops up when you're  
13 looking at methodology, it almost seems intuitive that  
14 you'd also start looking at the sufficiency for  
15 Peninsular Florida. And it was hard to find bite  
16 sizes to take one proceeding after the next. So I  
17 thought that this process, knowing that the parties  
18 would ask for reconsideration, that we could ferret  
19 that out and determine how we proceed; if we needed to  
20 break out these issues, how we would break them out.  
21 But it is hard to find a logical breaking point  
22 because there are some connectivities with respect to  
23 determining the methodology, whether we use LOLP or  
24 the percentage of, and then looking at the  
25 methodology. And it almost seems because of what is

1 happening in other states, too, it's hard for me to  
2 take the sufficiency off the table, making sure we  
3 have the right methodology and what are the -- what's  
4 adequate for Peninsular Florida.

5 COMMISSIONER CLARK: I'm comfortable with  
6 those two questions being answered in the same docket.

7 COMMISSIONER JOHNSON: Okay.

8 COMMISSIONER CLARK: But then I think, now  
9 what. Once we've made those determinations, I do  
10 agree that we need to do the next steps. I don't want  
11 to lose our focus that that is the primary thing I'd  
12 like to see come out of these hearings. I don't  
13 disagree that we need to -- at that point, we need to  
14 go further in the process. We need to say, all right,  
15 how much is appropriate to require those companies  
16 that have the obligation to serve to carry, either  
17 through investment or firm contracts or demand side  
18 management. And I do understand that that level may  
19 change if you have merchant plants and if you don't  
20 have merchant plants.

21 MR. JENKINS: At the March 13th workshop on  
22 merchant -- Commission workshop on merchant plants,  
23 the decision at the close of the workshop was not to  
24 discuss merchant plants in this docket. And so what I  
25 did is I simply put in uncommitted capacity because

1 there's plenty of that around from merchant plants and  
2 from other non -- you know, more traditional sources.

3 That limits -- that had the nice effect of  
4 limiting the docket to reserve margins and reliability  
5 without getting into all these issues of cost  
6 effectiveness and what have you. That was my  
7 interpretation of what you directed me at the  
8 workshop.

9 CHAIRMAN GARCIA: Tell me where this puts  
10 us. I mean, I don't think Julia disagrees.

11 COMMISSIONER JOHNSON: Yeah. And one of the  
12 things, the reason why I wanted to attach and go ahead  
13 and make some preliminary determinations as to the  
14 issues is because I wanted the other Commissioners to  
15 have the opportunity to look at those issues. And to  
16 the extent that they are -- if we're going to use a  
17 bifurcated process, which issues do we tee up first in  
18 the first docket and whether there are those that  
19 would be better addressed in secondary dockets, I  
20 don't have a problem with that. But --

21 CHAIRMAN GARCIA: It makes sense to address  
22 the two issues that Susan was discussing.

23 MR. JENKINS: Commissioner Clark, could you  
24 restate those two issues again?

25 COMMISSIONER CLARK: Here's what I hope we



1 accomplish from the docket. I want to know, what is  
2 the methodology we should use and that you're  
3 comfortable with in determining what margin of reserve  
4 we, in fact, have in Florida.

5 MR. JENKINS: Okay. And the second part?

6 COMMISSIONER CLARK: What margin of  
7 reserve -- so -- and using that methodology, what  
8 margin of reserve do we have in Florida.

9 CHAIRMAN GARCIA: If at all. If at all in  
10 either one of those, right?

11 MR. JENKINS: If at all. And do you include  
12 in that --

13 COMMISSIONER CLARK: Wait a minute. Wait a  
14 minute. If at all --

15 CHAIRMAN GARCIA: You're requiring it from  
16 the companies. In other words --

17 COMMISSIONER CLARK: No. I want some base  
18 line figures.

19 MR. JENKINS: Right.

20 COMMISSIONER CLARK: And then, a decision  
21 from that point. It has to do with, then it sort of  
22 moves to how we structure the wholesale market. How  
23 much are we -- and let me just indicate that I have  
24 been thinking about how do we structure a wholesale  
25 market in Florida because I think we need to be very

1 careful that it is a robust market or we will see our  
2 purchase power and capacity cost -- purchase power and  
3 fuel adjustment prices go up.

4 MR. JENKINS: On your sort of Phase 1, your  
5 two items, do you include in there testing the results  
6 against historical weather and historical events?

7 COMMISSIONER CLARK: I view that as being  
8 part of deciding that the methodology is appropriate.

9 MR. JENKINS: Okay. Good.

10 COMMISSIONER JACOBS: That would include, as  
11 well, the whole issue of undue reliance on DSM?

12 CHAIRMAN GARCIA: No.

13 COMMISSIONER CLARK: I think the next step  
14 is --

15 MR. JENKINS: Wait a minute. When you say  
16 DSM, you mean load management particularly?

17 CHAIRMAN GARCIA: I think, yes, that would  
18 be part --

19 MR. JENKINS: I would have to be in  
20 Commissioner Clark's Phase 1, yes. Not DSM, you know,  
21 for ceiling insulation and things of that.

22 COMMISSIONER CLARK: Part of determining the  
23 reserve margin would be how much margin you have  
24 that's attributable to interruptible and load control.

25 MR. JENKINS: Correct.

1 COMMISSIONER CLARK: Okay.

2 CHAIRMAN GARCIA: Okay.

3 MS. PAUGH: Commissioner Clark, if I could  
4 interject here for a moment. I'm intimately familiar  
5 with the issues in this docket because we've been  
6 through a number of permutations of those issues, and  
7 it is my firm belief that the issues that we have as  
8 stated from the prehearing officer from the July 1st  
9 order, do exactly what you're proposing. There are no  
10 merchant issues per say in this docket. There were,  
11 but there aren't now.

12 So, I really believe that's the --

13 COMMISSIONER CLARK: I didn't bring that  
14 down with me and it's being brought down to me right  
15 now.

16 COMMISSIONER JOHNSON: And that's one of the  
17 things, if -- to go through these issues because I met  
18 with Staff for quite a while trying to focus and keep  
19 them narrowly defined, and I thought the input of the  
20 other Commissioners as to, no, that one is way outside  
21 the scope and it's going to far, what works and what  
22 does not work, would be a useful exercise for all of  
23 us here, and Leslie is right. We kept trying to  
24 whittle them down.

25 CHAIRMAN GARCIA: All right. Well, does

1 that get at the heart of what is before us today,  
2 though?

3 MS. PAUGH: No, it doesn't.

4 CHAIRMAN GARCIA: Let me just say, I  
5 understand Commissioner Clark's position and I  
6 wouldn't mind scheduling a conference for that type of  
7 discussion. I just think it's too broad and  
8 far-reaching to have here under these confines.

9 So it strikes me, and perhaps unfortunately  
10 you and Julia can't sit down and discuss this, but  
11 maybe we could have another conference on this case  
12 and maybe find a way to bifurcate some of the issues.  
13 Although you -- I understand Leslie feels comfortable  
14 that that's what the issues presently before us do. I  
15 take it from Susan's comment that she does not, and  
16 narrowing those down a little bit I don't think hurts  
17 us, but that's not the issue that brings us here  
18 today.

19 MS. PAUGH: No, it's not.

20 CHAIRMAN GARCIA: Okay. So maybe the  
21 prehearing officer can do that and speak with my staff  
22 and we will set a date as early as possible and we  
23 don't necessarily all have to be here, but we could  
24 certainly do it by conference call.

25 COMMISSIONER JOHNSON: For the

1 Commissioners?

2           CHAIRMAN GARCIA: Yes. For the  
3 Commissioners and the parties to discuss some of these  
4 issues that we may not feel comfortable with and it  
5 will make you more comfortable with the prehearing,  
6 and if we need to bifurcate and break off another  
7 hearing on some of these issues after we finish the  
8 preliminary ones, I'm fine with that. But I don't --  
9 if that's all right with you, Susan. I just don't  
10 think we need to get carried on to this because I'm  
11 not ready to discuss --

12           COMMISSIONER JOHNSON: That's what I would  
13 need because candidly the list is probably as whittled  
14 down as I'm going to whittle it without you all's help.  
15 So you all are going to have to tell me what needs to  
16 come out.

17           CHAIRMAN GARCIA: All right. That said  
18 then -- so then, if that's all right, Leslie, you  
19 should speak to Julia on --

20           COMMISSIONER DEASON: Let me -- I'm having a  
21 little difficulty with that. Again, it's an extreme  
22 departure from normal procedure, in that the  
23 Commission lays -- as a body lays out its desire to  
24 proceed with a proceeding, whether it's an  
25 investigation or some other proceeding, and I know

1 there is some legal connotations with calling it an  
2 investigation. But however we are going to proceed,  
3 whatever characteristics the proceeding is going to  
4 take on, generally. The Commission defines the  
5 parameters and then it is up to the prehearing officer  
6 to define the issues within those parameters. And I'm  
7 not so sure that we want to go to the step of having a  
8 full Commission act as prehearing officer in this  
9 proceeding. I think that is a departure that we need  
10 to be very hesitant about making.

11 CHAIRMAN GARCIA: Commissioner, while I  
12 agree with you, I think the prehearing officer is  
13 looking for some guidance on this and I don't know  
14 what other way we can do this except by scheduling  
15 some discussion of the issues. The policy  
16 implications of the decision that would come from this  
17 hearing are quite large and if the prehearing officer  
18 sort of has some hesitancy and wants to address some  
19 other issues or some of the Commissioners want to  
20 narrow some issues, I think that that's why.

21 I certainly am not second-guessing the  
22 prehearing officer. I am simply trying to meet some  
23 of her concerns on this issue. I'm not trying to  
24 change the way we do things, nor am I doing this  
25 because the parties are asking for it. I'm simply

1 doing it because I think the prehearing officer has  
2 asked for some guidance, which these issues are so  
3 far-reaching for the policy issues that this  
4 Commission touches on. I think it's relevant to give  
5 her that guidance. If some --

6 COMMISSIONER JOHNSON: Let me be clear.  
7 It's not that I'm asking for guidance. What I think  
8 we have here is an explanation as to how I feel what  
9 we meant when we said margin reserve methodology, and  
10 these are the issues -- and I thought the industry did  
11 an excellent job of arguing or of stating, well, maybe  
12 that's not what the Commissioners meant when you all  
13 had that internal affairs and you were discussing  
14 methodology.

15 But from one Commissioner's perspective and  
16 looking at the record myself and trying to determine,  
17 well, I think our goal is to determine the reserve  
18 margin methodology, and in order to do that there is  
19 certain things we needed to do. And that's what I  
20 laid out in the prehearing order.

21 And in order to fulfill those components, I  
22 whittled out the issues that I thought necessarily  
23 needed to be addressed. I think this is the  
24 industry's opportunity to say whether I erred or not.  
25 And, in the course of -- if we allow them to have oral

1 argument, in the course of those discussions maybe  
2 some Commissioners might say, well, they agree or they  
3 disagree and this was that opportunity to do so.

4 I feel comfortable with the issues that have  
5 been laid out and with respect to my interpretation of  
6 what we intended to do and how we proceed, but I also  
7 look to others to say, well, that's not, you know,  
8 gone astray or bifurcated and this process is too  
9 large and to help and walk through some of those  
10 procedural matters. So -- and however we get there.

11 CHAIRMAN GARCIA: Susan.

12 COMMISSIONER CLARK: I think it's  
13 appropriate now to proceed with the recommendation.

14 CHAIRMAN GARCIA: Okay.

15 COMMISSIONER DEASON: I move we deny Staff  
16 on Issue 1 and entertain oral argument.

17 COMMISSIONER JOHNSON: Second.

18 COMMISSIONER CLARK: Second.

19 COMMISSIONER JOHNSON: Perhaps we could  
20 limit it, though.

21 CHAIRMAN GARCIA: What?

22 COMMISSIONER JOHNSON: The prehearing went  
23 all day. We might want to put some time limits.

24 CHAIRMAN GARCIA: I'd appreciate that. Give  
25 us some type of time frame.



1           COMMISSIONER DEASON: At the discretion of  
2 the chairman.

3           CHAIRMAN GARCIA: Okay. Thank you. You're  
4 in trouble guys. There is a motion and a second. All  
5 those in favor signify by saying "Aye". Aye.

6           COMMISSIONER DEASON: Aye.

7           COMMISSIONER JOHNSON: Aye.

8           COMMISSIONER CLARK: Aye.

9           COMMISSIONER JACOBS: Aye.

10          MR. MOYLE: This is on the oral argument  
11 request?

12          COMMISSIONER JOHNSON: Yes.

13          CHAIRMAN GARCIA: That is also -- is that  
14 similar to Issue No. 2? We're going to hear the oral  
15 argument and then move to that, to No. 2?

16          COMMISSIONER DEASON: Yes.

17          CHAIRMAN GARCIA: Okay. Gentlemen, I know  
18 you've probably prepared a long time. Five minutes.  
19 I know these are complex issues and you took all day.  
20 We've read through this to some degree and I'm sure  
21 that if there are issues that need to be hashed out  
22 we'll get there. All right.

23          MR. SASSO: We will do our best to keep our  
24 remarks very brief. Shall I begin?

25          CHAIRMAN GARCIA: Mr. Sasso, go right ahead.

1           MR. SASSO: Gary Sasso with Carlton Fields  
2 representing Florida Power Corporation. I've listened.  
3 with a great deal of interest to the discussion so far  
4 because it does point out some of the reasons that  
5 brought us to the table today.

6           Mr. Jenkins mentioned the word consequences  
7 which really puts the spotlight on what we're  
8 concerned about. I believe that there is a  
9 fundamental misunderstanding about what we are  
10 concerned about. Let me be clear that we are not  
11 challenging this Commission's ability to do its job to  
12 conduct an investigation by compelling witnesses,  
13 asking them to testify under oath, or by subpoenaing  
14 records, evidence and other information helpful to the  
15 Commission in conducting an investigation.

16           And a large part of the Staff recommendation  
17 labors to argue that the Commission can proceed using  
18 those types of procedures and we don't quarrel with  
19 that.

20           What we are concerned about is that this  
21 docket, which was begun very distinctly as an  
22 investigation, has been somehow confused with an  
23 adjudication. We asked for a status conference in  
24 order to address that concern. And what we learned in  
25 the course of the staff conference -- status

1 conference concerned us even more because during the  
2 course of that we were advised that, in fact,  
3 decisions may be made against specific utilities based  
4 on whatever comes out of this proceeding on the  
5 evidence in the record. The July 1st order that we  
6 asked the full Commission --

7 COMMISSIONER DEASON: Mr. Sasso, let me  
8 interrupt.

9 MR. SASSO: Yes.

10 COMMISSIONER DEASON: If the Commission were  
11 to go forward and to adopt a methodology for  
12 determining reserve margins, is that something that is  
13 adjudicated or is that something that can be the  
14 result of an investigation?

15 MR. SASSO: Actually, I think that would  
16 probably be something that would have to be done by  
17 rulemaking. And I think that there was a consensus  
18 around that. I don't want to speak for everybody.  
19 But Duke, in its memorandum filed with the Commission,  
20 indicates that if we were actually going to go forward  
21 and adopt industry-wide practices or policies, that  
22 would be done by rulemaking, and I think even  
23 Mr. Elias acknowledged that during the status  
24 conference, and that's certainly our position.

25 And fundamentally what we're suggesting is

1 that the Commission should proceed to conduct an  
2 investigation to inform itself, but that if it is  
3 going to make any decisions, particularly decisions  
4 that would be binding and effect the substantial  
5 interests of any utility, they cannot be done in this  
6 proceeding. If I had the time I would explain.

7 COMMISSIONER DEASON: Again, cannot or  
8 should not?

9 MR. SASSO: Cannot.

10 COMMISSIONER DEASON: Cannot.

11 MR. SASSO: Cannot. Yes, sir. The  
12 Administrative Procedure Act has been amended to  
13 change some of the rules of the game in that regard.  
14 Uniform rules have been adopted, which limit what  
15 agencies can and cannot do in that regard. We've  
16 tried to elaborate on some of that in our papers and  
17 I'd be happy to answer any questions about that. But  
18 in order for an agency to take action that can affect  
19 the substantial interests of any party, a very  
20 particular kind of notice has to be given in advance.  
21 Particular facts have to be alleged. The proposed  
22 agency action has to be announced. The relief  
23 requested has to be identified so that everybody knows  
24 what is at stake; everybody knows what information to  
25 bring to the table. And then the agency is in a

1 position to make an informed adjudication of those  
2 issues.

3           This docket was begun as an investigation.  
4 We have no quarrel with the Commission conducting it,  
5 using testimony, discovery to inform itself as a  
6 preliminary matter, than perhaps to identifying a  
7 proposed rulemaking or taking other agency action in a  
8 later proceeding.

9           COMMISSIONER DEASON: Let me ask another  
10 question. The way you envision this, if we went  
11 forward with our investigation and conducted  
12 discovery, took evidence, what would be the result?  
13 Would an order be issued or how would we not violate  
14 your concerns that we're somehow adjudicating your  
15 rights in an investigation docket?

16           MR. SASSO: Yes, sir. An order would not be  
17 entered and that was sort of the red flag to us,  
18 because some of the procedural documents in this  
19 docket indicated that the matter was being conducted  
20 under 120.57 and certain procedures and rules that  
21 apply to an adjudication under 120.57 would apply,  
22 including a final order at the end of the process.  
23 And we don't believe that that is appropriate to an  
24 investigation. It is appropriate to an adjudication.

25           The purpose of an investigation is for an

1 agency to inform itself by calling the regulated  
2 parties before it to provide information to respond to  
3 questions and that can then be used as a basis to move  
4 into the Phase 2, Phase 3 process that Commissioner  
5 Clark has outlined perhaps, but cannot be used to  
6 enter findings of fact, conclusions of law, adoptions  
7 of policies in this proceeding.

8 COMMISSIONER DEASON: Is the Commission free  
9 to create a structure or some type of a procedural  
10 outline to inform the parties as to what information  
11 is to be produced and solicited?

12 MR. SASSO: Oh, absolutely. Yes. In fact,  
13 what we recommended at the status conference was that  
14 the Commission tell us what issues it wanted to  
15 investigate, set a date by which we would provide  
16 written submissions and have us appear before the  
17 Commission to provide information and respond to  
18 questions. But, absolutely. That's part and parcel  
19 of any investigation.

20 COMMISSIONER DEASON: So it's permissible to  
21 define issues, but it's not permissible then to make  
22 an order addressing the outcome of those issues? The  
23 investigation is basically just a preliminary to  
24 taking that next step; is that correct?

25 MR. SASSO: Exactly, Commissioner Deason.

1 It is an information gathering process. Decisions can  
2 be made either through adjudication after proper  
3 notice of proposed action under the Uniform Rules or  
4 through rulemaking.

5 COMMISSIONER DEASON: Now, from the  
6 practical standpoint, if we do that, we call this an  
7 investigation, identify issues, take testimony,  
8 conduct discovery. We do everything except issue an  
9 order, and we do make the decision that we're going to  
10 take the next step and we're going to adjudicate your  
11 rights, are we going to redo what we've already done,  
12 and how efficient is that?

13 MR. SASSO: Well, actually, Commissioner  
14 Deason, I mean, we would have some concern about that.  
15 We would submit that, yes, before a proposed agency  
16 action could be taken we would have the right to  
17 litigate the issues that would be at stake in  
18 connection with that proposed agency action. The  
19 danger of trying to make decisions in the context of  
20 an investigation, it's far-reaching. We have general  
21 issues on the table. All the parties are appearing in  
22 good faith to try to discuss this openly.

23 But if in the course of the investigation  
24 parties say something or the Commission gets a certain  
25 impression, and out of that general investigatory

1 context, decides to make a specific fact finding, it  
2 will catch us out of the blue as it were. Then if you  
3 then propose agency action based on that fact finding  
4 it really isn't due process at all because you've  
5 already made up your mind on the issue that now is  
6 identified to be in controversy.

7 In fact, one of was the cases that Duke  
8 cites stands for that proposition. It's a Florida  
9 Supreme Court decision where an agency took action to  
10 remove a judge based on certain identified charges.  
11 During the proceeding, the agency concluded that the  
12 judge had given false testimony and removed him for  
13 that reason. The Florida Supreme Court set it aside  
14 saying, you proceeded on certain charges, you can't  
15 make decisions based on other things that just  
16 happened to come up on the record in the case before  
17 you. You have to amend your charges and give notice  
18 that that is what you're doing.

19 And here we really have no notice of any  
20 proposed agency action as such. We've been told that  
21 there may be findings made on certain issues that  
22 emerged somehow in the course of the proceeding or  
23 that certain decisions may be made of a policy nature  
24 based on what happens in the proceeding. But we think  
25 that approach is fraught with danger because until the



1 Commission has focused its attention on particular  
2 proposed action, and therefore, the parties have had  
3 an opportunity to focus their attention on a proposed  
4 remedial action or a proposed agency action or a  
5 proposed rule, no one is really in a position to give  
6 the kind of meaningful attention to that proposed  
7 action that is required.

8 CHAIRMAN GARCIA: Okay. Leslie, do you want  
9 to respond directly to that, because I'm just curious  
10 what your response is to his outlining of what we can  
11 or cannot do.

12 MS. PAUGH: Certainly. I disagree with him  
13 wholeheartedly. This Commission has full authority to  
14 investigate in a formal evidentiary hearing. The  
15 allegation that they don't have notice as to what the  
16 charges is, is unthinkable to me. They have the  
17 issues before them. They know what we're going to be  
18 investigating. I just -- I can't even conceive of  
19 their argument, frankly.

20 And with respect to the argument that we'll  
21 be making decisions on anything of which the parties  
22 don't have notice, Staff is very sensitive to the  
23 requirement of competent substantial evidence. It is  
24 inconceivable that we would lead the Commission down  
25 that kind of path. They know what the issues are.

1 They have notice, and they bring these issues up in  
2 the context of an evidentiary hearing at which they  
3 have full due process rights right now.

4 CHAIRMAN GARCIA: Mr. Sasso, that's -- I  
5 guess it goes to the question that Mr. Deason made.  
6 What kind of efficiency are we talking about here?  
7 You're asking us to what? Hold two proceedings on the  
8 same issue?

9 MR. SASSO: Well, actually what we had  
10 proposed to avoid that was to proceed informally at  
11 first, provide information to the Commission on an  
12 informal basis, responding to specific issues  
13 identified. And then the Commission would be in a  
14 better position to proceed to Phase 2. But, yes,  
15 sometimes due process is inexpedient. But --

16 CHAIRMAN GARCIA: I mean, what you're  
17 arguing is completely different. You're arguing, here  
18 we are in a proceeding. You know what the issues are.  
19 The prehearing officer has taken great pains to listen  
20 to those issues and narrow them down in her mind. And  
21 she's willing to work with you more on that, but there  
22 we are. And you're saying to us that in that  
23 proceeding that's not enough. We have to repeat this  
24 so that you understand what the outcome of this  
25 proceeding will be?

1           MR. SASSO: Well, we know what issues are to  
2 be addressed in the context of an investigation. No  
3 proposed agency action has been announced. No  
4 proposed rule has been announced. So we're going to  
5 show up in a couple of weeks with general testimony to  
6 address in a general manner the issues that have been  
7 identified in the context of an investigation.  
8 Ms. Paugh mentions that we should know what the  
9 charges are. Well, there haven't been any charges  
10 made.

11           CHAIRMAN GARCIA: So what you're asking is  
12 that Staff prejudge the matter, put out it's decision  
13 before we begin the proceedings so that then we can  
14 either prove up our decision or not?

15           MR. SASSO: No. We're not asking that Staff  
16 prejudge the issues. We're perfectly prepared to go  
17 forward to provide information in the context of an  
18 investigation. It seems to me that Chairman Garcia  
19 may be correct or Commissioner Deason may be correct  
20 in suggesting that there may be some duplication of  
21 effort involved. But that's very common and, in fact,  
22 it's inherent in the way agencies proceed. First  
23 there may be an investigation, but then that's  
24 followed by some formal decision making process.  
25 That's very, very common. Agencies generally

1 proceed --

2 CHAIRMAN GARCIA: Let's me just understand  
3 how we would fit it in to where we are. We have this  
4 investigation docket. The Staff proposes some final  
5 order as PAA and then we go to hearing on that order,  
6 on that position.

7 MR. SASSO: I mean, part of the problem here  
8 is, I think, identified by Commission Clark at the  
9 very inception. This started as a focused docket.  
10 The Commission directed the Staff to open a docket to  
11 consider the methodology used to determine reserve  
12 margin. And now, we have 27 -- some 27 issues. I  
13 think that may be the number.

14 COMMISSIONER CLARK: 19.

15 MR. SASSO: I'm sorry. 19. We started with  
16 27. At some point I guess Commissioner Johnson  
17 narrowed it to 19. But we have a host of issues. And  
18 included in, I guess, this collection of issues,  
19 according to the prehearing officer's order, are  
20 issues about what may be the appropriate level of  
21 reserve margins, the remedial action, if any, which  
22 must be taken to assure adequate reserve margins.

23 We are going far beyond the original concept  
24 of this docket. We're going from Phase 1 to Phase 2  
25 to Phase 3 that Commissioner Clark outlined. We're

1 going from identifying what methodology that the  
2 utilities are using to determine reserve margins, to  
3 discussing the appropriate level of reserve margins  
4 for individual utilities in Peninsular Florida, to  
5 discussing appropriate remedial action for whatever  
6 may come of this docket with respect to individual  
7 utilities in Peninsular Florida, and we're biting off  
8 the whole nine yards. And to know what any individual  
9 utility may face in this proceeding is very difficult.  
10 It's a very, very different kind of proceeding than an  
11 adjudication might be or a proposed rule.

12 CHAIRMAN GARCIA: Thank you.

13 COMMISSIONER CLARK: Let me ask a question.  
14 Have you gone through the issues as outlined and  
15 specifically stated that ones that you don't think are  
16 appropriate for this proceeding as opposed to the ones  
17 that are?

18 Just looking through them, it strikes me  
19 that the first two are, you know, what is the  
20 appropriate methodology for planning purposes and what  
21 is the appropriate methodology for evaluating  
22 individual utilities; calculating and then evaluating  
23 the reserve margins.

24 And then it strikes me that there are  
25 some -- some of the subsequent issues go to answering

1 that question, and they're just simply stated as  
2 issues. For instance, with respect to the question or  
3 the issue on the Reliability Coordinating Council's  
4 planning criteria, I think the issue there is, is it  
5 the appropriate methodology. And the other issues are  
6 part of that, which you would have to answer the  
7 question, have they been appropriately tested and how  
8 do others do it.

9 I think those are questions that you look at  
10 when you're trying to settle on the methodology. I  
11 can see where you might take issue with the notion of  
12 No. 10; do the following utilities appropriately  
13 account for historical winter and summer temperatures  
14 for purposes of establishing present -- planning  
15 criteria.

16 I can see where you would say, well,  
17 that's -- we need to know that you think that they're  
18 inappropriate and proceed on an individual utility  
19 basis. Maybe what we're really looking for is, how do  
20 you account for it. We want to know how you account  
21 for it and get some comfort that across the board  
22 everybody's doing it the same so we can factor that in  
23 to whether or not we think the methodology is correct.

24 But I'd be curious as to what specific  
25 issues you think go outside determining the

1 appropriate methodology and what our current reserves  
2 are.

3 MR. SASSO: Well, we haven't looked at the  
4 issues with that in mind because whether or not we  
5 have a concern with the issues is a function of what  
6 we're going to do in this docket. If we're doing an  
7 investigation and the Commission is interested in  
8 receiving information on all of these issues to inform  
9 itself, we're happy to participate in that and provide  
10 information on all of these issues.

11 COMMISSIONER CLARK: You don't think we can  
12 make a decision as to what the appropriate methodology  
13 for determining the margin of reserve existing in  
14 Florida is?

15 MR. SASSO: You mean to adopt a rule?

16 COMMISSIONER CLARK: Well, I will concede  
17 the point if we want to do that. At some point we  
18 have to go to rulemaking.

19 MR. SASSO: And rulemaking is a very well  
20 defined process under the statute and it doesn't begin  
21 with an investigation is our point.

22 COMMISSIONER CLARK: I think it can.

23 MR. SASSO: Well, it can as a precursor to  
24 notice of development of a proposed rule, but then you  
25 can't prejudge the issue going into the rulemaking

1 process; you can't have all ready made the decision.

2 It has to be a fair --

3 COMMISSIONER CLARK: I think we can.

4 CHAIRMAN GARCIA: Yes.

5 COMMISSIONER CLARK: We can put out a  
6 proposed rule that says, this is what we think, and  
7 then afford you a hearing to yet again tell us why you  
8 don't think that.

9 MR. SASSO: Fair enough. Yes. We then have  
10 to roll into a full blown rulemaking, yes. But to say  
11 that you're essentially going to make the decision  
12 after the investigation and that the rulemaking  
13 process then is of no moments, or you're concerned  
14 about it because it's a duplication of effort, I think  
15 is inconsistent with all respect with what we're  
16 required to do under the statute in connection with  
17 the adoption of a rule.

18 CHAIRMAN GARCIA: I guess that begs the  
19 question, isn't that where we end up? Don't we end up  
20 at a rule hearing if we go down this road?

21 MS. PAUGH: Quite possibly, yes.

22 COMMISSIONER JOHNSON: At the prehearing  
23 that was one of the elements that I thought all of the  
24 parties agreed on; even if we go through this process,  
25 the next step will most likely be a proposed rule.



1 And then to the extent -- because I'm very sympathetic  
2 to the arguments as it relates to specific utilities,  
3 that their substantial interests are protected in such  
4 a way that they're given due process.

5           When we say this is exactly what you're  
6 level for Florida Power Corp. will be, that we  
7 probably -- we would end up going through a -- having  
8 a proposed rule and allowing you the opportunity to  
9 respond with respect to how these things impact your  
10 specific utility when we have more than an incipient  
11 policy when we've decided this is the policy and this  
12 is the rule that will be applied to you.

13           I thought the parties on all sides agreed  
14 that there would be another step. It was just how we  
15 get there and I was having a hard time following the  
16 arguments of the IOUs that we couldn't get there  
17 through a full blown evidentiary process.

18           MR. SASSO: No, I think there was a  
19 misunderstanding, and it continues today. If we were  
20 to read Duke's memo we can see that Duke argues that  
21 action can be taken against a specific utility.  
22 Mr. Elias, during the status conference, gave the  
23 opinion that at the conclusion of this investigation  
24 the Commission could take action against a specific  
25 utility. We will have had our due process.

1           Now, we weren't on notice going in that we  
2 were on trial for anything, but on the basis of some  
3 remarks that may be made in the course of the  
4 investigation, we will have had our due process and he  
5 suggested specific findings could be made against  
6 individual utilities. He said he would draw the line  
7 between industry-wide action and specific utility  
8 focused action. If we are --

9           CHAIRMAN GARCIA: I'm sorry. Action as to  
10 what?

11           MR. SASSO: Well, the illustration that he  
12 gave was, for example, on the basis of testimony in  
13 this investigation, the Commission could find that a  
14 particular utility had failed to maintain adequate  
15 reserves and needed to take some specific remedial  
16 action to address that. And we don't believe that  
17 that would be appropriate.

18           COMMISSIONER CLARK: Ms. Paugh, let me ask  
19 you that. On Item 12 -- Issue 12, it's what  
20 percentage is currently planned for each of the  
21 following utilities and is it sufficient. Do you  
22 envision us saying, for instance, the City of  
23 Tallahassee is not carrying sufficient reserves and we  
24 order them to take appropriate action to carry the  
25 sufficient reserves? Would that be a final order?

1 MS. PAUGH: That --

2 COMMISSIONER CLARK: Or would we do proposed.  
3 agency action? And I think that may be the focus of  
4 their point.

5 MS. PAUGH: We have the jurisdiction to  
6 order utilities to build generation if we find that  
7 there is a reason to do that, if there is competent  
8 substantial evidence --

9 CHAIRMAN GARCIA: All right.

10 MS. PAUGH: -- in the record indicating that  
11 that is the case, yes, we could make that order. It  
12 is not envisioned that the purpose of this docket is  
13 truly the methodology. We may find out once we get  
14 into the discovery -- which the parties say we're not  
15 allowed to do by the way -- we may find out that they  
16 are bigger problems than we thought. We have a  
17 statutory jurisdiction both to do the investigation,  
18 do it as a formal hearing and order construction if  
19 that's appropriate and if we have the evidence.

20 COMMISSIONER CLARK: But Staff envisions  
21 doing that as part of Issue 12. You do envision  
22 finding, for instance, that the City of Tallahassee is  
23 not carrying adequate reserves and ordering them to  
24 take action?

25 MS. PAUGH: If there is competent

1 substantial evidence to that effect, yes, that could  
2 happen.

3 COMMISSIONER CLARK: Okay.

4 CHAIRMAN GARCIA: And that does not require  
5 a rule to do that?

6 MS. PAUGH: No.

7 MR. SASSO: May I respond briefly?

8 CHAIRMAN GARCIA: Yes.

9 MR. SASSO: With all respect, I think what  
10 Ms. Paugh has just said is that at the conclusion of  
11 this investigation the Commission could order Florida  
12 Power Corporation to build a plant based on the  
13 record. We would vehemently disagree.

14 That is exactly the kind of action that has  
15 to be proceeded by a notice of proposed agency action,  
16 and then we have to have an opportunity for a hearing  
17 on those issues without findings already being made  
18 against us, knowing what is at stake, knowing  
19 specifically what the concern of the Commission is,  
20 and then having an opportunity to defend. We roll  
21 into a general investigation, where we're talking  
22 about the plethora of issues on this list. We cannot,  
23 at the conclusion of that, be ordered to build a  
24 plant. And that is our concern and evidently the  
25 confusion still exists.

1           CHAIRMAN GARCIA:  You're ordered to build a  
2 plant, let's use that as an example.  If we decided  
3 that and what we would require is to issue a PAA --

4           MR. SASSO:  Yes.

5           CHAIRMAN GARCIA:  -- specifically on that  
6 issue.

7           MR. SASSO:  Yes, sir.

8           CHAIRMAN GARCIA:  Does the City of  
9 Tallahassee need to build a plant and then we have a  
10 hearing?

11          MR. SASSO:  Exactly.  Yes.

12          CHAIRMAN GARCIA:  Even though we may have  
13 heard -- I understand because the specifics of the  
14 issue that you're interested in is way too broad for  
15 it to be addressed in this docket.

16          MR. SASSO:  Absolutely.  I mean --

17          CHAIRMAN GARCIA:  Let me ask you something.  
18 It harkens when we get into these goals dockets and  
19 things like that -- which you're all over the place.  
20 We're going for days, you file rooms full of stuff and  
21 then we make a decision at the end, which you live  
22 with, which everyone sort of lives with.  Isn't that  
23 the same process?

24          MR. SASSO:  Well, I can't speak to that  
25 based on my personal knowledge.  I'd have to know --

1           CHAIRMAN GARCIA: All right. I understand.  
2 You make -- I understand the point. You did pretty  
3 good. You got us curious and you turned 5 into 25.  
4 Mr. Guyton.

5           MR. GUYTON: Commissioners, my name is  
6 Charles Guyton. I represent Florida Power & Light  
7 Company. We are in accord with everything that  
8 Mr. Sasso has told you this morning. I want to  
9 suggest to you, and I think you have three reasonable  
10 options to proceed. But none of those options are the  
11 option that is set forth in the procedural order and  
12 that is to conduct an investigation as a 120.57  
13 proceeding where you would determine substantial  
14 interests.

15           The reason that's not available to you is  
16 that both the Administrative Procedure Act, by its  
17 specific terms, and the Uniform Rules, by its specific  
18 terms, say that you are not to conduct an  
19 investigation pursuant to 120.57.

20           Section 120.57(5) states, this section --  
21 referring to Section 120.57 -- does not apply to  
22 action investigations preliminary to agency action.

23           COMMISSIONER DEASON: Mr. Guyton, let me  
24 interrupt. By us proceeding and labeling this an  
25 investigation, are you saying that that limits what we

1 can do and if we had called it something else to begin  
2 with, that that would have been okay?

3 MR. GUYTON: No, Commissioner Deason, I'm  
4 not.

5 COMMISSIONER DEASON: You need to clarify  
6 the distinction for me.

7 MR. GUYTON: I'm saying that you decided to  
8 conduct this as an investigation, not to conduct this  
9 as a proceeding to determine substantial interest.  
10 So, you're not, under the APA, allowed to conduct a  
11 proceeding to determine substantial interest under  
12 120.57(5). And under the --

13 COMMISSIONER DEASON: That's because we  
14 chose to label this an investigation.

15 MR. GUYTON: No. If you had chosen instead  
16 an alternative course of conduct, what were your other  
17 two alternatives? If you're going to make policy  
18 determinations, if you're going to establish rules of  
19 general applicability, then the appropriate procedural  
20 posture would be to initiate a rulemaking. So if  
21 you're going to come up with a methodology that you're  
22 going to prescribe by rule, then you ought to proceed  
23 pursuant to rulemaking.

24 If you didn't feel like you needed to move  
25 to policy but you wanted to determine a party's

1 substantial interest, and you didn't need an  
2 investigation to determine whether you needed to take  
3 that action, you were ready to go right then, then you  
4 should have proposed agency action. You wouldn't have  
5 created a proceeding and said, "Here are 19 issues.  
6 We are going to make you a party. Create 19 issues  
7 and tell you -- not tell you what the proposed agency  
8 action is on the front end."

9           Instead you would have -- as the APA  
10 envisioned, you would have taken a proposed agency  
11 action, and then if a party who had substantial  
12 interest was adversely effected, they could request a  
13 hearing and then you would be joined on the very  
14 specific action that you propose. We'd know what the  
15 action was, how it effected our substantial interest  
16 and what your rationale for it was. That's what the  
17 APA envisioned.

18           COMMISSIONER DEASON: Let me ask you. So  
19 you're saying that the procedure that has been  
20 proposed at this point is deficient because then it's  
21 an investigation and we cannot make a decision  
22 involving a party's substantial interest. But if we  
23 had, we could have not gone to the investigation, we  
24 could have issued a PAA that said, Florida  
25 Power & Light, build a 500 megawatt unit with this



1 technology located at this place; issue that as PAA,  
2 and that would be fine.

3 MR. GUYTON: That would be fine and we would  
4 have an opportunity at that point to either accept  
5 that as the mandate or to request a hearing. And  
6 that's the way -- if you're going to determine  
7 substantial interest, that's the way the APA envisions  
8 it will work. But that's not the procedure that we've  
9 been left with with the procedural orders here.

10 The procedure we've been left with is that  
11 you are going to not have the proposed agency action  
12 first, you're going to have a hearing first. You're  
13 going to have a hearing and you're going to identify  
14 issues, but you're not going to identify the potential  
15 proposed agency action or the rationale for it. So  
16 how does that prejudice me?

17 Well, the way it primarily prejudices my  
18 client is that that leaves me in a position where I  
19 don't know what -- of the myriad agency actions that  
20 you potentially could take with all of Peninsular  
21 Florida and all the individual utilities involved, I  
22 don't know what action you might take. So what I have  
23 to do, I have to try to conceive of every potential  
24 action that you might take.

25 COMMISSIONER DEASON: Well, let me interrupt

1 you again. If we had gone the PAA route and we had  
2 issued that PAA indicating a 500 megawatt unit located  
3 at "X" using such and such technology, and we -- and  
4 you protested that and we went through a lengthy  
5 proceeding and we took evidence which demonstrated  
6 that, "no, that's not the correct action. It's a 250  
7 megawatt plant located at "Y" which is the best  
8 thing." Are we free to order that or do we have to  
9 issue another PAA saying, "Well, we were wrong on the  
10 500 but now we're going to order you to do 200," and  
11 then take all the evidence again, and put you on  
12 notice that it's not a 500 megawatt, it's a 250  
13 megawatt plant located somewhere else?

14 I mean, I'm trying to look at the practical  
15 standpoint in the work load of this Commission and how  
16 we protect your rights and still get our job done in  
17 an effective and efficient manner.

18 MR. GUYTON: Commissioner Deason, I'm  
19 completely sympathetic with that and I understand  
20 that. I, on the other hand, have a perspective of,  
21 I'm simply trying to find out how my client's interest  
22 may be adversely affected and I need to have some  
23 appraisal when this hearing starts.

24 CHAIRMAN GARCIA: So you would agree with  
25 his point? In other words, if it was about building

1 new generation, that is specific enough and that we  
2 could effect your -- you know, if we were talking  
3 about you needing to build new generation we don't  
4 have to say, 500 megawatt plant located in Miami  
5 Beach, and you're going to build it on this day.

6 But if we were speaking specifically to  
7 that -- to your interest about new generation,  
8 because, Mr. Deason -- Commission Deason, which I  
9 think missed his calling, he should have been an  
10 attorney, is absolutely right. I mean, if you specify  
11 it that much, any deviation we make gets us back down  
12 to zero and we've got to start the process all over.

13 MR. GUYTON: I agree with your concept, but  
14 that's not where we find ourselves in this position.  
15 In this proceeding right now, we are far afield from  
16 that; that type of a scenario. The scenario we have  
17 here is that the Commission has said, we were going to  
18 conduct an investigation but now we're going to  
19 conduct an investigation to determine substantial  
20 interest. Something that you're not suppose to do  
21 under the APA, but set that aside.

22 What's the appropriate way to determine  
23 substantial interest? It's for you to take a proposed  
24 action and let us address the specifics of that  
25 proposed action. It's not --

1                   CHAIRMAN GARCIA: And you would be  
2 comfortable if Staff does this investigation, which I  
3 think we all understand it's very broad, and I think  
4 even the prehearing officer agrees with that. But we  
5 get to some proposed agency action on the -- at the  
6 back end. We say, "well, from now on there's a 15%  
7 margin reserve required of all the IOUs in Florida,  
8 two, three or four others and those would all be  
9 proposed agency actions." And then from that point  
10 then you could then take us to hearing on some  
11 specific findings and others just let them be,  
12 correct?

13                   MR. GUYTON: Commissioner Garcia, I think so  
14 with one correction.

15                   CHAIRMAN GARCIA: Okay.

16                   MR. GUYTON: It may be that we don't go to  
17 PAA on it. Some of it you may go to rulemaking on  
18 because you may be establishing policy.

19                   CHAIRMAN GARCIA: Correct. You're  
20 absolutely right. And in that case, we would be  
21 establishing -- for example, if that is what's  
22 required of setting up a 15% margin of reserve, well,  
23 then Staff says, this is the rule that we envision and  
24 we start the process, but we don't have to state the  
25 specific rule. I don't want to end up where

1 Commissioner Deason -- and he is quite right. That we  
2 would simply state a rule and that rule would evolve  
3 through the hearing, but you'd know what we were  
4 talking about and what we were heading to in the final  
5 product, correct?

6 MR. GUYTON: Then you would have a  
7 rulemaking proceeding that --

8 CHAIRMAN GARCIA: Right.

9 MR. GUYTON: -- you would --

10 CHAIRMAN GARCIA: Correct.

11 MR. GUYTON: -- adopt the rule and you would  
12 have the procedures attended to a rulemaking  
13 proceeding to address and refine it, if it needs to be  
14 refined further.

15 CHAIRMAN GARCIA: Correct.

16 MR. GUYTON: But the dilemma that we're  
17 faced with here, and I've repeated, it's just the  
18 opposite of what is envisioned by the APA. Instead of  
19 a proposed agency action and a hearing with specifics,  
20 you have, let's have a hearing, and we may or may not  
21 issue a proposed -- or take agency action.

22 CHAIRMAN GARCIA: You don't disagree with  
23 the fact that if we are not going to end up where you  
24 want us to, you do agree that we do have the right to  
25 have this hearing, we have a right to investigate this

1 information and require it? We just do not have a  
2 right to effect your substantial interest because you  
3 don't know where this hearing is going to end up. But  
4 we have a right to find out all this information that  
5 may take us somewhere in the end.

6 MR. GUYTON: We do not contest your ability  
7 to investigate here.

8 CHAIRMAN GARCIA: Great.

9 MR. GUYTON: What we contest is the fashion  
10 in which you're attempting to conduct the  
11 investigation, and it looks like you're trying to  
12 create a hearing with a record that may allow you to  
13 act in some unspecified -- unspecified action up front  
14 which we can't protect against in the course of a  
15 hearing. It's just the opposite of what the APA  
16 envisioned.

17 COMMISSIONER CLARK: I have a question.

18 COMMISSIONER JOHNSON: You know, and I'm  
19 sympathetic to what you all are saying and, you know,  
20 I thought we tried to address those issues in the  
21 order, and to the extent that we have a full blown  
22 evidentiary proceeding and issues are resolved in the  
23 manner of a final order and you're substantial rights  
24 have been protected, to the extent that you haven't  
25 had the opportunity and the process to fully litigate

1 those things, that'll end up being a proposed agency  
2 action in my mind. I was agreeing with what Mr. Sasso  
3 was saying.

4 In my mind there will be proposed agency  
5 actions issued, to the extent that there is  
6 specificity required by each of these utilities like  
7 stated in Issue 10 or 12, or some further rulemaking  
8 that will need to occur. Else you'll have the direct  
9 appeal. You'll be the ones able to say, wait a  
10 minute, we had no due process. We didn't even know  
11 this was an issue, there's nothing in the record upon  
12 which to base this particular decision. We had no  
13 idea we were not on notice.

14 You will have all of those procedural  
15 protections that are guaranteed to you by law. And I  
16 just -- and maybe it's my faith in this process and in  
17 the Commission that provides me with some comfort that  
18 when we get to the end of this proceeding to the  
19 extent that there are proposed actions that will  
20 impact Florida Power & Light, Florida Power Corp. in a  
21 detrimental way and they've not had the opportunity to  
22 fully litigate that, that we would have it proposed  
23 and continue on, and maybe you just don't have the  
24 same comfort that I have.

25 But I think we've tried to lay out a process

1 here that would allow us to fully educate ourselves.  
2 That would allow us to fully debate, explore and  
3 provide the discovery on all of the issues necessary,  
4 and for us to make some decisions and that there be no  
5 surprises at the end that we're telling you to build  
6 three or four plants. But that if we were to propose  
7 something like that, it would be done through a  
8 proposed agency action.

9 COMMISSIONER CLARK: Well, you know, let me  
10 ask Staff something with respect to -- let me ask you  
11 with respect to Issue 12 particularly. Suppose we  
12 determine through this proceeding that the way to  
13 determine the percent margin of reserve is just, for  
14 example, the methodology currently being used by the  
15 FRCC. And then we would say, well, we think that's  
16 the way it should be done, and based on that, the  
17 percent reserve margin currently being planned for  
18 these entities is "X" and it's not sufficient. And I  
19 think what you're saying is we -- as a result of this,  
20 we could issue a final order that says it's not  
21 sufficient, you need to take action to address that.

22 MS. PAUGH: That's correct, Commissioner.

23 COMMISSIONER CLARK: All right. Let me stop  
24 you right there.

25 MS. PAUGH: Okay.



1                   COMMISSIONER CLARK: Once we do that, do we  
2 run into any problems that we have applied the policy  
3 without putting it into a rule?

4                   MS. PAUGH: Quite possibly. When I said  
5 that we have the option of ordering construction for  
6 the City of Tallahassee, that is true. That's our  
7 statutory ability. However, the way the issues are  
8 framed, it is highly unlikely that this proceeding  
9 will get to that point because it's not looking at  
10 that.

11                   COMMISSIONER CLARK: Well, I want to address  
12 the specific question, if we did do that, would we be  
13 vulnerable on appeal that we have applied a policy  
14 that we have not --

15                   MS. PAUGH: Yes. That is quite possible and  
16 if we do establish --

17                   COMMISSIONER CLARK: Not possible. Do you  
18 agree that we --

19                   MS. PAUGH: We will be vulnerable, yes. And  
20 we are very sensitive to nonrule policy, and what in  
21 all likelihood --

22                   COMMISSIONER CLARK: What happens if we do  
23 that? What happens if we apply nonrule policy? What  
24 latitude does the court have --

25                   MS. PAUGH: Staff counsel advises that you

1 don't. We would go to rulemaking, yes.

2 COMMISSIONER CLARK: Okay. All right.

3 CHAIRMAN GARCIA: Okay.

4 COMMISSIONER CLARK: So I think there may  
5 have been a misinterpretation here as to what I think  
6 the Staff is saying with respect to those kinds of  
7 issues; that we're going to have to go to rulemaking  
8 and then we're going to have to go enforce those  
9 rules. But I think, and I would urge the parties to  
10 kind of look at the issues specifically and say, which  
11 ones don't relate to determining the appropriate  
12 methodology and then assessing our current status  
13 against that methodology.

14 CHAIRMAN GARCIA: Okay. Mr. Beasley.

15 MR. BEASLEY: Just say, Tampa Electric  
16 shares the concerns that have been talked about by  
17 Mr. Sasso and Mr. Guyton and we support their  
18 position.

19 CHAIRMAN GARCIA: Thank you for your  
20 brevity. LEAF.

21 MS. SWIM: Deb Swim for LEAF. I'm neutral  
22 on this. I just want to make sure that the  
23 opportunity to present our position is included in the  
24 issues.

25 CHAIRMAN GARCIA: Okay. Thank you. Scheff.

1                   MR. SCHEFFEL WRIGHT: Thank you,  
2 Mr. Chairman. Robert Scheffel Wright, law firm of  
3 Landers and Parsons, appearing on behalf of Duke  
4 Energy New Smyrna Beach Power Company, an electric  
5 utility in Florida under the Commission's order  
6 granting the need determination, and Duke Energy North  
7 America, an intervenor in this docket pursuant to  
8 order.

9                   Commissioners, I will be as brief as I can.  
10 I want to address some practical aspects of this  
11 proceeding. These are important --

12                  CHAIRMAN GARCIA: You've got five minutes.  
13 Everyone else got five.

14                  MR. SCHEFFEL WRIGHT: All right. I'm going  
15 to be quick, boss.

16                  CHAIRMAN GARCIA: We asked for longer. But  
17 you got five.

18                  MR. SCHEFFEL WRIGHT: I am not asking for  
19 longer. I will be done in five minute.

20                  These are important issues. To my personal  
21 certain knowledge issues relating to the adequacy of  
22 reserve margins in this state have been on the table  
23 and under active consideration by your staff since at  
24 least August of 1997, nearly two years ago. These  
25 issues should be addressed. They should be addressed

1 sooner, rather than later.

2 I don't think you need to take 18 months to  
3 address them when you can probably do it in something  
4 more like eight from now or what will turn out to have  
5 been 13 or 14 from the time you initiated the formal  
6 docket back in December of 1998.

7 Extra delay associated with addressing these  
8 issues imposes extra risk on the reliability of  
9 service to the customers, the ratepayers and the  
10 people of the state of Florida.

11 We would support inclusion of all the issues  
12 identified and included by Commissioner Johnson in  
13 Order 99-1274.

14 Now having said that, you, the  
15 Commissioners, can do what you see fit here. You can  
16 do something less formal. You can do it step wise, or  
17 you can proceed to, in my opinion, to an evidentiary  
18 proceeding on -- and make findings and issue an order  
19 on the issues set forth in Commissioner Johnson's  
20 Procedural Order 99 --

21 CHAIRMAN GARCIA: Mr. Scheffel Wright, you  
22 have to be a little bit more specific than where we  
23 are on the record to decide issues to that degree.

24 MR. SCHEFFEL WRIGHT: Well, Chairman Garcia,  
25 I --

1           CHAIRMAN GARCIA: For example, if we went to  
2 this hearing and we ended up, when we finished this  
3 hearing and we ordered no more merchant plants should  
4 be built in Florida, I think you'd have a problem with  
5 that.

6           MR. SCHEFFEL WRIGHT: I would have a problem  
7 with that just as I think Florida Power Corporation or  
8 Florida Power & Light Company would have a problem  
9 with a final order coming out of this proceeding based  
10 on these issues. I'm trying to follow Commissioner  
11 Clark's thinking, I believe here, and that is, look at  
12 the issues you all. We'd have a problem, just as  
13 they'd have a problem, if we came out of this  
14 proceeding based on these issues saying, you all go  
15 build power plants because I don't see an issue in  
16 here that says, should any utility --

17           CHAIRMAN GARCIA: Certainly not without  
18 letting you get a crack at them, right?

19           MR. SCHEFFEL WRIGHT: Thank you very much.  
20 Yes, sir. I don't see an issue in this case that  
21 says, should any utility, should Florida Corporation  
22 or should Florida Power & Light or anybody else be  
23 fined for having an insufficient reserve margin if it  
24 is determined that they do. I don't see an issue in  
25 here that says, should Florida Power Corporation or

1 Florida Power & Light or Tampa Electric Company or the  
2 Utilities Commission of New Smyrna Beach or anybody  
3 else be required to install facilities.

4 The issues here are predominantly  
5 methodological. There are some that address findings,  
6 factual determinations to be made and some that  
7 address the possibility of action. And the ones that  
8 address the possibility of action go to, should the  
9 Commission adopt a reserve margin standard.

10 CHAIRMAN GARCIA: Right.

11 MR. SCHEFFEL WRIGHT: That's what's really  
12 on the table here. There's nothing in here about  
13 should the Commission order anybody to install  
14 facilities.

15 COMMISSIONER DEASON: Mr. Wright --

16 MR. SCHEFFEL WRIGHT: Yes, sir.

17 COMMISSIONER DEASON: -- I think you're  
18 addressing Issue 15. Is that -- you just gave that  
19 example.

20 MR. SCHEFFEL WRIGHT: Well, 14 and 15 and  
21 16, actually.

22 COMMISSIONER DEASON: Look at Issue 15.

23 MR. SCHEFFEL WRIGHT: Yes, sir.

24 COMMISSIONER DEASON: Should the Commission  
25 adopt a reserve margin standard for Peninsular

1 Florida.

2 MR. SCHEFFEL WRIGHT: Yes, sir.

3 COMMISSIONER DEASON: And then the next part  
4 of that issue is, if so, what should be the  
5 appropriate reserve margin criteria. Is that --  
6 should that be done in a rulemaking proceeding?

7 MR. SCHEFFEL WRIGHT: I am not --

8 COMMISSIONER DEASON: Do you know what the  
9 appropriate reserve margin criteria is -- are?

10 MR. SCHEFFEL WRIGHT: I am not persuaded  
11 that that -- that may need to be done in a rule  
12 proceeding. It may not. There's --

13 CHAIRMAN GARCIA: But, would you agree that  
14 we need a separate proceeding for it? Let's assume --

15 MR. SCHEFFEL WRIGHT: No.

16 CHAIRMAN GARCIA: No. This would be --

17 MR. SCHEFFEL WRIGHT: Not to make a  
18 determination here. Now, if you want to have a rule  
19 that says we are going to evaluate 10 year site plans,  
20 or we're going to require such and such and such and  
21 such in terms of reserves, then, yes, you need to have  
22 a rule.

23 COMMISSIONER CLARK: To enforce it, to say  
24 with respect if we wanted to take actions specific to  
25 a utility mentioned in 12 that their reserve margin is

1 not sufficient, we should have -- we should have in  
2 the rule what we consider a sufficient reserve margin.

3 MR. SCHEFFEL WRIGHT: Or the criteria by  
4 which sufficient reserve margins can be determined.

5 COMMISSIONER CLARK: Can be determined.

6 MR. SCHEFFEL WRIGHT: And that may well be  
7 one outcome of this docket is that you may make some  
8 findings that reserve margins are insufficient and  
9 that the criteria to be included ought to be such and  
10 such and you may proceed to rulemaking.

11 You may make factual findings that -- that  
12 are so -- that indicate that the need for additional  
13 capacity is so urgent that you may then turn around  
14 and under your Grid Bill authority convene a  
15 proceeding as required by law to use the language of  
16 the statute to determine what, if anything, should be  
17 done about that. That would be the next step.

18 CHAIRMAN GARCIA: That would be a separate  
19 next step.

20 MR. SCHEFFEL WRIGHT: Yep. The assertion by  
21 my colleagues from the investor-owned utilities that  
22 no proposed agency action has been announced, I think,  
23 is just wrong. I think Commissioner Johnson laid out  
24 exactly what actions you all are considering. You're  
25 considering making some decisions, taking evidence,



1 making some decisions on methodology, and making some  
2 decisions on whether you should adopt a reserve margin  
3 standard.

4           These issues are on the table. Building new  
5 power plants isn't. Fining them is not on the table.  
6 You know, in the context of the inquiry concerning  
7 Davey case that we cite, I think it would be wrong for  
8 you all to go into this case with these issues and  
9 then come out and say, "oh, by the way, FPC, we're  
10 going to fine you \$5,000 a day retroactive December  
11 16, 1998." That would be a no, no in my opinion.

12           CHAIRMAN GARCIA: I think you're probably  
13 right. That legal standard is probably right; a no,  
14 no.

15           MR. SCHEFFEL WRIGHT: And on the simple  
16 legal issues, you got adequate notice and due process  
17 and I submit to you that all the guts issues that  
18 wound up in Commissioner Johnson's order of July 1st  
19 were in the Staff's issues list on May 28th, and  
20 your -- and that, I believe, is sufficient notice for  
21 a hearing that even then was going to be held on  
22 September 28th and 29th and now is going to be held on  
23 November 2nd and 3rd and --

24           COMMISSIONER CLARK: When is it?

25           MR. SCHEFFEL WRIGHT: Now it's November 2

1 and 3, Commissioner Clark. And your procedures do,  
2 indeed, provide for due process.

3 CHAIRMAN GARCIA: Let me tell you. I don't  
4 think you're too far from where the parties are. In  
5 fact, I don't even think that the prehearing officer  
6 is very far from where we ended up. Maybe I'm wrong.  
7 Mr. Moyle.

8 MR. MOYLE: Thank you. Jon Moyle on behalf  
9 of PG&E Generating. I would just remind every one I  
10 think that the issue before us is a motion for  
11 reconsideration. And that the law, as articulated by  
12 the Supreme Court, does not permit a reargument of  
13 what was argued before the prehearing officer and we  
14 have a transcript. I believe a lot of this is simply  
15 a rehashing of what has all ready been argued and has  
16 been decided, in my view, correctly.

17 To me, it's inherent within your power to be  
18 able to find out whether the state has enough  
19 electricity on a going forward basis. You made that  
20 decision when you opened the docket to look at that.  
21 The Grid Bill gives you the power to order new  
22 construction. Clearly, this is an investigation that  
23 ought to proceed and go forward.

24 CHAIRMAN GARCIA: Well, I understand the  
25 concern that the parties have here. Perhaps now it's

1 been stated a little bit more rationally and a little  
2 bit less dramatic than it was at the prehearing  
3 conference. But I think with just some degree we've  
4 limited where we're going to the issues that are at  
5 hand. And this is not a vehicle to set up some type  
6 of policy. It's a vehicle to figure out what's going  
7 on in Florida and from there move forward.

8 MR. MOYLE: Yes and no. I'm a little  
9 confused by some of the arguments in that it seems to  
10 me that some of the earlier decisions you had before  
11 you today, the standard offer contract where you say  
12 we're going to go down to 5 years rather than 10, that  
13 for the same reason that you did that, you know, is  
14 that a policy somebody who may not be here is unaware  
15 and due process rights could be affected by your  
16 failure to engage in rulemaking? That argument wasn't  
17 made in that proceeding.

18 It's kind of an attack on how you do  
19 business is the way I see it and, you know, a similar  
20 argument could be made with respect to your decision  
21 on that Texas El Paso case. I think you put some  
22 things in there that arguably could be policy that  
23 needs to be done through rulemaking.

24 So, I guess, my answer to your question is,  
25 I'm a little confused about the arguments that

1 anything that would substantially affect them has to  
2 be done through rule, yet we have, I think, a whole  
3 series of situations even before you today where  
4 matters substantially effecting people have been done  
5 not through a rule.

6 CHAIRMAN GARCIA: Point well taken.

7 MR. MOYLE: Again, the motion, I think,  
8 before you is for reconsideration, which I think the  
9 arguments have been made. It's a repeat of the  
10 arguments that have been made before the Commission,  
11 and I think the motion for reconsideration ought to be  
12 denied and you ought to continue with the  
13 investigation.

14 COMMISSIONER CLARK: Let me -- unless there  
15 are more questions, I'm prepared to make a motion, but  
16 I -- you know, reading over the issues I can see where  
17 some concern was raised as to what the action -- what  
18 potential action might have been suggested.

19 For instance, if you look at Issue 9. It  
20 says, "should the import capability of Peninsular  
21 Florida be accounted for in measuring." And then  
22 Issue 10, "do the following utilities appropriately  
23 account for historical winter and summer peak  
24 temperatures."

25 You know, kind of sounds accusatory in

1 there. And I think really, with respect to Issue 9,  
2 what we're looking for is how should that capability  
3 be accounted for. Is that what we're looking for?  
4 How should they? And part of that answer may be that  
5 they shouldn't be.

6 Let me turn to 10 and be more specific. It  
7 says, "do the following utilities appropriately  
8 account for" -- I think what we want to know, first of  
9 all, is how do they account for it, and is it  
10 appropriate for planning purposes.

11 MR. JENKINS: I think that's correct, but  
12 all that feeds into --

13 COMMISSIONER CLARK: Absolutely. The  
14 reserve margin issue. I agree. And then with respect  
15 to Issue 11 it says, has the FRCC reserve margin be  
16 adequately -- been adequately tested. And I think  
17 really the issue is, is it appropriate for planning  
18 purposes and the subissues are, has it been adequately  
19 tested and how does it compare to others. Those are  
20 sort of what I think you -- they're issues because  
21 those are the things you want to evaluate in  
22 determining the reserve methodology.

23 MR. JENKINS: That's correct.

24 COMMISSIONER CLARK: Okay.

25 CHAIRMAN GARCIA: Maybe --

1                   COMMISSIONER CLARK: Mr. Chairman, I'm  
2 prepared to move Staff on this item. I think we have  
3 had an adequate discussion to give you an indication  
4 and I don't think there's much disagreement among the  
5 parties as to what the outcome -- what the outcome is  
6 that we're planning. And I think Staff is looking for  
7 a methodology and then some evaluation as to where we  
8 currently stand.

9                   CHAIRMAN GARCIA: Very good.

10                  COMMISSIONER CLARK: And then the next  
11 opportunity -- next steps will be rulemaking, if we  
12 think it's appropriate, and then taking action to  
13 enforce, which I think is consistent with what you  
14 have raised as concerns. And to that end, I think we  
15 have adequately considered it and the prehearing  
16 officer has adequately considered it.

17                  CHAIRMAN GARCIA: We'll take that as a  
18 motion and I will take a second from the prehearing  
19 officer --

20                  COMMISSIONER JOHNSON: Second.

21                  CHAIRMAN GARCIA: -- if she wants to add  
22 anything.

23                  COMMISSIONER JOHNSON: No. I think she's  
24 absolutely right. Issues will be handled, some of  
25 them to the extent that they haven't been fully

1 debated and explored through either a PAA process and  
2 some of them rulemaking. The issues, we can continue  
3 to wordsmith and make sure that they adequately  
4 reflect what we're trying to accomplish here. And I  
5 can second the motion.

6 CHAIRMAN GARCIA: Very good. Is there any  
7 discussion?

8 COMMISSIONER DEASON: Just let me. I think  
9 that what we're here on is a petition for  
10 reconsideration and there is a standard for that. You  
11 know, I don't think that standard's been met so I  
12 believe that I'm going to have to vote with the motion  
13 to not grant the reconsideration.

14 I think there is a more fundamental question  
15 here, though, beyond that, and that is basically,  
16 should the Commission take a reassessment of where we  
17 are in this process and should we, perhaps take a  
18 different viewpoint as to what we want to try to  
19 accomplish.

20 I think there is some merit to the argument  
21 that perhaps we should do this in a bit more  
22 bifurcated manner and take smaller bites than what  
23 we're trying to take at this point. I think there  
24 would be some merit to that.

25 But I realize that's really not the issue in

1 front of us. I think Commissioner Johnson's done an  
2 outstanding job with what was presented to her and  
3 with her understanding of what the Commission desired  
4 as a result of our direction to Staff at the internal  
5 affairs meeting and I don't fault her one bit for the  
6 issues that have been delineated and I can support  
7 those.

8 But I personally would prefer breaking this  
9 up and the Commission addressing the question of the  
10 appropriate methodology first without any finding that  
11 there's going to be an appropriate methodology. Take  
12 all of that evidence and then after we've got all of  
13 that information and we're fully educated, direct our  
14 Staff to then come forward with their proposed  
15 methodology and issue that as a rulemaking.

16 CHAIRMAN GARCIA: Okay.

17 COMMISSIONER CLARK: I don't think that's  
18 much different from where we're headed.

19 CHAIRMAN GARCIA: I agree. I think we've  
20 helped the prehearing officer and Staff understand  
21 what we see here and, you know, and we can --

22 COMMISSIONER CLARK: I would take the notion  
23 of some more wordsmithing as probably to be an answer  
24 to some of the concerns so that the issues are  
25 appropriately identified as being -- we want an



1 investigation. We want to know what the methodology  
2 should be. And I think it would be okay to do where  
3 we stand on it. And then once we've done that, well,  
4 what are we going to do now. And that's for another  
5 day and other proceeding.

6 CHAIRMAN GARCIA: All right.

7 MR. MOYLE: Just for clarification, though,  
8 I think the -- and Commissioner Clark stated earlier,  
9 if I understand the direction, it's to examine  
10 methodology and sufficiency, and possibly, you know,  
11 you mentioned ensuring a wholesale robust competitive  
12 market. I'm not sure they can be done in isolation.  
13 But that -- you know, the primary focus here is  
14 methodology and sufficiency for the state.

15 COMMISSIONER CLARK: Right. And what we do  
16 with respect to how merchant plants might figure in.  
17 And I see that as sort of another step.

18 CHAIRMAN GARCIA: Very good.

19 COMMISSIONER DEASON: Just let me say one  
20 thing further. I think that's a little bit of the  
21 difficulty that I'm having, the sufficiency part. I  
22 think that we need to develop the standard and then  
23 once that is clearly defined, everyone understands  
24 what the rules of the game are, our utilities can go  
25 take that standard, apply it to their situation. And

1 they've got to file 10 year site plans every year, and  
2 I don't know when the next filing is due, but it's  
3 probably not that far off because it seems like they  
4 come around every six months. Take that standard and  
5 use that standard in making that filing and then we  
6 can evaluate that, applying that standard, and then  
7 they know up front how they're going to be evaluated.  
8 I understand we're in a different process and I can  
9 live with that, too. We just need to go forward.

10 CHAIRMAN GARCIA: All right. We have a  
11 motion and a second. All those in favor signify by  
12 saying "aye". Aye.

13 COMMISSIONER CLARK: Aye.

14 COMMISSIONER JOHNSON: Aye.

15 COMMISSIONER DEASON: Aye.

16 COMMISSIONER JACOBS: Aye.

17 CHAIRMAN GARCIA: Good. It passes  
18 unanimously. Next item.

19 (Thereupon, the proceedings on Item 13 were  
20 concluded at 1:30 p.m.)

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1 STATE OF FLORIDA)  
2 COUNTY OF LEON )

CERTIFICATE OF REPORTER

3 I, KIMBERLY K. BERENS, CSR, RPR, Official  
4 Commission Reporter,

5 DO HEREBY CERTIFY that the July 27, 1999,  
6 Agenda Item No. 13 in Docket No. 981890-EU, was heard  
7 by the Florida Public Service Commission at the time  
8 and place herein stated; it is further

9 CERTIFIED that I stenographically reported  
10 the said proceedings; that the same has been  
11 transcribed by me; and that this transcript,  
12 consisting of 71 pages, constitutes a true  
13 transcription of my notes of said proceedings.

14 DATED this 28th day of July, 1999.

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KIMBERLY K. BERENS, CSR, RPR  
Florida Public Service Commission  
Official Commission Reporter