BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 020398-EQ

In the Matter of

PROPOSED REVISIONS TO RULE 25-22.082, SELECTION OF GENERATING CAPACITY.
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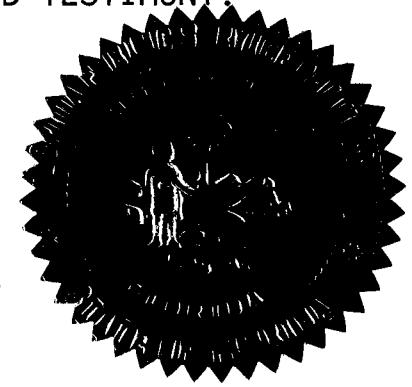

PROCEEDINGS: SPECIAL AGENDA CONFERENCE

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

DATE: Monday, September 30, 2002

TIME: Commenced at 9:30 a.m.
Concluded at 12:35 p.m.

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

REPORTED BY: JANE FAUROT, RPR
TRICIA DeMARTE
LINDA BOLES, RPR
Official Commisison Reporters

PARTICIPATING:

MARTHA CARTER BROWN, FPSC Office of the General Counsel; TOM BALLINGER, Economic Regulation; and MARK FUTRELL, FPSC Division of Competitive Markets and Enforcement, representing the Commission Staff.

JEFFREY A. STONE, representing Gulf Power Company.

MICHAEL J. TWOMEY and ERNEST BACH, representing Florida Action Coalition Team.

GARY SASSO and SUSAN CLARK, representing Florida Power Corporation and the IOUs.

JOE McGLOTHLIN and MICHAEL C. GREEN, representing Florida Partnership for Affordable Competitive Energy.

JOE GARCIA, representing Florida Industrial Power Users Group.

JON C. MOYLE, JR., representing CPV CANA, Ltd./CPV Gulfcoast, Ltd.

P R O C E E D I N G S

CHAIRMAN JABER: Let's get started with this agenda conference. Staff, I understand you have an introduction?

MR. BALLINGER: Yes, ma'am, very brief. As you know, in this rule development we have had a couple of rule development workshops. We have had comments come in from the parties on this. The parties have had a time to try to negotiate rulemaking. We have come to an impasse. That is all laid out in the background in gory detail.

Right now staff has got before you a recommendation that basically has two choices. The first issue will address the stipulation that has been offered by the IOUs, and that stipulation is in lieu of going to rulemaking and the docket would be closed. You have a primary and alternate recommendation on that issue.

If you choose not to address the stipulation or deny it for whatever reason and want to go to rulemaking, then Issue 2 is a proposed rule that staff has drafted that we would ask that you propose and go forward with the rulemaking process.

And then Issue 3 is if you do that, we would suggest you set it straight for hearing and not worry to ask for hearing, because we feel pretty confident one would be asked.

And with that, I think staff is ready to answer questions and the parties are here to speak, as well.

CHAIRMAN JABER: Thank you, Mr. Ballinger.

Commissioners, if it is okay with you, I would like to outline the procedure that I want to follow this morning for this agenda conference. I want every stakeholder that wishes to address the Commission this morning to go ahead and do that. We will do it in an orderly fashion. We will not interrupt each other. I want you to have all the time you think you need. So with that we will get started. I would ask that you make all of your comments regarding the entire recommendation up front, because once you make your comments then it will be the Commission's turn to have dialogue, and discussion, and ask questions of the stakeholders. To the degree there is a question to the stakeholder, great. If there isn't, I would ask that you not interrupt. So with that, Ms. Clark.

MS. CLARK: Madam Chairman, I am actually not going to go first. Mr. Sasso is going to go first.

MR. SASSO: Good morning. I'm Gary Sasso with Ms. Clark speaking for Florida Power Corporation, Florida Power & Light, Gulf, and TECO on the matter before us today. I will provide some comments about the staff's recommendation overall, and then Ms. Clark has some specific comments about the particular rule changes that staff has proposed.

We are here in support of staff's alternate recommendation on Issue 1, which recommends approving the stipulation that the IOUs have offered. And I hope through my comments this morning to help to try to narrow the issues

before the Commission for resolution.

I would like to begin by briefly recapping some recent history. The last time we were here, the IOUs proposed a stipulation in the form of an offer to undertake business practices that we hoped met the concerns expressed by the Commission, its staff, and by the IPPs and others. And we offered these up as a proposal to adopt certain voluntary business practices in an effort to circumvent some of the knotty legal issues about authority to undertake rulemaking in this area.

Briefly, our initial stipulation had several components. First, as regards projects that are covered by the bid rule, we had proposed to invite staff to attend milestone meetings and to observe negotiations in an effort to meet a concern about the need to improve transparency of our RFP process. We offered to appoint a knowledgeable, accountable liaison to work with staff on these projects. With respect to repowerings, also an issue of concern, we had offered to provide an evaluation presentation to staff before implementing repowering decisions, again in an effort to improve transparency.

We offered up this stipulation on the condition that we would be prepared to adopt these business practices if the Commission agreed that they provided a sufficient and appropriate basis, alleviated the concerns that led to the

docket, and provide an appropriate basis to close the docket. PACE, FACT, FIPUG all appeared in opposition to that stipulation, of course, and the Commission encouraged both sides to attempt to work together to see if we could alleviate our mutual concerns. And in the ensuing weeks we had several meetings in an effort to do that, had some good discussions where both sides put their various concerns on the table. And we believe that we made some progress in identifying the concerns from our point of view, and addressing those that are appropriately addressed through this process.

As far as the IPPs were concerned, they reduced their concerns to what they identified as their three key principles. And as far as we are concerned, we believe the IOUs made additional concessions, significant ones that helped address these concerns, but we did reach an impasse as staff reported. And on September 6th we wrote to the chair indicating where we stood on this.

At that time the IPP concerns were as follows; they had identified three principles: First, they were concerned that the IOUs identify RFP criteria up front in the process, and ideally to specify what weights we would assign to criteria in evaluating bids. Second, they were insistent that we involve a neutral independent entity to evaluate the criteria in the bids, somebody other than the utility itself. Third, they wanted all bidders placed on equal footing, treating the

IPPs and the IOUs alike, and specifically called attention to a concern that the IOUs needed to submit binding bids like IPPs supposedly submitted. So those were the three issues that they put on the table, and we worked diligently to understand them and address these concerns.

And let me report on our views about these issues and the steps we have taken to address them. First, with respect to the issue of identifying criteria early in the process. To begin with we agreed to list some examples of the criteria that might apply in an RFP, again, to improve transparency and to bridge the gap between the parties' understanding of the process. We included these in an appendix to the stipulation. We also agreed to conduct a meeting before an RFP is issued where we could get IPP input and clarify issues up front in the process.

Again, we are proposing to do this is a voluntary business practice. We considered the issue of identifying what weight, if any, would be assigned to the criteria up front, but this was not something we felt we could do. We felt this would compromise the best interest of customers, because that would impose a degree of rigidity in the process that was undesirable. In our experience, we need to retain flexibility going into the process, not prejudging the significance of particular attributes of bids before we see the bids in context and are in a position to evaluate their value to the customers

in context. And so we were not able to agree to commit to identifying weights of front.

With respect to the second issue, introducing an independent neutral evaluator into the process, we would suggest that the stipulation we have proposed provides for the involvement of staff at the milestone meetings and observing negotiations. And, of course, we don't mean to suggest that we are proposing that staff make the decision that the utility is charged to make. But what we did try to do was enhance the involvement and role of staff in the process.

And, of course, as staff and the Commission have pointed out in prior occasions where the bid rule has been debated, staff is really the only true independent neutral entity in this industry, and the Commission. And what we have tried to do is enhance the staff's role in monitoring the process, and thereby indirectly the Commission's role. We don't believe that it would be appropriate or even permissible for the IOUs to delegate their statutory authority in this scheme to third parties, whoever they might be. We believe that the involvement of the staff as we have provided should provide the assurance that the IPPs seek.

Now with respect to repowerings, we had originally proposed to provide an evaluation presentation to staff before implementing a decision as a result of these discussions and interaction with staff in this process. We agreed to provide a

presentation at Internal Affairs about repowerings before undertaking them. Let me digress for a minute to say that the staff was extremely helpful throughout this whole process in helping to facilitate discussions and get the parties together and move things along, and we appreciate that.

With respect to the third issue, putting all bidders on equal footing, and specifically with respect to having binding bids, we believe that this IPP concern really misconceives the role and responsibilities of IOUs and IPPs in this process under the existing regulatory scheme. IPPs and IOUs are not similarly situated. We don't think it is appropriate to suggest they are, and we are not the least bit defensive about this. Under the existing statutory scheme, IOUs have very distinct substantial responsibilities, a statutory obligation to serve. We are accountable, we are regulated, and they are not. It is as simple as that. And to treat us the same for purposes of our decision to add capacity to our systems is untenable.

When an IOU decides to build its own plant to serve its customers, the customers are protected by our statutory duties and by Commission oversight. When an IPP contracts to build a plant that ultimately will serve retail customers, the only protection the customer, the customers have is under the contract, and that can be very illusory at times. When push comes to shove, IPPs may construe their contracts aggressively,

may seek to renegotiate or threaten to walk away from projects, all of these things have happened.

The idea of binding bids is also illusory. IPPs don't submit binding bids, they submit preliminary bids which are always ringed about with conditions, and they are always subject to negotiation in the RFP process. And even after a contract is signed, as I have mentioned, disputes often arise, IPPs argue about whether conditions are met that trigger other conditions in the contracts, may seek to renegotiate, say this can't be accomplished, we can't build the project for this or we can't do that. May set up subsidiaries to run these projects and walk away from the projects, if need be. So we all have seen much litigation over power supply contracts, and we probably haven't seen the last of such litigation. That is what binding bids are all about with respect to IPPs, they are preliminary when submitted and at best contractual when the process is concluded.

Now what happens if either the IOU or the IPP actually beats their proposal? Let's suppose that an IOU estimates that it is going to build a plant for X amount of dollars and an IPP does also. If we beat that price, and are able to put a plant on the ground for less, the customers benefit. They get the benefit of that. If the IPPs beat their bid, the benefit flows to the IPP shareholders.

Let's suppose that somebody has an overrun. As I

have mentioned, that usually in the case of a contract results in some type of contract dispute with an uncertain outcome. With respect to an IOU, it results in Commission oversight. No overcharge is passed to the customers unless this Commission concludes that the overrun was prudently incurred and appropriately absorbed by the customers, so the customers have that protection.

So at the end of the day, the IOUs consider the IPP arguments, we consider the staff proposals, and we offered a revised stipulation in August in an effort to secure the agreement of all the parties, and the comfort on the Commission's part that we have made sufficient concessions to close this docket. And we sent that stipulation to the Chair on September 6th.

Now, briefly, the components of our current stipulation are as follows. Again, these are all offered up as voluntary business practices in an effort to avoid dealing with the legal question about which the parties sharply disagree whether the Commission has statutory authority to act in this area. Under our current stipulation, again, with respect to projects covered by the bid rule, the IOUs agree to hold a meeting before the RFP is issued to get input from the IPPs and to clarify any issues that may exist at that time.

We have provided a listing of evaluation criteria as examples in the appendix to the stipulation. Again, this is

illustrative of the type of criteria that might be used in an RFP. And, of course, we identify those criteria in the RFPs. If the Commission looks at the RFPs that have been used recently, that is the case. The stip expressly provides that the bidders, however, despite the fact that we may identify criteria, they retain the discretion to offer us creative proposals that we may not have contemplated, which is something that we want and they want.

Again, the Commission staff is invited to attend milestone meetings and observe contract negotiations, and we have provided some clarification in the stip about what we mean by the milestone meetings. We will, again, designate the liaison to work with staff, and for repowerings we will provide an evaluation presentation at Internal Affairs before the project is undertaken.

Now what are the advantages of accepting our stipulation and staff alternate recommendation on Issue Number 1. Well, we think that there are some distinct advantages to this approach. First, we believe that our stipulation addresses many of the identified concerns. It improves the transparency of the process. We provide more information to staff, to the Commission, and to the IPPs sooner than under the status quo. We provide for an expanded staff role in monitoring the process which ensures true independent oversight. And at the same time we recognize and preserve the

statutory role and responsibility of the IOUs in this matter.

Very importantly, we avoid the uncertain outcome of litigation, which may result if the Commission goes ahead to rulemaking. We are able to achieve a positive step forward immediately as contrasted with an uncertain result after an extended period of litigation.

Now I must add, and I don't intend to argue this issue here today, but the IOUs have heard the arguments by the IPPs, and we have read staff's comments, we have not receded from our concerns about the Commission's lack of statutory authority to undertake rulemaking in this area. I want to be clear about that. We will stand on our written comments on those issues. And suffice it to say here today, that in our view the IPP proposals and the staff proposals contemplate directing the IOUs how to go about making certain business decisions, how we go about adding capacity to our system.

And currently the statutory scheme and the regulatory scheme entrust IOUs, the utilities, with the discretion, the good faith, and the good judgment to determine how best to run their businesses, and empowers the Commission to review those decisions. That is fundamentally how the system is set up. And with all respect, we are concerned that the proposed rule changes and the proposals made by the IPPs and others run counter to this fundamental feature of the statutory scheme.

Now looking at the staff recommendation, we are

impressed by the fact and pleased by the fact that both staff recommendations on Issue 1 substantially support the stipulation we have provided. They have a primary recommendation and an alternate recommendation. The primary recommendation supports the acceptance of our stipulation with one modification, which I will discuss in a moment, but it supports the proposition that the Commission should accept the stipulation we have provided as a sufficient basis to assuage the concerns expressed by all parties as a basis to close the docket.

The one proviso is, the primary recommendation is that the staff would support that solution if we were to agree as a voluntary business practice to extend the use of RFPs to all capacity additions of 150 megawatts or more, which we are not able to do and I will explain that in a moment. But I did want to make the point that apart from that proviso, staff supports acceptance of the stipulation. The alternate recommendation, of course, supports acceptance of the stipulation outright.

Interestingly, on Issue 2, also, on the issue of whether to go to rulemaking on staff's proposed changes to the rule, staff says that the Commission should go to rulemaking and consider these proposed changes if the Commission is desirous of extending RFPs to all capacity additions of 150 megawatts or more. So as we understand what staff is

suggesting, what staff is suggesting is that the stipulation we have presented is an appropriate basis to close this docket with one proviso, both on Issue 1 and Issue 2, the only proviso is staff is holding out the possibility that the Commission believes it is important to extend the RFP process to capacity additions of 150 megawatts or more. It is the only basis to reject our stipulation, the only basis to go forward with rulemaking in staff's view.

Now, of course, again, I don't want to belabor this point, but I do hasten to point out that with respect to the Commission's authority, the Commission's authority is on the least substantial ground with respect to rulemaking on RFPs on projects outside the scope of the Power Plant Siting Act. That is exactly what that proviso concerns. It concerns an area where the Commission's authority is the most suspect or subject to doubt and challenge.

Now, let's talk about this one proviso, this one area that seems to separate us from staff or potentially separate us from staff's at least primary recommendation, and that is this issue whether RFPs ought to be extended to the addition of capacity of 150 megawatts or more. The IOUs have carefully considered this issue, because a spotlight has been shown on it by the staff recommendation, and debated whether we could agree to the proposed modification that staff recommends. And ultimately, and regrettably at the end of the day we are not

able to do that. And the IOUs feel very strongly about this.

The reason is is that the proposal to extend RFPs to capacity additions of 150 megawatts or more will capture CTs, combustion turbines, peaking units, and certain repowerings. And in these situations, the need for flexibility is the greatest. The IOUs use these types of capacity additions to respond flexibly to exigencies that arise in the operation of their system, unforeseen events, may miss a forecast, something else happens that occasions the need to add some capacity to the system in a flexible way without the delay, without the potential litigation or controversy associated with a regulatory process, or an RFP process.

Importantly, the Power Plant Siting Act draws a line between this type of capacity addition and the types that are covered by the Act. The Act covers more substantial power plant projects with respect to peaking units. The Power Plant Siting Act leaves that to the utility's discretion and to their ability to add capacity in a flexible manner. So this is a policy judgment that is reflected in the existing law. And we believe it is an important one, and it should and needs to be respected in the customer's best interest to enable the utilities to respond flexibly to exigencies that arise, but at the same time with respect to the types of projects that are covered by the Power Plant Siting Act, they are to have a more developed process. So, we believe that the proviso, while

apparently narrow proposed by staff, does compromise the policy judgment reflected in existing law and does impair the ability of the IOUs to serve their customers in a flexible and effective manner.

Further, upon examination it seems evident that nothing of value will be gained by going down this road. To begin with, staff says in its recommendation that very few repowerings, if any, are likely to occur in the future. So with respect to the repowering issue, we are not talking about a significant issue. With respect to peaking units, CTs, it is important to understand that the IPPs can build these types of units now outside the Siting Act. They don't have to have the utility projects to enter the state in this regard. And, in fact, there is no evidence that IPPs will prefer to build these types of plants for utilities and provide advantageous bids to utilities rather than building these plants on a merchant basis.

I think the record is abundantly clear in a variety of proceedings and forums over the last several years that the IPPs prefer to build these types of plants on a merchant basis. To the extent that a utility might require that such a plant be dedicated to meeting a particular utility's retail load, that is going to diminish the value of the power plant to the IPP, it is going to result in being monetized in the form of higher pricing to us than if the IPP simply built the plant on its own

and operated it on its own. So we don't have any evidence that would suggest that extending the rule into this dubious area where the Commission's authority is arguably the weakest would result in any substantial benefit.

On the other hand, we do have concrete reason to believe that this would impair the ability of the IOUs to respond flexibly to their system needs and serve their customers' best interest. Which really kind of takes us back to where we started in our discussions in these proceedings many meetings ago, and that is focussing really on the customers' interest. Where does the customers' interest lie?

The last time we were together we talked at some length about the history of the current bid rule. And if you will recall, I reviewed some transcripts from the different proceedings, and in particular we discussed the Gulf bid waiver docket in 1998 where various Commissioners explained how the current rule represents a true compromise between the contending factions, between the IPPs on the one side and the IOUs on the other side. It was fashioned by staff and the Commission as a true compromise to protect and serve the customers' best interests.

The current bid rule very much reflects what the Commission impartially and neutrally thought was needed to serve the customers' best interest, not the best interest of either side in this dispute. That judgment has not been

overtaken by events as has been suggested. The bid rule waiver discussion in the Gulf docket took place in 1998. That was the year Duke filed its declaratory statement proceeding raising the question whether merchants should be sited in this state. The changing market was very much in view in 1998 when the Commission was having that discussion and articulating its belief that the current bid rule was viable, effective, and best served the customers' best interest.

In fact, the whole premise of Gulf's request for a waiver of the bid rule was that the wholesale market is changing. So this isn't something that occurred after this discussion. It was very much in view at the time. Gulf went in and said, "We want a waiver from having to publish our numbers because now there is a competitive wholesale market, and there are a whole bunch of different issues that the Commission has to consider." And the Commission very directly considered them and concluded in 1998 that the current bid rule reflects a true compromise.

If anything, events in the wholesale market since 1998 confirm the need to proceed cautiously in this area, waiting for legislative direction and authority. We believe that if the Commission examines our track record in protecting customers' interests, the Commission will conclude that that record is strong, that the facts support our views in this docket.

The rates of the utilities in the state are commendable. The reliability is high. The Commission has reviewed a number of decisions made by IOUs after following the RFP process, and a number of need cases and concluded that the IOUs decisions were correctly made and made in the customers' best interest.

We don't believe that any case has been made that anything is broken, that the customers' interests are not being protected or are being disserved somehow, and that this has to be addressed through a change in the bid rule. All evidence points the other way. Points to the fact that the utilities are doing their job and the Commission is doing its job.

We believe that changing the bid rule as proposed will present serious legal issues and will risk serious unintended consequences to the detriment of the customers. And for these reasons we strongly urge the Commission to accept the stipulation we have proposed, as modified as a result of these discussions, as a suitable basis to close this docket.

Ms. Clark has some comments on the particular provisions of the rule that has been proposed by staff as a starting point, in the event the Commission does decide to go on to rulemaking. But we do want to be clear that we are providing these comments in response to the chair's invitation to make all of our comments at this time, but we don't mean to suggest by going down this road that we believe that authority

exists to promulgate a rule in this area, and the only question is the details on some of these individual provisions, but we did want to be complete in our presentation. We appreciate the opportunity.

CHAIRMAN JABER: Thank you, Mr. Sasso.

Ms. Clark.

MS. CLARK: Thank you, Madam Chairman and Commissioners. I appreciate the opportunity to talk to you today. I should tell you that my co-counsel at the firm is not in the United States today, and that is why I am here representing the parties, the IOUs in this case.

I do want to start out by asking you to sort of orient your thinking to the question that you need to answer. And I think that the question you need to answer is does the bid rule produce -- the bid rule as it is produce the outcome it should. And that is, does it take into account electric system reliability and integrity, adequate electric service at reasonable cost, and whether the plant is cost-effective, least-cost. I think that is what you should look at the rule and the proposed revisions to the rule, in that context.

I would remind you that this rule has been used, and you have reviewed in need determinations the outcomes of the use of this bid rule, and you have found that the plants selected have met the criteria of the statute and have been least-cost. It strikes me that that should be your orientation

when you look at these proposed rule revisions.

I would also point out that your staff has even said that without the adoption of these proposed revisions to the rule, the Commission would continue to carry out its statutory responsibilities, and in the alternative staff recommendation it says staff would still be able to carry out its statutory responsibilities under the Power Plant Siting Act.

I have also noticed in the staff recommendation that they believe that this will create more efficient regulation, and I would like to suggest to you that I don't think it will do that. In fact, I think it is probably antithetical to the Power Plant Siting Act and the notion that it is supposed to be a streamlined expedited process to effect these capacity additions. It creates more points of entry, which I will go over in just a minute, and I think it represents an unwarranted intrusion into the process for this reason: There is a very, very powerful incentive on the back end. If you don't prove your costs to be prudent, they will be disallowed. That is a very powerful incentive to get it right on behalf of the IOUs.

I think the rule will reduce IOU flexibility. It will introduce delay. I think it will increase regulatory burden, all of which I think are likely to increase the costs to customers. I would also like to point out the statutory provision that requires the utilities to provide service to carry out its -- and to carry out its business in such a way

that it can furnish to each person reasonably entitled thereto to reasonably sufficient, and adequate, and efficient electric service. So they do have the burden of looking closely at what is out there in terms of least-cost capacity additions. Your responsibility is to review those decisions, it is not to manage the decision-making process.

The only other thing I would state with respect to the statutory authority for these rules is that the law has changed since the rule was adopted and it creates a much higher standard in terms of statutory authority. We have outlined that in our written comments, and I will rely on those comments with respect to the concern about statutory authority.

Let me kind of run through the rule. I'm going to try and group my comments rather than running sequentially through the rule itself. First of all, we would question the authority to require RFPs for all capacity additions. And I think that is what your rule does, it does describe in the definitions capacity additions of 150 megawatts or above are subject to the rule, but then you have a provision in there that encourages the utilities to use this for other capacity additions.

And I think the question arises if they don't do that are they going to be found to be imprudent for not having used it. What is meant by encourage? Is it simply an academic exercise on the part of including it in this rule, or is it

intended to be enforced.

The next thing is the notion of publishing the costs in advance. And I think we have previously pointed out to you the concern. It arose particularly in the Gulf waiver, that if you publish these costs in advance, you are likely to have the bids cluster around that price and will not have people giving their best estimate.

The other thing is it also seems to say further on in the rule, I think it is in Subsection 11, that the evaluation conducted by the utilities will be limited to a comparison of the bids to that capacity addition described. That, too, is contrary to what the Commission has indicated in the past and that is the notion of the utilities sharpening their pencils.

And I think it would conflict with the statute, too, in the sense of looking for the least-cost alternative. You want the utilities to look at that again and see if there is a capacity addition that will, in fact, cost the customers less. I would also point out in the process of the evaluation of the bids, it is my understanding that the bids put in by IPPs and other parties are indicative bids, or bids upon which they expect further negotiations. So they, too, have the opportunity to sharpen their pencils and have been asked to do so.

There is another item in the section on providing detail costs, and that has to do with giving information about

site-specific costs. And as I read the recommendation, it seemed to me that the purpose of this provision was so an evaluation could be made about collocation of competitive projects on utility property. And I think we have explained to you through written memos the concern, the constitutional concern about the requirement of collocation.

Another issue is providing multiple points of entry. And as I said earlier, this is more regulation, not less. And it doesn't, in my view contribute to efficiency. Moreover, I think there is a concern about the authority under the APA. Because under the APA there is a requirement that a party be substantially effected to have the standing in any process, and at the various points of entry provided there is a question in my mind as to what their substantial interests are.

Let me just go through the various added proceedings that are outlined in the rule. In 5C you have the notion of Commission approval of an RFP, if necessary. It is not clear to me what is meant by "if necessary," but it does provide for yet perhaps another process. Also in Subsection 10 a potential participant in an RFP can file comments. Again, it is not clear what is meant by filing comments or what action the Commission might take. Then there is the opportunity to challenge the results of an RFP --

CHAIRMAN JABER: Ms. Clark, hang on. I missed what you said between if necessary and what you are about to say.

What did you say? You are questioning 5C?

MS. CLARK: Yes. 5C was the approval of the RFP when necessary. It wasn't clear to me what was meant "when necessary."

CHAIRMAN JABER: Okay. And what was your second question?

MS. CLARK: Subsection 10 provides for a potential participant in the RFP to file comments regarding the RFP. Section 13 provides for a challenge to the RFP. And then, of course, you have the need determination process. Another provision that caused concern is the notion of providing criteria and weights in advance. Again, we have previously talked about the authority for this kind of intervention in the utilities' choice of the next capacity addition. But I would also point out that there is no guarantee it will result in a positive result. And it suggests a precision there that I don't think exists.

There are lots of subjective things that need to be taken into account in evaluating the criteria. For instance, you know, if you have a proposal that is less than an -- that is for a period of time less than the unit would be available, how do you evaluate that particular proposal over the life of the unit, what do you add to it in terms of fulfilling the remainder of the life of that unit.

Also, I think in the need determinations you have had

in one instance you have had the Supreme Court bless the notion of being flexible in terms of criteria so you can have creative solutions to the capacity additions. And where FPL, in particular, tried to be more specific about the criteria in weighting, it turned out to be overly cumbersome to those people wanting to make a bid and it didn't help the process.

Another item causing concern is what has come to be known as the equity penalty. And the concern there is it is ignoring a cost that is attributable to purchased power contracts. I think it undermines the objective of an accurate comparison between competing proposals, and I think that would be contrary to the statute of looking for the least-cost alternative to customers.

There is also the requirements that are a little puzzling to me in the sense of trying to identify what it is the staff's objective is. There is a provision in there in 5G which refers to the fees. It sets them at 10,000. It seems to me that you would want whatever fees are charged to cover the cost of that evaluation so the customers don't bear that cost. And I'm not sure you would want to be that specific in the rule. I am not sure that have you had any complaints about the level of the fees.

There is also in 5H information on some specific, system-specific criteria. And what I have understood from the companies is it may not be worth the burden of producing that

information because it changes constantly. And the value of that, it just may not be there in terms of assisting potential bidders.

The other thing was the time frame on the pre-bid conference. There is some thought that the two weeks may be too soon. And I don't know that you have had complaints on that issue. And finally the time between the bid and the RFP, it is my information that it has been around -- there have been RFPs that have been around a 60-day time period, but it is not clear to me why it would be necessary to set a time, because you may have instances where you need to do it more quickly than that. And, in fact, I think in the FPL subsequent RFP, it was a lesser time period.

The other thing I would mention is there is a provision in there, I think it is under 5 which requires information by customer class. It is not clear to me why that is in there. I'm not sure there is a requirement on the part of the utility to identify need by customer class.

CHAIRMAN JABER: Ms. Clark, I missed your point on 5H.

MS. CLARK: 5H.

CHAIRMAN JABER: You said you had a concern on 5H, but I didn't hear it.

MS. CLARK: Yes, that is on the system-specific conditions. The concern there is that it may be of little

value because it changes constantly depending on what is happening in your load growth and what is happening where other facilities are being located. The concern is that it would be cumbersome to do this and the benefit, the cost would outweigh the benefit of gathering this information.

Let me hit one other item on 6. There is a concern over what is meant by evaluating all proposals. Clearly, there will be some initial screening of proposals, and I'm not sure you want to require the IOUs to evaluate every single proposal that came in.

For instance, some of them may not have met even an initial requirement such as providing adequate security, as they were unwilling to provide assurances of adequate security which was required for submitting the bid. And if they hadn't done that, why would you want to evaluate that? If they are clearly not even close cost-effective wise, why would you want to do that? Because if you mean taking that particular project through the whole process, that involves computer runs, comparisons, pairing up various proposals, and I'm not sure that you want to require every proposal to be evaluated to that extent. I think in the FPL process you had 16 bidders filing 53 proposals. That is a lot of proposals to have to run through a computer model.

Madam Chairman, I think that completes comments on specific provisions. Thank you.

CHAIRMAN JABER: Thank you.

Mr. Green.

MR. GREEN: Thank you, Madam Chairman. I'm Mike Green representing Florida PACE. I thought I would make a few fairly high level comments. I'm going to stay at a policy level, I think. I'm not going to go into a paragraph-by-paragraph argument, perhaps, unless that is what you really want to do. Mr. McGlothlin is here with me. He will also speak on behalf of PACE and he will follow my comments with some comments of his own.

We appreciate the opportunity to be here and appreciate the discussions with the staff and with my friends at the IOUs over the past six or seven months on this docket. Again, I am going to appeal to your sense of fairness, equity, openness, and transparency. And I will probably use those terms a lot in my comments. PACE encourages this Commission to act decisively and quickly to remedy a process that is, quite frankly, currently flawed. I believe there is a pretty common agreement among all the parties that the current process isn't working as good as it could. Even my friends at the investor-owned utilities have offered a voluntary stipulation to change it, so what is working now isn't working as good as it should. And I agree with what Ms. Clark just said that this Commission ought to be looking at, you know, what is in the best interest of the consumers, and whether the current process

meets the needs of the consumers and of this Commission.

You need to act quickly because the amount of capacity Florida is going to add over the next decade, over the next two decades is huge. You have the largest need determination before you, I guess later this week from Florida Power and Light, the largest need determination that you have ever seen, that this Commission has ever heard, over a billion dollars. You are going to have another large need determination case in December of this year from Florida Power Corp.

Over the next eight or nine years if you add up what is in the investor-owned utilities' ten-year site plans and what is presented by the Florida Reliability Resource Committee, FRCC, another 8,000 megawatts will be coming up for need in the next eight to nine years. At $600 a kW, give or take, that is 6 or $7 billion of additional capital investment. The consumers of Florida are going to be responsible for that capacity, whether it is provided by the investor-owned utilities with a self-build option, or whether a power purchase agreement is reached between the retail serving utility and an independent power provider.

The consumers need a transparent process. The consumers need a process that shows that they are absolutely and very clearly getting the best deal, the best price, the best value of these huge investments needed to meet the

capacity needs of the state. Bottom line, the current process doesn't give that transparency, it doesn't give that clear indication that absolutely the best deal has been arrived at and selected.

PACE encourages this Commission to implement meaningful change. I say meaningful because we think meaningful change is needed. Significant change is needed. But we urge you not to take small superficial steps just to get going in the right direction. Again, I plead to your sense of common sense here. If you think something is needed, go forward and seek that change that you think the Commission and/or the consumers need. PACE is not threatening litigation. If you think you need something, go seek it. And I think Mr. McGlothlin is going to speak to statutory authority in just a minute.

PACE proposed a set of three principles when we started this discussion probably six or seven months ago, and those three principles have not changed. And these principles we feel are critical to providing the fairness that is appropriate for all bidders, all potential bidders for this huge amount of capital investment needed for capacity in the state. And it is absolutely appropriate for the consumers that need the transparency, and I feel it is absolutely important to this Commission that needs to have the clear evidence that indeed you have got something to show that very clearly the

best choice is being made. Here is the evidence that you can point to Column A, B, and C, and say, "This is the best choice. This is the least cost, highest value, most reliable choice."

Again, these principles haven't changed in our six months of dialogue. We have had lots of meetings with my friends at Tampa Electric, Florida Power Corp, Florida Power and Light, Gulf, with the staff, group meetings with all of us, FIPUG, FACT, these principles haven't changed. And, once again, I don't think anybody has really argued that the principles don't make sense. I think everyone is in general agreement that these principles seem to have a sense of appropriateness for this Commission to consider. The question of is how are you going to address the three principles.

And let me just review them once again. I think Mr. Sasso and Ms. Clark have already talked about them but, first of all, clarity of the evaluation criteria and the weighting of that criteria. Getting clear understanding of what is being solicited, and clear agreement up front of what is needed, and how the bids are going to be evaluated only makes sense. Do that up front. Get agreement on those criteria, those weightings, the evaluation process. Get that clear up front. That only makes sense.

I disagree with what Ms. Clark said that that could be cumbersome and delay the process. I think if you get clarity up front and agreement up front, it prevents

intervention perhaps on the tail-end of a process, perhaps what we are going through now.

The second principle is the process where all the bids are submitted at the same time, and that the consumer is responsible for paying for only that winning bid, regardless who that winning bid is from. But a process where no one bidder is getting a chance to evaluate other bids before they submit a bid. If a second round of bids are needed or desired, let all short-lived people, people that will qualify that meet the minimum criteria of the evaluation criteria, let all people put in a sharpened pencil second bid. But don't give second or third bites of the apple to one and not to the others. If you are truly looking for what the consumers are best served by, give everybody a chance to sharpen the pencil and provide the best price they can.

And, finally, the third principle is if an IOU elects to submit a self-build option, then the evaluation must be performed by an objective third party. It only makes sense. If you are looking for transparency and fairness to suggest that one party who has the opportunity to perhaps penalize a short-term bid with a filler unit penalty, and/or penalize a long-term bid with a now famous equity penalty, it doesn't pass the snicker test of fairness and equity in my opinion.

Again, PACE suggests that these principles are essential to pass the common sense test. Again, fairness,

openness, equity and transparency. The PACE proposed rule that I sent you late last week, which I shared with my friends at the investor-owned utilities, isn't anything new. It is merely a reflection of these same principles, a reflection of what we have been talking about for six or seven months in simplified rule language. The point to putting it in rule language is probably two-fold. Number one, hopefully it will assist you in your decision-making and what direction to go. If you can see how these principles could be reflected in rule language, so to speak.

And, secondly, that, you know, this proposed process that PACE suggests, which is consistent with the three principles, doesn't have to be complicated. I think we put together in simplified language, in three pages so my counsel nods, that is fairly simple. It is straightforward, to the point, and basically gets to the meat of the issues that we have been espousing.

This PACE proposal also is very consistent with what many other states are doing. PACE is not suggesting that this Commission go out there on a limb and do things out on the edge. We have shared with staff various processes that are currently being used and currently being implemented, or at least being considered for immediate use in Georgia, Louisiana, Pennsylvania, Texas, Arizona and other states.

And PACE agrees with the recent press release from

TECO Energy Services where they espouse the benefits of the fair and transparent process that the Arizona process is adhering to. The Arizona process, as I have provided that to you as well last week, is extremely similar to what we are proposing this Commission consider for Florida. Florida needs a process that is fair, transparent, open, and equitable to all parties.

One final opening comment I guess I would make is that this docket is not about deregulation, or restructuring, or wholesale redefinition in any way. This is merely a review of whether or not this Commission has a clear and transparent assurance that the least-cost alternative is being selected for the capacity needs of the state. This is all within the current legislative and regulatory framework. This is not trying to push forward some new wholesale restructuring viewpoint.

Again, I will not take your time to review the details of our proposed language because we have been talking about it for six or seven months. There is nothing new in it. It is consistent with the three principles. PACE has said that we are not wed to any specific language in our proposed rule. We are indeed, however, wed to the principles that are at the basis of that proposed language. And also, I have not in all the six or seven months of discussion with the investor-owned utilities, with FACT, with FIPUG, with your staff, we have yet

to find anybody that says that these principles don't make sense. Again, they seem to be a good litmus test for what you should use going forward.

PACE respectfully submits to you that the IOU stipulation doesn't do very much. I appreciate the meetings I have had with the investor-owned utility representatives. We have had some movement on premeetings to identify criteria, but there is still an awful lot of unknowns. How the criteria will be implemented, how the evaluation will be weighted is critical. Having binding bids submitted by the same time by all parties is critical, and ensuring that the evaluation of all the submitted bids is evaluated fairly, objectively, and independently is absolutely critical, and those issues are not addressed to our satisfaction in the IOU stipulation.

Relative to the PSC staff recommendation, PACE appreciates the PSC's staff role as far as putting together a recommendation, and they have addressed more sufficiently on the first principle about preestablishment of the criteria, the weightings, and things like that. They have taken a further step than the IOU stipulation. But, once again, I go back to my three principles; the binding bids submitted at the same time, that issue is not, we feel, adequately addressed, nor is the independent third-party evaluation. The objectivity piece of the evaluation we don't feel is there.

And just a common-sense approach on the IOU

stipulation. I believe the staff would suggest, well, if you include repowerings in there, then maybe that is something that could be considered. Well, I respectfully submit to you there aren't any more repowerings that are going to be done in this state. If there are, there are very few. The major ones have been done and they have been excluded from consideration in this rule.

In conclusion, before I turn this over to Mr. McGlothlin, PACE encourages this Commission to act, again, decisively and quickly to provide the consumers the confidence they seek with a fair and transparent process. A process that is fair to all potential capacity providers and transparent enough that you can use as clear evidence that, indeed, the least-cost alternative has been selected.

We encourage you to seek this to make sure that the retail serving utilities are living up to their regulatory compact of providing reliable service at the least-cost, which is what the compact says they should do. The current process doesn't get you there. The current process does not give you that assurance or we wouldn't be here today. The time to act is now.

Again, Florida utilities are going to be issuing RFPs I would suggest to you every year for the next many years until I am retired. PACE encourages this Commission to adopt the PACE proposal and to do that quickly so that the transparency,

the openness, the equity, and the fairness issues can be addressed now.

I would like to address just one thing that Mr. Sasso said that I think just begs my comment. I think about whether the IPP bids are going to be binding or not, and it is borderline on offensive that he would suggest that companies as reputable as the Calpine's, and the Mirants, and the CPVs, and the Reliants, and the Constellations and all the other ones are not going to be bound by their bid.

We enter into contracts. The contract is the basis for the financing of several hundreds of millions of dollars. To suggest that we are going to walk away from such obligations is almost offensive, and I ask you not to give much credence to that comment. With that, I think I will conclude my comments and ask Mr. McGlothlin to say a few words.

CHAIRMAN JABER: Mr. McGlothlin, not to rush you, but just help me gauge the time. How much time do you think your presentation will take?

MR. McGLOTHLIN: I believe I will be under 15 minutes, probably 10 to 15.

CHAIRMAN JABER: Okay. We are going to take a ten-minute break and come back and pick up with you.

Ms. Clark and Mr. Sasso, I have a lot of questions that I will pose to everyone at the end of the proceeding, but I think this question will take you going back to your clients

and getting me a number, so I want you to be able to do that during the break and be ready for the question.

I have heard PACE say they anticipate no repowerings in the future. I have heard our heard our staff and certainly in the recommendation staff says we don't anticipate a lot of repowerings. I want you to poll each of the IOUs and give me a specific answer on that.

We are going to take a ten-minute break.

(Recess.)

CHAIRMAN JABER: We're going to go ahead and get started again. Where we left off, Mr. McGlothlin.

MR. McGLOTHLIN: Thank you. Joe McGlothlin for Florida PACE.

The principal reason that the IOUs offer in support of their request that the Commission close this docket is the thought that to proceed might invite a challenge to the Commission's rulemaking authority.

I have two observations on that. The first is this is no different from any other rulemaking case. Parties may challenge proposed rules, parties may challenge existing rules, and if the thought that to proceed might trigger a challenge is enough to cause the Commission to close a docket, then you're almost out of the rulemaking business. But, of course, our position, I'm sure your position is that if you believe the rule is needed and you have a sound basis on which to believe

that you have the authority to proceed, the idea that this might result in a challenge should not deter you from going forward.

My second observation is that in this case you do have a sound basis on which to believe that you have the requisite statutory authority. And I'm going to tell you that, if anything, your position is stronger today than it was the last time we talked.

I'm not going to belabor this subject by extensive discussions of case law, but I think in view of the importance of this issue in the overall scheme of things, it's, it's warranted to revisit it for just a second.

What is the requirement in Florida Statutes? Sections 120.52(8) and 125.36(1) of the Administrative Procedure Act require that an agency have both a grant of rulemaking authority and a specific law that is to be implemented through the rule. There's no doubt, there's no question but that the Commission has the grant of rulemaking authority. It appears in such areas as 366.05(1) and 351.27(2). And any issue about the authority to adopt the rule that's being considered today falls into this area of whether the Commission would be implementing a specific law.

Well, the courts have, have eliminated exactly what this requirement means. Beginning with the Save the Manatee case, which all sides cite as the seminal case in the area,

that the 1st DCA said that, yes, you do have to have a specific law that we implemented. But specific does not mean detailed. And, in fact, there is no prescribed degree of specificity. And if you have a specific law, that's as far as the analysis goes. And that has been affirmed time and time again.

In the Board of Medicine case involving standards governing the surgeries that a physician may undertake in the physician's office, the court said that even though the, the standard or the rule was not found in the statute to be implemented, the statute was specific enough, and whether the grant of authority is specific enough is beside the point. And then the same case in another area says such a consideration is irrelevant.

In the Osheyack case involving the PSC's rule, the statute simply said that the Commission can regulate the terms of service between telecommunications companies and their patrons. The rule authorized a telecommunications company to discontinue service for non -- and long distance service for nonpayment of bills, but not on the basis of the nonpayment of charges for dishonored checks, areas that were not mentioned in the statute. But the Supreme Court of Florida applied the Manatee test and said, this is specific enough, the Commission was within its lawful authority.

Your staff has ably canvassed the case law and came to this conclusion at Page 16. The cases indicate that the

statutes can provide a broad grant of authority without delineating every possible exercise of that authority the agency may implement through rules. Where the specific grant of authority is broad, the cases preserve the agency's discretion in its implementation. And Florida PACE agrees with that analysis.

And why is your authority stronger today? Very recently the 1st DCA issued an opinion in another case, Frandsen v. the Department of Environmental Protection, and it's found at 27 Florida Law Weekly D2039.

That case involved a situation in which the law to be implemented simply said the division has the authority to supervise, administer, regulate and control the operation of all public parks. Supervise, administer, regulate and control.

The rule that was challenged issued a warning to users of the park that the rule would impose some restrictions on free speech. The rule said, "The park manager will determine the suitability of a place and manner of activity based on the park visitor use patterns and other visitor activities occurring at the time." None of that appears in the statute to be implemented.

But in a per curiam decision the 1st DCA says, "The rule in question falls under the specific grant of authority and is otherwise a valid exercise of delegated legislative authority."

So clearly and consistently the courts have interpreted the APA to mean that, yes, you do have to have a specific law, but there's no test of specificity and specific does not mean detailed.

And turning to your situation, the staff has cited numerous specific laws that this rule would implement, and we agree with those. We have focused on the portions of 366 that enable the Commission to adopt rules governing practices that affect rates, and we believe that that is a specific law that would be implemented through the rule under consideration.

And I think it's telling that when the IOUs offer an alternative, they say, we'll undertake a voluntary practice. Connect the dots -- it seems to me that's almost an acknowledgment that that would fall within these provisions of the Chapter 366 which we contend give you your rulemaking authority.

So Florida PACE suggests that you have the authority to proceed and you should proceed. And if the IOUs or other parties intend to challenge your rulemaking authority, there are mechanisms in place for that to be done. And that can happen -- the APA gives one who intends to challenge a rule several points of entry, and it isn't necessarily the case that its challenge would slow you down. Any proceeding at DOAH can happen either in parallel or after your consideration of a proposed rule.

I want to comment and respond to several remarks made by counsel for the IOUs as they relate to PACE's proposals and positions, and I'd like to try to do it in the context of further elaboration of the three principles that Mr. Green described.

Florida PACE did not simply pull all those three principles out of the air. Our starting point was the observation that the rule should be and is intended to result in the selection of the most cost-effective capacity addition to serve ratepayers. And that, we agree, is your vantage point and your perspective and it should be your objective. The three principles were offered as means to both identify the components of a rule that would do that well, and at the same time identify some shortcomings in the existing rule, and at the same time some shortcomings in the stipulation that has been offered.

The first principle is that the terms and conditions should be identified at the outset, but that's only half of the equation. The rest of that first principle is that there should be a point of entry that would enable parties to resolve any disputes over the terms and conditions before the RFP gears up.

The staff's proposed rule goes part way towards addressing this first principle in that there is a further delineation of criteria in terms of conditions, and that's a

step in the right direction.

The IOUs' proposed stipulation doesn't go as far. They offered to identify possible criteria that could be included in an RFP. But neither the staff's proposed rule nor the offer of a stipulation addresses the need to resolve any dispute over terms and conditions at the front end.

Why is that important? The problem that this first principle is designed to address is this: If an RFP contains terms that are either onerous or commercially infeasible, developers will either choose not to bid or they will be forced to cushion their bid in order to protect themselves from, from this onerous condition. And if either of those events occurs, it means that the rule is less likely to reach its objective of identifying the most cost-effective selection. That is why the solution would be to have a point of entry that would enable a party who wishes to challenge a term or condition as either infeasible or unreasonable at the outset.

And we have structured the most recent PACE rule language as a point of entry. And that's important to understand because if there are no terms that are contested, then this point of entry would not affect the time schedule of the RFP at all. But even if it did, we have built into the rule a time line that requires that a potential participant file a complaint at an early point in time or waive any contingent of that nature. So in this way this is actually a

change from the status quo that improves the ability of the IOU to conduct an RFP with no loss of time.

The staff in its recommendation observes that under the status quo parties have the ability to file a complaint and can challenge the outcome of an RFP. We have an example of, or a near example of that in the FPL situation, and that resulted, even before the complaint was ruled on, in something of a do-over that extended the time frames.

But we have, in this most recent iteration of suggested rule language, suggested that the Commission could issue a notice in the Florida Administratively Weekly setting the deadline by which time a participant would have to file any such complaint. And if that is done within, say, 30 days of the issuance of the RFP and any complaint then is ruled on expeditiously, we believe there is more likely to be a savings in time compared to the alternative, which is a full-blown complaint proceeding occurring after the results of the RFP have been announced. So we have tailored this rule language to result in a savings of time, not a lengthening of the time requirements.

At the same time that the, the point of entry will assure that when an RFP is final, either by virtue of no complaint having been filed or by virtue of ruling on any, any issues raised, the potential participants will have the assurance that their bids will not have to be cushioned to

protect themselves against, against undue risks.

The second principle and the third principle I'll take together. The second principle says that if the IOU intends to offer a proposal, the evaluation should be placed in the hands of a neutral third party. And the third principle had to do with the need for an apples-to-apples comparison in the form of binding bids by all contestants.

One of the IOU's comments with respect to this area is that the, that PACE's proposal of apples to apples is misplaced because IOUs are inherently different because they have the obligation to serve. And I always have to smile a bit when I hear the IOUs offer up this idea that the obligation to serve is something that sets them apart in this area.

I would like to consider the obligation to serve in this context: To illustrate, let's assume a new customer that has not yet been hooked onto the system, and the new customer calls on the IOU and says, I wish to have service. What happens? Well, the IOU says, well, first let's get out our approved line extension policy and see if your revenues are sufficient to make this profitable. If the answer is yes, we'll be right out. If no, you may have to file, you may have to pay a CIAC or you may have to do without service.

So the obligation -- my point is the obligation to serve in other areas is always bundled. That's a term with which you're well familiar. There's always -- the obligation

is bundled with other components of what many people call the regulatory compact: It's bundled with the monopoly privilege of serving all customers, hardly a sacrifice on the IOU's part, and it's bundled with the expectation of an authorized rate of return, and it's bundled with oversight by the Public Service Commission. That all travels together. And so it's only a matter of convenience when they would try to break out from that bundled package this obligation to serve to say this is why we're different.

Always as part of the package the Commission has oversight of the IOUs' activities so that this monopoly privilege is not abused, so that the obligation is tempered with economic regulation, and that should be the case here. .

What makes this different is not the obligation to serve. What makes this different is that under the existing rule the IOU is serving as both contestant and judge. And in other areas after-the-fact review by the Commission is, is adequate to provide the necessary oversight. But in this context where they're wearing two hats, it's impossible for either the participants or the Commission or a staff member that's been invited to watch the milestones to know which hat are they wearing at any particular moment in time. And particularly in view of the need to provide to participants the perception of fairness, it's important to separate these two functions.

Another reason why the typical or routine oversight occurring after the fact is inadequate here is that in many cases you have the determination of need case where this, this selection process is attended by, by numerous assumptions, by, by computer simulation models and by a statutory 90-day clock, all of which makes it inadequate for the purpose.

So when, when the, when the IOUs say that we're different because we have the obligation to serve, remember that that obligation to serve is not necessarily, does not necessarily translate to least cost service. If the obligation to serve meant least cost service, then the IOUs would never have an occasion to say we need incentive regulation to motivate us to do a better job to get the rates lower. But that's not the case.

If the obligation to serve necessarily meant least cost service, then in every case the IOU's proposed return on equity would coincide with what you ultimately approve. And that's not the case either. There's always this tension between the obligation to serve and their desire to be profitable, and it always requires for oversight on your part to make sure that that privilege is attended by effective economic regulation.

Now I don't mean, I don't mean to imply that profitability is a bad thing. Florida PACE members are trying to be profitable, too. The difference is that in this

situation we're not the ones wearing, serving as both the judge and contestant. And we think that for these reasons it's imperative that this, this situation be addressed in a way that takes that dual role away from the IOU only in those situations in which it proposes to build a self-build alternative.

You'll see in our most recent iteration of rule language that we have tailored the rule to require the separation only in that situation. If the IOU does not intend to self build, if it's simply seeking the best alternative, under our most recent version of the rule it would, it would perform the selection process. It's only to resolve this tension of where it is both contested and judged that we contend the function needs to be separated.

As to whether the bids were binding and as to whether there is a difference in the manner in which PACE members or participants would enjoy the benefit of coming in under the bid, whereas, that would not be true of the IOU, let me point this out: I believe it's clear by the fact there's already a rule on the books that the Commission is convinced that an RFP process has the potential of yielding the cost-effective solution. And if the rule is strengthened and improved such that it has the effect of motivating numerous participants who are confident in the fairness of the rule and who see that the terms and conditions do not require them to protect themselves by an inflated bid, if it encourages them to bid aggressively

based upon their costs and if it at the same time, by virtue of encouraging that kind of response, leads a utility to sharpen its pencil, then, then the bids will drive the price of the capacity addition towards cost, and the idea that you're going to have a situation where some sort of unfair equilibrium between upside and downside is really academic.

Those are all of my comments, Commissioners. Thank you very much.

CHAIRMAN JABER: Thank you, Mr. McGlothlin. Mr. McWhirter.

MR. McWHIRTER: Madam Chairman and Commissioners, you've heard so far from presentations by the investor-owned utilities and by the representatives of the independent power producers with respect to your consideration for today. I'm here to speak on behalf of a consumer group I represent and you represent. There are 15 million residents in the State of Florida, more or less, and the economic well-being of this state is very important to the state.

A great responsibility has been given to you to protect, in your parens patriae position, the interest of these people. But the regulatory scheme under which you work gives moment for pause to consumers, and I'll tell you why.

First of all, the investor-owned utilities in this state are given government protection against competition. Therefore, to protect the people it's necessary for you to

evaluate what they do and for you to determine whether it's fair and just and in the public interest.

The regulatory scheme, however, has some problems with it. And the principal problem is that the greater the investment a utility makes in its assets, the greater potential amount of money it can collect to get a fair return on those assets.

The second thing is that consumer input into the prudency of the expenditures by a public utility is for all practical purposes foreclosed because the investment for examination of prudency doesn't come to you in a rate case until well after a plant is built, frequently in commercial operation and frequently has been in commercial operation for a number of years. These factors, the fact that the regulatory scheme makes the price want to be higher for the utility's benefit and the fact that consumers don't have any input until well after the plant is built, makes the bid process before that plant is built extremely important. And you need, as part of your operation, to allay public concern as to the fairness of that process.

You've had a bid rule that's been in place now for eight years, and in those eight years the utilities have never lost a bid. The independent power producers, the other people that would build power plants, say that that's an uneven playing field. I don't plan to speak to whether or not it's an

even or uneven playing field, but people of intelligence and understanding of the industry say it's not, and I think you should give great consideration to that.

Page 2 of your staff recommendation deals with a circumstance in which a utility was going to, is going to spend $680 million to add 380 megawatts of capacity to its system. Now I'm not all that good in math, but I believe it works out to the fact that that costs, that new addition to capacity is going to cost $1,790 per kilowatt.

I asked one of the independent power producers what it would cost to build a greenfield plant in today's market, and the answer was it costs between $450 and $600 per kilowatt.

There's, of course, a difference between the greenfield plant that the independent power producer would produce and the other plant that was going to be built by or is being built by a public utility. The principal difference is the investor-owned utility already had its environmental approvals, it owned the land, it had the basic infrastructure in place to connect that plant to the transmission system.

When that plant is added to the rate base, any consumer seeking to determine the prudency of price will have an extreme uphill battle because that utility will come in and say, hey, wait a minute, how can you contest the prudency today when in 19, or the year 2000 this Commission concluded that it was in the public interest not to have bids on that process and

to go forward with it? And that's a great burden you put on the public. There is a great responsibility you have to that public, and that is to be sure that the process going in before that plant is built is a fair process and that public concern can be allayed.

When we got involved in this case -- I'm going to give you some hearsay evidence, and I'm doing this primarily because this isn't an evidentiary hearing and, secondarily, to expedite it. But I called a meeting of several large industrial consumers and I invited our consultant, who is very keen on the knowledge of how this Commission operates, how the public interests are and somewhat the legislative process, I asked him to participate with us.

The outcome of that meeting -- and each of the industries were people who had purchased power from investor-owned utilities, they have built their own self-generation plants and they know what it costs to build them, and they have a higher degree of sophistication than the run-of-the-mine consumer who is somewhat helpless in the ability to contest what's going on with complex matters of which they have no knowledge. And I asked each one of them if a bid process would work; do they employ a fair, what they consider to be fair and just bid processes in their application? And each one without exception said we do; our primary desire is to get the most reliable possible plant, our

plants normally operate at a 92 to 96 percent operating factor, and we try to get them at the lowest possible cost, and we've had some degree of success with that using the bid process.

After that meeting I called upon a company that's been here before that's a large commercial grocery marketing chain, and I asked them -- they had built generation, they had participated in the market. I asked them whether they felt the process was fair as it stands now and whether or not they could operate in a bid process. They said they felt that a fair bid process was extremely important to allay the concerns that they would have about the output of electric utilities. They understood the difficulty in coming into a rate case and presenting a case.

Finally, I called Cape Kennedy and I asked a gentleman there that's in charge of energy management for the Cape if he felt that something as complex as a power generating station could be dealt with on public bid process or a request for proposal process. And he allowed as how he thought that that would work, and that people that went up in rocket ships under a government bid process felt confident that they were going to get there most of the time. And he felt that he would have liked to have been here and said they have found it to be a very worthwhile endeavor.

So I'm not going to suggest to you specific regulations or specific phraseology for the rule. There's no

question in my mind that you have the authority to adopt rules of this nature. But I am going to ask our consultant to say a few words based upon what he heard at our meeting and what his observations have been in discussions with the opinion elite around the state, those are the editorial boards of papers, his knowledge of the Legislature and his knowledge of this Commission's operation and its relationship with the public. It's my great pleasure to introduce the Honorable Carpetbagger, Joe Garcia.

MR. GARCIA: Commissioners, it's a pleasure to be here for several reasons. First off, after Mr. McWhirter's very generous introduction last time which had to do with the length and the curliness of my hair, I've been unable to cut it ever sense in the fear of losing employment.

Secondly, let me bring up -- I think John stated the basic points and I think -- let's talk about the context. And let's smile a little bit, because this is precisely what Commissioners do, make the tough decisions.

CHAIRMAN JABER: Are we not smiling?

MR. GARCIA: You've got to smile more, Commissioner, smile a little bit more. These are the things you do. These are the tough decisions that you have to make. And today is not a day where anyone is going to be less for the wear. We are challenging the system that is in place to do a better job for the consumers of Florida. You shouldn't be scared away by

what the utilities offer is this doom and gloom. We've all been caught -- those who want to change have all been called Enron today or some other bad name without, without actually stating it.

Commissioners, we're here to do these brave things. That's exactly why you're put in this exalted position, to do the best work you can for the people of Florida and look it into context. Let's take a rule, let's take a hard rule, let's take a hard look at that rule, let's go to hearing, let's hear the evidence, let's build a record, and when we build that record, let's make a decision in the best interest of the people of the State of Florida. That includes the investor-owned utilities.

Secondly -- thirdly, I want to come up to a point that Commissioner Clark and Mr. Sasso made in reference. You still have regulatory authority no matter how aggressive the bid rule that you apply is. You have regulatory authority when they purchase paper clips, when they purchase power plants, when they purchase land, who they do business with is within your regulatory authority when they come before you for prudency. That's just the way it is.

We're not asking you to get out of that framework. In fact, we're insisting on a framework that gives you apples-to-apples comparisons so you can do the things that you need to do, so that your accountants can look at the real

numbers and look at the comparison.

Commissioners, I know you've got a ton of information there and a ton of legal authority before you, and I know that there's yet a long way to go if you decide to go forward with this. But today is exactly why we have all these procedures in place because we get to make these types of decisions and we get to look at all the facts. And hopefully if you choose a rule that moves this process forward today -- and no one knows more than, than the clients I represent on this particular issue the need there is for generation in the state and inexpensive generation. Because when that generation is not inexpensive, we lose clients, Florida loses taxpayers, Floridians lose jobs. So this is tremendously important. And we should get this process started, we should move forward. We've looked at this long -- we've looked at it for a long time. Now let's look at the specifics, let's take this to a hearing and have the evidence before us and make the right decision. Thank you for your time and thank you for the opportunity.

CHAIRMAN JABER: Thank you, Mr. Garcia.

Mr. McWhirter, you were done?

MR. McWHIRTER: I'm done.

CHAIRMAN JABER: Mr. Twomey.

MR. TWOMEY: Thank you, Madam Chairman, Commissioners. Mike Twomey on behalf of the Florida Action

Coalition Team. With me today is the Executive Director of FACT, Mr. Ernie Bach, who is going to make a few comments. And I'd like to follow up with a few of my own and then close.

MR. BACH: They both ran away. Good morning, Madam Chair, Commissioners. Long hair or short hair, Commissioner Garcia is a hard act to follow.

I am Ernie Bach, Executive Director of the very real and legitimate Florida Action Coalition Team. Without reiterating all of those comments that I've previously put on the record, I will jump to just a few issues that have come up since that time.

The issue is the bid rule: Is it fair or not, who has the authority on the bid rule?

I attended the first joint meeting and later participated in two teleconference calls of both sides relating to the PSC direction for the sides to come together with a stipulation. And it's crystal clear to me, after participating in those, why I'm of the consideration I am on this issue and why you should put me on your side, the public side.

In our opinion the IOU stipulations are simply self-aggrandizing. We strongly support the principles of the proposed PACE stipulations, and not lightly. We reviewed them, we questioned them. But try as we may or try as we would, we simply could not find anything specifically wrong with the IPP stipulations' three principles. I mean, what's wrong with set

criteria, what is wrong with an independent neutral evaluator and what is wrong with equal footing? They appear obviously logical, and our citizens, our members, including the 77 FPL ratepayers who have requested my representation before you on this issue, view this as something with common sense. It demands citizen support and, therefore, we feel it demands Public Service Commission support.

Consumer protection, quote, unquote, has become an oxymoron in these times. Understanding that issues of black and white are almost nonexistent, understanding that gray is an almost endless expedition of interpretation and, as an issue goes on, more and more legal and interpretive, unfortunately even the black and white becomes blurred and, conversely, it becomes interpretive.

So who does the public's interpretation? If not the PSC, including an issue with rulemaking such as in today's case, who else is available, available for the public's interpretation of representation? One could say the Legislature. However, and I'll be brutally honest, FACT members do not have a great deal of confidence with that alternative, especially in light of a member of the Legislature who recently saw fit to stick his nose into this issue and, as we see it, attempt to influence the action of your independent agency.

Members of the Commission, this has certainly given

the appearance and the perception that the system, your system, my system is completely compromised or at least on its way to being compromised.

I would like to briefly respond to a couple of Mr. Sasso's comments. He said he saw the meetings as productive, and I guess I attended different meetings. Mr. Sasso's use of the word "impasse" is a misnomer. It was a stone wall, but it was a stone wall on behalf of the IOUs' participation.

Mr. Sasso asked about the customers' interests, where do the customers' interests lie? As a Florida electric user and ratepayer I'd like to answer that. It lies with the per kilowatt hour charge, it lies with the fuel adjustment charge, and just this year with the 17½ percent increase over the base rate for the kilowatt hour charge over a thousand kilowatt hours used. That shocked me when I saw that. So my interests are in total at the bottom line of that electric bill.

Late last week we released, FACT released an OPID (phonetic) statewide, which included in its comments, and I distributed a copy of that for your information, it included in its comments our opinion about that recent legislator's actions which we felt were intrusive and, indeed, seemed to us as a veiled threat to members of the Public Service Commission. We find that egregious. Actually, let me exemplify that. We find that outrageous.

FACT understands that this Commission is frequently called upon, as Mr. Garcia said, to make tough decisions, and in an issue such as this one would require an enormous amount of political courage on your part to do the right thing, something that FACT members, something that Florida electric users earnestly hope that you have on this issue of fairness, transparency and good representation for the citizens who rely on their Public Service Commission.

Thank you for the opportunity, Madam Chairman.

CHAIRMAN JABER: Mr. Twomey.

MR. TWOMEY: Thank you, Madam Chairman, Commissioners. Mike Twomey. I'll try not to repeat anything or many things that Mr. Bach has said and the other people on the consumer/IPP side.

FACT supports your staff's primary recommendation not to approve the IOUs' unilateral stipulation, but we don't support your staff's primary recommendation so far as it goes to say that you should go ahead and accept the unilateral IOU stipulation with their acceptance of a few IOU business practices.

We think that you should conclude this process today by proposing a new rule; a new rule that at a minimum has the three points raised by the PACE organization, supported by FIPUG and by FACT. That will give us a fair rule. It will be the right thing to do.

There are a couple, there are a couple of sacred cow, perhaps red herring issues I wanted to discuss that I don't think have been addressed sufficiently.

The first one is the rulemaking authority that this Commission has. You've been told by a number of folks on this side of the table that you have the authority necessary to change the rule, and FACT believes that. We believe you have the authority to initially promulgate it, we believe that you have the authority to change it. You still retain that authority. We think you should do so.

Mr. Bach danced around a little bit, but we think Senator Campbell's letter was intrusive, was unwarranted, that it was wrong and that it was wrong for at least three reasons.

One reason, it was the effort of one senior senator to interject his views in this process in a manner that had the appearance of trying to cow the Commission and dictate result of this hearing, if not of other dockets.

We think it was also wrong because the text of the letter, the tone seemed biased. It seemed clearly biased in favor of the IOUs.

It was wrong, also, because it suggested that the purpose of this docket here, this rulemaking proceeding somehow involved the reregulation or the deregulation of electric service in the state. And we all know that's not true; it's simply not true.

What we're facing here and ultimately what you are facing, Commissioners, is to determine whether your rule is adequate to meet the purposes of fulfilling your statutory obligation -- obligation, not permissive -- the obligation to see that when you approve a power plant, that it's the least cost, provides the least cost electricity.

So Senator Campbell was wrong in those areas. He may have been well intended, but it looked wrong, it felt wrong, it smelled wrong.

Now -- and, again, to the extent that he suggested that you don't have the authority, we agree wholeheartedly with your staff that you have the authority, you always had it, you still have it and you should exercise it as best you can. And if you're wrong, it's not for some joint committee of the Legislature to come in and tell you that you shouldn't do it beforehand because they think you don't have the power, rulemaking authority. The proper place for the decisions of this Commission, which is intended to be an independent agency, notwithstanding the fact that it is subordinate of the Legislature, your independent agency decisions are properly reviewed in the state's appellate courts. You should do your best job to interpret the law, fulfill your obligation, and if someone doesn't like it, they can take it to the appellate courts. You have the authority.

Now another serious red herring issue in here is this

obligation to serve business. Do they have an obligation to serve? Of course they do. It's in the law; it's in the statute.

Now all five of Florida's investor-owned utilities have a legal statutory obligation to serve, including Florida Public Utilities.

Florida Public Utilities, to my knowledge, doesn't have a kW of native generation. They purchase their full responsibilities from other utilities 100 percent of the time.

Would it surprise you to know or do you know which of the five investor-owned utilities in this state has the lowest residential rates by far, notwithstanding the fact that it doesn't have a kW of native generation? Commissioners, it's Florida Public Utilities Company, and by a great margin.

Furthermore, if you check your own staff's -- the filings by these utilities, the best I can read it, Florida Public Utilities now and historically, for the most part, have the best quality of service as measured by the amount of time that they, their customers experience outages and the duration that their customers experience outages. So, so what's the problem? They don't have any generation at all, they have the lowest rates, they meet the electrical needs of their customers on a far greater basis than the others.

Now I did some other checking and I think my numbers are right, but you have to ask yourself -- I found myself

asking, do the IOUs say to themselves our obligation to serve means we shouldn't have a bid rule at all, or does it mean it's okay if we have a bid rule, but only one which we can always win?

They seem to suggest to you, notwithstanding the fact that you have a rule now and everybody goes through this process of submitting bids, largely a useless process so far, they seem to suggest to you that if they have to give any generation at all or obtain any generation at all, capacity through contracts with third parties, that somehow their obligation to serve will be diminished. That's what they seem to -- that's how I interpret it. Okay?

Now do they have, Commissioners, do these utilities, these four utilities, do they have any third-party contracts now for firm power? The answer, of course, is that they do.

I did some checking in FP&L's ten-year site plan, and I think I got the numbers correct, but they currently, this year, I believe it is, between firm capacity and energy contracts with cogenerators and small power producers, which they have, I think it's 855 megawatts, combined with the UPS purchases in the St. Johns -- from Southern Company and St. John's Power Plant purchases, they've got this summer 300, I'm sorry, 3,288 megawatts of outside obtained power and capacity. If I did the math right, that comprises about 15 percent of their total capacity available of something in excess of

21,000 megawatts. So right now they are reliant upon about 15 percent of their capacity to serve their total needs from outside sources.

The ten-year site plan shows that that number increases to a total of 3,351 megawatts two years from now, in the year 2004, although the percentage may be about the same because the total capacity needs increase. But the outside percentages start dropping somewhat dramatically in 2005 when the total goes to 2,625 megawatts; it goes to 2,044 in the year 2007; and by the year 2010 it drops to only a total of 1,021 megawatts.

When you get down to 1,021 megawatts in the year 2010 and you compare it to the total capacity needs of the company as projected in their ten-year site plan, you're down from 15 percent currently to four percent of the total capacity that they're willing to have or will have from outside sources.

So I had to ask myself if it's okay now with 15 percent, why couldn't it stay at 15 percent? Why couldn't it go to ten or eight? Why does it have to go to four percent in the next eight years? And if it goes down that much and the 15 percent is okay now, why couldn't, if they had the lowest cost, why couldn't one of these IPPs, if they had the lowest bid, win one of these contracts without diminishing FP&L's or any of the rest of their obligation to serve? And I think the answer is, is that they could have, the current number, they

could keep it forever. And there may be reasons for not having these people win, but it shouldn't be based on the notion that it will hurt their ability to meet the obligation to serve.

Now earlier in this process, in the workshop FACT handed out a number of handouts that tried to show you why we think getting the statutory obligation correct is so important in the dollar sense. Again, it's a duty you have. It's not something that you can do -- it's mandatory.

So least cost -- everybody here, most people here have told you there's no confidence in the public that the current process gives you the information so that you can be confident that you got least cost. We suggested in some of the handouts we had before that there were hundreds of millions of dollars to be saved with as little as five percent reduction in total power plant costs, if you could obtain five percent reduction in total power plant costs through a better bidding rule. Hundreds, hundreds of millions of dollars. But you can't know that, we maintain, because they always win and they always get to undercut it.

And one of the things that FP&L and the other IOUs have said is that if we have a firm bid, it's not fair for a couple of reasons. One reason would be that it wouldn't give us any incentive to try and come in below that bid cost because all the savings would go to our customers. Well, one has to ask, what's wrong with that if savings went to their customers?

But accepting the fact that they're a for-profit business, FACT would say to you if they had the lowest hard bid in a fair bidding process, let's say $500 million for a given power plant, and they come in at 480 or 460 or 450, we'd say give them a good part of it, make it worth their while because the customers will benefit, too. FACT would say to you, split it 60/40 with the IOU taking the biggest percentage. They come out ahead, customers come out ahead, 40 percent. It takes that argument away from them that they lose out with a hard bid.

On the other hand, they say to you, it's not fair for the IPPs or the customers that are interested in this matter to suggest that the IPPs don't or that they really have hard and fast bids. IOUs say the contracts are loose, sufficiently loose that the IPPs can come in and they can beg and whine and look for change orders and this kind of stuff and ask for more money, and if their bids aren't hard and fast either, so it wouldn't be fair to stick us with a hard and fast bid that the Commission would hold us to.

Well, I would say to that, FACT would say to that let the IOUs tell us what slip we have to have in their bid to give them precisely the same amount of, of advantage in making change orders and so forth that they claim that the IPPs have. If there are legitimate reasons why they made a truly legitimate low bid at $500 million, and by the time they get around to completing the plant and coming in for a rate case,

they should have the same opportunity as an IPP would have in saying we experienced some problems beyond our control, we need to ask for another 5 million, another 20 million. Put them on -- make it a level playing field. And if they, IOUs know where the IPPs have this slippage, they can draft it up in a rule.

That's all I'm going to address, except that I know that it's a difficult decision for you, as others have said. Do the right thing, do the best you can to do the right thing. And if someone doesn't like it, we'll go to court. That's, that's the way it's supposed to work.

There are dollar amounts here that are huge, Commissioners, and we would ask that you promulgate a rule, incorporate the three principles and get on with it. Thank you very much.

CHAIRMAN JABER: Thank you, Mr. Twomey.

Are there any other stakeholders that may be sitting here in the jump seat that I just haven't seen?

MR. MOYLE: Madam Chair?

CHAIRMAN JABER: Mr. Moyle. Anyone else after Mr. Moyle? Okay.

MR. MOYLE: Thank you. Jon Moyle, Jr., appearing on behalf of Competitive Power Ventures, CPV. And you've heard a lot today. I'm going to keep my remarks very limited. And I'm a little concerned that I may be, my remarks may be stating the

obvious, but let me just go ahead and state that.

I've listened today and you have heard a lot of people make comments. And I've written notes -- Mr. Sasso has talked about FACT supporting the IOU and evidence pointing this out and pointing that out. Ms. Clark said that the weight process was overly cumbersome when used. Mr. Twomey just indicated that Florida Public Utilities is the lowest cost and gave you a lot of information about them.

And my point simply is, is that all of those are, are facts. And in this proceeding, as far as I know, I don't believe that there has been any evidence adduced in this rule proceeding to date. And I think where you are is at a point of deciding should we go ahead and give ourselves the benefit of hearing evidence, in which case you should vote to move forward with a rule. And any party who wants can request a hearing and will have an opportunity to present evidence.

You've heard a lot of remarks about this being a very, very significant policy issue. And I would argue that in order to make the best decision and the right decision, that you should move forward and receive evidence as to, as to some of these things that have been said.

So I just wanted to make that clear that at this point in the process there has been, been no evidence. There's been a lot of argument, yes, but there's been no evidence. And I would urge you to move forward with a rule so that evidence

can be provided to you. And we would request that you move forward with the PACE rule as it's set out there. But my main point is I think it's very important for the parties and for you and for ultimately the ratepayers to have a proceeding in which evidence can be provided and y'all can make the best decision based on that evidence. So that's all I wanted to say.

CHAIRMAN JABER: Thank you, Mr. Moyle.

Again, no other presentations?

MR. McGLOTHLIN: Chairman Jaber, may I have about 15 seconds just to follow up?

CHAIRMAN JABER: No. Huh-uh. No. I told you from the outset what the plan was, and that's what we're going to stick to.

Commissioners, I'm going to open it up for dialogue and discussion by the Commissioners here in a minute. But I, I can't resist but addressing one thing, and I think it'll help us with the dialogue going forward.

First and foremost, let me tell the entire room that every decision we make is a tough decision, and I take seriously -- and I think I can take the liberty of speaking on behalf of all of my colleagues when I say we take seriously our responsibility to the ratepayers of the State of Florida.

I am personally offended when all of you try to politicize an issue when it is not our job to politicize

issues. It's our job to look at the evidence in the record, Mr. Moyle, as you say, and listen to the dialogue by parties, to read comments that have been filed by parties in a process that, frankly, has been really, really efficient. I was prepared to compliment the parties today for all of the ongoing efforts, all of the efforts to date.

Do not think this decision is tougher than the decision I made last Friday or a year ago or the decisions that I will make going forward. These responsibilities are serious. We regulate multibillion dollar industries. And every customer is just like the next one to me; every customer deserves the highest respect and the benefit of a record and, frankly, my job is to ask tough questions.

Now with respect to the letters I received from the Legislature, those are, frankly, welcomed. If a senator or a representative wants to say to me, you know what, you have an invitation, Lila, to let me know what issues you think I should take up, then that's a relationship that we, this Commission, has fostered.

Commissioners, let's take up questions. I don't mind going first. My questions are all over the place, so forgive my being unorganized as it relates to the questions. But let's start with Mr. Sasso and Ms. Clark.

You talked about the companies that bid on your projects, and you really refer to the companies as IPPs bidding

on your projects. Am I correct in understanding that all companies bid on your projects, not IPPs; in other words, your, your other regulated companies bid on your RFPs?

MR. SASSO: Yes, ma'am.

CHAIRMAN JABER: So really this is not about IPPs versus IOUs. The rule, if we decide to go forward with modifying the rule, you would agree with me that it would apply to all companies that choose to file a proposal in response to your RFP. It's a simple question.

MR. SASSO: Yes.

CHAIRMAN JABER: With respect to local governments, in one of the workshops we had, I think it was the last workshop and I think it was Mr. Sambo, I think it was Mr. Sambo, he talked about local governments, suggested a fee based on the size of capacity in the RFP and perhaps taking a look at whether the application fee should be reduced. And I thought, Mr. Sasso, I think it was you that said that that might be a consideration that the IOUs would be willing to make. Did that come up in your negotiations? Did you give it any additional thought?

MR. SASSO: I don't believe that issue ever surfaced again. I may be mistaken, but I don't believe it did.

CHAIRMAN JABER: Okay. Well, then let me pose the question to you. Is there merit in having a reduced fee for local governments, co-ops? Just educate me on that issue.

MR. SASSO: Reduced application fee?

CHAIRMAN JABER: Yes.

MR. SASSO: Well, the application fee, speaking now from the point of view of Florida Power Corporation's experience, has been set with the object in mind of deferring the cost of operating the RFP. I don't believe the cost would be any different for processing any one bidder's bid over another. So it would be a question of either other bidders subsidizing certain bidders or the customers subsidizing certain bidders.

CHAIRMAN JABER: Okay. And with respect to the cost of -- someone brought up the argument today, I think it was Ms. Clark said, you know, capping the application fee, one must keep in mind, appropriately so, that to the degree the companies cover the cost of the process, that's better than asking the consumer to, to cover that cost. And I would expect, I would expect that the number of bidders has a lot to do with whether you recover the entire cost of the project, of the process.

MR. SASSO: Yes. It's not perfect. The only way we could get closer to being actually cost-based would be determine the cost of running the RFP after the fact and then go back and reallocate as opposed to doing it up front.

CHAIRMAN JABER: As a general rule, is there -- can you give me an idea of how much the evaluation process costs

the company?

MR. SASSO: Well, on our last couple of projects it's cost a lot more than the $10,000. It depends, of course, in part whether there's going to be intervention and litigation. But if you're just talking about the evaluation itself, my best information was that it cost more than that per bidder.

CHAIRMAN JABER: Okay. You made the argument, IPPs can walk away from projects. To the best of your knowledge, have IPPs ever walked away from projects?

MR. SASSO: There's been a fairly high profile example of it in the press, but that may be an extraordinary example.

CHAIRMAN JABER: You said something about to the degree IOUs come under, the cost of the project comes under originally anticipated, then customers benefit. How and when do the customers see that benefit? When do they realize that benefit?

MR. SASSO: The, the customers would, would realize that benefit at such time as any when the IOU seeks cost recovery on the project.

Now, of course, in some cases the IOU may not seek cost recovery on a particular project, in which event the customers would demonstrably benefit for self-build versus an IPP-built project, which would be recovered through a clause.

But assuming that a utility seeks cost recovery for

the development of a particular project, the extent that there's a, a favorable cost discrepancy would be reflected at that time to the customer's advantage.

CHAIRMAN JABER: How -- what -- hang on, Commissioner Bradley. If I could finish this train of thought.

COMMISSIONER BRADLEY: I want to ask a question though that ties into what you said.

CHAIRMAN JABER: I'll let you.

With respect to seeking recovery, you said they realize the benefit if the company seeks, files a rate case basically.

MR. SASSO: Yes.

CHAIRMAN JABER: Is there an incentive for the company, and I don't mean any, that there's any sort of foul play in not wanting to, to have a savings, but is there an incentive built into the process that gives the company a clear signal to come in under the cost when you do exercise a self-build option?

MR. SASSO: Well, I can, I can answer that with respect to two examples: Florida Power Corporation and Florida Power & Light. I know, for example, because in the course of developing our comments in this docket, Florida Power & Light has advised that there have been a number of projects where the company has estimated and represented that a project would cost X dollars and, in fact, was able to come in substantially under

that.

I know from my own representation of Florida Power Corporation that the company has consistently driven very hard to bring the best deal back to the customers, including embarking on litigation at times to, to press its position on contract interpretation where it was important to do so for the customer where the benefit of prevailing would flow exclusively back to the customer. So the company has fought very aggressively to try to keep costs down for the benefit of the customer and negotiating with vendors and negotiating with other third parties. And I've seen that time and time again. I've been asked for advice on it.

CHAIRMAN JABER: Okay. And is the opposite true? Have you ever been in a situation, any of your clients that you're representing here today, been in a situation where the costs came in higher than anticipated?

MR. SASSO: I suspect there must be cases of that nature. I can't tell you conclusively that there is an example where we know for sure that that will be true or has been true. I just can't tell you sitting here today.

CHAIRMAN JABER: Okay.

MR. SASSO: I would be surprised if there weren't cost overruns. I do know that in the course of some of our discussions various companies have mentioned that their experience in dealing with IPPs in various jurisdictions has

been that we run into change orders, renegotiations and so forth, cost overruns.

CHAIRMAN JABER: And in terms of ratemaking, have you sought to recover those cost overruns? How are they internally handled?

MR. SASSO: Well, again, I'm talking only in the abstract right now. But certainly if, on any project, whatever it is, capacity addition or some other project, the company negotiates hard, administers, manages contracts rigorously and nonetheless incurs cost overruns on projects, then those would be prudently incurred expenses and the company would justifiably, we would think, seek recovery.

CHAIRMAN JABER: Staff, I'm going to ask you about that, too, later on.

Commissioner Bradley, you said you had questions on that point before we move on?

COMMISSIONER BRADLEY: Right. I'd like for the IPPs to answer that same question as it relates to cost recovery. Who, who benefits if -- if you bid and all of the sudden you discover that, that your bid was too high and there is going to be a savings, who benefits? A statement was made that the investors benefit and not the customers.

MR. GREEN: I'll take that question, Commissioner. I think if an IPP had a winning bid and was able to come in under that bid, then the benefit of that would fall to the

shareholders of the IPP, quite clearly.

COMMISSIONER BRADLEY: Well, one premise that we discussed is, you know, benefit to the customers. And I'm trying to figure out with that particular situation how would the customers benefit if the investors are going to receive a higher rate of return on their investment than the customers? What would the customers receive if that situation occurs?

MR. GREEN: Well, in this very hypothetical case of yours I'm not sure the customer or the consumer would benefit from anything in that hypothetical situation.

But I've got to add that I don't, I don't know of any case in recent, in my recent experience in many states when I did work for an energy company that there was very significant cost savings. A fairly administered request for a proposal, or in some states such as Arizona which might go into an auction, it will drive out a bare minimum cost. And for someone to come in and surprisingly save 50, 20, whatever the numbers were that have been discussed, millions of dollars is extremely rare. And in my experience I don't know of any case where that's happened.

But in your hypothetical case, if that was to happen, the consumers may not benefit other than the IPP. And I'd maybe ask Joe McGlothlin to add to this.

MR. McGLOTHLIN: I would like to just follow up and point out that in that hypothetical the IPP has won the RFP,

and so by definition has given ratepayers the least cost alternative of any that were submitted. So the, so the customers benefit in that regard.

COMMISSIONER BRADLEY: Follow-up? Okay. Now let's switch scenarios hypothetically. Who pays if there's a cost overrun as it relates to cost recovery, the customer or the investor?

MR. GREEN: Are you addressing that to the IPPs, sir?

COMMISSIONER BRADLEY: Yes.

MR. GREEN: If there is a cost overrun, again, this would -- you know, in other states it is determined by what the evaluation criteria that has been preestablished would dictate. Are there opportunities for negotiations to collect the cost overruns or not? As Mr. Sasso said, both parties manage the contracts aggressively to their best interests, and there would be negotiations if there was cost overruns, just as if there are cost overruns on an IOU, self-build opportunity, there would be some negotiations perhaps with the Public Service Commission to see if cost recovery could be obtained. There would be negotiation.

There's -- but a contract is a contract. And if we have -- if the contract says there is no negotiation or -- again, this all goes back to what the stipulations of the contract say or the stipulations of the evaluation criteria might say; you either, you know, you either have the

opportunity to negotiate some recovery or you don't. It just depends on what the criteria that has been established say.

COMMISSIONER BRADLEY: But I still need to know who pays if there's a cost overrun? If the customers -- if the investors benefited as a -- if you come in under bid and discover that you're going to make more of a profit, then they naturally will receive a higher rate of return on their investment. But if the opposite situation occurs, I'm trying to find out who, who takes up the slack or who pays for the difference. Is it the investor or is it the --

MR. GREEN: If an independent power producer wins a bid for $400 million, say, and that is what the contract says they can collect from the investor-owned utilities, and the independent power producer then finds it costs them $450 million to provide that energy and capacity that was committed in the contract, the shareholders of that company, of that independent power company are going to bear the brunt of that $50 million cost overrun.

COMMISSIONER BRADLEY: Okay.

CHAIRMAN JABER: All right. Again, apologies for how unorganized this is, but I was just jotting questions down as people were speaking.

With respect to repowerings, Mr. Sasso, I asked you to talk to the IOUs and give me their expectations on what they think, how many repowerings in the next five years in

particular.

MR. SASSO: Yes, ma'am. Florida Power Corporation, Florida Power & Light and Gulf show no repowerings in their ten-year site plans. TECO shows the Gannon repowering, which is currently in progress, but no future repowerings.

Now that is not to say that each of these utilities would not consider repowerings, and they will consider the option of repowerings in the future if economics, technology or environmental considerations make it appropriate to do so. But currently the ten-year site plans of these companies project no future repowerings over the planning period.

CHAIRMAN JABER: With respect to the stipulation itself, you list the evaluation criteria, but you're not stipulating as to what the criteria will be.

MR. SASSO: That's correct. And those are listed as examples. And that's about the best we could do without really inappropriately tying our hands. I think everybody understands that.

CHAIRMAN JABER: And on the ranking, you're not -- in the stipulation you in no way agree to ranking the criteria.

MR. SASSO: Correct. For the same reason; the need to retain flexibility to ensure that we do get the best value for the customers.

CHAIRMAN JABER: Have you had an opportunity to look at PACE's proposal?

MR. SASSO: Yes, ma'am.

CHAIRMAN JABER: Do you think their idea of ranking the criteria somehow ties your hands? You said the flexibility in putting more weight on one criteria or another.

MR. SASSO: I can look at that specific aspect of it. My concern with the proposal was more fundamental, and I'm happy to look at that one aspect of it.

Madam Chairman, can you point me to a particular provision?

CHAIRMAN JABER: Well, let's see. (2) talks about outlining the appropriateness of the terms. Did you even look at it or did you just dismiss it as a matter --

MR. SASSO: Oh, no. No. I read it. But as I say, my concerns or our concerns with the proposal were much more fundamental.

CHAIRMAN JABER: Okay. (2) talks about --

MR. SASSO: And I'm looking in particular at the ranking issue, and I, I'm still missing that.

CHAIRMAN JABER: Well, it talks about in the notice how the Florida Administrative Weekly could contain the specific criteria, the scoring, methodology, the ranking and then -- Mr. Green, you may have to help us out. Oh, and then (7) --

MR. SASSO: Are we -- I'm sorry. Are we talking about the proposed rule?

CHAIRMAN JABER: Yes, filed September 25th. Do you not have a copy of that?

MR. SASSO: Yes, ma'am. I'm reading it. I'm looking at (2).

CHAIRMAN JABER: Okay. Look at Page 3, Page 3, 7(G). It says, "All criteria, including all weighting and ranking factors and all price and nonprice considerations that will be applied to evaluate proposals should be set forth ahead of time."

MR. SASSO: Right. Yes. I've got it.

CHAIRMAN JABER: Do you think that language is just too restrictive in terms of leaving with the IOUs the flexibility to put more weight on criteria after you see the bids?

MR. SASSO: This, this contemplates that weighting and ranking would be included in the RFP, which would be issued before any bids come in, which would require prejudging the relative importance of some of the criteria, which is something that we strongly believe we should not do.

Now there are -- there will always be certain very broad categories or, or preferences which are generally identified in the RFPs. But getting into the weeds, so to speak, of assigning particular weights and ranks to all the criteria that they contemplate would be listed, we believe would be highly detrimental.

CHAIRMAN JABER: Well, let me use the example of technology. To the degree your RFP just does not envision, because of unforeseen circumstances, because of, you know, some new technology or innovations that a company that submits a proposal would have that you don't have, can't you put disclaimer language in the RFP to retain that sort of flexibility?

MR. SASSO: Well, I suppose that we could put disclaimer language that we could then invoke to depart from the weighting and ranking. But one can already anticipate what that's going to lead to.

CHAIRMAN JABER: Okay. With respect to -- from a legal standpoint, the stipulation being accepted by this Commission in addition to retaining the rule, can you talk to me about whether you think this Commission has the legal authority to accept a stipulation by one segment of the stakeholders in lieu of modifying a rule? I'm not real clear on that.

MR. SASSO: Yes, ma'am. Yes, we believe that the Commission can and has done so. In fact, that was exactly the mechanism that was used to resolve the reserve margin docket.

Because what we're proposing is not that the Commission take any official action, but just the contrary. The only official action, if you will, that the Commission would take would be to close the docket.

The Commission may choose to open a rulemaking docket for any number of reasons. This one was open because, as staff describes, staff was directed to consider extending the rule to repowerings. The Commission may decide based on what it's heard today that that's fairly academic, and so for that reason alone let's just close the docket.

There are facts out there in the world that come to the Commission's attention that the Commission reacts to in deciding whether to go forward with rulemaking or not to go forward with rulemaking, and what we're proposing is to change some of those facts.

We're proposing to tell the Commission in a solemn commitment that the IOUs will undertake certain practices which we hope address some of the concerns discussed, which the Commission can now look at and say that's how they're doing their RFPs, we have the assurance, and based on that we'll close this docket, we don't see a sufficient need to go forward with this at this time. Now if we, if somebody departed from that commitment or other circumstances changed, the Commission could say, well, we need to reopen this docket and go forward.

CHAIRMAN JABER: What's our authority to enforce your voluntarily business practices?

MR. SASSO: There would be no enforcement authority as such. What, what would be at work here would be, one, the integrity of our commitment to the Commission, as in the case

of the reserve margin docket. There were no orders that entered a requirement that the IOUs meet a 20 percent minimum reserve margin planning criterion. It was just simply undertaken as a solemn commitment. So we simply have the integrity of our commitment.

Second, again, we're not asking the Commission to give anything up if the Commission were to accept this as a sufficient basis to close the docket. We're simply saying, Commission, we've heard all the criticisms, we've tried to respond as carefully and as thoughtfully as we could, and we're going to do the following things. And we're appealing to your discretion to say that's enough for now for us, we'll close the docket and not go any further. That does not tie your hands in any way from taking any kind of action you feel you need to take in the future should you reach a different conclusion, have a different concern.

So on the one hand, no, it's not the kind of resolution that has the same teeth, let's say, as a Commission order or a rule, but the advantage of that is we don't have to test the legality of that, we don't have to get caught up in the delays and uncertainty. But you do have the assurance that the utilities will honor their word, and you also have the ability, in the event we don't or because of other circumstances that may arise, to take whatever action you believe is appropriate.

CHAIRMAN JABER: Let me make sure I understand the response to the authority on enforcement.

Let's say part of your stipulation envisions having a pre-bid meeting and then, you know, inviting staff to some of those milestone events. Let's say you forget to do one of those things. Are you suggesting that the Commission has no enforcement authority to say, you know what, you forgot to do one of those things, we don't like it, you should be fined or you should redo; is that your suggestion?

MR. SASSO: The Commission could certainly say you forgot to do one of those things and you told us you were going to do it. Why aren't you doing it? And I trust that we would do it.

Could we be fined for not doing it? My answer would be no because it would not be in breach of a Commission order or directive.

And then the other thing, of course, is whatever we do will be judged by the Commission at such time, as in the case of -- for example, a plant covered by the Power Plant Siting Act, we'd come before the Commission for approval. And while whatever we're proposing to do voluntarily would not have the same force as a rule requirement or a statutory requirement, it would be part of the facts about how we handled the project.

CHAIRMAN JABER: So what exactly would the Commission

gain -- let me preface this by what I've always viewed the rulemaking to be versus what it is not.

For me, this rulemaking is about making the process this Commission in its wisdom uses to determine, by the way, the most cost-effective alternative -- all of you were saying least cost and it's not that and there is a difference -- in determining what the most cost-effective alternative is. And why do we look at that? Well, it's really about the economic regulation and the ultimate cost to the retail ratepayer. So for me it's how do you make that process better, more transparent, more fair so that the benefits flow through to the ratepayers? This is not about changing the statutory scheme as it relates to the industry or allowing merchant plants in the State of Florida or doing any of that. It's about taking the rulemaking, the current bidding rule and making it better for the ratepayers.

So saying all of that, what does this Commission gain in accepting your stipulation, if I can't enforce it?

MR. SASSO: Well, again, Madam Chairman, when we make this commitment, I can say that the IOUs intend to honor it. I can give you the recent example of the reserve margin stipulation. And I don't doubt anybody in this room -- I don't believe anybody in this room would, would suggest that the IOUs have not taken all necessary steps to honor that stipulation. All of the IOUs involved are honoring their commitment to

increase their reserve margin commitments at 20 percent or better by the agreed upon deadline. We undertake this representation in this stipulation with equal seriousness.

What does the Commission gain if the, if the Commission relies upon this to close this docket? Well, let me say two things.

To begin with, again, the Commission acts against a background of what's happening in the industry, what's happening with our utilities. We're now advising the Commission about what would be happening as a quid pro quo for closing this docket. The Commission could rely on that.

If one of us departed, then the quid pro quo is gone, and the Commission might feel that it's appropriate at that time to initiate rulemaking because what you relied upon did not materialize. So there's enforcement in that sense, if you will.

What the Commission gains by accepting this stipulation is we're able to make immediate progress in trying to improve the process. We disagree with Mr. Green, with all respect. We don't agree that the process is broken. We haven't made these commitments because we agree that the process was broken. We've made these suggestions or these proposals because, with the benefit of the dialogue and the discussion, we realize that a number of people have very heartfelt concerns here and we're trying to identify those and

address them to the extent we believe is appropriate. And we've identified a set of practices that we would propose to implement and we think they do give real value. We think they do.

The staff has said in its recommendation that whether or not the Commission accepts our stipulation or goes forward with the rulemaking or not, staff still feels quite confident that the staff and Commission can still do its job in administering this process of capacity additions and reviewing for cost recovery. What we've proposed would enhance that. And if the Commission accepted it, we'd put it into place and we'd be able all to say that we've made immediate progress.

If we don't -- and this is not a threat, please understand. This is not like any other case -- I disagree with Mr. McGlothlin that this is like any other case where every rulemaking has some risk and there's always a possibility that somebody is going to be unhappy and challenge it. We think this is fundamentally different.

If this were a situation where we thought the Commission had authority, we would be talking about the terms of the rule, not whether there should be a rule. And we've talked about this, we've considered it very carefully. If the Commission wishes to hear, I can provide some further comments on our views on statutory authority, but we firmly believe that this is an area where the Commission cannot act. It's not a

threat. It's just our firm, firmly held belief, our thoughtful conclusion in looking at this.

And so we feel no choice but to say that to the Commission and, therefore, to look for an avenue to solve this problem without getting into the legal controversy. And I understand that --

CHAIRMAN JABER: But, Mr. Sasso, help me. Here's where I am just fundamentally not there. If I assume with you for a moment that we don't have statutory authority to even initiate rulemaking at all on this rule, I'm going to accept the stipulation that has the effect of supplementing the rule? Either I've got statutory authority or I don't.

MR. SASSO: No, it doesn't have the effect of supplementing the rule, not in the form of any type of legal action. Right now, the companies can do all kinds of things to run their businesses in terms of purchasing paper clips, all kinds of things that are not subject to a rule. And as to many of these, the Commission does not have rulemaking authority.

Yes, the Commission has authority to promulgate rules regulating practices that affect rates, but as our colleagues would interpret that at the other end of the table, that would cover everything, arguably. Everything we do, arguably, affects rates. And no one would suggest the Commission can regulate every aspect of the management of our businesses, but there are all kinds of things we do every day that we do

without legal compulsion.

And all we are suggesting is, with the benefit of the debate and the discussion, we will do some more things. It has nothing to do with rulemaking. We're not saying that this becomes part of the rule, an addendum to the rule, an amendment to the rule. It's just that we are going to do these things voluntarily the same way we do ceratin things to buy paper clips, and we're informing the Commission of that in a very formal way, in the form of a stipulation, where we're making a commitment to you to do these things. And now it becomes part of your understanding of how we conduct our business.

It does not represent a change to the rule. It represents information to you that you can rely upon to say we don't need to take action with respect to a rule. And that's why we sidestepped the legal issues.

CHAIRMAN JABER: Okay. Mr. Twomey, in your presentation, you said you can support -- I think I heard you say you can support the primary staff recommendation because staff recommends that we add on repowering and CTs as part of modifying the rule. And I ask you the same question: What authority does this Commission have to accept a stipulation in lieu of a rule?

MR. TWOMEY: I don't think you have any. I mean, I wasn't involved when you did the margin reserve -- we resolved that the way you did. It struck me when I heard about it that

it was odd, but be that as it may, I don't want to criticize that too much. I don't think you have the authority. I think you need to decide whether your current rule is functioning adequately or not. A number of us -- of the parties have suggested that it's not. The IOUs say that it is, although they're willing to supplement it with these business practices that they'll take a solemn oath or promise for.

I think you need to decide legally whether you like the rule or not, whether it's functioning or not. If you're happy with it, then leave it alone. If you think that there are things that need to be improved so that you're more confident and that the consumers are more confident that you're meeting your statutory obligations, you get the least-cost generating plants -- we're not talking about paper clips here; we're talking about the biggest things these companies own generally in terms of producing their products -- if you don't think that it's adequate and that it needs improvement, you shouldn't accept side deals -- unilateral side deals by the IOUs that you are -- they've conceded are unenforceable.

I mean, if you want -- and if you're satisfied that the things they'd offered as their voluntary business practices are sufficient and necessary to make the rule better, and that's all you want, you don't accept PACE's three principles and our three principles, then at a minimum you ought to take their voluntary business practices and incorporate it in the

rule.

CHAIRMAN JABER: All right. Let me switch gears. I need a minute with the repowerings and then turn it over to the Commissioners for other questions.

My reading of the Power Plant Siting Act indicates to me that the Legislature did not intend to include repowerings and CTs. I think just my bare reading of the Power Plant Siting Act indicates that that was designed to certify next plan generation, new construction, basically. Saying all of that -- that's just one Commissioner's opinion -- that's not to say the current rule can't be made better and more transparent.

But with respect to repowerings and CTs, staff in their recommendation talks about the public policy concerns with that, that the ratepayers pay for that too. And shouldn't the Commission be on solid ground in reviewing those costs and the prudency of those costs? There should be a mechanism for that. What's wrong with having the Legislature with this Commission notifying the Legislature that that is a real public policy debate that is worthy of the Legislature's consideration? Any feedback there?

MR. TWOMEY: Well, I think you raise an excellent question. FACT was happy with the recommendation, although I'm not -- I won't go so far as to say that I would support it wholeheartedly. I'm not here to criticize it either. But I think the reality is, Madam Chairman, when I worked here many

years ago, CTs were rehab old small jet engines, and they're an entirely different scale these days.

The focus of the Power Plant Siting Act was addressed to the plants that the Legislature reasonably thought would be seen in providing base load and intermediate power. And typically, those plants had to have a steam cycle because there was nothing that didn't have a steam cycle except for the smaller CTs. So I think your staff is reasonable in wanting to include the repowerings and encompassing the 150-megawatt range.

By the same token, I think it may be incumbent upon the Commission if they see that the statute is fallen behind vis-a-vis today's markedly improved technology, that you may want to recommend to the Legislature that the things that were sought to be captured by the Power Plant Siting Act when it was first adopted and last amended needs to be modified to take into consideration the fact that they're very huge and often very efficient units that don't have steam at all, let alone 75 megawatts.

Did that answer your question?

CHAIRMAN JABER: It does. Thank you.

Commissioner Palecki, you had questions?

COMMISSIONER PALECKI: Yes, I had a question for Mr. Sasso. You stated earlier that you didn't believe there was a legal compulsion on the utilities to bid out other

aspects of their operation. You mentioned paper clips. But are you certain that that's not the case?

MR. SASSO: No. There might be -- without canvassing the rules and regulations, I can't speak to whether there are other situations where we might not be required to use competitive bidding, but I can't think of any, and there of course is a whole area of PURPA which is regulated in a different manner. But the fact is that the issue of when and whether we use bidding presents some very distinct policy considerations. In fact, it was taken up by the Study Commission and so on. How the company proceeds generally is going to be subject to review by the Commission with respect to whether we provided assurance that purchases and so on have been done prudently, but certainly I'm not aware of anything that says, the only way to make prudent purchases is through competitive bidding.

COMMISSIONER PALECKI: Let me ask staff the same question. I recall when I worked in the gas industry that the company I worked for was required to go to bids on installation of pipelines, on purchase of office supplies and numerous other aspects of doing business.

Was that through incipient policy or -- I recall that it was a legal compulsion varying without doubt. Cathodic protection was one of the issues we were required to bid. What's the difference between power plants and these various

aspects of running a gas company?

MR. BALLINGER: I don't know that there are any. I think there have been specifics where the Commission has required bidding for other aspects. I believe in electrics it may be on procurement of vehicles, let's say of fleet vehicles. We look at it. It's more in the auditing section where they look at how do they procure these businesses.

COMMISSIONER PALECKI: But there are many areas where utilities are required to put things out to bid, and by our decisions over the years, we have made those policies quite clear to the utilities. And we've let them know, if you don't do it, you won't get cost recovery.

As a matter of fact, I recall myself being personally hauled into the -- before the Commission when there was an aspect of business that City Gas did not bid out, and they were not allow cost recovery. Is it different in the electric industry?

MR. BALLINGER: I don't know the specifics of it. I really haven't looked at that, of the gas versus electric. I'm sure there's other aspects that we do require bidding of certain services. I can't give you the details of where they are at this time, but we can find that out and see where else the Commission has required bidding.

COMMISSIONER PALECKI: But the main point I'm trying to get at is, this Commission has required utilities to go to

bid on various aspects of the running of a utility business.

MS. BROWN: Commissioner, I could envision that occurring in the Commission's rate case review of management prudence and other rate proceedings where the Commission determined on evidence that there was a problem. And this would be a solution that the Commission would mandate to what it perceived to be imprudent management practices on the part of the utility.

COMMISSIONER PALECKI: I want to make sure I'm clear on this. Are there aspects of running a utility business that are always required to be bid out? And let's just take a gas company. Let's take cathodic protection. I don't recall that it was done on a case-by-case basis, and I recall that it was required to be bid out across the board. And when the Commission found out that a certain aspect of running the business had not gone to bid, that that was considered a violation of a requirement imposed by the Commission.

MS. BROWN: I'll have to review the rules and get back to you. I really don't know the answer to that, but I will find out and let you know.

COMMISSIONER PALECKI: Is there anyone from the gas side of the industry that's aware of those particular requirements that could address this issue? Thank you.

CHAIRMAN JABER: Commissioner Bradley, you had a question?

COMMISSIONER BRADLEY: Yes. The first question I have is, I've been looking at the PACE -- at the core principles, and I need to ask a question based upon some information that was put forth that ties into Number 3. I think I heard Mr. Sasso, or someone on your side, state that currently bids are not binding. What they are is, they are preliminary and indicative which allows for -- which means that they're nonbinding; is that true?

MR. SASSO: Yes, sir. We were speaking to that issue in two respects. First, with respect to the initial submission of the bids, the way the process is worked is that the bid submitted by bidders and the RFPs that have been conducted are subject to negotiation. It's the first initial submission, and in fact, there's give and take after that. And they're often conditioned on various things that the utility won't accept or won't agree to. And if you seek clarification, you may learn that, well, we'll offer you that price only if you don't make us do this, or you allow us to do that. And it's an unacceptable condition, and therefore, the price changes.

So that type of discussion goes forward, and the utility may come back to the bidders and say, can you do better? And so the initial submission is rarely ironclad. Everything you need to know, all we've got to do is sign the contract. So as a practical matter, initial submissions are not binding in a meaningful way.

And we also meant to speak to the issue of, what happens even when a contract is signed? I believe Mr. Green has acknowledged that there may be occasions where maybe something happens that nobody anticipated, and there's a cost overrun, and then there's an effort by both parties to protect their interests. In our case, we would be protecting the customers' interest. The IPPs' case or bidders' case, they would be protecting their shareholders' interest. And there might be even a good faith disagreement. I don't mean to suggest it has to be a bad faith disagreement. But if there is a problem that arises, you get into a contract dispute, and so what looked like it was $10 turns out to be 12 or 15 or 20. You just don't know until the Court tells you what the bid is or was.

And there can be change orders. There can be practical solutions to those that result in the price going up, settlements. So there are a variety of things that enter into the transaction.

COMMISSIONER BRADLEY: Right. Well, with that being the case, then, how would a requirement that all bids be binding at the time that they are submitted affect the process?

MR. SASSO: It would be very difficult to envision a procedure where that would be the case, where that would be workable. We've heard a lot of discussion over the various workshops about this, and a lot of people have addressed the

issue: What do you do about the terms and conditions of the contract?

When you're talking about capacity additions, these become very complex transactions, and there have been a number of suggestions, well, perhaps an effort could be made for the utilities to identify those up front. Tell the bidders exactly what they want. That's what we did in our last project. And we got back responses lined through, x-ed out, alternative contract terms. These are very complex transactions, and I cannot envision as a practical matter that a utility could run an RFP for a substantial project and expect everything to be completely wrapped up with a bow on it with the first round of bids. I just don't think that can be --

COMMISSIONER BRADLEY: And I'm trying to determine what the truth is because now one of the problems that we're dealing with is the fact that it has been stated that the IOUs require the IPPs, or whomever there is that's bidding, to submit a binding proposal. Now, you just told me that these proposals are not binding, and that they're preliminary and indicative. Which -- what --

MR. SASSO: We asked the bidders to be prepared to stand by their bid for a period of time. But again, the bids we get are evolving. They do get changed in the process.

COMMISSIONER BRADLEY: The bids are not binding.

MR. SASSO: They're not binding in a meaningful

sense. They're binding in the sense that we may ask a bidder, if you submit a bid on an RFP, be prepared for us to accept it, and then you're stuck. Okay? You have to be prepared for us to accept your bid, but the problem is, we rarely get something that we can just sign off on and that's the end of the process. There's enough conditions and what-ifs that that's not going to happen as a practical matter.

COMMISSIONER BRADLEY: Okay. As it relates to Number 2, neutral and independent entities, I don't think that the Public Service Commission itself should put itself in the position of being a neutral and independent entity to assess if a bid is fair or legal or what it -- how it should be executed. Who might be a neutral and independent party? Is this another entity that we're going to have to create in order to assess these bids?

MR. GREEN: I know the question, sir.

COMMISSIONER BRADLEY: Yes.

MR. GREEN: From the -- you know, representing PACE, there's a lot of consulting companies out there in the country, in the nation that do this type work. The -- they have auctions. The idea of RFPs evaluated by independent third parties has created, you know, hoards of these people that will go out and do this work and they exist. And if the Commission feels they are not the right one to be the independent third party, we support that decision, but independence and

objectivity is still a good principle that should be adhered to. And there are people out there that can be employed -- paid for by the fees collected on bidding -- on bidders that will do this independent and objective evaluation.

COMMISSIONER BRADLEY: One of the questions -- well, one of the statements that I made early on is, for sure, I believe that this Commission has the jurisdiction to deal with the Bid Rule as it relates to transparency and fairness. But, you know, one of my concerns that I expressed early on is the fact that when the statute was passed, no one anticipated or even thought at that point during that time frame that we would be dealing with the possibility of wholesale deregulation or restructuring as a part of our endeavors.

My concern is legislative intent. And I heard someone say that by no means are we trying to get into deregulation or restructuring. And I have a theory. You know, sometimes to excuse yourself is to accuse yourself. Would someone respond to me as it relates to the three principles that PACE has put forth and how that might push this Commission into a role that for sure it was not put here to do?

We're here strictly to implement the statutes and to not be an activist commission. And I don't want to be put in a position of being an activist commission and that is to overstep my boundaries by legislating or creating public policy when our role is strictly to implement and not to interpret,

also. That's the role of the judiciary. So, you know, I'm just still a little concerned about what might be happening here in terms of this Commission itself putting -- well, taking on the role of being a policymaker rather than an implementer.

MR. SASSO: Commissioner Bradley, I can speak to that issue, and please understand that we are not suggesting that the Commission has this agenda. But we would suggest that the principles put on the table by PACE do call upon the Commission to essentially upset the apple cart and depart from the current regulatory scheme. We have a proposal, for example, that IOUs be treated the same as IPPs. That is not the current statutory paradigm in Florida. The IOUs have a very serious responsibility to make decisions of this nature to run their plants for the benefit of the customer. And that's something that we take very seriously.

It's our turn to take a little offense at some of these comments, that the premise of all of them is that we cannot fairly do our job, that we cannot fairly evaluate these proposals and make judgments in the customers' best interest. And I think the track record proves we have, and this Commission has done its job in overseeing those decisions to ensure that the customers are protected. We think the system is working.

To the extent that the IPPs are suggesting that we need to introduce a third party, a neutral third party, some

consultant into the model and have them make the decisions about how we run our systems, we believe that fundamentally alters the current statutory framework and would put this Commission in a position of taking an activist role. And I think it's revealing that staff has not supported those suggestions appropriately so. In fact, staff has repeatedly gone on record and this Commission has repeatedly gone on record recognizing the role of IOUs in the statutory scheme, recognizing that it's inappropriate to insert neutral -- so-called neutral independent third party consultants who may have their own horses in the race in some way, shape, or form.

The staff and the Commission have repeatedly recognized that that is not the model that we have in Florida. So it's not so much that the Commission is proposing to do something it shouldn't. It's a situation where some of the proposals have called upon the Commission to do some of those things.

MR. GREEN: Could I add to that response, sir?

COMMISSIONER BRADLEY: Yes. Madam Chair?

CHAIRMAN JABER: Yes, absolutely.

MR. GREEN: Yeah, I disagree with Mr. Sasso. There's nothing in this discussion that goes forward as far as asking for some new legislative movement or something like that. The Legislature has laws out there today which you are implementing. The Supreme Court case of the Duke New Smyrna

Beach case said that no one can -- that independent power producers can't build merchant plants, but they can build plants if they get a contract with a retail-serving utility.

And what you're looking at is the way in which contracts are solicited, bid upon, evaluated, and eventually awarded. And that's what you're looking at. This is not outside the existing legislative framework or construct, and it's not outside the regulatory framework which you are currently, you know, involved in. This is nothing new. This is not wholesale deregulation, and this is not outside the lines that you are concerned about crossing.

Mr. Sasso has said that the independent third party would dictate how they run their systems, I think he said. That's not what the PACE proposal is suggesting. The PACE proposal is suggesting an objective evaluation of the submitted bids and that's it. They run their system, and they are good companies. They will run their systems well. They have the obligation to serve, not the obligation to build all capacity, and we need to keep in mind the different obligations they have here.

COMMISSIONER BRADLEY: And yes, Mr. Green, objectivity is in the eyes of the perceiver. You know, one of the things that I strongly suggested the last time we dealt with this issue was that the two entities get together and come up with language that deals with transparency and fairness that

the two of you could live with. And I know that in doing that, probably it would have required you to come up with something that you didn't necessarily like, but you could live with it, and for the IOUs to come up with language that they didn't necessary like, but that they could live with it.

Now, I must say that I'm a little disappointed because I've seen movement on the part of the IOUs, but I haven't seen movement at all in terms of a stipulated agreement on the part -- on your side of the equation.

MR. McGLOTHLIN: May I respond to that?

COMMISSIONER BRADLEY: These are the same stipulations that you initially had -- I mean, you still have the same language before us today that you had when I made that request.

MR. GREEN: Before Mr. McGlothlin goes into some detailed response, I'd like to say, and I've said it before, we are not wed to specific language, and our language has changed in our proposals back and forth. But we are wed and we are consistent in our support for the three principles that we espoused early on in this negotiation. And we have given on several points. We had three or four meetings -- I don't know if it's three or four. We had several meetings with the investor-owned utility community by phone and in person, and there was give and take, but quite frankly, the chasm is remaining very large between where we're comfortable going.

CHAIRMAN JABER: Mr. Green, I think you need to say to Commissioner Bradley -- you've got to give him the facts. Here's where you've made movement best I can tell, and to the degree there's more, you need to tell us. You've given up on the land issue, and you've given up on the fact that you want the IOUs to put costs in their RFP. Is there anything else?

I think there has been movement on both sides. I think the IPPs need to put the facts out there, just answer the questions. Don't be shy about saying, you know what? We have made movement. Here's where it is.

The fact is, all sides need to be commended, Commissioner Bradley. They didn't go as far as I would have liked them to go, but I think there's been movement on both sides.

Mr. McGlothlin.

MR. GREEN: I'm going to ask Mr. McGlothlin to go ahead and respond.

MR. McGLOTHLIN: Chairman Jaber, you mentioned two of the three I had in mind. In addition to agreeing that IOUs be required to put their costs in the RFP and that they would not be required by an RFP to entertain construction of IPPs on their land, we also offered to limit the opportunity for up-front complaints to something like 30 days after the notice is issued in response to the argument that we might jeopardize the time frames involved in the RFP. That is a change in the

status quo which now allows complaints to be filed at any point.

CHAIRMAN JABER: You know where else you've given up from a year and a half ago? You've also figured out that we are not going to deregulate the electric industry. That's the biggest.

COMMISSIONER BRADLEY: Yes, Madam Chair, but, you know, what I'm concerned about is the fact that no movement has occurred as it relates to the core principles, and that seems to be where we're stuck.

MR. GREEN: Well, Commissioner, in all due respect, sir, I don't see flaws in the three core principles. And I do think they are good principles, and I think they have proven to be good principles in processes in Louisiana and Arizona and Pennsylvania --

COMMISSIONER BRADLEY: And I'm not --

MR. GREEN: I don't see what's wrong with them to adhere those principles here in this state.

COMMISSIONER BRADLEY: Right. But my request is that the two of you get together and come up with something that you could give to us that you could agree upon and stipulate. And, you know, what -- it appears to me that what you've done is to dig in and decide that your core principles are going to be -- are going to govern the process and that you're not going to negotiate those core principles. And that's what I have a

problem with.

You know, the core principles are guiding this whole discussion. And I'm just -- you know, as I said earlier, I'm disappointed that you have not negotiated or given up on some of your core principles so that we can have some movement. And you know, understanding that, you know, today, if we had that situation, that is, if we had movement, that today maybe you-all might not be too happy with the outcome, but at least we've had some movement -- some substantive movement. And tomorrow, you know, there could be even a little bit more movement just based on the fact that movement is occurring.

And I'm just wondering why you're so determined just to have your core principles. Is it designed to win your point, or is it designed to negotiate? I mean, what is it? I mean, I'm just trying to figure out why there hasn't been any movement as it relates to the core principles, to make a long statement short.

MR. McGLOTHLIN: We understand that from your vantage point you're interested in a rule that does the best job for the ratepayers. And we've tried to put ourselves in a position to understand that and to try to articulate those principles which we believe embodied in a rule lead to that result. And I think that the principles we espouse hopefully are the ones that you want to see embodied in that rule as well.

That's why we think that to the extent that we can

negotiate on items where we -- the other side makes a point, we've done that. We've heard nothing in the arguments that persuades us that we're wrong when we say that not only are these principles of interest to us, they should be of interest to the customers who pay the bill and to the regulators who ensure that the utilities do the best job for the customers.

CHAIRMAN JABER: Mr. McWhirter and Mr. Twomey, you've been trying to respond. Let me go ahead and let you do that. And then, Commissioners, if you have other questions, we need to resolve other questions.

MR. McWHIRTER: The discussion kind of moved on away from the original question that I wanted to answer. But to go back to that and the rationale for the bid process, I would suggest to you that if you look at Attachment D to the staff's recommendation, it sets out Chapter 366.06, and it gives your responsibility from the Legislature in determining what rates the customers will pay. And the rates are based upon the utility's investment in assets. And it's the prudent investment in assets. So you have a responsibility to determine whether or not that investment was prudent.

The question that arises in the Bid Rule is, when do you make that determination? And you may recall, if you didn't go to sleep during my original presentation, that I talked about a situation in which a utility did not go to bid. You concluded under the Siting Act that it was inappropriate to go

to bid because it's a repowering process, but it looks like that that amount that was given to you as a cost for repowering is three times as high as the highest cost that an independent power company would bid to build the project. So the question is, do you want to wait until that issue comes before you in a rate case to determine whether it was appropriate to spend three times as much as an independent power producer would spend, or would you rather do it up front?

And I would suggest to you, with the bid process, what you have is the opportunity at the moment in time that construction starts to see what else is available rather than waiting until three, four, five years after the fact and then trying to go back and say, well, what was the market like at that moment in time.

And my suggestion is that you don't have to look to the Power Plant Siting Act to incorporate a bid rule. You didn't do that before. You look at a good way for you to determine the prudency of an investment. And a good way to do it, just like Commissioner Palecki suggested with buying office supplies, if a utility has put them out to bid, you can have a pretty good comfortable feeling that that was a good price. There may be other factors. There may be circumstances that you don't always come in with the lowest bid. You want the most reliable power plant. You want to have the credibility of the person that's producing the power. There are a lot of

other factors. So the lowest cost is not always the best cost.

But if you do put it out with a request for proposal and you do have an independent evaluation and not the people that stand to gain by the process to make that evaluation, then I think you when the matter comes before you to increase customers' charges can say, I am satisfied that at the outset this project was done in the most prudent fashion rather than waiting until six years after -- three or four years after the fact.

COMMISSIONER BRADLEY: And I'll agree with you, but tell you what -- where my heartburn is. If an IOU does that, then we have -- since they are a regulated industry, we have a process in place that allows us to deal with that situation. But if an IPP does that and if the investors decide that -- say, for example, they come in under, and they discover that the cost is 25 percent or 30 percent more. Then they have to go to their investors in order to get the additional moneys that are necessary in order to complete the project.

Well, suppose the investors decide that they are not willing to put forth the extra dollars that are necessary to complete the project. Then we have another problem to deal with. So, I mean, there's another side -- another way of looking at it, also. And we're just trying to figure out, at least I am, I'm trying to figure out what is best for the ratepayers and for the power users.

And again, I'm taking it right back to where I started out. I mean, you know, I'm a little disappointed that we haven't had any movement here as it relates to these core principles. And I will tell you this: There are a lot of principles that every state can use, but Florida is different. And what may apply in Montana for sure might not apply 100 percent in Florida as it relates to core principles and the bid process. So I'm struggling with it and just trying to determine what is best for the consumer.

MR. GREEN: You know, Commissioner, again, I'm sorry you're struggling with it. You know, PACE has given on several points relative to the three principles. We think the three principles are very appropriate for the Commission to consider in their test of whether the rule that they use or don't use is appropriate.

Did we look at other states? Absolutely. And others -- you can't take a state and say that's the right rule to use for Florida. I agree with that. However, we have moved on several positions, and I would submit to you, I'm not sure that the principles need to have movement on them. I mean, the principles are pretty sound and pretty fair and pretty appropriate. And no one -- and I would challenge you to tell me where a principle is flawed for consideration as a test or a litmus test for a proposal going forward.

COMMISSIONER BRADLEY: I think that's a better

question that you should ask -- I mean, that question should be asked of the IOUs. That's why I asked the two of you to get together and come up with something that you all can live with but that you might not necessarily like, which indicates that it's good public policy.

MR. GREEN: And we didn't get -- just to continue my response, sir. We did get together on several occasions. We did move on the three points, as Mr. McGlothlin has summarized. Movement on the IOUs' side, I'm still pretty well stuck with their original stipulation. So the movement might have been minimal on PACE's side in your understanding. It was significant from our viewpoint. And I would challenge you to ask the same question to the investor-owned utilities.

CHAIRMAN JABER: Mr. Sasso, I'm going to give you an opportunity to respond. But, Commissioner Bradley, Mr. Twomey has been wanting -- so go ahead, Mr. Twomey.

MR. TWOMEY: Madam Chairman, I leaned forward. The first time when Commissioner Bradley asked the question, aren't we getting off track policy-wise, deregulation, that kind of stuff, I think that was answered pretty well. The answer is, in our opinion, no, you're not. You're in the power plant area trying to figure out how you can get the least-cost, most cost-effective plant.

Now, with regard to the going back and forth and people giving, I believe 100 percent, Commissioner Bradley,

that you believe that the IOUs gave more than the other side of the table, but I don't think that's the case. The Chairman listed a number of things, more than the PACE people out here on the other side did, about where they've retreated from their initial position. I watched them give and we concurred on the basis of our participation as FACT.

On the other side, I'm not sure I see anything more than parsley from the IOUs in terms of what they have given these various volunteer, voluntary business practices, close the docket, that kind of stuff. I think that PACE and the consumer side have gone further in trying to meet your objectives than the other side has. And that's my perception. You know, we can both be strong on that.

When it comes to the core principles, "core" means almost like -- to me, it means, like, the Ten Commandments. You know, do you give up coveting your neighbor's donkey because you want to go for adultery or something like that, you know? Which might be okay. But I wrote down -- Commissioner, I wrote down when Mr. Green was talking about the three things he wanted, and they gave up on a lot of those things the Chairman mentioned. I just wrote them down even though I've got them in here someplace elsewhere. He said, we're looking to have clarity up front in the RFP's provisions. Okay?

We're looking, Number two, all bids at the same time, and I think they said "binding." Number three, we want

objective parties to look and judge the beauty contest. And I think, Commissioner, in fairness, this side has gotten down to the three commandments, and all of them are something that you could go to church and support because we're looking at clarity, we're looking at fairness, we're looking at neutrality.

Mr. Sasso suggests, well, what if the third party neutral judge has got his own agenda? Well, the answer is, then he's not neutral or she's not neutral. Okay? They're not impartial. So there's ways you can structure these things. So all I'm saying is, as the Chairman suggested, maybe you should ask, or somebody should ask, the IOUs how much they gave up from their original agenda. And my bet is that they're not going to have a lot of meat on the table when they start talking about it.

But I don't think it's right, Commissioner Bradley, that we didn't go as far as we could and we went further than they did and we got down to the nub of things where we got the three commandments. That's my perception, anyways.

CHAIRMAN JABER: Commissioner Bradley, did you want Mr. Sasso to respond?

COMMISSIONER BRADLEY: Yes.

CHAIRMAN JABER: Mr. Sasso, respond. You're the last person on this series of questions. And then, Commissioner Baez, I see you've got your mike on.

MR. SASSO: I'll try to be very brief and very specific. I think I'm answering the question, Commissioner Bradley. Let me know if I'm not. But if the question is, are there -- has anyone pointed out flaws in those three principles, the answer is yes. This is not a matter of their having three things on the table that are appropriate, and we can all go to church and worship them. It's quite the contrary.

We think each of their three principles has flaws. The first is, identify criteria and weights up front. Well, we've made movement in identifying criteria up front. The weights we've discussed today. We don't think that serves the customers' interest. That is flawed.

Second, IOUs and the IPPs should be treated the same. We are not the same. That is the statutory paradigm in Florida. That is a fundamentally flawed proposition. We have an obligation to serve; they do not. We are regulated; they are not.

Third, interject neutral third parties. Again, that's fundamentally flawed. We can't delegate our responsibility to make these decisions and to be accountable for the decisions to third parties, to some consultant who may pick a plant and then disappears and he's not accountable to the Commission. So those are fundamentally flawed principles.

CHAIRMAN JABER: Okay. Commissioner Baez, questions?

COMMISSIONER BAEZ: Yes, brief questions. First, I want to say that I am appalled at the parties' inability to negotiate -- what's the donkey commandment again? Is it seven or eight? I don't know. These are quick questions because I think a lot of my questions had been answered before. Mr. Sasso first, and I'm going to try and go down the line as I took the notes.

We've already discussed a little bit about what the nature of the bids -- of an IPP bid at the outset is, that it is not binding. It is in fact indicative, I think the word was, and that there is subsequent negotiation involved. What I want to know, is there a point during all of this process of which the bid actually becomes fixed?

I mean, where throughout the process -- I'm not so much concerned that the first number that gets thrown out there is a solid bid, but given the process even as we have it today, is there a point at which you say, all right, here's the number from Bidder A, it is fixed, and ultimately -- or if not, something to which you can say, okay, my price is better. Is there a point at which that happens?

MR. SASSO: There is a theoretical point when the contract is signed. Or at least when we get to the point where we've completed any negotiation and we've got a potential deal documented and we know what it is and we have the opportunity to sign it, at that point it's fixed theoretically, but then

you get into the issues that we discussed about contract interpretation, disputes, change orders, renegotiations, things like that.

COMMISSIONER BAEZ: Okay. Second, you mention in response, I think it was one of Commissioner Bradley's questions, you raised the notion of who shares the benefits of, for instance, underbudget projects. And you also -- as part of your answer you suggested that companies -- IOUs will hold an asset until rate recovery and that somehow that creates a savings for the ratepayers on a basis. I mean, you suggested somehow that they benefited during that interim of holding an asset until you seek rate recovery. Is that accurate what you said or --

MR. SASSO: Yes, sir. Believe it or not, the facts are getting foggy on me now. It hasn't been that long since our rate case --

COMMISSIONER BAEZ: It really is foggy up here.

MR. SASSO: -- but my recollection is that Florida Power Corporation, for example, had put a number of plants on the ground without coming in for rate relief. Whereas, if they had been developed by independent developers, the customers would have been expected to pay through a recovery clause.

COMMISSIONER BAEZ: Now, how long before you came in for rate relief? And I'm not asking for specific examples. I mean, there's obviously a dynamic that goes on, and there is an

interim. But for an in-service plant, have you ever --

MR. SASSO: Yes, sir, I don't want to overstate this because I don't want to mislead the Commission that we're offering to build plants without seeking rate relief. But as a practical matter, there is -- as a practical matter, there has been historically. If you look at the record, there's been a gap between the construction of plants and the request for relief, and sometimes it all gets folded in and there's no request for relief.

COMMISSIONER BAEZ: But when there is no request for -- in those examples, I mean, there have been other ways of addressing those costs.

MR. SASSO: Well, sometimes not by increasing rates. There has been no facility --

COMMISSIONER BAEZ: Sometimes by not increasing rates? I mean, is that for --

MR. SASSO: Perhaps.

COMMISSIONER BAEZ: Okay. On the question of repowerings -- and I know that this was covered before, but you did make a qualification. There are no -- the statement is that there are no repowerings listed in at least three of the utilities' current ten-year site plans.

MR. SASSO: Correct.

COMMISSIONER BAEZ: You left the door open because economics may dictate or other conditions may dictate that a

repowering becomes a cost-effective alternative or it becomes a viable alternative. In those situations, and I'm not interested in closing that door or that option to any of the IOUs, but in that situation, what kind of back check does this Commission retain a repowering?

And I guess similar to what the goal of a bid rule or the Bid Rule has been thus far, that being to get information to be able to ascertain whether the alternative is the least -- or the most cost-effective alternative, that sort of thing, what kind of process is in place now? What kind of back check does this Commission currently have?

MR. SASSO: When and if the utility seeks cost recovery for the repowering, the utility will come before the Commission and provide information. It can provide some of the information that staff has indicated in its proposals that it would like to see. At the time that it comes in for cost recovery, we can provide information on the costs of the unit, all costs associated with the project and so on.

Under the proposal that we've offered, we are proposing to make a formal presentation to the Commission and staff at the inception of the project. Now, of course, currently, there may be some discussion, but we're seeking to institutionalize that.

COMMISSIONER BAEZ: I'm sorry. Institutionalize what might otherwise be a practice that's already available?

MR. SASSO: Or might be informal or not taking place in the same manner.

COMMISSIONER BAEZ: Okay.

MR. SASSO: But the idea is, again, to improve the process without regard to whether it can be compelled or should be compelled. It's just as a result of the discussions. We've identified some opportunities to make these suggestions. But the backdrop the Commission has is the same backdrop it always has, an ongoing oversight of the utilities. We're accountable. We need to provide information that you need to do your job at such time as we seek to recover costs.

COMMISSIONER BAEZ: A question on -- there was some discussion on evaluators, on the value of independent evaluators or the difficulties that those kinds of things bring. As a matter of practice, do the companies even now, whether we judge them to be independent or objective or not, do you use consultants as part of your evaluation process?

MR. SASSO: We did on the last project. I believe FP&L did. We did not in the case of Hines 3. We did in the case of Hines 2.

COMMISSIONER BAEZ: And I guess you're here speaking on behalf of more than just Florida Power Corp?

MR. SASSO: Yes, I'm speaking of the examples I'm aware of.

COMMISSIONER BAEZ: Yeah, just off the top of your

head, would you characterize it as a rarity or more on the side of common -- fairly common practice?

MR. SASSO: I don't believe that I could characterize it as a common practice.

COMMISSIONER BAEZ: Okay. And my last question for you is, Mr. Twomey discussed or presented the Commission with some numbers in terms of percentages that nonnative generation represents right now and available to meet load or demand on the part of -- I forget what company it was, Mr. Twomey.

MR. TWOMEY: FPL was the only one I looked at.

COMMISSIONER BAEZ: FPL. All right. And this is not an FPL-specific question, but is the reliability of that existing nonnative generation any different? You know, is there something magical about what you have now as an industry and what could possibly be the outcome if there were more?

MR. SASSO: Well, if I can clarify what the facts are, my understanding of Mr. Twomey's point, he's suggesting that if you look at the current percentage of power purchase agreements versus utility-owned generation, you get a certain percentage of power purchase agreements, but if you look at the ten-year site plan, you see that percentage going down.

COMMISSIONER BAEZ: Well, I'm not talking about his point. I guess I'm trying to understand, what is it about the existence now of nonnative generation as part of you-all's supply? Is it of a character somehow? Is it more reliable,

the one that you have now, and potential IPP projects in the future are less reliable? I mean, is it down to that?

MR. SASSO: Oh, I don't know that we can generalize about that. I mean, there are issues prevailing today in the industry with respect to the ability of IPPs to get financing, for example, that may place in jeopardy the ability of an independent power developer to develop a project, see it through a successful conclusion, and operate it successfully. That may affect reliability, but reliability is going to be a function of contractual commitments and that in turn will influence price.

When you're obtaining reliability through a contract, you pay for it. And the more reliable you want it to be, the more you pay for it. And so there may be some trade-off, and some judgments may be made to include pricing at the cost of reliability, maybe with the best of intentions by the utility and the IPPs, and then you get down the road and find out, oops, it's not as reliable as we needed it to be. Maybe we shaved too much off the price. Whereas, with a utility-owned plant, you don't have those same issues. Now, I don't mean to suggest that anybody has concluded that contractual power purchase options are not reliable in some generic way.

COMMISSIONER BAEZ: And just to make sure that I'm clear, there's nothing -- you mentioned financing. I guess at some point when the financing comes through and the plant is

built, I mean, are the concerns attendant to that trouble getting financing? Do those go away?

MR. SASSO: Are they over? Well, recent events have demonstrated that they're not by any means, that companies still have ongoing challenges in operating their businesses, and those challenges can affect existing projects.

COMMISSIONER BAEZ: Thank you, Mr. Sasso.

And now some questions to Ms. Clark. Sorry. You opened your mouth, you know. You went over a couple of -- you went over the proposed rule, anyway, and tried to point out where you all have concerns or disagreements with it. And I just have a couple of quick questions.

First, concerning the site-specific costs -- and that's sort of a two-parter, or at least I understood it to be -- is the IOU objection to providing site-specific cost information because it leads to collocation proposals?

MS. CLARK: Commissioner, I think there was something in the staff's recommendation that suggested that they would be looking at that issue for determining cost-effectiveness and looking at the issue of locating independent power production on that site. I'm not sure I can find it right away.

COMMISSIONER BAEZ: And understand, I'm just asking, you know, and perhaps staff can clarify as well. You mentioned the word "requirement." You have a concern that there is a requirement in there somewhere, and I just want to be clear.

What is the requirement that's objectionable? Is it providing the information in order to perhaps -- that result in a little bit easier comparison for the Commission's purpose, or is it some -- or is it that you're perceiving a requirement that any proposal that has collocation on it -- that you would potentially have to accept a collocation proposal out of hand, assuming --

MS. CLARK: Well, certainly the latter issue is of concern, the notion of requiring collocation and the constitutional concerns with that. But the other point is, is the notion of the detailed publishing of costs in advance and the notion of having your bids cluster around what's put out there. And I think, as I recall in the Gulf case, there was concern about providing -- being very specific on that cost detail so that you would encourage them to cluster around that and not encourage them to put forward their best price.

And also, I think there was the notion, if you looked in Subsection 11 of the rule, as I recall it, it says, you must fairly evaluate the proposals against the next capacity addition. So, in effect, it tied it back to that proposal and I think carries with it the idea of precluding the utility from coming back in and sharpening their pencil.

COMMISSIONER BAEZ: Okay.

COMMISSIONER PALECKI: Can I ask a follow-up on that question?

COMMISSIONER BAEZ: Sure.

COMMISSIONER PALECKI: Ms. Clark, are you aware of any real world examples where that has occurred, where because a price is stated as the starting price -- I always think of a bidding procedure where, you know, the auctioneer always starts off with the price, but that doesn't mean that all the bids are always lumped right around that price.

I hear what you're saying, but can you give me some examples of where that's happened in Florida or elsewhere? Because there was a starting price that was mentioned, nobody sharpened their pencil and the bad deal resulted.

MS. CLARK: Well, I guess my response is, the way the rule was originally structured was so that you would not have the opportunity for clustering around that point. And in fact, when we discussed the Gulf case and their concern about putting the costs out there, the Commission acted upon that concern and said, yes, you put your price out there, but that doesn't preclude you from coming back in and sharpening your pencil. So that discourages the bidders from just clustering around that point.

MR. STONE: And if I may, Commissioner Palecki.

COMMISSIONER PALECKI: Thank you, Mr. Stone.

MR. STONE: In our actual experience on that same bidding process, I believe the facts would bear out that the prices that were received from independent parties in fact were

clustered around the original prices that were put out as part of the RFP, and that is one of the reasons why when we were given the opportunity to sharpen our pencil and submit our bid that we came in substantially lower. And that's why the proposal -- our self-build proposal is the one that prevailed with substantial savings for our customers.

COMMISSIONER PALECKI: Thank you.

COMMISSIONER BAEZ: And I just -- Mr. Ballinger, can you clarify exactly what is a requirement and what is not a requirement in the rule as we've discussed?

MR. BALLINGER: Okay. The requirement of having the cost data out there? The first issue about bids clustering around that data, that was discussed in the original rule, and it was decided by the Commission that since a lot of this data is already out there in the public domain, the cost of units, things of that nature, it's not going to do anything to have a sealed bid, if you will. And quite frankly, we haven't seen people cluster around data. We've seen it all over the board even though the price is out there. So I haven't witnessed a clustering per se.

Having the cost information for site-specific stuff is not to mandate collocation, but it is to give us a sense of, if they're building the same plant as the utility, what's making the cost difference? Is it the cost of land? Is it something else? And we're trying to get a handle for why --

what makes this the best alternative. That's what it's there for.

COMMISSIONER BAEZ: Okay. And I have one last question, Madam Chairman.

MS. CLARK: Commissioner, if I could -- I could point you to the section in the staff's recommendation regarding Subsection 6. It says, on the cost -- sorry, this was on the evaluation of the proposals. And it says, "The utility shall allow participants to formulate creative responses, and the public utility shall evaluate all proposals." It's in that section that the staff recommendation is, this is intended to require the utility to consider all proposals which may be cost-effective to ratepayers, such as proposals that would locate generation on utility-owned property.

CHAIRMAN JABER: What page are you on, Ms. Clark?

COMMISSIONER BAEZ: Yeah.

MR. BALLINGER: Page 11 of the staff recommendation, the scope of utility evaluation.

CHAIRMAN JABER: Thank you.

COMMISSIONER BAEZ: Okay. And quickly, just so that I can get the staff out of the way, Madam Chairman. The stipulation that the IOUs have provided refers to a pre-RFP meeting. The rule refers to a pre-bid meeting. Are they the same thing, or are they different?

MR. BALLINGER: No.

COMMISSIONER BAEZ: I was a little confused as to if there was a difference or not.

CHAIRMAN JABER: Martha said yes; Tom said no.

COMMISSIONER BAEZ: Martha is nodding.

MR. BALLINGER: In my mind --

COMMISSIONER BAEZ: I don't feel so bad anymore.

MR. BALLINGER: In my mind they're different. The pre-bid meeting is after the RFP has been issued, and utilities have typically been doing this to answer questions about the RFP once it's hit the streets.

COMMISSIONER BAEZ: Exactly.

MR. BALLINGER: The pre-RFP meeting as the IOUs have put forward is before they even put it on the streets to discuss it.

COMMISSIONER BAEZ: Right.

MR. BALLINGER: So I see them as slightly different.

COMMISSIONER BAEZ: And can -- are they a mutually exclusive concept? I mean, are you getting no more benefit from having both concepts incorporated? Would you be getting no more benefit from having both concepts as to one or the other -- as opposed to one or the other?

MR. BALLINGER: I don't know. I don't know if you'd get a benefit of having a meeting of parties before you issue the RFP, and then if you didn't include it in the RFP, you know, would you still have complaints? Or the other way

around, you structure your RFP, it hits the streets, and then you answer questions and clarifications about what you're really looking for. Then you go forward.

I think as long as you have the time in between when the RFP hits the streets and when bids are due to allow for some dialogue, that's really what you're looking for, not to close people down.

COMMISSIONER BAEZ: And one last question, Madam Chairman, I'm sorry.

CHAIRMAN JABER: Take your time, Commissioner Baez.

COMMISSIONER BAEZ: To Mr. McGlothlin, you had some discussion, and I call it front-loading the RFP process, so that the suggestion being that you can get any problems with either the terms of the RFP or the criteria, whatever it is that crops up out of the way ahead of time, and you presented it up front. Let's get those straightened out up front. Do you see that -- assuming that kind of concept of shifting the information for a protest process up to the front of the time line, does that -- did you contemplate any effect on interventions in the need determination stage?

MR. McGLOTHLIN: Yes, sir. As presently formulated, the PACE suggested rule language says that upon the issuance of the notice, the PSC would identify the deadline by which time potential participants could file a complaint relative to the terms, conditions, and any other aspect of the RFP. Later, in

the event someone wants to contest the outcome of the RFP, that party would be limited to an assertion that the approved criteria were incorrectly applied unless that party could also show that for whatever reason it could not have raised its issue during that first opportunity.

So it's designed to deal with the content of the RFP, the feasibility and reasonableness of the terms and conditions at the front end, and then to limit any participation on the outcome of the RFP to the argument that the approved criteria were misapplied.

COMMISSIONER BAEZ: Okay. Thank you.

MR. McGLOTHLIN: May I just add one more thought to that?

COMMISSIONER BAEZ: Sure.

MR. McGLOTHLIN: Because this is -- in further answer to the same question, I think the front-loadings you characterize, it serves to do a couple more things. For instance, as has been pointed out, PACE strongly recommends that all criteria, including the weightings, be identified at the front end. As I see it, that's where the IOU in large measure carries out its role of the obligation to serve because it is identifying and describing the capacity additions that best serves its customers, that it notifies the potential participants of what it's looking for and what would -- that in turn enables the participants to tailor their submissions

efficiently and affectively so as to meet the requirements or the needs of the IOU system as the IOU sees it.

In addition, it would enhance the ability and the willingness of a participant to offer what would be in the nature of the binding bid earlier in the process. The IOUs point out that under recent RFPs, the bids received have been indicative or conditioned, but look at it from the participants' point of view. If you have an RFP that says, for instance, you have to hold your bids open for 390 days, then that has an affect on how willing you are to put a binding and locking bid up front.

But if these things are vetted at the front end so that there's clarity provided and so that the terms are reasonable and feasible, that enhances the ability of the participant to offer a binding bid.

In our most recent iteration of suggested rule language, which PACE commends for your consideration today, we have set out a two-step process such that the first round would be evaluated by the neutral entity and a short list created. At that point, the IOU would provide to the short list -- to those who made the short list the transmission integration costs, which is sort of an unknown until that point. And then all participants on the short list, including the IOUs' proposal if the evaluator says it belongs there, offer a second and final and binding bid. So we've attempted to address this

binding nature of the bid by the two-step process that's in our most recent proposal.

CHAIRMAN JABER: Should there be yet another application fee in that sort of process?

MR. McGLOTHLIN: That's not identified in our submission. I think the answer is no, because I think typically the RFPs conducted by the IOUs have contemplated negotiations for a short list. And this would be more of a departure from our first effort to describe something to conform more nearly to that. Our first suggested rule language contemplated only one bid.

COMMISSIONER PALECKI: What if the two bids and two payments were defined up front in the criteria that you've discussed? I mean, I hear your answer, but it seems to me that if that's going to be the rule, as long as it's defined up front, that you shouldn't have any problem.

MR. GREEN: Yeah, if I could jump in. I think PACE's position would be that if the criteria said up front says that there's going to be a second round of bids and if there's an appropriate fee for that short list winner, if you will, to participate in that second round, then so be it. Make the fees reasonable and appropriate and not excessive, and don't make them such that it, you know, prohibits. The initial concern about fees was that multiple fees on an initial thing limit what a bidder may want to promote. You know, if it's 10,000

bucks a pop, you're not going to put 12 options out there, perhaps.

COMMISSIONER PALECKI: I have a question --

CHAIRMAN JABER: Can we take a ten-minute break, Commissioner Palecki? And we'll come back with your question. Ten minutes.

(Brief recess.)

(Transcript follows in sequence in Volume 2.)

STATE OF FLORIDA)

: CERTIFICATE OF REPORTER

COUNTY OF LEON)

WE, JANE FAUROT, RPR; TRICIA DeMARTE; and LINDA BOLES, RPR, Official Commission Reporters, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

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

WE FURTHER CERTIFY that we are not a relative, employee, attorney or counsel of any of the parties, nor or we a relative or employee of any of the parties' attorneys or counsel connected with the action, nor or we financially interested in the action.

DATED THIS 3RD DAY OF OCTOBER, 2002.

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