

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 020398-EQ

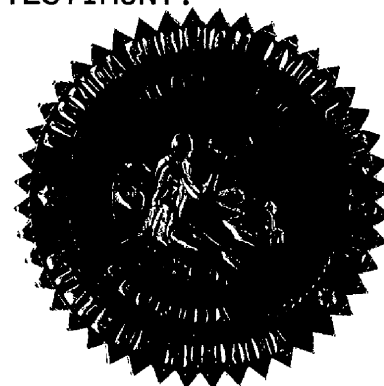
In the Matter of

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

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VOLUME 1

PAGES 1 THROUGH 105



PROCEEDINGS: HEARING

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

DATE: Monday, December 9, 2002

TIME: Commenced at 9:35 a.m.  
Concluded at 4:45 p.m.

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

REPORTED BY: TRICIA DeMARTE  
Official FPSC Reporter  
(850) 413-6736

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3 the General Counsel, 2540 Shumard Oak Boulevard, Tallahassee,  
4 Florida 32399-0850, appearing on behalf of the Commission  
5 Staff.

6           JEFFREY A. STONE, Beggs & Lane, P. O. Box 12950,  
7 Pensacola Florida 32591-2950, appearing on behalf of Gulf Power  
8 Company.

9           MICHAEL J. TWOMEY, P. O. Box 5256, Tallahassee,  
10 Florida 32314-5356, appearing on behalf of Florida Action  
11 Coalition Team.

12           GARY SASSO and SUSAN CLARK, P. O. Box 2861, St.  
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14 Power Corporation.

15           JOE McGLOTHLIN, McWhirter, Reeves, McGlothlin,  
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17 Street, Tallahassee, Florida 32301, appearing on behalf of  
18 Florida Partnership for Affordable Competitive Energy and  
19 Reliant Energy Power Generation, Inc.

20           JAMES D. BEASLEY, Ausley McMullen, P. O. Box 391,  
21 Tallahassee, Florida 32301, appearing on behalf of Tampa  
22 Electric Company.

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1 APPEARANCES CONTINUED:

2 RICHARD ZAMBO, 598 S.W. Hidden River Avenue, Palm  
3 City, Florida 34990, appearing on behalf of the City of Tampa  
4 and Solid Waste Authority of Palm Beach County.

5 ROBERT SCHEFFEL WRIGHT, Landers & Parsons, 310 West  
6 College Avenue, Tallahassee, Florida 32301, appearing on behalf  
7 of Calpine Eastern Corporation.

8 VICKI GORDON KAUFMAN, McWhirter, Reeves, McGlothlin,  
9 Davidson, Decker, Kaufman & Arnold, P.A., 117 South Gadsden  
10 Street, Tallahassee, Florida 32301, appearing on behalf of the  
11 Florida Industrial Power Users Group.

12 JON C. MOYLE, JR., Moyle, Flanigan, Katz, Raymond &  
13 Sheehan, P.A., 118 North Gadsden Street, Tallahassee, Florida  
14 32301, appearing on behalf of CPV Gulfcoast.

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1 I N D E X

| 2 | PRESENTATIONS:   | PAGE NO. |
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| 3 | By Mr. Ballinger | 13       |
| 4 | By Mr. Sasso     | 17       |
| 5 | By Mr. Taylor    | 21       |
| 6 | By Mr. Sasso     | 30       |

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EXHIBITS

10

| 11 | NUMBER:            | ID. | ADMTD. |
|----|--------------------|-----|--------|
| 12 | 1 Staff's notebook | 10  | 13     |

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## P R O C E E D I N G S

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CHAIRMAN JABER: Good morning. Let's call this hearing to order. And staff, if you could read the notice, please.

MR. HARRIS: Thank you, Chairman. Pursuant to notice issued December 3rd, which is a notice of rescheduled hearing of this hearing which was originally scheduled for December 5th, 2002, this time and place has been noticed for a Commission workshop on rulemaking on proposed revisions to Rule 25-22.082, Florida Administrative Code, selection of generating capacity.

CHAIRMAN JABER: Thank you, Mr. Harris. Now, in terms of taking appearances, you want me to go ahead and take appearances for all of the parties that intend to speak and participate today; correct?

MR. HARRIS: Yes, Chairman.

CHAIRMAN JABER: Ms. Clark, let's go ahead and start with you, and we'll just work our way down the Bench. And if there's anyone sitting out in the audience that needs to make an appearance, you can come up to the table and do so.

MR. CLARK: Susan Clark representing Florida Power & Light and also will be speaking on behalf of the IOUs.

MR. SASSO: Gary Sasso representing Florida Power Corporation, and I will be speaking on behalf of the IOUs.

MR. STONE: Jeffrey A. Stone of the law firm Beggs &

1 Lane in Pensacola representing Gulf Power Company.

2 MR. BEASLEY: James D. Beasley of the law firm of  
3 Ausley & McMullen, Tallahassee, Florida, representing Tampa  
4 Electric Company.

5 MR. ZAMBO: Rich Zambo representing Solid Waste  
6 Authority of Palm Beach County and the City of Tampa, Florida.

7 MR. GREEN: Michael Green representing Florida PACE.

8 MR. MCGLOTHLIN: Joe McGlothlin representing Florida  
9 PACE and also Reliant Energy Power Generation, Inc.

10 MR. WRIGHT: Schef Wright representing Calpine  
11 Eastern Corporation.

12 MS. KAUFMAN: Vicki Gordon Kaufman representing the  
13 Florida Industrial Power Users Group.

14 MR. TWOMEY: Mike Twomey representing the Florida  
15 Action Coalition Team, and with me today is Ernie Bach, the  
16 executive director of that organization.

17 MR. MOYLE: Jon Moyle, Jr., Moyle, Flanigan  
18 representing CPV Gulfcoast.

19 CHAIRMAN JABER: Is there anyone else that needs to  
20 make an appearance this morning?

21 Okay. Staff.

22 MR. HARRIS: Larry Harris on behalf of the Florida  
23 Public Service Commission. With me is staff member Tom  
24 Ballinger who, I believe, has some comments.

25 CHAIRMAN JABER: Okay. I would note for the record

1 that this hearing is conducted according to the rulemaking  
2 provisions of Section 120.54, Florida Statutes. The proposed  
3 rule that we're concerned with today is Rule 25-22.082, Florida  
4 Administrative Code. It's the selection of generating  
5 capacity.

6 The amendments to the rule were proposed in a notice  
7 that was published in the Florida Administrative Weekly on  
8 October 25th, 2002. The purpose of this hearing is to allow  
9 the Commission to inform itself of matters bearing on the  
10 proposed rule amendments by giving affected persons an  
11 opportunity to present evidence and argument on the merit of  
12 the amendments.

13 In a rulemaking proceeding, any person may make  
14 comments or make suggestions concerning the proposed rule. I  
15 do understand that parties have worked with staff on a proposed  
16 order for presentations. I do want to say from the outset that  
17 I appreciate everyone's cooperation in that regard. We will  
18 proceed informally without swearing witnesses. The Commission  
19 staff will make its presentation first.

20 It's my understanding that on November 27th a list of  
21 issues and an order of presentation was issued to the parties  
22 pursuant to an order establishing procedure, and both the order  
23 and in the notice, the parties were put on notice that  
24 following the staff participation parties would have an  
25 opportunity to present evidence and make comments.

1           It may be necessary, as we go along the way, to  
2 impose time limits on presentations, although I don't expect to  
3 do so. This has been noticed for a two-day hearing, and I  
4 would encourage parties to limit their comments as appropriate.  
5 Understand that the Commission is very aware of the issues that  
6 have been presented in this proceeding and that we've read all  
7 the comments that were filed in this proceeding.

8           Do note that Commissioners may ask questions and that  
9 parties may ask questions of each other. I'm going to be  
10 flexible in allowing all of that. Persons who wish to  
11 participate at the hearing need to go ahead and register at the  
12 beginning of the hearing. I think we've addressed that just by  
13 taking appearances, or is there something more you need?

14           MR. HARRIS: That's fine. And we also have a sheet  
15 of paper over here that people can sign to make sure that --  
16 we'll go back and check it at the end to make sure everybody  
17 who signed the list will be given a chance to participate.

18           CHAIRMAN JABER: Great. Now, I'm also aware that one  
19 of the orders on procedure indicated that the post-hearing  
20 comments -- whether there's a need for post-hearing comments  
21 would be taken up at the hearing. I want to bring that to the  
22 Commission's attention at the conclusion of the hearing. I  
23 have to tell you, though, just as one Commissioner where I  
24 stand right. I'm interested in not having post-hearing  
25 comments. I think that, Commissioners, we've heard so much



1 related to the proposed rule amendments concerning this rule,  
2 but I just -- in the interest of disclosing to folks where my  
3 preference is, I wanted to go ahead and put that in the record  
4 but not take that issue up until the conclusion of the hearing.

5           And with that, staff, I understand that the notebook  
6 that you've prepared for the Commissioners and the parties  
7 needs to be identified as a composite exhibit?

8           MR. HARRIS: That's correct, Chairman. We have a  
9 composite Exhibit Number 1 which consists of, I believe, 17  
10 tabbed items. We have a copy per presenter or per party. Some  
11 have been passed out already, but we do not have enough copies  
12 for each individual person in the audience to receive one. The  
13 exhibit contains all of the items that need to be in the  
14 record: The notice of proposed rulemaking, a copy of the rule,  
15 and then the comments that we've received, including responsive  
16 comments received through the end of last week.

17           CHAIRMAN JABER: Are there any modifications or  
18 corrections to the composite exhibit?

19           MR. HARRIS: I don't believe so. Mr. Ballinger has a  
20 few modifications to his testimony to bring it in line with the  
21 composite exhibit, but no modifications that I'm aware of to  
22 the substance.

23           CHAIRMAN JABER: Okay. Then let's go ahead and  
24 identify composite Exhibit Number 1 as staff's notebook  
25 containing all the comments, the notices, and it looks like the

1 orders on procedure related to this proceeding. It's composite  
2 Exhibit Number 1.

3 (Exhibit 1 marked for identification.)

4 CHAIRMAN JABER: And is it appropriate to go ahead  
5 and admit that into the record now or at the --

6 MR. HARRIS: I believe so, yes.

7 CHAIRMAN JABER: Hearing Exhibit Number 1 --

8 MR. McGLOTHLIN: Chairman Jaber?

9 CHAIRMAN JABER: Mr. McGlothlin.

10 MR. McGLOTHLIN: I do have a correction in the form  
11 of a short addition to one of the attachments to PACE's  
12 comments and exhibits. I do intend to address that during the  
13 proceeding today. If you want to wait, at that point I'll just  
14 add a short sentence at that point.

15 CHAIRMAN JABER: It's a sentence that goes into your  
16 comments?

17 MR. McGLOTHLIN: It's a sentence that will be added  
18 to one the attachments to our comments.

19 CHAIRMAN JABER: Let's go ahead and deal with that  
20 now, so I can admit the exhibit into the record. Which  
21 attachment is it?

22 MR. McGLOTHLIN: Attachment Number 9. And by way of  
23 quick explanation, PACE is going to sponsor its own draft rule  
24 language, but we also in the alternative submitted a markup to  
25 the amendments that were published. And it was pointed out to

1 me just this morning that there was an omission in that markup.  
2 It's at Page 7 of that attachment.

3 CHAIRMAN JABER: Okay. I'm on Exhibit Number 9 which  
4 looks like your modifications to the proposed rule.

5 MR. McGLOTHLIN: That's correct.

6 CHAIRMAN JABER: I'll find it for you in just a  
7 second, Commissioner Bradley. Let me make sure I have it.  
8 Your changes to the proposed rule and Page 7 of those changes?

9 MR. McGLOTHLIN: That's correct, and what is  
10 identified as (9) of that page.

11 CHAIRMAN JABER: Hang on. Let me get the  
12 Commissioners caught up. Commissioner Bradley, if you look at  
13 Item Number 7 in the notebook, and go to the very back of Item  
14 Number 7, yeah, Page 7 of that. Those pages you're on right  
15 now, Page 7 is what you want. And I think the change is to  
16 (9); is that correct?

17 MR. McGLOTHLIN: That's correct.

18 CHAIRMAN JABER: Commissioners, are we all there?  
19 What's the change, Mr. McGlothlin?

20 MR. McGLOTHLIN: The change is to add to that  
21 sentence, in order to complete the thought, there would be a  
22 comma after score all proposals, comma, and add the following  
23 language, including that of the public utility, comma.

24 COMMISSIONER BRADLEY: Repeat that, please.

25 MR. McGLOTHLIN: Yes. Including that of the public

1 utility, comma, and shall submit its proposal at the same time  
2 and in the same manner as other participants, period. And I  
3 apologize for that having escaped my attention earlier than  
4 today.

5 CHAIRMAN JABER: Would you read the entire sentence  
6 now?

7 MR. McGLOTHLIN: Yes. "In those circumstances, the  
8 public utility shall engage in an independent evaluation for  
9 all proposals, including that of the public utility, and shall  
10 submit its proposal at the same time and in the same manner as  
11 other participants."

12 CHAIRMAN JABER: Thank you.

13 COMMISSIONER BRADLEY: Madam Chair?

14 CHAIRMAN JABER: Commissioner Bradley.

15 COMMISSIONER BRADLEY: I have a suggestion for a  
16 manner to deal with this in the future. Would it be possible  
17 in the future for you to submit these changes in writing so  
18 that --

19 MR. McGLOTHLIN: I certainly would have done so had I  
20 been alert enough to know that before this morning,  
21 Commissioner. I regret for the inconvenience.

22 COMMISSIONER BRADLEY: Okay. But I would hope that  
23 any changes that you would want to submit that you would be  
24 alerted to it before the hearing and just take the time to type  
25 it up and give it to us.

1 MR. McGLOTHLIN: Sure, that would be my ambition.

2 COMMISSIONER BRADLEY: If at all possible, I would  
3 appreciate that.

4 CHAIRMAN JABER: So that sentence: In those  
5 circumstances, the public utility shall engage an independent  
6 evaluator to score all proposals, including that of the public  
7 utility, and shall submit its proposal at the same time and in  
8 the same manner as the other participants.

9 MR. McGLOTHLIN: Yes.

10 CHAIRMAN JABER: Okay. Any other modifications to  
11 the comments? Okay. With that, Exhibit Number 1 is admitted  
12 into the record.

13 (Exhibit 1 admitted into the record.)

14 CHAIRMAN JABER: Mr. Ballinger, I understand you have  
15 a presentation you need to make, and then we'll turn to the  
16 parties.

17 MR. BALLINGER: Yes, ma'am. It's very brief. Before  
18 I summarize the rule, I need to make a few corrections in my  
19 prefiled comments to jive with the staff composite exhibit. I  
20 handed out these corrections to the Commissioners last week, so  
21 your assistants could have marked them up in the exhibit. I  
22 hope they did. If not, I'll just run through them real quick.

23 I guess it would be on Tab Number 9 is where my  
24 comments are contained. On Page 1 of the comments, on Line 23,  
25 that last sentence needs to be stricken since now the proposed

1 revisions to the rule are in the composite exhibit. The one I  
2 had attached to my prefiled comments was a little earlier  
3 version, and there was some numbering changes that came about.

4 The other changes are on Page 3, Line 16.

5 COMMISSIONER BRADLEY: Which exhibit?

6 CHAIRMAN JABER: This is Exhibit 9. Exhibit 9, the  
7 change to Page 1.

8 MR. BALLINGER: Strike the last sentence on Line 23.

9 CHAIRMAN JABER: The sentence reading, "The proposed  
10 rule revision is contained in Exhibit Number TEB-1" is  
11 stricken?

12 MR. BALLINGER: Yes.

13 CHAIRMAN JABER: Page 3?

14 MR. BALLINGER: Page 3, Line 16, just change the  
15 number 6 to a number 5, and change the number 12 to a number  
16 13.

17 COMMISSIONER BRADLEY: Change 6 to what, 5?

18 MR. BALLINGER: Five, and then 12 to 13 on those  
19 number references of the rule.

20 That same page on Line 25, again, change the 6 to a  
21 5.

22 On Page 4, Lines 2 and, 4, again change the 6 to a 5.  
23 And on Line --

24 COMMISSIONER BRADLEY: Which line?

25 MR. BALLINGER: At Lines 2 and 4, you'll see two

1 references to the rule there. Change the number 6 to a number  
2 5.

3 COMMISSIONER BRADLEY: And Line 4?

4 MR. BALLINGER: Yes. That same page, Lines 17 and  
5 19, changing the 12 to 13. And that completes my corrections.

6 COMMISSIONER BRADLEY: And I would also make the same  
7 request to staff.

8 MR. BALLINGER: And they were. I submitted them to  
9 your assistant last week.

10 COMMISSIONER BRADLEY: Okay.

11 CHAIRMAN JABER: Mr. Ballinger, go ahead.

12 MR. BALLINGER: The existing rule has been in place  
13 since 1994, and in January of 2000, the Commission directed the  
14 staff to analyze expansion of the current rule to require RFPs  
15 for repowering projects. At the September 30th, 2002 agenda  
16 conference, the staff presented such a rule that would require  
17 RFPs for repowering projects and other non-Power Plant Siting  
18 Act projects. At the conclusion of the agenda, the Commission  
19 decided not to expand the scope of the current rule but  
20 continue RFPs for Power Plant Siting Act projects only.

21 The proposed revision that is before us today will  
22 enhance the existing rule based on experiences gained over the  
23 past eight years. The overall intent of the revisions are to  
24 ensure a clear and understandable process whereby information  
25 is plainly identified up front. The majority of the revisions

1 codify existing regulatory practices which should add clarity  
2 to the rule.

3 The requirement to conduct a meeting prior to the  
4 release of the RFP should help to identify concerns and,  
5 hopefully, streamline the entire process. As with the existing  
6 rule, the IOUs still make the final decision and must justify  
7 that decision before the Commission at a determination of need  
8 proceeding.

9 In a memo dated -- from Ms. Brubaker dated  
10 December 5th, which was a revision to the 11/27 memo that the  
11 Chairman referenced, included a list of tentative issues.  
12 Issues 1 through 3 were discussed at the 9/30 agenda. Issues 4  
13 and 5 are new issues that staff has gleaned from the comments  
14 submitted so far by the parties. And since the purpose of this  
15 hearing is to educate the Commissioners and the parties, I'm  
16 prepared to discuss all these issues as well. And that  
17 concludes my summary.

18 CHAIRMAN JABER: Thank you, Mr. Ballinger. Now,  
19 before we turn to the IOUs -- Ms. Clark, I know you want to  
20 start on behalf of the IOUs -- are the members of the public  
21 here? Any customer participation before we get started with  
22 the IOUs?

23 Okay. Ms. Clark, go ahead.

24 MR. CLARK: Madam Chairman, Mr. Sasso will make the  
25 comments for the IOUs.



1 MR. SASSO: Madam Chairman, Commissioners, we are  
2 very mindful of the Chairman's remarks that the Commission has  
3 heard a great deal about the proposed amendment to the rule.  
4 In fact, the Commission has had the benefit of many comments  
5 and arguments and input by staff. There have been extensive  
6 discussions, even negotiations, workshops, agendas and so on,  
7 and the culmination of all of that is the proposed rule that  
8 Mr. Ballinger described. It's not exactly what we wanted.  
9 It's not exactly what others wanted, but it's our  
10 understanding, based on the discussion at the agenda  
11 conference, that this reflects the Commission's best sense  
12 about how to balance the many views, interests, and  
13 considerations on the key issues at least that have been  
14 presented to the Commission.

15 We are not here today to debate issues of statutory  
16 authority and to attempt to go back to square one on this,  
17 although we certainly stand on the comments we have submitted.  
18 Judging from the comments submitted by other participants,  
19 we're not confident that everyone agrees that we've passed  
20 square one. In fact, the Commission is being urged by many to  
21 revisit what in our view are some of the most fundamental  
22 issues that we believe the Commission has entertained, worked  
23 through in the process of developing the proposed rule, and in  
24 many cases rejected.

25 The spirit of our comments today is really to offer

1 some proposals that would incrementally clarify and improve the  
2 proposed rule, not to start from a clean slate. Although, we  
3 do feel obliged in the course of our remarks to address some of  
4 the proposals and arguments put forward by others in this  
5 process.

6           Turning to our comments on the particular provisions  
7 of the proposed rule beginning with Section 1, this concerns a  
8 statement of scope and intent. And as we read it, it reflects  
9 language that is really a vestige of some early drafts of the  
10 proposed rule. As Mr. Ballinger was describing, staff started  
11 off with some straw proposals that were much broader in scope;  
12 and, therefore, it was pertinent to discuss different issues of  
13 statutory authority which, in our view, have now been  
14 beneficially mooted out by the evolution of this rule. And  
15 we're concerned that by retaining some of this far-reaching  
16 discussion about scope, that we will have some ambiguity, and  
17 we may face issues in the future about what the rule was  
18 intended to accomplish. And so we've proposed paring back the  
19 statement of scope and intent to what is tailored to the  
20 current scope of the rule to avoid disputes in the future about  
21 what the rule was intending to accomplish. And of course,  
22 we've submitted a marked up version of the proposed rule  
23 reflecting those changes which simply eliminates some of the  
24 language in the current statement of the scope and intent of  
25 the rule.

1           Turning to Section 5B of the proposed rule. This  
2 provision stipulates a new requirement that utilities provide  
3 detailed information regarding the utilities' ten-year  
4 historical and ten-year projected net energy for load. And  
5 we've suggested here that we omit this requirement because  
6 we're confused by what's meant by it. We don't know what  
7 detailed information refers to. The IOUs already publish  
8 detailed information and data about this matter in the ten-year  
9 site plans. And so we're concerned that incorporating an  
10 undefined requirement of providing detailed information in this  
11 rule will only give rise to disputes in the future and  
12 unnecessarily so because the information is provided in the  
13 ten-year site plans which are matters of public record.

14           Section 5F is a central part of this proposed rule  
15 because it deals with the content of the RFP. And 5F in  
16 particular requires that we identify criteria that will be  
17 applied to select the finalists in the process and specifically  
18 refers to all criteria, including all weighting and ranking  
19 factors. We're concerned about this because it implies a  
20 degree of precision that doesn't exist and shouldn't exist in  
21 the best interests of the customers.

22           In his testimony that he's filed with the Commission,  
23 Tom Ballinger describes that the purpose of this is not to  
24 imply numeric scoring values, necessarily; that weighting and  
25 ranking could include criteria that are qualitative in nature;

1 and he says that the basic premise is that the IOU describe the  
2 evaluation methodology and criteria to the best of its  
3 knowledge as part of the RFP and not change the evaluation  
4 process without good cause. And we have no real quarrel with  
5 this statement of the intent of the rule, but frankly, other  
6 statements have been made about the current rule and have been  
7 forgotten with the passage of time. And we're concerned that  
8 the language of the rule may take on a life of its own. And so  
9 we're concerned about the inclusion of this reference to  
10 weighting and ranking factors in this proposed rule. We're  
11 especially concerned in view of the comments of some of the  
12 other participants. For example, PACE's comments refer  
13 repeatedly to weighting systems and ranking criteria. And in  
14 fact, we believe that it's important to the overall efficacy of  
15 PACE's proposal that there be numeric weighting, because when  
16 they're proposing an independent evaluator, what they envision  
17 is that the independent evaluator will simply tally up the  
18 numerical scores and give an answer, sort of like a calculator.

19 And so we're very concerned about how this language  
20 might be construed and the arguments that might occur over this  
21 in the future. Even assuming that the Commission rejects their  
22 proposal to go with an independent evaluator, as we suggest the  
23 Commission should, we're still concerned about this language.

24 The bidders frequently ask for precision of this  
25 nature in RFPs because it does and can help a bidder win a bid,

1 but the question is, is winning a bid necessarily in the best  
2 interest of the customer? The two are not synonymous. It's  
3 difficult to address this in the abstract, so we've brought  
4 with us today an expert in the area of power procurement and  
5 contract negotiation, Alan Taylor, who's testified before this  
6 Commission. And we would like him to provide some discussion  
7 to the Commission on this issue. We understand it's an  
8 important issue to the Commission to help the Commission have  
9 an understanding in more concrete terms about our concerns  
10 about weightings and rankings.

11           Mr. Taylor is to my right. As I mentioned, he is a  
12 consultant in this area, an expert in the area of power  
13 procurement and contract negotiation. He's been working with  
14 utilities and independent power producers since 1980 in this  
15 area. He has degrees from MIT and the University of California  
16 at Berkeley.

17           Mr. Taylor.

18           MR. TAYLOR: Mr. Sasso, thank you.

19           Madam Chairman, Commissioners, it's nice to be able  
20 to be before you to address you again. I was here about two  
21 months ago testifying as the independent evaluator in the FPL  
22 case, and as Mr. Sasso has indicated, I want to give some  
23 insights into these issues as far as formulaic or  
24 weighting-based scoring systems in RFPs.

25           By way of a quick introduction, just to refresh your

1 memory as far as my background, I've been involved in the  
2 utility arena since 1980. Over most of that time I have been a  
3 consultant in that area of economic and financial analysis,  
4 focusing much of my efforts on system planning and integrated  
5 resource planning issues. For the last five to ten years, I've  
6 really been focussing most of my energies on competitive  
7 bidding. I've been involved in developing dozens of RFPs.  
8 I've reviewed hundreds of proposals for power supplies. I've  
9 assisted clients in negotiations for these power supplies.  
10 Much of this and in many states around the country coast to  
11 coast I've advised commissions. I've performed both  
12 independent evaluation processes for utilities or, in some  
13 cases, been retained by utilities to come in and manage their  
14 entire staff on these processes. And I've testified on behalf  
15 of IPPs in states where competitive bidding was being  
16 considered and the adoption of rules very much like the  
17 existing rule that Florida already has in place were being  
18 considered.

19           My focus on all of these efforts has always been on  
20 making sure that the best resources are acquired for the  
21 benefit of the customers. And from my work in the trenches,  
22 I've seen what works and what doesn't work.

23           So turning now to the issue at hand as far as the  
24 scoring-based system that some parties in this case are  
25 proposing, these systems were considered and used primarily

1 back in the early 1990s at the very early stages of the power  
2 procurement process in the utility industry. Ostensibly, they  
3 were adopted to develop an objective process, but as you will  
4 see as I describe things further, they don't really ultimate  
5 subjectivity. They have an appearance of objectivity, but I  
6 think that that's an incorrect appearance. Ultimately, they  
7 were abandoned by the utility industry because these scoring or  
8 formulaic approaches ended up being too rigid. They really  
9 were unresponsive to the realities of the bid evaluation  
10 process, and invariably, they stood the chance of coming up  
11 with the actual wrong result.

12 I'm reminded of some examples. In the early 1990s,  
13 there was a situation in California. I wasn't involved with  
14 the solicitation, but I remember hearing that a formulaic  
15 approach was adopted in an RFP, and a rather clever bidder saw  
16 the formula and saw a way to engineer their pricing such that  
17 they, quote, unquote, won the solicitation by putting in  
18 negative prices in some categories and high positive prices in  
19 other categories. The way the formula worked, though, this  
20 bidder ended up coming out with the top score, but clearly from  
21 stepping back and looking at the various proposals, this was  
22 not the least-cost bidder. I've been involved in developing --

23 COMMISSIONER DEASON: Madam Chairman, are we going  
24 to -- I'm sorry.

25 MR. TAYLOR: Uh-huh.

1           COMMISSIONER DEASON: Are we going to be allowed to  
2 ask questions during the presentations, or would you rather  
3 just wait until after the conclusion?

4           CHAIRMAN JABER: My preference would be to wait until  
5 after each party completes its presentation. Is that all  
6 right? Okay.

7           MR. McGLOTHLIN: Chairman Jaber, I don't like to  
8 interrupt, but we've been conferring among ourselves. Is this  
9 the subject of prefiled comments? Because I don't have  
10 anything from this gentleman.

11          CHAIRMAN JABER: What is -- Mr. Harris, this has gone  
12 beyond the scope of what I read in the prefiled comments, but  
13 it's my understanding that the rulemaking proceeding is pretty  
14 informal.

15          MR. HARRIS: That's my understanding also, Chairman.

16          CHAIRMAN JABER: Okay. So, Mr. McGlothlin, I  
17 understand your concern, but I think the lack of formality of  
18 this process lends itself to this kind of discussion.

19          MR. McGLOTHLIN: Very well, Chairman Jaber. I was  
20 just going by the order on procedure which says -- which  
21 directs persons to prefile comments or testimony and then gives  
22 a responsive round. And of course, we have no ability to  
23 respond to anything that may come from this gentleman at this  
24 point.

25          CHAIRMAN JABER: Ms. Helton, how is all of that



1 handled?

2 MS. HELTON: I'm not sure -- could you read me the  
3 language from the order establishing procedure?

4 MR. McGLOTHLIN: Interested persons may prefile  
5 comments or testimony no later than November 15th, 2002. Then  
6 there's something about each filing must clearly identify the  
7 issues and applicable rules such as being addressed. Then  
8 there's a statement of the issues for which additional comments  
9 are solicited. And then the next page, any person may prefile  
10 responsive comments or responsive testimony to the comments of  
11 the testimony that are filed by November 15th, 2002, and giving  
12 a date for the responsive round.

13 So it was our understanding that the Commission  
14 wanted substantive comments to be prefiled and provide for an  
15 opportunity to respond if comments were received.

16 MS. HELTON: I agree with you that rulemaking  
17 proceedings are very informal in nature. I have never  
18 understood that parties must be limited to discussing only  
19 their prefiled comments when at a rulemaking proceeding. I  
20 think it's within your discretion to hear the utility's witness  
21 if you so choose. What we are bound by is that any changes  
22 that are made to the rule that was proposed must be part of the  
23 rulemaking proceeding record. So any changes must be included  
24 in the comments or must be a part of the transcript of this  
25 proceeding or be contemplated in any exhibits that become part

1 of this proceeding. So I believe it is within your discretion  
2 to hear the utility's witness if you so chose.

3 CHAIRMAN JABER: Okay. And, in fact, any substantive  
4 changes to the proposed rule actually have to go back through  
5 the FAW notice process; right?

6 MS. HELTON: Right. We will have to file a notice of  
7 change if the Commission ultimately decides to make any changes  
8 to its proposed rule. And those changes must be based upon the  
9 comments that were filed, any responsive comments that were  
10 filed or what you hear today.

11 CHAIRMAN JABER: Okay.

12 MR. TWOMEY: Madam Chair?

13 CHAIRMAN JABER: I can't tell who's speaking.  
14 Mr. Twomey, go ahead.

15 MR. TWOMEY: Yes, Madam Chairman, just briefly. I  
16 would like to for FACT join Mr. McGlothlin's objection. While  
17 it's clear that the Commission and the Chairman have great  
18 discretion in the rulemaking proceedings, it's clear to me, I  
19 think, that the Taylor presentation is not only beyond the  
20 spirit of the prehearing order on procedure but the letter as  
21 well. It's a form of ambush unfair to all other participants,  
22 and I would urge you not to allow it to continue. Thank you.

23 CHAIRMAN JABER: Mr. Twomey and Mr. McGlothlin, I am  
24 going to allow Mr. Taylor to finish his comments with some  
25 direction that I'll give in a minute.

1           But, Mr. McGlothlin, to your point with respect to  
2 the order on procedure on the identification of issues, those  
3 were absolutely the issues we wanted to make sure got covered  
4 in this proceeding. They were not designed to limit any  
5 comments that were filed.

6           But, Mr. Taylor, I have to tell you, listening to  
7 your comments, it was clearly outside the scope of what I  
8 wanted to hear, so take that for whatever it's worth to you.  
9 You can spend the rest of your time commenting on what we're  
10 here to hear, or you can complete your presentation which I'm  
11 going to let you do.

12           MR. TAYLOR: Thank you, Madam Chairman. I simply  
13 mean to provide the Commission with the benefits of my  
14 experience in this area and reinforce various considerations  
15 that are on the record right now. FPL had made comments as far  
16 as their formulaic approach that they adopted back in the late  
17 '80s and some of the problems that they encountered there. And  
18 that's very similar to what I encountered in a later  
19 solicitation that I performed in Texas on behalf of the  
20 Southwestern Public Service where we also adopted a very  
21 formulaic approach mathematical process.

22           These processes can become very complicated, and I  
23 just think that the Commission needs to be aware that not only  
24 is there the opportunity for gaming on the part of a clever  
25 bidder, as was seen in the California solicitation I just

1 referred to, but in the case of this Texas solicitation, any  
2 sort of formulaic approach basically needs to take two worlds  
3 and marry them: A price world that is invariably denominated  
4 in dollars and a nonprice world that generally is denominated  
5 in terms of some sort of points or relative ranking. You need  
6 to either take dollars and convert them into points in order to  
7 combine them with the nonprice factors or take nonprice  
8 qualities and somehow convert them into dollar bases.

9           In the case of the solicitation that I did in Texas,  
10 we converted from the dollars into a point-based system and  
11 scored all proposals on a 1,000 point system where 600 points  
12 had been set aside for price-related issues. But as far as how  
13 you took a bidder's price and converted it into those points on  
14 a 600-point system was a rather involved effort in finding the  
15 right formula. We kept finding ways to break our own formula  
16 before we issued the RFP and eventually ended up with a rather  
17 esoteric mathematical function called the hyperbolic tangent  
18 function for converting prices into a point-based system.

19           The solicitation, I think, was a successful one in  
20 Texas, but we did not get many bids. And one concern, I think,  
21 may have been the complexity of the formula and may have  
22 discouraged participation. We will never know because there  
23 wasn't a broad enough array to really sense whether we had come  
24 up with exactly the right formula. But I simply bring up this  
25 experience to let the Commission realize that this is not an

1 easy process of designing these types of formulaic or  
2 weighting-based solicitations.

3           On the nonprice side, as FPL had included in the IOU  
4 comments, there is the problem of establishing in the case of  
5 this Texas solicitation the 400 nonprice points into discrete  
6 categories. And we did realize at the end of that effort that  
7 our preconceptions in designing how many points should be set  
8 aside for evaluating bidder experience, for example, or the  
9 permitability of a project or the feasibility from a financing  
10 perspective, that these were perceptions that we identified at  
11 the beginning that really were not well-suited for what we saw  
12 once we had all the proposals open and in front of us. And I  
13 think that's the major lesson that was learned overall in the  
14 industry, and certainly by myself specifically, was that the  
15 evaluation team needs to have the flexibility in order to  
16 employ its professional judgment.

17           There are things that you simply won't realize at the  
18 outset of the process in designing some sort of formulaic  
19 approach that become very apparent once you've got all the  
20 proposals, and you can really see what are the key risks that  
21 differentiate those proposals.

22           So in concluding, I simply want to emphasize that I  
23 believe that the evaluation team, the utility needs to be left  
24 with sufficient flexibility. I think that the current process  
25 does result in the Commission reviewing decisions at the end of

1 the process. The utility is accountable for its decisions, but  
2 it needs to have the flexibility to employ professional  
3 judgment. I think that scoring and formulaic-based systems can  
4 be prone to gaming. They do not remove subjectivity from the  
5 process, because even within these various categories where  
6 points have been set aside, there is still a judgment into how  
7 many points any particular proposal should be given for bidder  
8 experience or financeability or so forth.

9 I think that ultimately it would not reduce the  
10 number of challenges, but it could actually introduce  
11 challenges to have a scoring-based system or some sort of  
12 weighting, and I think as the Florida Supreme Court indicated  
13 in its Panda decision, it can also hinder creativity as far as  
14 seeing new types of issues emerge from bidders. That concludes  
15 my statements.

16 CHAIRMAN JABER: Mr. Sasso.

17 MR. SASSO: Yes. Thank you, Mr. Taylor. The reason  
18 we brought Mr. Taylor here today was because it was our  
19 impression, perhaps erroneous, but we believe it's accurate  
20 that even after all of the written submissions were made, that  
21 this continues to be a concern to individual Commissioners.  
22 And, also, when Susan Clark talked to Mike Green about this  
23 proposed rule, we understood that this continues to be a  
24 concern on the part of PACE. And it is very difficult at times  
25 to deal with this issue of weightings and rankings and the

1 specificity of the criteria and the precision of the process  
2 and the transparency of the process in a vacuum, because there  
3 is at the end of the day a need on the part of the utility to  
4 have flexibility to use professional judgment.

5           This cannot be reduced to a completely objective  
6 process, nor is it necessarily advantageous to the customer to  
7 have an overly precise set of criteria, weightings, rankings,  
8 and factors because that allows perfectly rational economic  
9 entities on the other side of the table, namely, the bidders,  
10 to tailor their bids to win the bids which is not necessarily  
11 the same thing as providing the most value to the customer.  
12 And that's the thrust of our comments there.

13           So, again, we propose the elimination of weightings  
14 and rankings. Now, having discussed this with Mr. Green and  
15 having heard the concerns of the Commissioners, we have  
16 continued to struggle with how can we provide greater  
17 transparency and so on. And the discussion came up between  
18 Ms. Clark and Mr. Green about the possibility of incorporating  
19 some idea of tiers of importance. The most important criteria,  
20 the next most important criteria and so on. And it is possible  
21 in the context of particular RFPs that the utility might be in  
22 a position to communicate what threshold requirements must be  
23 met, what mandatory disqualifying criteria need to be taken  
24 into account in the proposal, and then there may be a third  
25 bucket of other criteria, and that may be appropriate in the

1 context of particular projects. But we believe that the  
2 proposed rule does in fact permit that and allow that, and  
3 utilities can and may well do that. But beyond that, we're  
4 very reluctant to suggest that we can go beyond what staff has  
5 proposed and what the Commission has proposed in its current  
6 proposed rule with respect to the issue, and we would even  
7 suggest we eliminate weightings and rankings.

8           Now, we also understand that the Commission wants to  
9 ensure that the utility stick with the criteria identified in  
10 the RFP when determining the winning bid. As Mr. Ballinger  
11 said, we want to identify them up front and not change them  
12 except for good cause. And we understand and accept that  
13 concern, but we do believe it is important to incorporate some  
14 kind of materiality standard, and we have suggested that in our  
15 proposed clarifications or changes to the proposed rule that we  
16 incorporate a materiality requirement with respect to this  
17 issue about being bound to the criteria. In other words, we  
18 wouldn't change any material criterion without good cause. We  
19 don't want disputes over the slightest little arguable  
20 discrepancy between what was in the RFP and what was actually  
21 done in the review process.

22           Section 5G. Section 5G proposes that an application  
23 fee be cost-based. We have proposed the elimination of that  
24 requirement because we're concerned that this starts to get us  
25 into the process of micromanaging the process. We believe that



1 the issue of setting a fee should be left to the good faith and  
2 the judgment of the IOUs and not be the subject of rulemaking.  
3 Although we generally agree with the idea that these  
4 application fees should be cost-based, we're concerned that  
5 setting these fees is not a science. We're concerned about  
6 engendering disputes over this issue. Before an RFP is issued,  
7 the utility doesn't know how many proposals it's going to  
8 receive, how much time they're going to take to evaluate, so  
9 the best a utility can do in advance of the project in setting  
10 the fee is to engage in a reasonable estimate of what's a  
11 sensible fee. And, again, we simply don't want a requirement  
12 that is going to give rise to disputes with the benefit of  
13 hindsight now that the bidders know how many people were there  
14 and so on, was this really strictly cost-based.

15           Section 5H requires any information regarding  
16 system-specific conditions be included in the RFP, including  
17 transmission constraints and the like. Our concern with this  
18 requirement is that system conditions and other features  
19 identified in this proposed rule provision are a moving target.  
20 Now, Mr. Ballinger has acknowledged this, as I said earlier on,  
21 in indicating that his main concern is that utilities provide  
22 information to the best of their knowledge. And we appreciate  
23 that, but again, we're concerned that that isn't expressly  
24 reflected in the language of the rule, and we are anxious about  
25 how the rule may be interpreted in the future. So we would

1 suggest incorporating in Section 5F a requirement that we  
2 include the best available information on system constraints,  
3 and again, that we incorporate a materiality requirement. And  
4 so we've proposed some language to that effect.

5           Section 9. This is a requirement that utilities  
6 evaluate all proposals submitted. And, again, reading  
7 Mr. Ballinger's comments, we're comforted to know that he  
8 doesn't expect us to do a full-blown evaluation of all  
9 proposals. He acknowledges that some proposals may be  
10 eliminated based on a screening at the outset of the process,  
11 but in keeping with the spirit of our comments, we're concerned  
12 about how this rule will be interpreted in the future and  
13 evaluation to some implies a more extensive process than  
14 perhaps a threshold screening which might be appropriate in  
15 particular cases. And so we're being concerned about the use  
16 of the term "evaluation" or "evaluate" as a potential term of  
17 art. We've asked to change that to consider, recognizing that  
18 sometimes we will need to do a full-blown evaluation of  
19 technical and economic criteria, and in other cases, there may  
20 be some threshold disqualifying features that are dispositive.  
21 And we also understand, of course, that anytime a utility  
22 eliminates a proposal during the process, it will have to have  
23 a good explanation for that to the Commission at the  
24 appropriate time.

25           Section 10. This requires that the utility conduct a

1 post-RFP meeting within two weeks of the issuance of the RFP.  
2 Now, we understand that in the context of the other aspects of  
3 the proposed rule this is intended to provide an early trigger  
4 date for the point of entry for a challenge to the Commission.  
5 And as I'm about to explain, we have a lot of concerns about  
6 that process, and so you have to understand our comments on  
7 Section 10 are in the context of our proposing we eliminate  
8 that so-called point of entry. But we're concerned about  
9 establishing a rigid timetable for this post-RFP meeting. Some  
10 utilities might want to do it sooner, some might want to do it  
11 later, but if we are not going to use it as a trigger for a  
12 point of entry, an opportunity for litigation, then we believe  
13 there should be more flexibility there and no need to mandate  
14 the date by rule. It will be identified in an RFP, so  
15 interested persons will be aware of the schedule.

16 Now, Section 11 provides for early challenge to the  
17 RFP and a Commission resolution of that challenge. And after  
18 much consideration, we have resolved to ask the Commission to  
19 delete this provision. We have given this a lot of thought and  
20 consideration and debate among the IOUs. At first blush, this  
21 seemed to offer some advantages. As we've all discussed in  
22 prior workshops and so on, there is some virtue if we can  
23 achieve closure on some issues early on, but we've concluded  
24 that the offer of closure is illusory, and there are many  
25 negatives that will come out of this change.

1           To begin with, we are convinced that this will  
2 encourage bidders to file unnecessary challenges early in the  
3 process simply to protect their rights. Because if you're  
4 going to have closure, you have to have a waiver in the event  
5 that people don't file challenges, which is exactly what the  
6 proposed rule suggests. You don't file your challenge, you  
7 waive some arguments, and we all know how lawyers are very  
8 concerned about waiving their arguments. So we're going to see  
9 bidders filing challenges that would not ordinarily be filed  
10 just to protect their rights. So we think this will actually  
11 convert the RFP process into a litigious process even more so  
12 than it is now. In fact, we think this would encourage bidders  
13 to use the pre-bid meeting as an opportunity to take discovery  
14 and again convert the process into a contentious one. In fact,  
15 I think there are already signs of this under the current  
16 system.

17           What benefit do we get from this? Do we get closure?  
18 Well, we would suggest we don't get closure through this  
19 process. As the proposed rule is set up -- and this is  
20 consistent with Mr. Green's comments on behalf of PACE -- it's  
21 envisioned that bidders would challenge the RFP as written but  
22 not as applied. So what the bidders would have available to  
23 them at the time they file this challenge is the RFP. And so  
24 they could file a challenge, and they can quarrel with the  
25 terms of it, the way it's laid out, but later in the process,

1 after they have gone through the evaluation and we find out who  
2 the winner is and so on, we can virtually guarantee that we're  
3 going to have those same bidders back saying, oh, well, we  
4 didn't know that these criteria were going to be applied this  
5 way or in this fashion, and we couldn't possibly have  
6 challenged this criterion or that criterion or this provision  
7 or that provision until we saw how it was actually applied.  
8 Now we know how it was applied, and we have had discovery, and  
9 we see what you did with it and so on. So they're going to be  
10 back challenging the same provisions as applied rather than on  
11 their face, and we're really not going to buy any peace by  
12 virtue of this.

13           And what is the scope of the challenge? Well, in the  
14 proposed rule, it's undefined; it's unlimited. And we have  
15 every reason to believe that this will be taken as an  
16 opportunity to throw open wide the gates on this litigation.  
17 In fact, PACE's comments suggests that they want to be able to  
18 challenge the reasonableness of the terms of the RFP. They  
19 don't want to simply challenge compliance with the rule. They  
20 want to challenge the reasonableness, the onerousness of the  
21 terms. So you can envision the challenge. There's going to be  
22 experts on commercial reasonableness. There's going to be  
23 discovery. And we're going to have one side of the table  
24 arguing, well, this term is onerous and it's not reasonable;  
25 the other side of the table arguing, well, it is reasonable and

1 the Commission in the middle. And the Commission is going to  
2 be called upon to decide, well, what's onerous and what's  
3 reasonable in a vacuum without having seen how it's being  
4 applied. And if it sounds a lot like a negotiation, it is  
5 because what's going to be going on is the bidders are going to  
6 be trying to gain some ground in the process that actually  
7 should be left to the negotiation process as the RFP evolves.  
8 And the Commission is going to be asked to come in on the side  
9 of the bidders to take some ground essentially from the  
10 customer and push it over to the bidder on these terms because  
11 in a sense it's a zero sum gain. What's reasonable and onerous  
12 to the bidders may well be beneficial to the customer.

13 As I understand the Commission's intent in going into  
14 this rulemaking process, it's to take your best shot at what  
15 the Commission should be doing with respect to an RFP, how  
16 intrusive you should be in telling us how to draft our RFP, how  
17 much flexibility to leave us, how much transparency to order,  
18 and the Commission will make its best judgment in promulgating  
19 this rule on those issues.

20 So what's left to be done in this challenge? The  
21 Commission is going to be asked on a case-by-case basis now to  
22 extend that judgment or to change it or to intrude further into  
23 how the RFP should be drafted or constructed. So we don't see  
24 this as being consistent with the spirit of this rulemaking  
25 effort, and we see it as creating a great deal of litigation

1 and controversy unnecessarily.

2           What happens to the RFP in the meantime? Well, the  
3 rule isn't absolutely clear about that. And PACE complains  
4 about this. They say, well, it's not clear that while this  
5 challenge is going on that the RFP is going to be abated. We  
6 want it to be abated. So that means the whole thing comes to a  
7 screeching halt. The process of developing this power resource  
8 is stopped while this litigation takes place. And they want a  
9 full-blown hearing, make no mistake about that. They say it,  
10 we want a full-blown hearing. We don't simply want the  
11 Commission reviewing objections. So the RFP is stopped. The  
12 Commission is called upon to review this thing. And suppose  
13 the Commission decides we need to make some changes. Well, we  
14 go back to square one. We start over issuing a new RFP, and  
15 we're caught in a do loop, and then that's subject to review  
16 and so on.

17           We have prepared a time line which we suggest is a  
18 conservative estimate of the amount of time that may be  
19 required by the proposed rule and by PACE's suggested  
20 incremental additions to the process. And if we could  
21 distribute that.

22           Mr. Stiles has been good enough to prepare a CASR  
23 essentially of how it might look if the proposed rule were  
24 adopted or if PACE's procedural suggestions were adopted and  
25 implemented very, very aggressively on a rocket docket

1 procedure. This provides no additional time, no special time  
2 for discovery, no special time for reconsideration or  
3 interlocutory appeals. And I know this is very difficult to  
4 understand at first glance, and we have also prepared a legend.  
5 But the bottom line of this is all that -- the proposal rule  
6 conservatively would add about 148 days to the time for  
7 developing a power resource project. With PACE's changes to  
8 that, conservatively we estimate this would add an additional  
9 195 days to the development of a power resource. Now, that's  
10 very, very conservative. That assumes the best case in terms  
11 of no special time allotted for discovery, no continuances, no  
12 interlocutory review, no motions for reconsideration and so on.  
13 And of course, we have all seen those things occur. So this  
14 will force utilities to build months more into the regulatory  
15 process.

16           The regulatory process will become more contentious,  
17 more divisive, more costly, more risky. What happens to the  
18 quality of the data, the forecasts, negotiations with third  
19 parties, planning assumptions as you build in these additional  
20 months into the process? We suggest that upon reflection, the  
21 Commission may conclude, as we have concluded, that the evils  
22 associated with trying to incorporate an early opportunity for  
23 litigation into the process far outweigh any potential and we  
24 would submit illusory benefits that might flow from that.

25           MR. TWOMEY: Madam Chair?



1 CHAIRMAN JABER: Mr. Twomey.

2 MR. TWOMEY: Yes, ma'am. May I make the observation,  
3 please, that the reason that Mr. Stiles and Ms. Clark were  
4 passing out this colorful stuff just right now is for the  
5 obvious reason that it wasn't submitted earlier. And I would  
6 make the same objection that Mr. McGlothlin made earlier, and  
7 note that Commissioner Bradley's good point raised to  
8 Mr. McGlothlin that a small sentence should have been submitted  
9 earlier in writing would carry greater weight with respect to  
10 this stuff. I object.

11 CHAIRMAN JABER: Mr. Twomey -- well, it's an  
12 objection. So, Mr. Sasso, let me let you respond before I --

13 MR. SASSO: Yes, Madam Chairman. Our intent is not  
14 to sandbag anybody here. This is something that has been under  
15 consideration and discussion for many months. It's been  
16 evolving. We have been encouraged by all concerned to continue  
17 discussions and analysis, and we have done so with the benefit  
18 of the written comments. We have sat down and we've looked at  
19 it all. And we've tried to consider how we can best help the  
20 Commission in this proceeding understand some of the issues,  
21 and frankly, these are some ideas that occurred to us late.

22 This is in the nature of a demonstrative exhibit,  
23 something that we think helps illustrate graphically what is in  
24 the testimony that's been filed, and we submit it in the spirit  
25 of assisting the Commission and providing information. I could

1 make the same points orally. I could have simply told you that  
2 if you add up the time contemplated by the proposed rule and  
3 make certain assumptions, you will have 148 days on one hand or  
4 one issue and 195 on the other, but we thought it would be more  
5 helpful to provide something graphically.

6 CHAIRMAN JABER: Mr. Harris, when were reply comments  
7 due?

8 MR. HARRIS: Chairman, I'm sorry, the reply comments  
9 according to the prehearing order -- I'm sorry, I didn't expect  
10 that question, so I don't have the information immediately in  
11 front of me.

12 MS. HELTON: Madam Chairman, while Mr. Harris is  
13 looking that up, may I say something?

14 CHAIRMAN JABER: Sure.

15 MS. HELTON: We are in a legislative, you know,  
16 function at the moment. We are not bound by 120.57 and 120.569  
17 as far as strict rules of evidence, strict rules of procedure.  
18 If you want to consider this information when you are deciding  
19 whether to make changes to your proposed rule, you have the  
20 discretion to do that. This is your day. The next two days  
21 are your days to get all of the information that you can to  
22 decide whether the rule that you have proposed is the rule that  
23 you want to go forward with and adopt.

24 CHAIRMAN JABER: I clearly understand that. I think  
25 Mr. Twomey's concern goes more to surprise as it relates to the

1 parties and the ability to respond. And that's something I'm  
2 sympathetic to always in an effort to make sure that the due  
3 process and fairness requirements are met.

4 Mr. Harris, what did you say?

5 MR. HARRIS: Chairman, the answer is November 28th of  
6 2002 was the date for responsive comments and testimony.

7 CHAIRMAN JABER: Mr. Sasso, obviously the exhibits,  
8 they're not even exhibits, the handouts I'm going to allow you  
9 to discuss.

10 Mr. Twomey, I would note that we will have plenty of  
11 time for you to take these documents into account and respond  
12 as appropriate during your presentation.

13 But let me caution the parties. Mr. Sasso, you said  
14 it yourself. There has been ongoing dialogue and discussion,  
15 and knowing how well you work, I can't imagine you didn't  
16 envision having some sort of time line at least discussed, much  
17 less an exhibit prepared. So if there are other things like  
18 this, I don't mind taking a break and let you all show the rest  
19 of the parties documents.

20 MR. SASSO: Certainly, I understand. I wish I could  
21 claim credit for this good idea, but it was something that  
22 occurred to us late. I can assure the Commission that we have  
23 nothing else that we intend to hand out or submit. It's just  
24 something that we thought that might be a useful aid, and it  
25 took some time to develop. And we have it for what it's worth,

1 and we hope that it will help illustrate our point. If it's  
2 not useful to the Commission, we certainly understand that too.

3 CHAIRMAN JABER: Okay. Let's move forward. And,  
4 Mr. Twomey, I am going to allow the discussion, but your  
5 objection is duly noted.

6 MR. TWOMEY: I appreciate that, Madam Chair. I just  
7 wanted to point out the obvious. Thank you.

8 CHAIRMAN JABER: Thank you.

9 Go ahead, Mr. Sasso.

10 MR. SASSO: Again, the bottom line on this issue is  
11 we are concerned that while the provision for early review and  
12 challenges may appear to offer some benefits, those benefits  
13 are both illusory and demonstrably outweighed by the negatives  
14 on the other side.

15 Section 12. This requires a minimum of 60 days  
16 between issuance of the RFP and the due date for proposals to  
17 the RFP. And we are not certain why this is being mandated by  
18 rule. This has not been an issue in the past. It's not been a  
19 concern. The appropriate time frame in this regard, we  
20 believe, will vary with the circumstances of the project, and  
21 so we suggest that this should be deleted.

22 Section 14 of the proposed rule provides that if the  
23 Commission approves a power purchase agreement, the utility can  
24 recover costs absent fraud, mistake, et cetera. It also  
25 provides that we can recover costs of the self-build over any

1 original estimates on the project only if they were prudent and  
2 unforeseen and beyond the control of the utility.

3           Looking first at the initial part of this provision  
4 that provides for cost recovery in certain circumstances, we  
5 would suggest that this is not an appropriate subject for this  
6 rule. The bid rule should not be addressing cost recovery  
7 issues. This subject matter goes to cost recovery clauses, not  
8 the bid process as such, and so we propose deleting that.

9           The second aspect addresses the concern that has been  
10 discussed in prior workshops about cost overruns. And we  
11 suggest that the Commission use the prudent standard on this  
12 issue. It's a time-tested standard. It served the Commission  
13 well for decades in controlling and monitoring utility costs.  
14 And we believe it's inappropriate to impose the additional  
15 conditions that overruns be, quote, unforeseen and beyond the  
16 control, close quote, of the utility. Somebody's going to  
17 argue that whatever happens could have been foreseen. You can  
18 always with the benefit of hindsight say, well, somebody could  
19 have seen that happening. At least categorically it's the kind  
20 of thing that should have been anticipated, or there may be a  
21 memo or an e-mail that talks about the possibility of something  
22 occurring. And they will say, see, they actually knew about  
23 it, and they saw it coming. When, in fact, utilities have to  
24 make reasonable judgments based on the facts and information  
25 known to them at the time they make their decisions, and that's

1 what the prudent standard is all about. Likewise, beyond our  
2 control. Some will always argue that costs were within our  
3 control. What does that mean? We believe that the body of  
4 case law and Commission decisions about prudence over the years  
5 provides a good established framework for monitoring utility  
6 costs in this context.

7           We have suggested that the Commission add the  
8 language that the prudent standard will be applied taking into  
9 account that the self-build option was based on lower cost  
10 estimates. We believe this directly addresses Commissioner  
11 Baez's concern that the Commission should not lose sight of the  
12 fact that at the time the need order was granted, that lower  
13 estimates were submitted. And this would expressly recognize  
14 that the prudent standard should be applied taking into account  
15 the fact that the project was initially based on lower  
16 estimates, and we are comfortable with that. But we do believe  
17 that the time-honored prudence test should be used and that we  
18 shouldn't attempt to engraft upon that other conditions that  
19 will only lead to contentiousness.

20           Now, Mr. Ballinger has suggested in his comments or  
21 testimony that the proposed rule would limit the necessity for  
22 reg out clause in a power purchase agreement by virtue of  
23 providing for cost recovery, and it would provide an incentive  
24 for IOUs accurately to assess their costs. Well, first, we  
25 would be inclined to suggest that this will not eliminate the

1 need for a reg out clause. Reg out clause serves an important  
2 purpose for utilities to ensure that in the event that there  
3 are regulatory disapprovals utilities are not bound to pay  
4 those costs, and those provisions would still be appropriate  
5 and would still be used in contracts.

6 As regards to the incentive issue, the importance of  
7 providing an incentive to utilities to ensure that their cost  
8 estimates are accurate, that already exists. There is prudence  
9 review of all of the utilities' expenditures. The utilities  
10 understand full well that this Commission has the authority to  
11 review our costs, review the reasonableness of those costs.  
12 And we would submit that the Commission's existing authority  
13 has provided ample assurance over the years in disciplining the  
14 utilities to ensure that the estimates they make to this  
15 Commission are reasonable and accurate to the best of their  
16 knowledge, and we believe the proof is in the pudding.

17 The rates in this state have faired very well  
18 compared to national averages as a result of this oversight  
19 function. And that's the greatest testimony to the fact that  
20 the utilities have been incentivized to provide accurate cost  
21 information and control those costs.

22 Now, there are some other issues that have been  
23 identified. Again, we believe that these have been debated,  
24 and it is our understanding the Commission has worked through  
25 these to its satisfaction and resolved these in the many

1 occasions we've had to discuss these issues and most  
2 importantly in the most recent agenda conference, but they have  
3 been flagged again for discussion. We believe that the  
4 positions being urged to the Commission are not new. They have  
5 been argued before, and they have been discussed before, but in  
6 the interest of being complete, we will address the issues  
7 identified in the notice.

8           The first is: Should the rule be expanded to include  
9 non-Power Plant Siting Act plant additions? Our answer to that  
10 is no. There are several reasons for that. As we've discussed  
11 repeatedly in past workshops and the agenda, it's our firm view  
12 that the Commission's statutory authority to promulgate a rule  
13 is most subject to challenge outside the confines of the Power  
14 Plant Siting Act. When we talk about these power resource  
15 additions, it's important to keep in mind we're talking about  
16 repowerings, basically, and peaking units. As we discussed  
17 last time, the repowering issue is not a great practical  
18 importance. None of the IOUs are projecting repowerings in  
19 their ten-year site plans. Yes, that is subject to change, but  
20 the Commission should not be exercising its rulemaking efforts  
21 particularly in an area where authority is subject to great  
22 debate to deal with issues that do not have real practical  
23 significance.

24           As for peakers, this is the area in which utilities  
25 need maximum flexibility in managing their systems. Peakers



1 provide utilities with the opportunity to adjust for  
2 discrepancies from load forecasts and other exigencies that  
3 arise. And it's most important that we not burden the  
4 utility's ability to serve their customers' needs and best  
5 interests and provide reliability in this area where they need  
6 the most flexibility by creating additional regulatory  
7 processes. So we would suggest the Commission has  
8 appropriately made the judgment in connection with promulgating  
9 this proposed rule not to go in that direction.

10           Second issue: Should an independent evaluator be  
11 retained to select the RFP winner? Again, our answer is no for  
12 several reasons. First, we reject the premise that this  
13 argument is built on. The premise is that utilities can't be  
14 trusted to make a good decision for their customers; that we  
15 can't act in good faith; that we have a conflict of interest;  
16 we're not going to make the best decision for our customers.  
17 We reject that premise. We don't believe there's one wit of  
18 evidence to bear out that allegation.

19           The only evidence cited is that in RFPs conducted by  
20 IOUs self-build has prevailed, but the Commission has had the  
21 opportunity to review all of those decisions. And in each  
22 instance where the Commission has conducted that review and  
23 made a decision, it's upheld the decision based on the actual  
24 evidence in the case, not conjecture or innuendo. To say that  
25 utilities have a conflict of interest in operating their

1 systems for the benefit of the customer doesn't make a whole  
2 lot of sense to the IOUs. That's like saying, if I have some  
3 ability to do some plumbing work, I have a conflict of interest  
4 in deciding whether I'm going to fix my sink myself or hire a  
5 plumber to do it. I have no conflict of interest. I'm looking  
6 for the best project, as are the utilities in managing their  
7 systems.

8 Further, we would submit that this argument about  
9 turning this process over to an independent evaluator would  
10 stand the current statutory and regulatory framework on its  
11 head. Currently, utilities have the obligation to make these  
12 decisions. We're held accountable for them. If we're going to  
13 be held accountable for these decisions, the utilities have to  
14 have the responsibility to make these decisions.

15 Independent evaluators cannot be expected to know as  
16 much as the utilities about the utility systems and the utility  
17 system needs. In fact, it's evident in examining PACE's  
18 comments that in order to tee this up for an independent  
19 evaluator, you have to have some objective scoring criteria.  
20 So all the evaluator does is tally up the score. That's  
21 evident. Which is why we wanted to spend some time talking  
22 about how that's unwise.

23 If judgment is to be used, how is an independent  
24 evaluator going to exercise the judgment that it's the  
25 utility's responsibility to make, and who's going to be held

1 accountable for the outcome?

2           Further, there will be endless disputes about whether  
3 the evaluator is truly independent. As Mr. Ballinger has  
4 pointed out before, nobody is independent in this industry  
5 except the Commission and its staff. There will be arguments  
6 over whether this person worked for the utilities, or did this  
7 person work for the IPPs, or where do they want their next job  
8 to be or something along those lines about the independence of  
9 this independent evaluator. And so that's an issue too. And  
10 so for all of these reasons, we would suggest that the  
11 Commission reject the invitation to basically transfer the  
12 utility's responsibility to an independent evaluator.

13           Next issue is: Should an IOU be held to its costs in  
14 the RFP for the life of the project? Again, we would submit  
15 the answer is no. In making the argument that utilities should  
16 be held to the costs in their estimates for the life of the  
17 project, the bidders are essentially mixing apples and oranges.  
18 The bidders aren't held to their costs for the life of the  
19 project. They propose a price. They don't tell the Commission  
20 or the utility what their costs are. Their costs are not  
21 transparent. The Commission cannot monitor their management of  
22 those costs. They bid a price. Utilities provide full  
23 transparency to the Commission about their costs, and we are  
24 accountable for the management of those costs.

25           If you want to have apples to apples, then utilities

1 should be bidding a price, not their costs. For example, if  
2 there's a \$100 million difference between a self-build in terms  
3 of the cost and a power purchase agreement price, that doesn't  
4 necessarily mean if the utility were bidding a price, there  
5 would be that \$100 million difference. The price bid might be  
6 much higher than that. And to provide an apples-to-apples  
7 comparison, if we really want to treat utilities the same as  
8 bidders, the utilities shouldn't show their costs to the  
9 Commission, no longer provide the transparency. And if the  
10 utilities are successful in managing their costs, they bring  
11 home a lot of money to their shareholders. And if they are  
12 not, they accept the risk of some loss. But if what I'm  
13 describing sounds like it's not cost of service regulation,  
14 that's correct, it's not, because that is what essentially the  
15 bidders are asking for when they ask you to treat the IOUs the  
16 same as the bidders. They are asking for a change of the  
17 regulatory compact where there is no longer cost of service  
18 regulation of the utilities if we're truly going to be held on  
19 the same level and operating on the same basis as bidders. And  
20 that is a change of the regulatory compact.

21           Currently, under the regulatory compact, in exchange  
22 for accepting a regulated rate of return, we are entitled to  
23 ask for cost recovery of all costs prudently incurred. That  
24 system has integrity, and all parts of it are important to  
25 maintain that integrity. And we believe it provides a lot of

1 protection to the customer. You have over on the other side  
2 the system of commercial contracts, which the bidders are  
3 understandably touting, but that system of commercial contracts  
4 provides a lot of risks to customers as at least my client has  
5 experienced over the years as this Commission is well aware.

6 Nobody is going to eat significant cost overruns.  
7 There are no absolutes in the world of commercial contracts or  
8 in the world of utility regulation. Is a bidder going to eat a  
9 substantial cost overrun if it's going to put the bidder into  
10 the red? What actually happens in the real world is the bidder  
11 comes back to the utility and invokes some condition or some  
12 term or finds some ambiguity in the contract, and there's an  
13 argument. There may be litigation, or they invoke force  
14 majeure or something else, and there's an argument, maybe  
15 renegotiation, maybe litigation.

16 After we get far enough down the line and we've  
17 abandoned -- we've been forced by the passage of time to  
18 abandon the self-build option, there's no leverage over the  
19 bidder anymore. And we need that power plant, and we need that  
20 bidder, and we're forced to come to the table sometimes and  
21 renegotiate that contract. So there are no absolute  
22 guarantees. Contracts provide certain protections. The  
23 regulatory system provides certain other protections. And we  
24 believe the track record shows that the regulatory system works  
25 well in this state. And you can't piecemeal dismantled pieces

1 of the regulatory compact without understanding that's what's  
2 happening. So we suggest again the answer to this question is  
3 no, and the Commission should respectfully decline the  
4 invitation to change the regulatory compact.

5 Fourth: Should RFP application fees be reduced for  
6 local government entities? Our answer to that is probably not.  
7 Somebody has to pay the costs of reviewing these bids. And  
8 it's either going to be the other bidders or the utility's  
9 customers. And so in fairness to the customers, we suggest  
10 that the bidders pay the costs or defray the costs. In  
11 practical application, the bidder application fees do not  
12 completely cover the costs. And unless the other bidders, the  
13 nonmunicipal bidders are willing to accept subsidizing the  
14 municipal bidders, we suggest the answer to that question  
15 should be no.

16 Fifth: Should an IOU be allowed to perform an  
17 electronic auction in lieu of an RFP process? Our answer to  
18 this is this should be left up to the utility. The proposed  
19 rule as written would not foreclose this option. In  
20 appropriate circumstances, a utility might want to experiment  
21 with an auction within the confines of the rule, but as a  
22 practical matter, we believe this would be infeasible in the  
23 context of long-term capacity additions because of the  
24 complexity of those issues.

25 New Smyrna has submitted some comments indicating

1 that it's used the auction procedure in the case of some  
2 contracts, but if you look at those contracts, they are 10  
3 megawatts, 15 megawatts, seasonal, or energy sales, a very  
4 different kettle of fish than long-term capacity additions that  
5 we're talking about in the cases of the IOUs.

6 We would certainly reject Calpine's proposed rule  
7 change in this regard because to begin with it's engrafted on  
8 PACE's proposed rule, and for the reasons I've discussed today,  
9 we have many difficulties with PACE's proposed rule. It's also  
10 offered up in lieu of an RFP. So it's not a type of an RFP  
11 process. It would be included in a rule as a substitute for  
12 the RFP process. It contemplates preclearance of bidders and  
13 terms by the Public Service Commission such that the winner  
14 would be presumptively entitled to a determination of need  
15 which really fundamentally changes the need case, the need  
16 proceeding, and is not what is contemplated under 403.519. It  
17 would call upon the Commission to look at everything except  
18 price in the initial determination. So on this issue, we think  
19 the best approach is, leave that to the utility working within  
20 the parameters set by the rule in the context of an RFP.

21 And that concludes our remarks. I understand from  
22 the latest notice on December 5th that there are four  
23 additional issues that the Commission had previously indicated  
24 it might like to hear from the parties about, or maybe it  
25 was -- four, yes, and that you would like to take those up at

1 the end of the process, time permitting and in your discretion.  
2 And I would intend to proceed in that fashion unless the  
3 Commission would like to do it differently.

4 CHAIRMAN JABER: That's bid protest and dispute  
5 resolution; the need for an equity adjustment?

6 MR. SASSO: Yes, ma'am.

7 CHAIRMAN JABER: Utility staffing of bid proposal  
8 evaluation, and sharing of benefits flowing from under-budget  
9 self-build projects?

10 MR. SASSO: Yes, ma'am.

11 CHAIRMAN JABER: Commissioners, I propose we take a  
12 ten-minute break and come back for Commissioner questions  
13 and -- because, Mr. Sasso, you were done with your  
14 presentation --

15 MR. SASSO: Yes, that's correct.

16 CHAIRMAN JABER: -- on behalf of all of the IOUs;  
17 right?

18 MR. SASSO: Yes, ma'am.

19 CHAIRMAN JABER: We're going to take a ten-minute  
20 break and come back with Commissioner questions.

21 (Brief recess.)

22 CHAIRMAN JABER: Okay. Let's get back on the record.  
23 Commissioner Deason, you said you had questions, so  
24 let's start with you.

25 COMMISSIONER DEASON: I'd like to ask Mr. Sasso



1 first about Section 5F. And this section deals with the  
2 requirement -- this is in the proposed rule, and it includes  
3 the terminology weighting and ranking factors. And, Mr. Sasso,  
4 from your comments I take it that you feel that that is --  
5 first of all, it's your position that that reference to  
6 weighting and ranking should be deleted. And according to the  
7 testimony which Mr. Taylor provided, there's some concern that  
8 that -- that relying upon that type of evaluation is not  
9 workable, and you also made the point that the evaluation team  
10 needs flexibility. To that last point, first, let me ask you  
11 this. In the language as is contained in the proposed rule,  
12 where do you see a lack of flexibility for the evaluation team?

13 MR. SASSO: It's more a matter of concern about how  
14 this language might be applied and construed in the future, and  
15 it is the use of the term weighting and ranking which has  
16 certain connotations. Weights, ranks are often thought of  
17 numeric terms. And, again, judging from PACE's comments and  
18 trying to discern what their position is and where they are  
19 going on this, it's my understanding that they are looking for  
20 as much specificity and objectivity in the process as possible.  
21 And so I envision arguments in the future that weighting and  
22 ranking means numeric, or it means objective.

23 We have to have some type of designation with numbers  
24 associated or what may be the same thing, some type of  
25 preference which would spell a lack of flexibility. It would

1 create the problems that Mr. Taylor was talking about, creating  
2 the potential for gaming of the RFP so that maybe the winning  
3 bid is not the best bid for the customer.

4           There's another concern about flexibility further on  
5 down where the proposal says, no criterion shall be employed  
6 that is not expressly identified in the RFP absent a showing of  
7 good cause. Again, on its face, good cause requirement is not  
8 all that troubling, and the utilities aren't attempting to  
9 change the rules in midstream, but bids come in, projects come  
10 in, proposals come in, and they may not always look like what  
11 the utility thought they were going to get. They may have some  
12 features that weren't anticipated. And so if they take into  
13 account something or they identify something in their work  
14 papers that they looked at that is a function of the bid that  
15 came in, an argument is going to be made while we're applying a  
16 different criterion from what was in the RFP. So we suggested  
17 putting into that a material requirement, a materiality  
18 qualifier, so no material criterion shall be employed that is  
19 not expressly identified, so we avoid fussing over any  
20 discrepancy that a bidder who is interested in challenging the  
21 project can identify.

22           COMMISSIONER DEASON: How would you define  
23 "material"?

24           MR. SASSO: I think the Commission -- well, and the  
25 utility in the first instance, subject to Commission review,

1 will make that judgment on a case-by-case basis. And material  
2 is generally something or thought of as something that can  
3 change the outcome or significantly influence the outcome.

4 COMMISSIONER DEASON: Let me ask you this question.  
5 I think the objective here is to try to provide as much  
6 information up front to the bidders so that they can put  
7 together the most responsive bid and, hopefully, bids that are  
8 most beneficial to customers. I think we all agree that's  
9 the entire -- that's the real motivation for this rule, is to  
10 try to maximize benefit to customers. I think we all agree  
11 with that. And the idea is that if this information is shared  
12 up front, that that -- it could have that result.

13 Let me ask, is it your understanding when a utility  
14 issues an RFP that at the time of the issuance that they know  
15 generally what weighting and rankings they are going to use to  
16 scrutinize the results, or are those weightings and rankings  
17 not used, are they not formulated until after bids are  
18 received?

19 MR. SASSO: I couldn't say that weightings are ever  
20 formulated during the process; likewise, with rankings. Now,  
21 there may be a situation as you go through the process where  
22 the utility will look at the different bids and rank them based  
23 on an exercise of professional judgment about this one being  
24 stronger than that one on this factor. Let's say it's  
25 environmental. Is it stronger on environmental? This is

1 stronger on --

2 COMMISSIONER DEASON: Let's take an example. There  
3 probably is going to be some evaluation as to the probability  
4 that the project would receive environmental permits, and  
5 there's some subjectivity involved in that. So we all realize  
6 that that's going to be part of the review. You would agree  
7 with that; is that --

8 MR. SASSO: Yes, that is one factor that the utility  
9 may look at and then in turn the Commission will look at.

10 COMMISSIONER DEASON: Okay. Now, with this  
11 terminology that is in the proposed rule, what would be the  
12 obligation to divulge to bidders how the utility was going to  
13 make an evaluation on the likelihood of a project being  
14 permitted environmentally?

15 MR. SASSO: We would construe it as not to impose an  
16 obligation, because frankly, I don't know how to apply that by  
17 coming up with weightings or rankings in the sense that I think  
18 a bidder would like to know about them. In my experience in  
19 working on a couple of these projects, it's my understanding  
20 that it's very, very difficult for a utility to form  
21 preconceptions about the relative importance of one criterion  
22 versus another in a vacuum. You want to see the whole project.

23 I think Mr. Taylor gave an example of a situation  
24 where in advance you may say that we anticipate that one factor  
25 will be less important than another factor, and let's suppose

1 that we were forced to assign some weight. So you say, one  
2 factor will be given a weight of ten. So we multiply that  
3 times some other value. Another factor will be given a weight  
4 of two. But then in the context of a particular proposal that  
5 thing that we were going to give a two to is presented in a way  
6 that we didn't quite anticipate. It's either more attractive  
7 or more deleterious to the overall desirability of the project,  
8 and it's really not a two. It's really more important in the  
9 context of that particular proposal. And that's always been  
10 the concern of the utilities, that it's very, very difficult to  
11 prejudge these things and specify up front what the weighting  
12 and ranking will be.

13           In the interest of making the best decision from the  
14 utility's point of view -- now, there's another side of this  
15 thing that Mr. Taylor was talking about. It's not just the  
16 matter of the utility wanting to make the right decision. You  
17 can imagine if the Commission had to give weights and ranks  
18 to -- you are going to give so many points to an argument if it  
19 touches this issue or so many points to a presentation if it  
20 touches that position and you add them all up, and you decide  
21 who wins, it would be very, very difficult. And the utility  
22 likewise wants to have the judgment.

23           But the other side of that, too, is that as much as  
24 the bidders want to have specificity in advance, it may not be  
25 in the best interest of the customer to give it to them,

1 because once a rational economic entity, not impugning  
2 anybody's motives, anybody's good faith, but a rational  
3 economic entity trying to maximize its chances of winning the  
4 bid will so shape its bid to score the highest on the numeric  
5 values or the relative rankings or weightings that are  
6 identified. And that might not result in the best bid for the  
7 customer, the best value to the customer. It may give you a  
8 winning bid, but that may not be in the best interest to the  
9 customer.

10 We want to encourage the bidders to take into account  
11 all factors, all matters of value to the company, try to  
12 identify them in the RFP, try to provide some explanation, look  
13 at the big picture, give us the best value. And then the  
14 utility looks at that in the context of its system needs and  
15 says, we'll pick the project that gives the best value to the  
16 customer. That's the bottom line.

17 COMMISSIONER DEASON: The second sentence of that  
18 section which refers to nonprice considerations, how do you  
19 contrast that with what is required in 5H of the proposed rule?  
20 Is that the same general subject matter, or is that two  
21 different things, in your opinion?

22 MR. SASSO: Well, there arguably is some redundancy  
23 even under the existing rule. I mean, strictly speaking, if  
24 you say that we should identify all price and nonprice  
25 considerations that will be relevant, you don't need anything

1 else, because that should subsume criteria, that should subsume  
2 what's in H. And I understand the intent of H is to spell out  
3 with more specificity some particular issues that staff would  
4 like us to comment on or the Commission would like us to  
5 comment on in the process through the RFP, but there is some  
6 redundancy arguably.

7           COMMISSIONER DEASON: Well, let me ask you this. If  
8 there were a requirement upon the investor-owned utility to  
9 give as much information as possible to the bidders as to the  
10 expectations, the general parameters of the review, if you go  
11 in beforehand with a general idea that you have an importance  
12 on environmental permitability as opposed to fuel diversity or  
13 whatever, share that information, and then once you get the  
14 bids, you realize that there are some attributes of a  
15 particular bid which are more important than others and that  
16 gives that an -- you have the ability under this language, do  
17 you not, to deviate from that general expectation or general  
18 applicability of the review? The only thing is you have to  
19 present a showing of good cause for deviation. Is that  
20 unworkable?

21           MR. SASSO: That's correct. We have two concerns.  
22 And this is -- this cuts across all of our comments. One is a  
23 legitimate concern about what the rule does mean without regard  
24 to advocacy or argument, what does this mean, how can we  
25 comply? And the other concern is to try to avoid litigation,

1 to try to anticipate and avoid as many disputes as we can over  
2 things that don't matter, that really shouldn't matter to the  
3 customer and to the Commission. And so that's why we suggest  
4 incorporating a materiality consideration, so we're not going  
5 to get into endless disputes about some arguable technical  
6 discrepancy between the RFP and what appears in some document,  
7 for example. That's why we want to strike weighting and  
8 ranking because there's arguably some ambiguity there. And  
9 we've already seen it, as I say, in the comments of some other  
10 participants. We think that the interpretation or the slant  
11 being put on that is more precise than we think is appropriate.

12 So, one, we're concerned that the rule states clearly  
13 what the utility's obligations are; and, two, we want to try to  
14 avoid litigation in the future in future need cases.

15 COMMISSIONER DEASON: Let me share this with you. It  
16 seems to me that there are two competing considerations here,  
17 and the other competing consideration is the need for an  
18 independent evaluator. And it seems to me that -- and please  
19 share with me if you disagree because -- well, I'm sure you  
20 will. You never have -- you always share your disagreements.

21 If the Commission is to take the position, and I  
22 don't know what the Commission will do, but if the Commission  
23 takes the position that we're not going to require a  
24 third-party independent evaluator, that the ultimate decision  
25 is going to rest with the IOU and they have the obligation to



1 justify their decision. So if we take that position, don't you  
2 see that there is a competing concern that if there's not to be  
3 a third-party independent evaluator, that the process needs to  
4 be as independent, objective, transparent as possible but not  
5 taking away the ultimate decision away from the IOU and the  
6 flexibility to make that decision considering all of the inputs  
7 from the various bids?

8 Now, do you see that there is a need for that if  
9 there's not going to be an independent evaluator?

10 MR. SASSO: I understand completely the issues you're  
11 posing. Now, you have put a lot of terms in that sentence.

12 COMMISSIONER DEASON: And I apologize for the length  
13 of the question.

14 MR. SASSO: No, that's fine. But there's a lot of  
15 substance in each one of those terms. We share the  
16 Commission's concern. We believe we share the Commission's  
17 ultimate goal in this, which is to get the best decision for  
18 the customer. You have to understand that from the utility's  
19 point of view, they need to have the judgment. They need to  
20 have the latitude to make the best judgment. These are  
21 difficult choices. They involve professional judgement. And  
22 to use the same analogy, just as the Commission struggles  
23 within issues within its responsibility and you have to make  
24 judgment, and sometimes that's arguably subjective, but you're  
25 drawing on your professional expertise and your good faith and

1 your judgment to make the best decision you can, the utility  
2 feels in the same position. And we're not arguing this simply  
3 as a matter of advocacy or points or anything else.

4           The utilities adamantly believe that they are capable  
5 of making good faith judgements for the customer. They have  
6 always done it. They will continue to do it. And they want to  
7 do it. That's their goal. But they want to be able to do it  
8 without artificial limitations that actually can be detrimental  
9 to the process and the customer. So, you know, those are the  
10 competing considerations.

11           We understand the accountability issue. We  
12 understand that the utility is going to have to open up its  
13 process to the Commission, show its analysis, show its  
14 material, show its conclusions, explain them, answer any  
15 questions the Commission has about how the decision was made,  
16 how the process was made. It's completely transparent to this  
17 Commission. We would submit that transparency to the bidder is  
18 a more complex issue, because if you make completely  
19 transparent again all of your criteria and so on, you open up  
20 the possibility of gaming by rational economic entities who  
21 want to try to use that information to shape their bid to win  
22 it, which is not necessarily the same thing as getting the best  
23 project for the customer. And it's not bad faith. It's just  
24 rational economic behavior by these firms. And that's what we  
25 have seen in instances in the past. And so there is a

1 balancing act there.

2           So, yes, we want transparency to the Commission. We  
3 believe we provide it. Yes, the utilities understand, they get  
4 the message that they need to be making these decisions based  
5 on appropriate considerations with the customers' interest in  
6 mind. They need to be able to explain that to the Commission,  
7 withstand cross-examination by the Commissioners, withstand  
8 scrutiny by the staff. We understand that completely. But  
9 looking for the best way to get that job done, the utilities  
10 have to fall back and say, at some point, we have to have the  
11 judgment. At some point, we have to have the ability to do our  
12 job in running this system and deciding, should we build it, or  
13 can we do better by outsourcing it, essentially? We have to  
14 have that judgment subject to your review.

15           Now, is it a perfect world? Is it completely  
16 foolproof? No, it's not. You know, probably utilities make  
17 mistakes. They are not clairvoyant. They don't have perfect  
18 knowledge any more than the Commission does, but they do the  
19 best job they can, and it is reviewable by you which is very  
20 different from the world of commercial contracts. You wind up  
21 in court, and you don't know where that's going.

22           COMMISSIONER DEASON: I want to shift now to  
23 Section 11, and this section allows for there to be objections  
24 filed to the RFP.

25           MR. SASSO: Yes, sir.

1           COMMISSIONER DEASON: I think the terminology is  
2 within ten days of the post-issuance meeting. First of all,  
3 it's your position that this should be deleted. And I think  
4 that you made reference to the fact that you think it's just  
5 going to encourage objections to preserve positions and rights,  
6 and that you don't think that it provides any closure, and that  
7 it is going to add time to the process. I think I pretty much  
8 summarized your concerns. Did I miss any?

9           MR. SASSO: That's correct.

10           COMMISSIONER DEASON: Okay. I guess I'm concerned  
11 with your concern that it doesn't provide any closure, that it  
12 doesn't -- we're just adding time to the process with no  
13 benefit. And I don't mean to be putting words in your mouth,  
14 but I kind of get that to be the bottom line of your concern.  
15 You see no benefit -- if there is some concern with a provision  
16 or requirement in the RFP, that that gets determined up front  
17 before you go through the RFP and the evaluation process. You  
18 see no benefit that it could encourage or streamline the  
19 process on the back end, that we don't have as many issues in  
20 the need determination proceeding perhaps, or we don't have as  
21 many issues in a cost recovery proceeding?

22           MR. SASSO: Not in the real world, in all honesty.  
23 And after much, much debate and consideration, we don't. Now,  
24 I should say that this is not all or nothing, because the  
25 proposed rule does provide for pre-RFP meeting where the

1 utility will discuss with participants what the RFP is going to  
2 be. So there's an opportunity there in an informal way to work  
3 out some issues.

4           The proposed rule also provides for a post-RFP  
5 bidders conference which provides a further opportunity for  
6 questions and answers, which has worked well in the past, to  
7 flush out questions and get things on the table and have  
8 communication between the utility and the bidders. So we're  
9 not saying that there is no opportunity or value to be gained  
10 from some discussion. It's reflected in the proposed rule.

11           The concern we have in the real world in  
12 incorporating this provision is that we've already been put on  
13 notice by the comments filed that some participants are going  
14 to want a full-blown hearing. They're going to want to raise  
15 all kinds of issues about the reasonableness of the terms and  
16 the onerousness of the terms. And based on our experience, my  
17 experience as an attorney and hundreds of proceedings,  
18 contested proceedings, I can only predict the worst, that we're  
19 going to have increased litigation. We are going to have a  
20 situation where what is now an informal effort to work through  
21 the process, an informal Q&A with representatives who are not  
22 lawyers talking to utility people who are not lawyers, we're  
23 going to wind up in a more adversarial situation where counsel  
24 come in early, and they're serving discovery in these meetings.  
25 And it's going to cause a breakdown, I think, in a proper

1 administration of a power plant development project.

2           The closure issue has an allure to it, and for that  
3 reason, the IOUs discussed this at some length and initially  
4 saw some value in this. But the more we thought about it, the  
5 more we were convinced that there was going to be no meaningful  
6 closure, because the idea of closure means you've litigated it  
7 once. You can't litigate again in a meaningful way, meaning  
8 you reduce the cost, you reduce the risk, you reduce the delay  
9 in a meaningful, significant way. But let's suppose there's a  
10 facial challenge to some terms of the RFP. Maybe some of those  
11 get resolved, and we move forward in the project. Especially  
12 now that everybody is squared off, and they've got their  
13 lawyers, and they've got their discovery and everything else,  
14 we're going to roll into the need hearing and we're going to  
15 still have a challenge. And we're going to have a bunch of  
16 other issues about how those were applied, how those terms were  
17 applied.

18           Let's suppose the Commission expressed some concerns  
19 in the initial challenge about the RFP. Now we're going to  
20 have another round of arguments in the need case. We didn't do  
21 what the Commission said you were supposed to do in that  
22 initial challenge. The Commission expressed a concern about  
23 this, that or the other thing, and you didn't appropriately  
24 implement that. So we compound the complexity of the process.  
25 And somewhere in this, we lose sight of the objective which is

1 to build a power plant or to buy a power resource for the  
2 benefit of the customer and move on with it and do it without  
3 undue regulatory delay. We lose sight of that, and it becomes  
4 a battlefield for other issues and other interests and things  
5 that really sidestep us from where we're supposed to be going.

6 COMMISSIONER DEASON: Let me ask you this. You have  
7 a concern that this would just invite objections to be filed.  
8 Do you think there's any benefit that it would -- to avoid that  
9 litigation, and I don't think the IPPs necessarily like  
10 litigation any more than you do, but do you think that there's  
11 any benefit in knowing that there is an opportunity for an  
12 objection to be filed, that it would allow the parties in the  
13 pre-RFP meeting to try to get as much worked out as possible so  
14 as to avoid that possibility?

15 MR. SASSO: Again, looking at it from a strictly  
16 pragmatic point of you, we'd have to say the answer is no.

17 COMMISSIONER DEASON: Let me ask you this question.  
18 If there is to be some opportunity for a bidder or a potential  
19 bidder to file an objection to the proposed RFP, is there any  
20 way to do it better than what's contained in staff's proposed  
21 language?

22 MR. SASSO: Filing an objection contemplates a point  
23 of entry, Commission review, Commission decision, and so the  
24 answer would be no. If what we're interested in is working out  
25 issues in a common sense way, in a practical way, getting on

1 with the project, making sure people understand the  
2 expectations, if there are any ambiguities, we clear it up, we  
3 provide for that now. We provide for that in the proposed rule  
4 through a pre-RFP meeting and a post-RFP bidders conference.

5           The bidders conferences have worked very well in  
6 these projects. There is a lot of discussion. There is a lot  
7 of give and take. Again, the lawyers generally haven't been  
8 involved. You have engineers talking to engineers. You have  
9 planners talking to planners, and there is good communication  
10 about what do you guys really want? What's this issue? What  
11 do you want on this issue? And there's communication back and  
12 forth, answers are given, clarifications are made. It works to  
13 work through the issues and achieve a real valuable  
14 understanding.

15           I don't think that the Commission has seen too many  
16 challenges to the RFPs themselves in these cases that have been  
17 litigated, not too many. The challenges generally concern  
18 something that occurred during the evaluation process, not the  
19 letter of the RFPs. I think that's revealing. If we provide  
20 for an opportunity to challenge the letter of the RFPs, we're  
21 going to start seeing those challenges.

22           COMMISSIONER DEASON: Shifting now to Section 14 and  
23 this area addresses cost recovery generally. And it's your  
24 position that this is inappropriate for a bid rule. And you  
25 also made reference that there is still a need for a reg out



1 clause. Can you expand upon that? If I understood you  
2 correctly.

3 MR. SASSO: Yes, sir. This language does not take  
4 away the risk completely of an adverse regulatory decision  
5 about cost recovery. There is always that risk, and a reg out  
6 clause is an effort on the part of the utility to protect  
7 itself against that risk, because it operates on the assumption  
8 that if it makes good decisions, it's going to get cost  
9 recovery. But of course, we can't always predict with complete  
10 certainty what's going to happen in the future and what the  
11 Commission will do in any given case. And so a reg out clause  
12 is again just a sensible way on the part of a business to  
13 protect itself against risk.

14 COMMISSIONER DEASON: Are you proposing language  
15 which achieves that?

16 MR. SASSO: Well, we're proposing the deletion of the  
17 first portion of this which would essentially leave us with a  
18 status quo. We understand that cost recovery is always  
19 examined under prudent standards. We understand that there's  
20 always some risk that if the utility mismanages something or  
21 makes bad decisions, there will be consequences. There is some  
22 risk that even if the utility makes good decisions, a decision  
23 will be rendered adverse to the utility. And reg out clauses  
24 have been used in these situations. And we would suggest by  
25 deleting this information that we stick with the status quo on

1 that.

2 COMMISSIONER DEASON: And what is your understanding  
3 of the status quo again?

4 MR. SASSO: As I mentioned, we understand that cost  
5 recovery is subject to prudence review, and at the same time,  
6 utilities generally do use reg out clauses in contracts of this  
7 nature.

8 COMMISSIONER DEASON: Well, let me shift then to the  
9 question concerning -- well, these are the issues that you  
10 addressed after you addressed the specific sections, and it was  
11 the third one which, I think, pretty much addresses the  
12 question of binding bids. And I don't think that's the  
13 terminology you used, but that's the nomenclature which I used  
14 when I was making my notes. Do you recall that particular  
15 section? I think it was the third question which you answered  
16 after the you addressed the specifics.

17 MR. SASSO: Yes, sir.

18 COMMISSIONER DEASON: And you made the point that the  
19 IOUs, that you bid your cost; is that correct?

20 MR. SASSO: We wouldn't use the term "bid."

21 COMMISSIONER DEASON: You're held to your cost  
22 standard, prudent cost standard.

23 MR. SASSO: We evaluate -- in deciding whether to go  
24 forward with a power purchase agreement or a self-build, the  
25 utility evaluates its costs of the project.

1 CHAIRMAN JABER: You said "bid your costs," though.  
2 You did say that.

3 MR. SASSO: Well, I may have misspoke. What I was  
4 mentioning in the context of my remarks was that it's our  
5 belief that the argument that we should be held as having the  
6 same standing or status or position as a bidder would mean that  
7 we would be bidding a price like they bid a price. Nobody bids  
8 cost. We don't bid a cost; they don't bid a cost. I may have  
9 misspoke if I said we bid cost. We make our costs known to the  
10 Commission. Bidders don't make their costs known to anybody.  
11 Nobody really bids cost.

12 COMMISSIONER DEASON: Well, would that be a  
13 preferable way to allow the utility to bid a price and expect  
14 the utility to stick by that price? And if you achieve the  
15 construction and operation of the plant at parameters better  
16 than the price, that you keep the difference? That's part of  
17 the reward of being an efficient utility.

18 MR. SASSO: Well, it really would amount to  
19 restructuring legislation, because as I was explaining, it's  
20 inconsistent fundamentally with cost of service regulation. We  
21 announce our costs. We estimate our costs. We tell the  
22 Commission what they are. We are entitled to collect rates  
23 based on recovery of our costs. If we change the whole concept  
24 and say, we are going to operate like an unregulated entity and  
25 simply quote a price, the Commission doesn't know what our

1 costs are. And if we achieve that price, it may have good  
2 consequences or bad depending on how --

3 COMMISSIONER DEASON: Well, let me ask you this. If  
4 it is the best price and that's the best price available for  
5 the customers, why should we be concerned with what your costs  
6 are?

7 MR. SASSO: Well, it does change the whole regulatory  
8 compact, and, frankly, we would have to think through the whole  
9 system to see if it added up and made sense. But this is what  
10 the Commission would be accepting if it did that. Let's again  
11 suppose that we have a project where the utility has certain  
12 costs. And the next closest bid is \$100 million above those  
13 costs. Right now, the customer gets the benefit. If the  
14 utility can build that project at the costs that are estimated,  
15 the customer gets the benefit of the discrepancy between the  
16 \$100 million higher power purchase agreement versus the lower  
17 self-build option. The customer gets that benefit.

18 Now, let's suppose we switch to a regime where the  
19 utility quotes a price. Suppose the utility quotes a price  
20 that eats up \$85 million of that difference, and says, well, we  
21 beat the power purchase agreement by \$15 million, plus there's  
22 some other advantages on some of the other factors. Now, the  
23 utility takes for its shareholders \$85 million that would under  
24 the current system of cost of service regulation go to the  
25 customer. Is that really what we want to do?

1           We haven't seriously contemplated that because we  
2 didn't believe that the Commission either had the power to do  
3 that or it would have the interest in doing that, but that is  
4 essentially the system that we're talking about.

5           COMMISSIONER DEASON: Well, let's put out another  
6 hypothetical. Let's say that your bid -- the IOU's bid has --  
7 is \$10 million better on a net present value of revenue  
8 requirements basis than the next best bidder. And you go  
9 forward with your project. The Commission determines there is  
10 need and that it's the most cost-effective unit, and you go  
11 forward with that project. And then there is some unforeseen  
12 event outside the control of the utility, and you react to that  
13 in a prudent manner, but the result is that instead of being a  
14 \$10 million savings in net present value of revenue  
15 requirements, it's a \$10 million excess in net present value of  
16 revenue requirements. Under that scenario, is the customer  
17 \$10 million less or hurt to the tune of \$10 million?

18           MR. SASSO: Not necessarily, because, again, there  
19 are no absolutes either under regulation or commercial  
20 contracts. There is always some risk, and the utility and then  
21 the Commission makes the best judgment on the best available  
22 information at the time. There are no guarantees in either  
23 regulation or commercial contracts.

24           Let's suppose that that happens in the case of  
25 regulation, and the utility, building its own unit, encounters

1 a problem as you've described, Commissioner Deason, that is  
2 unanticipated, that would qualify as a prudent cost overrun.  
3 We can't assume necessarily that the power purchase agreement  
4 would have gone forward. Let's suppose we had actually gone  
5 ahead and we negotiated a power purchase agreement that was \$10  
6 million more expensive on the presumption that that was  
7 risk-free. We would submit that that is an erroneous  
8 presumption.

9           In the world of commercial contracts, independent  
10 power producers encounter problems, too. Maybe the problem we  
11 would have encountered with self-build is exactly the same as  
12 they would have encountered in building their own power plant.  
13 Very few power suppliers are prepared to go ahead and build a  
14 losing project. So you immediately get into the world of  
15 contract interpretation, conditions, clauses, perhaps  
16 renegotiation. Again, if we're close enough to the deadline  
17 for the in-service date of the project, we've lost our  
18 self-build. We've walked away from that. We have no leverage.  
19 We need the plant. So they come back to us, and they say, we  
20 need your help. You need the plant. We ran into this problem.  
21 We didn't anticipate it. It's beyond our control. Can we  
22 renegotiate this? We can't do it for this. And companies have  
23 found themselves in that situation before, and they have been  
24 asked to step forward to help the contracting party.

25           Worse case, you wind up in litigation. And as you're

1 aware, Commissioner Deason, our company has had a number of  
2 these disputes with contracting parties over pricing terms and  
3 other terms. So you wind up in litigation, and the Commission  
4 may choose not to get involved in deciding that dispute. In  
5 which event, the parties go over to the state court, and they  
6 present their case to a judge who is not familiar with the  
7 industry issues and so on. And we have no confidence that the  
8 customer will always win that dispute. So there are a number  
9 of exigencies that can happen in the world of commercial  
10 contracts. There are some that can happen under regulation.  
11 So all we can do is make the best decision that we have at the  
12 time on the facts available to us at the time, recognizing that  
13 there are risks in both worlds.

14 CHAIRMAN JABER: Did you get an answer to your  
15 question? Because I was very interested in hearing the answer.

16 COMMISSIONER DEASON: Please, Madam Chairman, if you  
17 need to -- you want to interject, please feel free to do so.

18 CHAIRMAN JABER: I didn't understand Commissioner  
19 Deason's question to make a presumption or a comparison to  
20 purchased power agreement and the risk associated with that  
21 versus self-build option, Mr. Sasso. So saying that, I think  
22 the question was, you made the point that there are current  
23 benefits and savings to consumers when the self-build option  
24 comes in with the most cost-effective alternative. So the  
25 question posed by Commissioner Deason is, are you suggesting

1 that if there are cost overruns, that those would be subsumed  
2 by the consumer through rates? That's what I understood the  
3 question to be.

4 MR. SASSO: Well, in answer to that question, the  
5 answer is very likely so. If the cost overrun is incurred  
6 through the prudent management of the project by the utility,  
7 the utility under the regulatory compact and again in exchange  
8 for accepting a regulated rate of return should get cost  
9 recovery on costs prudently incurred.

10 I understood Commissioner Deason to be asking, would  
11 the customer necessarily be \$10 million worse off when it  
12 appeared at the start that they were going to be \$10 million  
13 better off, and my answer to that is no, not necessarily.

14 COMMISSIONER DEASON: Well, let me put a qualifier in  
15 the question, or an assumption, and say that the IOU bid comes  
16 in at \$10 million less than the next most attractive bid. But  
17 in that next most attractive bid, that bidder realizes that  
18 there are risks that affect them like they affect all  
19 participants in the energy markets. They build in in their  
20 bid, you know, a fudge factor, contingency factor, whatever you  
21 want to call it, because they have to live within the  
22 constraints of their bid and the contract that results.

23 And I understand, you realize that you -- you argue  
24 that there are certain parameters within the contract which  
25 allows some flexibility. But let's just assume that their bid



1 is \$5 million higher than it had to have been because they  
2 built in this contingency factor because of the risk that they  
3 feel like they're taking on as opposed to -- that their  
4 shareholders are taking on as opposed to your shareholders  
5 taking that risk because you feel like you can demonstrate that  
6 you acted prudently, and under that standard, you would recover  
7 cost overruns.

8           So there's \$5 million more than it had to have been  
9 because of that, and that if it had not been for that -- I need  
10 to change my numbers. If it had not been for that contingency,  
11 say it was \$15 million, that they would have been \$5 million  
12 less than the IOU's bid. Now, under that scenario, is that an  
13 even playing field?

14           MR. SASSO: Well, you're never going to have all  
15 things completely equal because we do have two different  
16 paradigms. We have a commercial contract and we have  
17 regulation. And each project is going to be a little  
18 different. I think you could get the numbers close enough to  
19 where it becomes a judgment call first by the utility and then  
20 by the Commission about which is the most cost-effective  
21 alternative. The utility might look at that contract that  
22 you're describing and conclude, well, maybe they do have some  
23 contingencies built in there, but we don't like some other  
24 hooks in the contract which present other risks to us and to  
25 our customers. So it's a very complex decision.

1           On the other hand, on the self-build side, the  
2 utility may have done sensitivity runs to assure itself that it  
3 feels real good about its numbers. So you get to a point  
4 where, yes, the numbers get close enough, and somebody has to  
5 make a judgment, subject to this Commission's review, about  
6 which is the best project for the customer. It's not  
7 necessarily -- this is the point we're trying to make. It's  
8 not necessarily something that can be decided by a computer.

9           COMMISSIONER DEASON: Well, let me kind of change the  
10 direction of the question a little bit. Do you feel that under  
11 the current process that there is the ability to transfer risks  
12 from your shareholders, IOU shareholders to customers into that  
13 same possibility of shifting that risk does not -- it is not  
14 available to the IPPs such that they are -- don't have the  
15 ability to -- they're already kind of behind the ability to put  
16 in a competitive bid because they have to take on all the risk;  
17 whereas, the IOU can shift that risk if they can prove that it  
18 was a prudent thing to do?

19           MR. SASSO: I don't think I would disagree with that.  
20 It's a very complex -- I don't know how I answered that. I'd  
21 say I don't think I would agree with that.

22           COMMISSIONER DEASON: I was going to say, I didn't  
23 think you were going to agree.

24           MR. SASSO: It's a complex set of issues about  
25 whether IPPs are shifting or not shifting risk. They will try,

1 again, as rational economic entities to shift as much risk as  
2 they can. Generally speaking, they are going to have a higher  
3 cost of capital than utilities. Which does it put them at a  
4 cost advantage? Yes, it does. It puts them at a cost  
5 advantage, but that's the whole purpose of regulation. You  
6 have a regulated rate of return which is supposed to benefit  
7 the customer, and in return, you have recovery of prudent  
8 costs. So regulation is supposed to provide some benefits, and  
9 we should not apologize for the fact that it has been providing  
10 benefits to customers.

11 Now, can somebody who doesn't operate under  
12 regulation compete effectively? That really isn't the  
13 fundamental issue, whether they should compete effectively.  
14 The fundamental issue is, what's the best deal for the  
15 customer? Now, maybe --

16 COMMISSIONER DEASON: Let me interrupt, please,  
17 because this is very, very critical. I agree with what you're  
18 saying, but if there is some fundamental advantages for the  
19 regulated utility, and the IPPs are not ever able to put in a  
20 winning bid, well, then in the future we're not going to have  
21 bids because they never are going to have the opportunity to  
22 win a bid; and, therefore, we don't have the benefit for  
23 customers to make sure that we're utilizing a bidding process  
24 to get the maximum amount of savings and efficiency for  
25 customers.

1           MR. SASSO: That is a theoretical concern, but in  
2 reality, there are a lot of power purchase agreements in this  
3 state. Florida Power Corporation has a very substantial  
4 portfolio of power purchase agreements. We would anticipate  
5 that a bidder can make a viable bid. Whether they have --  
6 whether they feel they are at a cost disadvantage is really a  
7 business decision for them. They can be more aggressive in  
8 pricing their proposals to us. It depends on the expectations  
9 of their shareholders, how they want to manage their risk, what  
10 kind of portfolio they want to assemble. They do pass their  
11 risk to our customers through recovery clauses. In a sense,  
12 the customers are absorbing the cost in a much more transparent  
13 and immediate way than most self-build alternatives which are  
14 worked into rates at some point. And there may be regulatory  
15 delay or drag in that process.

16           So that's why I would not agree that the utilities  
17 are able to pass their risk on to customers and the IPPs are  
18 not. They have a different set of strengths and a different  
19 set of weaknesses. They can compete if they choose to compete,  
20 and sometimes they do. And we would expect them to do so in  
21 the future. But it's a question of their deciding based on an  
22 assessment of their own self interests what risks they're  
23 willing to assume, what return they want, and how aggressively  
24 they want to price their projects.

25           COMMISSIONER DEASON: Let me ask you this question,

1 and this is -- please don't read any more into this question  
2 than what's there. I'm just trying to try to understand the  
3 general framework that we're working in here. You mentioned  
4 the need for a regulatory out clause, and what basically that  
5 means is that if this Commission disallows amounts that  
6 otherwise go through a cost recovery clause, that you no longer  
7 have the obligation to pay those amounts to the independent  
8 generator. I may be oversimplifying, but in a nutshell, that's  
9 it; correct?

10 MR. SASSO: That's correct.

11 COMMISSIONER DEASON: Should we look at the  
12 possibility of having a reverse regulatory out clause? And  
13 what I mean by that is this: That if a bidder comes in, wins a  
14 bid, and they encounter some unforeseen change that was beyond  
15 their control, and they acted prudently in trying to minimize  
16 that impact, and they come forward to the Commission and  
17 demonstrate that that was the best alternative to undertake,  
18 and they feel like there should be some additional amount  
19 passed through the cost recovery clause, and that it is in the  
20 long term, it's to the benefit of customers to do so, that then  
21 you would have an obligation to pay that amount, even though it  
22 may be in excess of the strict terms of the contract.

23 MR. SASSO: I have two responses to that. First, to  
24 some extent, we would probably submit to the appropriate extent  
25 that exists now because the utility manages its contracts with

1 its contracting parties, taking them to court, if necessary,  
2 and that's happen quite a bit. But the utility makes a  
3 judgment, does the contracting party have a good case? Have  
4 they stated good grounds to renegotiate, ask for additional  
5 consideration, ask for special consideration? And if the  
6 utility concludes that the answer is no, they just don't like  
7 the bargain they struck, but we're entitled to the benefit of  
8 it, or that the arguments they have given are specious, we take  
9 them to court. And we enforce the contract for the benefit of  
10 the customer. And it's strictly for the benefit of the  
11 customer because it's all a pass-through.

12 Let's suppose that the Commission entertained this  
13 idea that you're suggesting. I would ask, how could it be  
14 meaningfully enforced in the case of a power purchase agreement  
15 where we don't have their costs? Unlike a regulated utility  
16 where we have to open up our books to the Commission and show  
17 you our costs, we don't see their costs. So we would have no  
18 idea about the integrity of their estimates or whether this  
19 overrun they say they are incurring is legitimate or what the  
20 circumstances were that created it or what have you. So,  
21 again, it's very difficult to impose either a regulatory model  
22 on unregulated entities or a deregulated model on regulated  
23 entities. They both have their place in the system, but it's  
24 hard to start mixing and matching.

25 COMMISSIONER DEASON: Okay. Thank you, Mr. Sasso.

1 That's all my questions, Madam Chair.

2 CHAIRMAN JABER: Commissioners, do you have any other  
3 questions?

4 MR. SASSO: Oh, I'm sorry. Ms. Clark just reminded  
5 me of one other responsive fact, and that is, under the current  
6 regime we do tend as a result of these comments to focus on the  
7 downside risk to the customer, but there is an upside to these  
8 commercial contracts. And if the vendor quotes a certain  
9 price, and they have got an appropriate cost structure where  
10 they can manage those costs and do real well, and let's suppose  
11 they beat some of what they estimated their costs were going to  
12 be, those benefits go to their shareholders, not to the  
13 customer, which is a significant difference again between the  
14 power purchase agreement and the regulated model.

15 CHAIRMAN JABER: Commissioner Baez, I saw you had  
16 questions.

17 COMMISSIONER BAEZ: Just a couple. First, a  
18 theoretical question. If it were possible, and I know that you  
19 have already stated that you probably can never get there, but  
20 if it were possible for a self-build option and a particular  
21 bid to have graded out equally, and, again I may misstate that  
22 you grade yourself, but I guess for argument's sake that they  
23 both grade out equally, what then? Do you flip a coin or -- I  
24 mean, is it as simple as that?

25 MR. SASSO: I'm not sure I can answer that honestly

1 because I don't know that I'm sufficiently expert to do so.  
2 And I think I'm having trouble with the assumption because  
3 there's not going to be any situation where there is complete  
4 equality. And so if you assume that, then we're paralyzed  
5 because we can't make a decision if all things truly, truly are  
6 equal. And there would be nothing wrong with flipping a coin,  
7 perhaps, if they were truly, truly equal. But chances are, the  
8 evaluator being first, the utility, and then the Commission  
9 will then go to another order of detail in its evaluation.  
10 They will say, based on the initial set of criteria or  
11 standards, they graded out equal. Now, we need to go to the  
12 next order. Perhaps we look at imputed debt. Perhaps we look  
13 at some other risk. Perhaps we look at some other  
14 consideration. Perhaps we look at, you know, our system  
15 diversity. Do we want some power purchase agreements? Are  
16 there some advantages in terms of the diversity?

17           And so you may start looking at another set of  
18 criteria which is one of the reasons we're concerned about  
19 having to specify with complete precision everything up front  
20 in the RFP and how it will be applied in the particular  
21 circumstances of that project. You have to have some  
22 discretion to use your judgment. Then we would be accountable  
23 for that judgment. We'd come before the Commission, and we'd  
24 explain on the first run they graded out equally, and then we  
25 broke the tie by looking at this, that or the other thing.



1           COMMISSIONER BAEZ: One of the statements that I am  
2 having a little bit of trouble with is when you refer to the  
3 rational economic entity. How do you -- what does that mean?

4           MR. SASSO: It means with respect to the bidders in  
5 these projects, they want to win the bid. Their obligation is  
6 to make money for their shareholders. There's nothing wrong  
7 with that. The utilities are interested in that doing that  
8 too.

9           COMMISSIONER BAEZ: So the utilities are rational  
10 economic entities as well.

11          MR. SASSO: Utilities are rational economic entities,  
12 but we have a different set of rules.

13          COMMISSIONER BAEZ: I understand.

14          MR. SASSO: And our accountability to the Commission  
15 figures hugely in the long-term ability of a utility to prosper  
16 in this state.

17          COMMISSIONER BAEZ: You said -- you alluded to the  
18 flexibility and the problem that you-all have with the  
19 criteria. In your initial comments, you mentioned some concept  
20 of tiering. Have you given any thought to how -- exactly what  
21 that means to you? Have you formulated that in your collective  
22 minds at least?

23          MR. SASSO: Again, it's very difficult to be too  
24 precise about this or to imply a level of precision that  
25 doesn't exist, but it may be possible in the context of a

1 particular project to identify threshold requirements.

2 COMMISSIONER BAEZ: And by "threshold," you mean the  
3 screening requirements?

4 MR. SASSO: Yes, it might be the screening  
5 requirement. If the bidder doesn't demonstrate certain basic  
6 attributes, they'd be disqualified. Now, you could say those  
7 are the most important, but maybe they are in the sense that  
8 they --

9 COMMISSIONER BAEZ: That wouldn't be accurate.

10 MR. SASSO: -- yeah, they eliminate a project, but  
11 hopefully people get past the gate. Okay? Now they get into  
12 another order of criteria, and maybe you can say, now we have  
13 some mandatory requirements once you get past the threshold  
14 screening which we hope everybody will do. Now there's some  
15 other must-haves or mandatory requirements, and we might be  
16 able to identify those. There may be some that we can't, you  
17 know, some that are in between that might turn out to be  
18 disqualifying. But there's some that maybe you can identify up  
19 front and say, if you don't have these certain features, it's  
20 disqualifying. And maybe you could identify those. Then you  
21 would have all others and maybe the third bucket.

22 These are factors that will affect our perception of  
23 the value of your project for our customer. We can't tell you  
24 exactly how. They are important enough for us to identify  
25 them, but we can't say up front that if you're not real strong

1 on one of these, it will be disqualifying. The danger in that  
2 again is that in actual application, some of those might be  
3 outcome determinative. And so at the end of the day, you have  
4 a bidder who files a challenge and says, well, they said it --  
5 they didn't identify it as disqualifying, but look, that's what  
6 made the difference. When they graded out equally, they went  
7 down to that, and we lost because of it.

8 COMMISSIONER BAEZ: I guess if we go back to the  
9 original theoretical question, all criteria are disqualifying  
10 potentially.

11 MR. SASSO: In some sense, yes.

12 COMMISSIONER BAEZ: And I think that we all have to  
13 understand that. But by what you just said, I mean, you could  
14 envision a world where the company can be -- where the IOU  
15 could be perhaps generally specific I guess is as close as I --

16 MR. SASSO: We're trying to figure out how we  
17 could -- oh, I'm sorry.

18 COMMISSIONER BAEZ: You know, to say, these are  
19 things that we're really taking a hard look at because these  
20 are, in essence, our priorities, these are the -- and while I'm  
21 on that 5H, you said it may even be redundant, system specific  
22 conditions and so on. Does that take on the character of  
23 mandatory criteria? I mean, could that -- or are we talking  
24 different things?

25 MR. SASSO: Talking about 5H in particular?

1           COMMISSIONER BAEZ: Yes, as an example, I guess. Are  
2 those the kind of things that if you do --

3           MR. SASSO: This -- I'm sorry. I guess, you know, we  
4 were talking in 5H about a possible constraint. And as I  
5 understand the staff's interest here or the Commission's  
6 interest here, it is to help identify some constraints on the  
7 system that maybe a bidder should know about in shaping its  
8 bid. And I guess in certain circumstances, something like that  
9 could have an impact which is really the spirit of the  
10 suggested modification we've made, which is to say, let's not  
11 just talk about these things, but let's talk about those that  
12 the utility has identified as likely to have a material impact  
13 on its evaluation. That's the qualifier we want to put in  
14 there because now we are talking about something that might  
15 matter. And it would give more guidance to say, well, we've  
16 made a judgment that these are likely to have an impact on the  
17 evaluation with the understanding that's based on current best  
18 available information today.

19           COMMISSIONER BAEZ: But without accepting the  
20 qualifier of likely for the moment, in a tiered world, are your  
21 mandatory criteria going to sound a lot like, you know, the  
22 proposal should avoid burdening an existing constraint at X?

23           MR. SASSO: They might.

24           COMMISSIONER BAEZ: The proposal should address in  
25 the most effective way a particular load that we're trying to

1 concentrate on in a -- I mean, are those the kind of things?  
2 Is that the way it would translate?

3 MR. SASSO: They might. They might. There might be  
4 some conditions that again it's going to vary from project to  
5 project.

6 COMMISSIONER BAEZ: Understood.

7 MR. SASSO: And they might be general sometimes in a  
8 particular project. It might be very specific depending on the  
9 capacity need or the importance of a constraint. Maybe we can  
10 say on a particular project this is unique for this project,  
11 but it's disqualifying if you don't take this into account and  
12 deal with it effectively.

13 But you put your finger on the problem, and that is,  
14 when we're discussing criteria, the Commission doesn't want to  
15 encourage us to be overly rigid on the bidders and exclude bids  
16 unnecessarily by saying -- well, you've got to say up front,  
17 you know, tell us with as much specificity as you can that you  
18 don't want a certain project. So we do that, and guess what  
19 happens? Maybe somebody doesn't put in a bid who could  
20 creatively work around that issue. And so the tendency has  
21 been in some of these projects that have been brought before  
22 the Commission lately to allow more flexibility on the part of  
23 the bidder, conversely, more flexibility on the part of the  
24 utility, so they can work together to come up with a project  
25 that's strong for the customer and that also avoids this

1 possibility of gaming, where you artificially specify some  
2 criteria in the RFP, and then somebody can shape their bid to  
3 win it but not necessarily by giving us the best project.

4           COMMISSIONER BAEZ: Concerning the relationship  
5 between, for instance, the tiering, while we're on it, and how  
6 you weight -- how you would weight the tiering so that that  
7 kind of gaming wouldn't take place without a proposal actually  
8 meeting your -- not just threshold requirements or screening  
9 requirements or even mandatory requirements but as you can see  
10 on down the line, the problem that I'm seeing is that if we  
11 accept the notion that every criteria is potentially a  
12 disqualifying one, we're not offering an opportunity for bids.  
13 And if you permit me for a moment, I don't think we're sending  
14 a good message to the potential bidders walking through the  
15 door and saying, you know what? I can be competitive here  
16 based on this hierarchy of criteria somehow. And I think it's  
17 just as important for a bidder to not bid knowing why they are  
18 not bidding as to bid knowing why they are bidding.

19           I think that clarity or that type of information or  
20 transparency works both ways. And I'm not at all concerned  
21 with the effect that that might have of someone staying away if  
22 they did it knowingly. If they didn't do it based on a  
23 fatalistic view of the process, but that they could actually  
24 get down to numbers in a perfect world, and I may have  
25 mentioned this before at some point, in a perfect world, a

1 bidder should have the opportunity to walk in probably already  
2 knowing his score. I understand that that's impossible. I  
3 believe that it is, it is an unperfect world, but to have that  
4 as a goal without giving up the type of flexibility that I  
5 believe that you need at a given point in time. So how do you  
6 go about identifying what criteria is perhaps more equal than  
7 the rest, you know, and how much rigidity does that cause you,  
8 how much lack of flexibility does that cause you in the end if  
9 everybody can sort of agree that you do have needs that are  
10 unquestioned?

11 MR. SASSO: I must say it's been my observation that  
12 the utilities try hard to provide the transparency. They try  
13 hard to communicate in the RFP what's important to the utility  
14 and often why up to the point where they can. I haven't seen  
15 anybody trying to hide the ball. It's a matter of exercising  
16 the kind of professional judgment that we've been describing in  
17 good faith, and it's a difficult balance to strike, but we  
18 really don't believe that there is a breakdown in the process  
19 that the utilities are not putting out what needs to be put out  
20 for people to make good bids, that they're mixing up the  
21 criteria, pulling other ones out of the hat in the process.

22 It has come done in these projects to -- often to  
23 fairly straightforward differences between the third-party  
24 proposals and the self-build proposals. Again, we certainly  
25 understand the interest in having a bidding community that

1 continues to be interested in providing bids, but at the same  
2 time, we make no apologies for the fact that the utilities have  
3 aggressively over the years been managing their systems well  
4 for the benefit of their customers, looking for opportunities  
5 to achieve economies of scale, looking for opportunities to get  
6 resources and contract options and so on that will benefit  
7 their customers. That's their business, and they have been  
8 doing it well for the benefit of the customers.

9           And so, yes, in some of the recent projects, they  
10 have been able to put better proposals out there than the  
11 third-party proposals. That will not always be true. But as  
12 somebody in our company likes to say, it's the prices, not the  
13 process.

14           It comes down to the proper management by the  
15 utilities of their system and their ability to take advantage  
16 of opportunities that help the customer. It comes down to  
17 perhaps the hesitancy of power suppliers to make a commitment  
18 of resources in a certain climate. Who knows? But we don't  
19 think that there's anything structurally wrong with the  
20 process. We believe the proposals that have been suggested in  
21 the rule do add some definition to some of these issues,  
22 provide some clarity, some incremental benefit with the  
23 modifications and exceptions we've suggested, but we are  
24 straining to achieve what is largely in place. We are  
25 straining to achieve a process where utilities have an



1 incentive and are encouraged to put good RFPs out there that  
2 communicate real information to the bidders that they need.

3 They encourage the bidders to respond. There's a  
4 process for give and take back and forth so that we can clear  
5 up confusion and make sure everybody understands what's  
6 expected. There's a good competent evaluation process which is  
7 completely transparent to who really matters, and that is the  
8 Commission and its staff, who can come back and go over every  
9 step of the process and make sure that we have looked at the  
10 right things, and we've looked at them fairly and reached the  
11 right conclusions. And that gives assurance to the bidding  
12 community.

13 Yes, some are disappointed by the outcome of  
14 particular projects, but the Commission is uniquely situated to  
15 know the facts in those cases and can evaluate whether that  
16 disappointment is well-founded on the facts of the cases.

17 COMMISSIONER BAEZ: I'm sure that this question has  
18 been asked, but I still need some clarification today. Do IOUs  
19 regularly use -- forget independent third-party evaluators, but  
20 do you use third-party evaluators at all?

21 MR. SASSO: In some projects in this state the IOUs  
22 have used them. We asked Mr. Taylor in the Hines 2 case to  
23 shadow analyses and provide guidance. In the most recent  
24 project, we did not, but we had a different team who had vast  
25 experience with RFPs and so on, and felt less in need of that

1 type of guidance. We understand that in FPL's recent case,  
2 they also asked Mr. Taylor to come in and assist them on the  
3 project. But it's not always done, and it's not always judged  
4 necessary.

5 COMMISSIONER BAEZ: Do you know in the cases where  
6 your company in particular did use a third-party evaluator, do  
7 they provide, say, a report to you? I'm assuming they do. I  
8 mean, there is something in writing, as it were, some type of  
9 evaluation that's formalized?

10 MR. SASSO: In our project -- I'm not sure what was  
11 done on Light's recent project, but in our project for Florida  
12 Power Corporation, my recollection is that Mr. Taylor did not  
13 provide a report. He did provide prefiled testimony at some  
14 point, but it was a more informal back and forth on that.

15 COMMISSIONER BAEZ: To the extent that there are  
16 reports done, are those things normally discoverable?

17 MR. SASSO: I suppose it would depend upon how the  
18 engagement was structured. In the case of that project, we  
19 anticipated that everything that Mr. Taylor did would be  
20 discoverable. That's the way it was established from the  
21 outset. Now, I certainly am aware of situations where  
22 businesses retain consultants who are not going to be  
23 testifying and who are generally not subject to discovery for  
24 certain issues. But the fact is, in these kinds of projects,  
25 we go into them with the expectation that the evaluation, the

1 decisions are discoverable; that what the company does to make  
2 its evaluations and make its decisions will be made known to  
3 the Commission either voluntarily through the publication of  
4 testimony and exhibits of the matters we deem most important or  
5 through discovery by staff or through discovery in the event of  
6 an intervenor. We anticipate that those materials will come  
7 before the Commission.

8 COMMISSIONER BAEZ: Another question. Do you believe  
9 that this Commission right now has the authority to order or to  
10 issue an order abating the progress of an RFP?

11 MR. SASSO: Well, we came here not to discuss that  
12 issue, but -- and --

13 COMMISSIONER BAEZ: You can say yes or no. We won't  
14 get into it. I just --

15 MR. SASSO: No.

16 COMMISSIONER BAEZ: Okay. Let me see what else I  
17 have here. What costs exactly are sought to be defrayed by the  
18 application fees? Is it your development of the RFP and the  
19 evaluation, or just the evaluation? Is there a line --

20 MR. SASSO: I'm not sure I could answer that because  
21 I'm not aware of whether within Florida Power Corporation, for  
22 example -- I can't speak about the other companies -- the  
23 matter was discussed with that degree of precision. And that's  
24 one of our concerns because the process of evaluating  
25 proposals, developing the RFP, then evaluating the proposals,

1 having the bidders conferences, going back and forth, doing the  
2 runs and so on is very, very costly. And the fees that have  
3 been charged in the past only partially defrays the cost.

4           The advantage of an application fee is it encourages  
5 only bidders who are serious about the projects to participate,  
6 who are substantial enough to file an application fee, and then  
7 to take the process seriously and to participate actively, be  
8 committed to the project, respond to questions that come up in  
9 the course of the project, and it is a customer benefit because  
10 it does partially offset the cost of the process.

11           COMMISSIONER BAEZ: I want you to understand  
12 something. I don't ever want me to be able to afford -- you  
13 see. So I appreciate the fact that it does stand as even  
14 perhaps one of those screening factors. And I appreciate that.  
15 But we also have to appreciate that there is a potential  
16 barrier there that could possibly work to the detriment of the  
17 ratepayer at the end of the day.

18           So if we were able to lend some clarity in the rule  
19 identifying when we say "cost-based" exactly what part of the  
20 equation, for instance, is going to be -- is the cost exactly  
21 that we're referring to, and then let it be what it will be.  
22 I'm not so concerned about the price if everybody has an  
23 understanding of what that's going to be. I think everybody  
24 is -- at least all of you are pretty well educated about what  
25 sounds right and what doesn't. So is that a type of

1 modification that might lend you some comfort if it were to be  
2 clarified that that's what -- those are the kind of costs  
3 that -- I mean, it opens up the door as much as anything else  
4 to --

5 MR. SASSO: Part of our concern is philosophical and  
6 part of it is practical. The philosophical part is, with  
7 respect to what is really an extraordinary exercise of power to  
8 develop rules, that should be reserved for something that  
9 really matters and needs to be addressed by rule. As, for  
10 example, if there's been an established problem with fees, we  
11 don't believe there has been; that, in fact, the amounts being  
12 discussed by staff were the amounts actually being used and  
13 practiced by utilities.

14 I can say that as far as Florida Power is concerned,  
15 consideration was given to not wanting to set the fee too high  
16 to deter bidders who we'd want. And there was an attempt made  
17 to look at what is being used in the industry and to set a fee  
18 that was within the realm of what's being used in practice.  
19 And so there isn't a problem. And so we're concerned  
20 philosophically about the use of a rule in an area that really  
21 is a detail because it's micromanagement of sort. And then the  
22 practical problem is, which is kind of related to that, we're  
23 trying to avoid litigation. We're trying to avoid disputes  
24 over things that really don't matter and shouldn't matter. And  
25 if there's a requirement, and there's going to be discovery

1 about how it was said, and what are our costs of evaluation  
2 now, and what are our costs of developing the project, and give  
3 us a showing of how you made the decision and what information  
4 you have, now we have got another round of discovery and  
5 another round of disputes.

6 COMMISSIONER BAEZ: And I think this is my last  
7 question. At the outset, you had mentioned that -- I guess  
8 it's 5B, the information as an example of what's being required  
9 to be provided. I recall -- and I'm pretty sure it was  
10 specifically that particular information -- the point was made  
11 that it was redundant. I think the point was clarified by  
12 staff that it was a matter of convenience rather than a  
13 substantive requirement. Is it everybody's understanding or is  
14 it at least your understanding that the ten-year site plan  
15 information is, in fact, sufficient for that requirement? Or  
16 are you interpreting that to be --

17 MR. SASSO: This is 5B?

18 COMMISSIONER BAEZ: Yes.

19 MR. SASSO: Well, we were genuinely not sure what was  
20 intended by that. If the ten-year site plan information is  
21 what's intended by that then, yes, it would be redundant  
22 because that is already provided. And, again, I guess we'd  
23 just be concerned about everybody a year from now forgetting  
24 about this discussion and there being a debate or a dispute  
25 over whether the information we provided was sufficiently

1 detailed. And of course it can't just be what's in the  
2 ten-year site plan because there would have been no need to  
3 promulgate a rule on that because it's already out there. So  
4 of course it has to mean something else, and now we're into a  
5 dispute over that.

6 COMMISSIONER BAEZ: Would you accept -- would you be  
7 comfortable with clarification that sort of leans towards --  
8 it's more for efficiency sake? I mean, I think we have less  
9 resources available to us to go digging through ten-year site  
10 plan information than you have pulling it up, compiling it, and  
11 resubmitting it as part of your filing. And I don't mean to  
12 make that a point of argument between you and I.

13 You know, it seems to me that that's -- I think  
14 that's really what the purpose of the staff's inclusion or,  
15 certainly, the Commission's inclusion in the proposed rule. I  
16 don't recall it being a substantive difference between the  
17 information. And my memory is pretty bad. So if I can  
18 remember that, I think that there was a fair amount of  
19 clarification, certainly enough for me made that that's really  
20 what they meant, that it was more geared towards having it all  
21 in one place rather than it being requiring something  
22 different.

23 Would you be comfortable with some clarification  
24 possibly that substantively that information and the  
25 information in the ten-year site plan are not, in fact,

1 different?

2 MR. SASSO: I believe as I understand the utilities'  
3 concerns that would address that concern.

4 COMMISSIONER BAEZ: Okay.

5 CHAIRMAN JABER: That was it, Commissioner Baez?

6 COMMISSIONER BAEZ: That's it for me. Thank you.

7 CHAIRMAN JABER: We're going to take a one-hour lunch  
8 break and come back and finish Commissioners' questions.

9 (Brief recess.)

10 (Transcript continues in sequence with Volume 2.)

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1 STATE OF FLORIDA )

2 : CERTIFICATE OF REPORTER

3 COUNTY OF LEON )

4

5 I, TRICIA DeMARTE, Official Commission Reporter, do hereby  
6 certify that the foregoing proceeding was heard at the time and  
7 place herein stated.

8

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

14

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

20

21 DATED THIS 12th DAY OF DECEMBER, 2002.

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23

*Tricia DeMarte*

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TRICIA DeMARTE

25

FPSC Official Commission Reporter  
(850) 413-6736