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 2

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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:	JANE FAUROT, RPR Chief, Office of Hearing Reporter Services FPSC Division of Commission Clerk and Administrative Services (850) 413-6732
APPEARANCES:	(As heretofore noted.)

I N D E X

P R O C E E D I N G S

(Transcript follows in sequence from Volume 1.)

CHAIRMAN JABER: Let's get back on the record. Commissioner Baez, you asked all your questions for now?

Commissioner Palecki, I saw you turn on your microphone and then --

COMMISSIONER PALECKI: Yes. I have just one question and this is on 5G, which has to do with the application fee. I believe that our intent in this particular provision is to avoid any sort of excessive application fee, and other than -- and I can understand your desire not to have it defined as cost-based because that could cause complications and difficulties in how do you even define what does cost-based mean.

But how could you fulfill our intent to make sure that there are not excessive application fees without some provision such as this? Is there a way we could redraft this to make sure that we avoid excessive application fees without getting into what is cost-based and what is not cost-based?

MR. SASSO: I can't come up with anything on the spot, and I'm not sure that it is possible because excessive is a relative term, so you have to have some point of reference. And cost-based is as probably as good as any if you wanted a point of reference. The fact is that the fees that have been charged on projects in actual cases have been in line, I

believe, with the Commission's expectation, because it is the same number that staff was using in the initial straw proposal here.

COMMISSIONER PALECKI: And what number was that?

MR. SASSO: $10,000, I think. That was the amount used on our last project per bidder. So, again, we would submit that there hasn't been a problem with the practice in the past, and it would sort of fall in the category of a lot of other expenses that the Commission -- I'm sorry, that the utilities manage that come before the Commission. Your assurance is an opportunity to review on a case-by-case basis.

Now, of course I understand that you might say, well, gosh, if you charged a much higher fee and it came before us in a need case could we really meaningfully disapprove that fee at that time. But the best assurance I could give you, Commissioner Palecki, is that there hasn't been a problem. The utilities share your concern in not wanting the fee to be excessive, wanting to encourage bidders, having a reasonable fee, a modest amount that does have a reasonable relationship to costs. But the disagreement between us is not so much substance as whether there should be a rule on it.

COMMISSIONER PALECKI: Between a provision such as this that states that the fee shall be cost-based or a provision that states that no application fee shall exceed $10,000, which would be your preference?

MR. SASSO: Cost-based. Because one would have to -- for one thing the rule locks in the number for the future. And as cost escalate, one would need to take into account changing reality, and cost-based would have more flexibility.

COMMISSIONER PALECKI: Thank you.

CHAIRMAN JABER: Commissioner Bradley.

COMMISSIONER BRADLEY: Yes. I have several questions here that I want to ask so that I can clear some things in my mind. Binding bids. If bids are binding, what is the impact to costs that might occur that aren't expected, such as what we dealt with a couple of days ago, unexpected events?

MR. SASSO: If bids were made binding in the sense as the discussions has been taking place here, meaning if the IOUs' costs number were treated as a binding bid, the implications of that would be that if there were a legitimate cost overrun incurred, and the costs were deemed prudent, the utility would be denied costs that it is entitled to recover under the regulatory compact. So, part of the quid pro quo for accepting a regulated rate of return would not be honored.

COMMISSIONER BRADLEY: How does the bid rule that is being proposed with all of the amendments -- and I'm looking at the big picture now -- how does that impact the type of plant to be built? This is probably a loaded question. The type of plant to be built, the cost of building the plant, and its inclusion in the IOU's ten-year site plan. And would this

likely not allow the Commission oversight regarding costs of siting a plant incurred by an IOU?

MR. SASSO: If the rule were amended as drafted, what impact would that have on the type of plant built? Difficult to say. Chances are it wouldn't have an impact on the type of plant built. It would increase the development time for a power plant project, it would potentially increase the costs of developing a project because of the additional regulatory costs and legal costs associated with it. It would increase the risk of building a plant under the Power Plant Siting Act.

COMMISSIONER BRADLEY: And when we get to the IPPs, I would like for you all to remember that question. And would you be so kind as to compare the concept of bid price to the concept of projected costs?

MR. SASSO: Yes, sir. Again, a bid price generally proposed by an independent power developer or power producer bidding on a project such as our last one is just that, it is the price that the parties will eventually negotiate and put into a contract to be paid for the energy and capacity on the project. It is not the same as the power supplier's costs, which presumably are lower than the price.

Only the power supplier knows what its costs are and exercises its own judgment about how high to bump the price above its costs. The IOU's bid, so to speak, isn't a bid. There has been a lot of discussion about how there ought to be

simultaneous bidding, and that all the bidders ought to be treated the same. The IOU isn't really making a bid. The IOU is conducting an evaluation. It has determined through its own internal processes if we had to supply this power ourselves, how much would it cost, how would we do it, what would be the best kind of power plant, what would fit best into our system with need for diversity, et cetera, intermediate versus peaking, and what technology and what are our costs of building it.

Then we do a market test. We go out and we issue an RFP to see what somebody else could do this for us. Sort of like the plumbing analogy where do I repair it myself or do I get somebody else to do it. And then we look at those prices which will then become the utility's costs if we accept that contract.

But the IOU's costs are just that, they are costs. They are transparent to the Commission. We recover rates based on cost of service, and so there are some fundamental differences between our costs and their price.

COMMISSIONER BRADLEY: Okay.

CHAIRMAN JABER: Mr. Sasso, I have a few questions, and I'm going to be jumping around, so I apologize for that. And some may seem repetitive. But with respect to your comments on scope and intent --

MR. SASSO: Yes, ma'am.

CHAIRMAN JABER: -- you said that the crux of your comments, if I understood them, was that it didn't belong in the rule, because to some degree you felt like it took you outside the scope and purpose of the rule. Is that a correct paraphrasing of your concern?

MR. SASSO: The statement of scope and intent in the proposed rule as written is broader than it needs to be given the current scope of the rule.

CHAIRMAN JABER: Okay. Does that mean, however, you do not disagree with the statements made in the first three sentences? You don't disagree, for example, that a public utility is required to provide reasonably sufficient, adequate, and efficient service?

MR. SASSO: That is not precisely the statutory language, but I wouldn't disagree in substance.

CHAIRMAN JABER: Okay. And you don't disagree with the substance in the second sentence?

MR. SASSO: Correct.

CHAIRMAN JABER: And I don't think you will disagree with the substance in the third sentence.

MR. SASSO: Correct.

CHAIRMAN JABER: But those are the three sentences you prefer be deleted?

MR. SASSO: Yes, ma'am.

CHAIRMAN JABER: Staff, I went back and forth on

those three sentences, too, not because I agree with Mr. Sasso that they are broad and go beyond the scope of the rule, but because I thought they were three statements of fact probably covered in the statute and other places. So my question of you is what is the purpose of those three sentences in this part of the rule?

MR. BALLINGER: I think it is to lend a general framework. Normally, we don't rephrase statutes in our rules because obviously you can read the statutes to get that. But sometimes in rules it helps to have a paraphrasing of the structure to give the reader a one place reading of what is going on. We thought it added the overall crux of what utilities' responsibility is. How they have the obligation to serve and, therefore, that is why it is appropriate for them to have the final decision and the outcome.

CHAIRMAN JABER: Mr. Sasso, with that explanation do you still have a concern with including those three sentences in the rule?

MR. SASSO: Again, our concern is very rarely with Mr. Ballinger's explanations, our concern is with the language of the rule as it may be issued. And our concern is with disputes that may arise in the future once this discussion today may have been forgotten.

CHAIRMAN JABER: Well, you are real good at not letting us forget discussions.

Commissioner Deason, isn't Mr. Sasso the one that likes to read transcripts?

COMMISSIONER DEASON: Yes. Mr. Sasso is very good at that.

MR. SASSO: Not very effective with it, though.

CHAIRMAN JABER: You win some, you lose some. I understand your point, and I had some of the same concerns with the scope and intent, but where I don't agree with you is with respect to your fear that folks can read more into this. It seems to me that if we are real clear in our intent memorialized in an order or in a transcript herein that your concern really is not very well-founded, especially in light of the fact that you recognize those three sentences just merely state facts.

MR. SASSO: Yes. They are set out, though, as a statement of scope and intent. And the scope, as your discussion with staff indicates, really is almost as broad as the statutes that govern all of our activities. And so the scope is so all-encompassing that we are concerned it just may fuel further disputes that the Commission intended to do things with this rule that the Commission never imagined it intended to do because it reaches as far as your statutory authority.

CHAIRMAN JABER: Okay. Staff, do you agree that the intent of the rule is articulated in that last sentence of Subparagraph 1?

MR. HARRIS: Yes.

CHAIRMAN JABER: With respect to the obligation to serve, in rulemaking don't we just cite the statutory references on a public utility's obligation to serve?

MR. HARRIS: That is the way I have seen it in the past, Chairman.

CHAIRMAN JABER: Okay. So if the Commission were to remove that language there would be specific statutory references related to obligation to serve and a public utility's requirement to provide sufficient, adequate, and efficient service?

MR. BALLINGER: I believe so. And I believe those statutory references are at the back of the rule. I'm trying to put my book back together here.

CHAIRMAN JABER: Okay. And if we decide to leave that language in, those same statutory references would be included in the rule as statutory --

MR. HARRIS: That is correct. My understanding is the rule body will contain the statutory references. If I understand your question correctly, it's merely a matter of whether it will contain them at the end, where they would be at in any place, and then something at the beginning as sort of a reference point, or deleting the reference point, which would still include the specific cite to the statute at the end of the rule.

CHAIRMAN JABER: My next questions, Mr. Sasso, relate to your concern with respect to the detailed information regarding the public utility's ten-year historical and ten-year site plan. That is 5B. I think I agree with Commissioner Baez's recollection of that provision, staff, but let me make sure that you all agree. This was -- I, too, believe this was our attempt to attain specific information from the ten-year site plan so as to staff not have to go back and dig up information from the ten-year site plan. Plus there was a timing issue, I thought, that depending on when the RFP process began and the need cases came in, the ten-year site plan may not be accurate depending on the time.

MR. SASSO: That is correct.

CHAIRMAN JABER: So detailed information regarding the public utility's ten-year historical and ten-year projected net energy for load is not necessarily limited to what was in the most current ten-year site plan, it could be an updated version of that depending on when the RFP process began?

MR. BALLINGER: Yes.

CHAIRMAN JABER: Mr. Sasso, does that satisfy your concern?

MR. SASSO: That clarification would address our concern.

CHAIRMAN JABER: Okay. With respect to the criteria, including all weighting and ranking factors, Sub F, I

understand why you would look at the words weighting and ranking factors to think that they were quantitive in nature, but what I would be interested in is looking at a mechanism that allows the evaluation process to be transparent regardless of what you chose to look at.

I guess I looked at this language as giving you flexibility, and you are telling us it doesn't give you flexibility. So if it is my intent to allow the public utility to identify the criteria and the importance that the public utility wants to give to the criteria, how could that sentence be changed?

MR. SASSO: If we just kept in criteria that should capture it. We also have price and nonprice considerations. There is another part of the rule that requires that we describe the methodology. We think all of those would cover the concern. That would include -- for example, if a utility decided that it was appropriate in a particular project to use some type of weighting and ranking, that would be subsumed under criteria, price, nonprice, evaluation methodology.

CHAIRMAN JABER: It would be your understanding that if you chose to weight a certain factor, you would understand that you would have to include that discussion in your RFP?

MR. SASSO: I believe that is accurate. In the description of the methodology, if the utility were actually going to assign weights to factors, that would be covered by

the requirement that we describe our methodology.

Now, we have got to keep in mind that the process is always going to culminate in a selection where the utility says we prefer this to this, or might even put them in, quote, rank order; this is the best, this is the next best, this is the third best, this is the fourth best. That type of thing is fairly implicit in the process. I'm not sure that if you a utility failed to say that we are going to at the end of the process prefer one to the next, to the next, to the next that the whole project would have to be scuttled. But if there was going to be something that was not obviously part of the process or something that was elaborate or involved, then we would agree that the utility should describe that in the RFP.

CHAIRMAN JABER: What language are you referring to that you believe covers methodology?

MR. SASSO: Right above 5F, Chairman Jaber, under 5E you will see that we are required under the current rule to provide a detailed description of the methodology to be used to evaluate alternative generating proposals on the basis of price and nonprice attributes. And the RFPs that have actually been used in recent projects have done a good job of that.

CHAIRMAN JABER: Give me a couple of criteria I can use in a hypothetical. Obviously we have talked a lot in the last few months about financial viability of a corporation. We have talked about heating factors, and fuel sources, and

reserve margins, and whether companies can put up the appropriate security. Are those some of the criteria that are foreseen and can be included in an RFP?

MR. SASSO: Yes, ma'am.

CHAIRMAN JABER: Sitting here today I would think that financial viability of a corporation is a stronger factor to consider -- and Ms. Clark is smiling. This is sounding like deja vu, I'm sure. That is a stronger factor than maybe the heating factors that are used.

MR. SASSO: The overall financial viability of the bidder in the project might well be. It depends on the context. The heat rate would normally be identified by the bidder and it would be a material factor in terms of setting the fuel cost, the fuel price. It would probably be subsumed under their price in terms of the pricing of energy and capacity, but one can imagine a situation where that could be outcome determinative in relationship to another contract proposal.

CHAIRMAN JABER: If it is my desire to allow the public utilities to have the flexibility to include in the RFP statements like financial viability will be given favorable consideration, I mean, obviously that is an extreme. That should be obvious, or fuel diversity will be an important consideration. Like you said, depending on the RFP. If it is my desire to give the public utility enough flexibility to

include statements like that in their RFP so that people are put on notice that different kinds of weights will be -- different kinds of considerations will be given, depending on the needs of the public utility, wouldn't this language accomplish that, all criteria including all weighting and ranking factors will be included in the RFP?

MR. SASSO: Again, it depends upon how that language is applied. It could be applied in a perfectly appropriate manner or not, and we are concerned about the not. We think that you could achieve your objective by taking out that language because you still have coverage of your concerns and issue in the other language. Criteria, price, nonprice, methodology, if you look above even beyond Subpart E to Subpart D, there in the existing rule and in the proposed rule it is perpetuated.

There is a listing, a noninclusive, nonexhaustive list of price and nonprice considerations that the rule identifies. We have identified in an appendix to an earlier proposed stipulation some other criteria which is submitted in the record. The Commission could review those. We think it is covered. We think it is covered and we are concerned simply about unintended consequences. If we give this phrase life of its own, is there a benefit that outweighs the risk? We think not.

CHAIRMAN JABER: Mr. Sasso, though, here is where I

don't agree that it is covered. The importance of the individual criteria is not addressed in the current language, and that's what I'm trying to get to. The methodology that you use may be addressed in the RFP pursuant to this language, but methodology in my mind doesn't address we are going to be looking for this in the bids, or we are going to be considering financial viability over reserve margin, or we will look favorably upon clean coal technology.

MR. SASSO: Well, that is where it is really, really difficult to address this by rule because of the need for flexibility. As we were discussing earlier today, there may be a way to break that down into threshold, mandatory, and other. As Commissioner Baez was illustrating, at some point everything becomes disqualifying. If you ask an evaluator what is most important to you, they might say economics, but they are assuming other things. They are assuming technical viability, financial viability, they may be assuming all of the threshold conditions are satisfied which enables them to be evaluated at all.

So, which of these are the most important is a very difficult issue. And, again, if the Commission considers the RFP that is actually reviewed in actual cases, I think you will agree that it wasn't about hiding the ball. These things were spelled out. What the utilities wanted were spelled out. And going beyond that to prejudge what is going to be more

important is very, very difficult to do even if we wanted to do it. Because you have got to see the context. You have got to see the proposal in the context in which it is made. The type of plant, the term, the type of technology, the other bells and whistles on the proposal. And then you can say, well, gosh, in the context of this proposal dispatchability is very important, or this other issue is very important.

CHAIRMAN JABER: Isn't dispatchability always important?

MR. SASSO: Yes.

CHAIRMAN JABER: Isn't financial viability always important?

MR. SASSO: All of these things are important and we could certainly stipulate that. We could say all of these things are always important. But I understand that you are looking for something more where we could say this is more important than that, and that is just very difficult for us to do. And I don't think you really want us to do that, because that requires making judgments before seeing the proposals.

CHAIRMAN JABER: Okay. Talk to me about what you consider to be included in explaining the methodology that is used. The application of an equity adjustment, when you enter into a purchased power arrangement do you consider that part of methodology and, therefore, it will be disclosed in the RFP?

MR. SASSO: Yes.

CHAIRMAN JABER: Certain technologies that would be used and looked upon favorably, would that be included in what you consider methodology?

MR. SASSO: I don't think that would be our methodology. Our methodology would involve things like we will open the bids, we will judge them for satisfaction with threshold requirements. Those that pass muster there will go on to another type of economic screening analysis, and we will use production costing modeling to do a screening analysis. We will do a technical review, then we will go into a more detailed economic analysis where we will compare the proposals to self-build using production costing modeling, that type of thing is a discussion of our methodology.

CHAIRMAN JABER: You said threshold requirements. Would the threshold requirements be articulated in the RFP?

MR. SASSO: They can be and sometimes are.

CHAIRMAN JABER: No, under the proposed rule would you consider that to be covered with the methodology language?

MR. SASSO: If the utility were going to generate a list of threshold requirements, yes, I would believe they would be subsumed under the description of methodology. Now, some utility might not choose to do it that way, but if the utility did promulgate, let's say, a list of ten threshold screening requirements that it was going to subject all proposals to, yes, that would be described in the methodology.

CHAIRMAN JABER: What are some of the threshold screening requirements?

MR. SASSO: Has the bidder provided answers to all of the questions in the RFP package; has the bidder provided minimal information about its project; has the bidder paid the application fee; things of that nature.

CHAIRMAN JABER: I think it was Louisiana, as I was reading through some of the comments -- I will try to find it as we go along -- Louisiana requires as part of the RFP package a sample purchased power agreement. If a public utility was forced to draft a purchased power agreement, wouldn't those threshold requirements and the known factors, a public utility would have to think about things like that and, therefore, articulate them. And, therefore, put bidders on notice that these are the requirements that the public utility would be looking at from the onset and, therefore, a bidder would think more definitively about bidding or not.

MR. SASSO: A utility may choose to include a power purchase agreement or terms and conditions. We did on our last project. Whether it should be mandated in all cases, currently under the rule as conceived and drafted, the utility proceeds through a rational process to get to a stage where it may negotiate with bidders. And the contemplation of the rule is that is when the terms and conditions will become important. Now, again in Florida Power's last project they put the terms

and conditions out front and asked for feedback and red-lined responses and the like. That is one way to do it, but it is not necessarily the only way to do it.

CHAIRMAN JABER: Would that satisfy your concern, though, about including weighting and ranking factors? If you were given the opportunity to include your wish list in a draft purchased power agreement, no one could come back and say we didn't know that the public utility would be considering these kinds of things in their evaluation process, that doesn't preclude at least in -- upon reflection I don't think it precludes a negotiation period, because that is only a draft.

MR. SASSO: The power purchase agreement doesn't address all of the evaluation criteria. The evaluation criteria are used to identify whether a bidder is a qualified bidder who is presenting an attractive -- at least facially attractive proposal based on economic and technical criteria. You look at those criteria, you say, well, is this person in the ballpark, are they demonstrating value that would beat the self-build? Then you can sit down and start negotiating contract terms which will involve different considerations. They will involve things such as liquidated damages, the term of the agreement, some of the conditions of supplying the energy and capacity and the like. But those considerations are not necessarily taken into account in doing the evaluation to identify the potentially attractive contracting party.

CHAIRMAN JABER: Does the draft purchase power arrangement, agreement, contain language associated with the equity adjustment?

MR. SASSO: No. No, that is an internal issue where the company, really to address a question posed to us by another Commission rule, needs to identify the potential impact on the utility's cost of capital of entering into a power purchase agreement. That is an internal capital structure issue. And it has cost implications, but that is a cost issue, not necessarily a contract issue between the company and the third party.

CHAIRMAN JABER: But it can and it has been an evaluation factor.

MR. SASSO: Yes, ma'am.

CHAIRMAN JABER: Here is the Louisiana order. It is included in Tab 7, Item Number 7. I'm not sure which exhibit it is, but I'm on Page 8 of 8 of that order.

MR. SASSO: Okay.

CHAIRMAN JABER: We have talked about the draft agreement. Louisiana chose to handle the criteria being listed by calling for a description of the methods and criteria that the utility intends to use to evaluate the RFP bid responses. You think there is language similar to that in our current proposed rule?

MR. SASSO: Yes. Actually the proposed rule of this

Commission is much more detailed than this.

CHAIRMAN JABER: How so?

MR. SASSO: Well, this simply refers to methods and criteria. The proposed rule and, in fact, the existing rule breaks that down to price, nonprice, gives a list of potential criteria that might come into play, speaks about providing a detailed description of the methodology. So there is more precision and detail in your rule than in the Louisiana rule.

CHAIRMAN JABER: Okay. With respect to the price and nonprice attributes, I think you alluded to this earlier, would that include technical and financial viability, dispatchability, deliverability, fuel supply, water supply, environmental compliance, performance criteria, and pricing structure?

MR. SASSO: Yes, ma'am.

CHAIRMAN JABER: Are those also considered threshold criteria?

MR. SASSO: Some of them could be. Again, it depends upon the approach of the particular utility. A utility might choose to treat the threshold criteria as a very low bar rather than getting into an analysis of some of these issues which require more in-depth review. Again, a threshold criterion might be did you answer all the questions? Did you pay the application fee? Have you demonstrated that you are serious about this project? It's a low enough bar that you want

everybody to get over. You want to weed out only those who are truly not going to be serious contenders. So that might be one way to run the project.

A different utility might decide we will put more up front and call it threshold and we will look at those issues right off the bat. There are different ways of doing it. And actually there is some advantage into allowing some experimentation because then the Commission gets the benefits of the results of different ways of doing things. Because none of us has a lock on exactly the perfect way of running an RFP.

CHAIRMAN JABER: I'm looking at the -- the factors I read to you come from the PACE Exhibit Number 8, it is Page 5 of that exhibit, and it is tab -- again Tab 7.

COMMISSIONER BRADLEY: Exhibit 8?

CHAIRMAN JABER: Exhibit Number 8.

COMMISSIONER BRADLEY: Page 5?

CHAIRMAN JABER: Yes.

MR. SASSO: I'm sorry, what item number was it, Madam Chairman?

CHAIRMAN JABER: Item Number 7, and it is Exhibit 8.

MR. SASSO: Is this their last exhibit?

CHAIRMAN JABER: This was filed November 15th, 2002 according to the exhibit.

MR. SASSO: The individual exhibits -- I have it, yes.

CHAIRMAN JABER: Page 5?

MR. SASSO: Got it.

CHAIRMAN JABER: Now, the way they have done it -- now, remember, my goal is to maintain flexibility, but yet have an open and transparent process so that companies can discern whether they want to bid or not.

MR. SASSO: Right.

CHAIRMAN JABER: The way PACE has offered language, I think, maintains that flexibility, and I'm interested in your feedback. They say a description of the price and nonprice attributes to be addressed by each alternative generating proposal including but not limited to 1 through 8.

MR. SASSO: I'm sorry, what numbered paragraph are you looking at?

CHAIRMAN JABER: It's the new 9. It is PACE's new Section 9D, Page 5.

MR. BALLINGER: Chairman, I think you are referring to Exhibit Number 9 of PACE, which is the markup of the existing rule.

CHAIRMAN JABER: Am I? Let me see. Yes, I would be referring to Exhibit Number 9, Page 5. Sorry, Mr. Sasso.

MR. SASSO: That's okay. And, again, the provision?

CHAIRMAN JABER: 9D.

MR. SASSO: I've got it. 9D. I believe that is the existing rule. That is -- it is not shown to be crossed

through or underlined. I believe that is the text of the existing rule.

CHAIRMAN JABER: Is that, Mr. Ballinger? You haven't modified that rule at all?

MR. BALLINGER: No, that is the existing rule.

CHAIRMAN JABER: Okay, great.

COMMISSIONER BRADLEY: Well, then does this eliminate the concept of the independent evaluator?

CHAIRMAN JABER: No, I don't think this has -- no, I don't think PACE -- and I don't want to put words in their mouth, Commissioner. At the right time you may want to ask PACE. I don't think PACE was offering this language to eliminate the possibility of an independent evaluator.

MR. McGLOTHLIN: That is correct, Chairman.

COMMISSIONER BRADLEY: Well, how does this jibe with the concept of an independent evaluator if the public utility is to evaluate all proposals?

CHAIRMAN JABER: I'm sorry, say that again. I'm having trouble hearing you.

COMMISSIONER BRADLEY: How does this concept fit in with the language that says that -- well, it says that the public utility shall evaluate all proposals. One other section advocates for an independent evaluator. It just appears to me the two are in conflict.

CHAIRMAN JABER: I think we might be looking at two

different things, Commissioner Bradley.

COMMISSIONER BRADLEY: Number 9, Item 9 on the --

CHAIRMAN JABER: I'm looking at 9 from PACE's proposal where they are describing they actually take the section in the current rule that describes the price and nonprice attributes.

COMMISSIONER BRADLEY: Okay. Where are you in the book at, because I'm working from the summary sheet?

CHAIRMAN JABER: Yes, and I'm not working from that. Item Number 7 in the book.

COMMISSIONER BRADLEY: Item Number 7.

CHAIRMAN JABER: Okay. Go to Exhibit 9 in PACE's comments.

COMMISSIONER DEASON: It's near the very end of Item 7.

CHAIRMAN JABER: Near the end, Commissioner Bradley, Page 5.

COMMISSIONER BRADLEY: Number 9?

CHAIRMAN JABER: Right, Number 9D. And I was corrected, I thought that was new modified language, but staff has said that there were no changes from the current rule. Okay. And, Mr. Sasso, let's go to Tab 8. And, staff, I've got some questions of you to the changes that were suggested by Mr. Sasso on Tab 8, Page 6.

MR. BALLINGER: Are you on Page 6 of the comments or

Page 6 of the marked up rule?

CHAIRMAN JABER: Comments. Mr. Sasso would have us add the word material. And his definition was something that could significantly change the outcome and it could be decided on a case-by-case basis. If we don't add the word material, can't that be part of the review in looking at good cause?

MR. BALLINGER: I think so. I don't know that it adds a lot by having material there, because I'm not sure what material means, either. I think staff was trying to look at, again, the basic pretense, put as much information as you know up front of how you are going to do it. If you change something or add something else, explain it. And that is as best as you can get. When you start getting into materiality, we are making that decision up front, and I really don't want to do that. I think we would rather leave it more flexible, to let them change it and explain it when they file the need determination or something changes.

CHAIRMAN JABER: Mr. Sasso, let me turn to you. My first reaction to adding material in the very beginning like that creates a debate on what material is. But through the evidentiary process, it seems to me that if criteria are applied or are not applied and there has to be a showing of good cause, that that would be something that is brought up in the need case.

MR. SASSO: That's correct. It would be brought up

in the need case. We are trying to avoid having things brought up in the need case unnecessarily. That's why we would suggest imposing a materiality requirement which is generally implied in most contexts. Most courts will read into some requirement a materiality requirement. We just wanted to make it express, because that is a safer course. Again, material would be something that would significantly influence the determination or could be outcome determinative.

CHAIRMAN JABER: Well, if you are trying to avoid litigation in the need case, then would this be an example of something that gets decided through the objection period, what constitutes a material criteria or not?

MR. SASSO: No, that is actually an excellent example of something that could not be decided at the inception of the project because a bidder would take the position we have no way of knowing what criteria they are actually going to employ in the evaluation process until we see what they have done, and then we will argue that they did or didn't apply the criteria listed in the RFP.

And all we are asking for is that we don't fuss over things that really don't matter and have a hypertechnical need case where we have bidders nit-picking at the evaluation. We want them to focus on issues that make a difference to the outcome of the decision.

CHAIRMAN JABER: How do they know what those issues

are? What I'm really struggling with -- first of all, let me articulate I don't share your concern with the need process becoming too litigious. I think that is where we are right now. So if I'm looking for a way to decide as much of those immaterial things as you say in advance of the need process, then aren't these the kinds of issues that should be decided before the need application is filed when there is a very tight statutory time frame?

MR. SASSO: This one can't be. Whether the word material is inserted or not it can't be decided until the evaluation is conducted.

CHAIRMAN JABER: So then you really don't have any objection to the word material coming out.

MR. SASSO: Well, yes, we do for a different reason. And that is when we get around to the need case, again, we don't want to have to defend nit-picks about the process, and say, well, gosh, you know, you can read something in the RFP as a criteria and there was arguably some departure from this requirement. Look, they didn't do it exactly that way. When everybody can tell based on discovery and the exercise of common sense that it had no impact on the outcome of the project.

CHAIRMAN JABER: So the Commission would decide what was material, and it would be during the need case?

MR. SASSO: It would be in the need case. That's

when that issue would be brought to the Commission's attention.

CHAIRMAN JABER: By a bidder who has participated in the process and has chosen to intervene in the need case?

MR. SASSO: Yes. Now, the utility in all likelihood would not be making decisions during the evaluation. Oh, we are just going to throw out this criteria because it is not material. The utility would be operating on a different basis. Let's apply the RFP, do our best job to apply all the criteria. Now, if there came a time where some criterion didn't make sense, yes, we would be in the good cause world then because we would make that decision consciously and come to the Commission and explain why.

What we are trying to deal with here are perhaps oversights or arguable technical discrepancies between the RFP and what was done in the evaluation process that really weren't even conscious or purposeful or weren't significant. Just get them out of the way and let's talk about what really matters in the case.

CHAIRMAN JABER: Okay. And a party -- I'm just thinking ahead of the need case and what issues would be coming to us for consideration. Any party could raise as an issue of fact that a criteria was used inappropriately or was not used appropriately based on the materiality language?

MR. SASSO: The way this would come before the Commission is without getting into issues of standing and who

has the right or the opportunity --

CHAIRMAN JABER: Well, that's exactly where I'm trying to go.

MR. SASSO: Let's suppose we have an entity with standing in the case and they became concerned that the RFP had all of these criteria spelled out, 30-page single spaced RFP. Now, look, we have taken discovery and we have looked at all of their working papers and we have looked at their charts at the end where they have summed up what they are doing and so on, and, look, here is the way this criteria is expressed. And they worded it a little differently in the evaluation papers and so they really didn't apply that criteria exactly the way it was in the RFP.

We would argue that, one, that wasn't even a departure. Two, if it was it wasn't material because there is no credible argument that it had any impact on the outcome. If you have a real case, bring it. If we said we were going to look at price and we didn't -- to take a ridiculously simple example, or something else that is significant to the outcome of the project, we said we were going to do it this way and we did it a completely different way, yes, now you can come in and argue to the Commission that that was inappropriate. And, yes, now it is incumbent upon us to demonstrate the good cause for doing it that way, which is going to take the form of arguing what was best for the customer.

CHAIRMAN JABER: Anyone could bring that argument to the Commission?

MR. SASSO: Yes.

CHAIRMAN JABER: On Section 11, the complaint process, everything you articulated, I think, in response to Commissioner Deason's question was exactly why I want to have some upfront dispute resolution process. And I don't necessarily think it should be called a complaint process, and I don't think the proposed rule amendments called it that. I understand you're reacting to language that was proposed by PACE, but the way the current proposal reads it allows parties an opportunity to object to the terms of an RFP. If that could be done in an expedited fashion in a form of a final order or procedural order with no opportunity for a hearing, would that alleviate your concerns?

MR. SASSO: No, it would alleviate some of the concern. The more time we trim off the process the better it would be. We are still going to have bidders arguing that they want a hearing, they demand a hearing, you know.

CHAIRMAN JABER: But it would be decided by a rule. The mechanism used to resolve disputes related to the terms and conditions of an RFP would be articulated in a rule. See, I hear you speaking out of both sides of your mouth. You want a less litigious need case, and you have a concern with a lengthy complaint process that results in a hearing. The way I look at

it that is what we have got now. You said it yourself, under the current system anyone can file a complaint. Complaints at the PSC result in a PAA order. That gives substantially affected persons an opportunity for a hearing. What I'm asking is about the possibility of a ten-day objection resolution process that results in either a final order or a procedural order, an order that could be issued perhaps by the prehearing officer. What is wrong with that?

MR. SASSO: I may have misunderstood your earlier question. I didn't mean to acknowledge that anybody can file a complaint now and get a hearing. I know that statement has been made before, perhaps by staff. We would disagree that that is appropriate, that anyone in particular, but even bidders should have a point of entry, have standing to raise objections during the RFP process. So we would disagree with that, that that is currently the case.

But let's put that to one side and ask the question should it be the case. Should there be this early resolution process? Again, we were initially entertaining that proposal as beneficial because there is an argument that can be made, and the chair has made it very well that in an ideal world if we could tee up some of these objections early on, get them resolved quickly, no disruption of the process, move on and get some closure there would be some benefit.

But as we started to think about it, we came away

with a very different conclusion that that is just not going to happen for a variety of reasons. For one thing, what type of objection can be made? This provides, for example, for an objection to the terms of the RFP. What does that mean? The Commission is going to define by rule what the RFP should say and the utility will follow that rule.

CHAIRMAN JABER: No, it's going to have enough flexibility so that we don't articulate everything in the rule.

MR. SASSO: All right. And that means you are making a considered policy judgment that the utility should have that kind of flexibility, so what is left to challenge. If a bidder comes up to you and says, we object to the terms of the rule, and you look at your rule -- I'm sorry. They say we object to the terms of the RFP, and you look at your rule and you say, well, we gave them flexibility and they used it, it's not objectionable.

Look, they have their criteria listed; if we have complied with the rule there is nothing else to review or is there. The bidders will say, oh, yes, we want to argue about the reasonableness and the onerousness of the terms, but you will have already made the considered policy judgment that that is not something that you can prescribe in advance, that that is something that has to be left to the judgment of the utility. We have to have the flexibility to deal with those issues. And so why have an objection process just to raise

those issues, because you have made a policy issue not to weigh in on those issues.

CHAIRMAN JABER: Let's use a specific example, because I agree with you, one of the questions we do have to nail down as we go through this process is what do people object to, what are their opportunities for objections. But from those factors we articulated earlier, we talked about technical and financial viability, for example, or environmental compliance. Your RFP process will include those. And assume with me for a moment that the objection is filed related to how you assess technical viability, or how you assess financial viability.

That objection is filed here. A prehearing officer is assigned; order goes out. That becomes a decided issue. I understand your fears about what parties might do to the process. But what I'm asking is if you assume with me that the process is articulated in the rule and can be expedited that way, I'm having difficulty understanding your concern.

MR. SASSO: Well, because we're looking at it from a strictly practical point of view. What does this actually mean? How is it going to actually work in an application. Let's take your example. Somebody objects to the so-called terms of the RFP because they don't like what we said about how we are going to assess certain technical criteria.

What is the prehearing officer going to do about

that? Is the prehearing officer going to tell the utility you can't assess the technical criteria this way, you have got to assess it some other way? On what basis does he make that statement, and then whose RFP is it? Can the utility be held accountable for it anymore now that the prehearing officer has said how the evaluation is supposed to take place? It is now the Commission's RFP. And what does that mean if prehearing officer says change it in this respect in a vacuum without knowing how the evaluation is going to proceed, how we actually apply it in real practice.

We now have to go back to the drawing board, give new notice again, issue a new RFP with all the requisite notice, give a pre-RPF meeting, have a post-RFP meeting and we start all over again if changes have been ordered, if they are meaningful changes. So query, does this actually help us? Is the Commission really willing to get into these issues? Does it want to be deciding the kinds of issues that the utility has the responsibility to decide and that the Commission will be called upon to review but not prescribe when we come before you in the need case.

We can't work out everything in advance. At some point we have to run the project, we have to run the company, we have to make judgments with the confidence that we can justify them to you. When the whole project is done and you can see the whole picture, you can see what matters, what

doesn't matter, what is important, what had an impact on the outcome, what didn't, you can see it all in context and it will make sense. You will be able to review the judgments made in the context of the facts in the record.

CHAIRMAN JABER: One of the things that was articulated in the Louisiana decision is the requirement that the evaluation process and the purchased power agreements, if there are some, actually come to the Louisiana PSC at the hearing. If we can't decide some of these disputes ahead of time, I feel like there is nothing left but to have the whole evaluation process at hearing.

MR. SASSO: You have that now. You mean actually conduct the evaluation at the hearing or review it? Well, again, fundamentally the way this is set up is we conduct the evaluation and you review it. We are the regulated entity and so we have already done that. We have completed it.

But currently under the current scheme, yes, all that evaluation is laid out before you. Staff picks over it with a fine-toothed comb. They get all the discovery they want, they evaluate it, they look at it, they inform the Commission about it. If there is an intervenor, they do the same thing.

CHAIRMAN JABER: How is that different from what happens in Louisiana? It is my understanding that Louisiana actually assesses the bid evaluations.

MR. SASSO: I might have to be directed to particular

language. When I read the Louisiana procedures, I didn't see much of a difference between what they are doing and what Florida is doing. I really didn't see.

CHAIRMAN JABER: Okay.

MR. SASSO: Ms. Clark is pointing out to me that in Phase I that there must be an informational filing with the Commission setting forth planning information, including but not limited to identified capacity need, proposed self-build capacity alternatives, a draft RFP, a proposed schedule, and there is review and comment by staff which is essentially what the proposed rule is going to provide. Because under the proposed rule we'll have a pre-RFP meeting, and staff will be notified of that, and staff can attend and staff can give us input on what we are proposing to do. So that is a step forward from the existing rule. And as I said, I really think it is best done in an informal nonconfrontational setting where the lawyers are not running the show. It's just a meeting among the technical experts about what is the best way to do this.

CHAIRMAN JABER: The Louisiana PSC actually approves the draft RFP?

MR. SASSO: It is not approval. It is not a formal approval. Again, it is review and comment by staff. So it is not approval, it is informal input. Because, again, there are difficulties in approving something up front. I'm not sure you

want to do that. You might prefer to see how the whole project is run.

CHAIRMAN JABER: Staff, before I leave this subject, tell me what you thought the objection period -- how you envisioned the objection period working itself out? Were you anticipating a PAA process; were you anticipating a final process; and what would people be objecting to exactly?

MR. BALLINGER: Let me answer the first part about the process that would be handled. I don't think we really thought that far ahead, whether it would be PAA or final order. I'm not sure how we can handle a final order where you are deciding on the merits of an RFP. I don't know that it would fall under the guise of a procedural order which is more in the line of time lines and things of this nature. You are actually affecting the substance of the RFP.

I guess perhaps it could be worked into a final order. I think that is more appropriate for Legal to look into of a way to do that. Quite frankly, we haven't thought about the process. Initial blush would be a PAA order, agenda, try to work out resolution between the parties before we did that. But we haven't gone into that much detail about actually how to handle it.

The objections to the RFP could be anything from the filing fee to the time lines in between things to a number of things. Staff has gotten in the past phone calls and things of

this nature. People complaining about this and that of the RFP, but nothing formalized. The only complaints we have had have been after the fact, after the evaluation has been taken care of. It really hasn't been on the onset. So we are kind of treading in new ground here of how to handle this.

CHAIRMAN JABER: One of the things, staff, I want you to think about, please, Mr. Harris, and talk to Harold and Mary Anne, I analogize this to -- perhaps inappropriately so, but worth checking on -- interim rate cases. Those kinds of decisions are done in an interlocutory fashion where the point of entry and the appellate rights don't come into play until the final decision has been made. Think about that process.

And also I don't recall, maybe Commissioner Deason does, how developer agreement disputes are handled. It seems to me that in water developer agreements are executed among the developer and the company. And I think those disputes have come here before the execution of that contract, and I don't know how those are handled. I have just forgotten.

COMMISSIONER DEASON: Madam Chairman, if I may, may I ask a question at this point?

CHAIRMAN JABER: Please.

COMMISSIONER DEASON: And this is something I really was intending to take up with some of the other participants, but now may be an appropriate time to do that. And maybe this is a correct question for staff.

What type of objections do you anticipate? And what I'm getting to is objections to any terms of the RFP I think is the terminology that is in the proposed rule. And to some extent that is a little troubling in that that could be interrupted to mean I object to the size of the paper they use or I object to the font they used. I object -- you know, I object to them giving -- assuming there are going to be weightings -- they weighted this factor 50 percent and I think it should be weighted 55 percent.

It seems to me that an objection should be something substantial, something that is on the verge of somehow rendering the RFP non-compliant with the rule. You know, here at the Commission complaints usually involve some type of a rule violation. You know, a customer complains that a utility assessed an incorrect deposit amount. Well, we go to the rule, what does the rule say. The rule says here is the criteria, and we say did the utility apply the rule criteria appropriately or incorrectly. And we either say, yes, the deposit was the right amount or it was not.

When you say anything, that pretty much opens the door for anything. And I guess the question is what do you anticipate? How is this going to work?

MR. BALLINGER: Let me take a shot at it. And I think Mr. Sasso made a good point, how would you evaluate the complaint, under what baseline? And I think probably the

correct baseline is did it comply with the rule. That is typically what we do with complaints, if you will.

I think staff was looking at this not so much from a formal complaint, but getting comments for us. New things crop up all the time. We have had, if you will call them, informal complaints in the past about the time lines imposed in the RFP, that they were too quick for people to get proposals together. About certain other things, certain financial disclosures they had to make and the amount of detail they had to provide up front, that that was a bit onerous. And they just kind of grumbled to us a bit like that.

I think what staff was trying to do with this section was give people an opportunity to give us comments. Maybe not so much a formal complaint, and maybe if staff saw it as a real problem that could have a material impact, to bring it to the Commission's attention. Otherwise you're really not going to know the impact of it until you go through the evaluation process.

Does it really cull somebody out? Does it keep somebody from participating? We haven't seen that yet. A lot of other parts in the rule may have fixed a lot of the problems we have seen in the past about the timeliness. That's why we had the 60 days in there, a minimum between the RFP and when bids are due, because that has been a big complaint we have heard over time.

So, I think it is kind of in there just to give people an opportunity to send something in to the Commission. Maybe there isn't cause for action by the Commission, a formal action. I don't think what staff wants to get into is the Commission approving an RFP every time through this process. I definitely don't want to go down that road. We had that discussion ten years ago, and the Commission decided not to bifurcate the proceeding and approve the RFP before it went out.

COMMISSIONER DEASON: Well, it seems to me there needs to be some threshold, that if you are going to allow a complaint and trigger conceivably a due process procedure where you are adding anywhere from 140 to 190 days that there has got to be some showing or initial prime facia showing that there has been some violation of some sort to trigger that. You just don't file a complaint and say, you know, I would prefer that it be X as opposed to Y. And then there is probably another bidder out there that maybe likes the way it is and they don't want it to changed from X to Y.

MR. BALLINGER: Because it may keep their competitor out. I agree. And I think that exists today. That if somebody feels that the RFP violated the rule, they could file a complaint with us, and we would deal with it. That's why staff has said before that this opportunity to object to the RFP exists today under the rules.

CHAIRMAN JABER: I'm having trouble with -- go ahead, Commissioner Bradley.

COMMISSIONER BRADLEY: Yes. And just to tie into what you and Commissioner Deason asked, at what point does the protest period become terminal so as to not delay construction? I mean, I can see this as an amendment, a language, that is, that could be used to kill a project.

MR. BALLINGER: Exactly. And that was one of the reasons why the Commission with the original rule decided not to preapprove the RFP package as people have offered. They wanted basically the IOU to present the RFP package, have the Commission issue an order saying it is approved, then send it out, and then they would come back in again with a need determination, so you have two shots at litigation.

We are trying not to do that in this instance. I wouldn't want this to get out of hand to where it could drag things on indefinitely. And you're right, it could kill a project.

COMMISSIONER BRADLEY: Well, what language would staff suggest then to clear that up and to make it terminal at some point? How many appeals --

MR. BALLINGER: We struggled with this, and I came from the side that said we didn't need anything in here because the current procedures allow people to file a complaint, we'll handle it expeditiously noting that there is a project going

on. Others felt we needed some explicit language in here to make it clear, and I think the expedited basis is about as good as we can get. It's a struggle.

CHAIRMAN JABER: Any other questions, Commissioner Bradley?

COMMISSIONER BRADLEY: No.

CHAIRMAN JABER: Staff, I think we are all saying the same thing. I wonder if the hang-up is in the words complaint and objections. What I envisioned was something expedited in the form of, you know, seeking clarification for purposes of moving forward. Something similar to a declaratory statement.

MR. HARRIS: I would say, Madam Chairman, I have not been with the Commission that long, but in the time I have been here I have seen a number of proceedings where there seems to be something filed and the Commission makes a determination up front as to whether to proceed on it or not. And we could get into some discussion, and I will certainly have this with the general counsel, as to what the effect would be if a party disagreed with the Commission's decision.

But I can just off the top of my head, and I have not consulted with general counsel, but I can anticipate a solution where somebody would come in and say we don't like this term. The IOU is telling us that we have to file it on legal-sized paper, and that is a burden on us because our copy machine only does letter-sized paper and we want to change that. And the

Commission says, come on, guys, this is not a material -- and that is the term that has been used, and I'm not saying we should adopt that, but the Commission, the five of you all could sit there and say, we just don't think this is a big deal. And we are going to issue an order at this point saying we don't think it is a big deal, come back at the conclusion of the RFP process and we will see if it was or not. Come back at the conclusion of the hearing and we will see if it was or not.

Or you all might sit there and say we do think this is a big deal. This could foreclose somebody. And so up front we are going to issue, you know -- and I don't know if we would call it a declaratory statement, or an interlocutory order, or a PAA, or something that could say we do have a concern with this. And, you know, company, if you decide to go forward with it, you know, you might need to justify it to us at some further point.

Or you might say we do think this is a problem. We see that there is two sides with evidence. We are going to go ahead and set it for a fast-track hearing. We are going to make time in 30 days or 60 days and we are going to get this heard. And we are going to set a special agenda, and, parties, you have 30 days to get in here and we are going to take testimony and we're going to make a decision.

So I think we could proceed any number of ways. I'm not sure that since it is not an issue that staff had really

considered up front, that it can't be decided when it occurs. I don't know that language in a rule at this point, if you all issue some language, that you can issue it with the understanding through this comment period, through the rule itself, whatever you wanted to do, that said we are not sure, let's see what happens. We are thinking about this, we are thinking about a process here, we don't know exactly how we are going to handle it and we will see when it comes up.

If we get a lot of complaints that are the size of the paper, then maybe we'll come back -- and I'm not meaning to suggest another rulemaking proceeding, maybe we will come back and issue some type of guidance to the parties that this is not really what we anticipated, or maybe we will come back and say this is exactly what we anticipated and this is the way we're doing it.

And I'm not familiar with the rulemaking process, I'm not in the rulemaking section of the general counsel's office, I'm just thinking off the top of my head. But I do not see that the Commission can't, through this discussion, come up with a solution.

CHAIRMAN JABER: Okay. But, Mr. Sasso, to summarize your real concerns in that regard, it was your need to avoid delay in the need process and time and expense associated with litigation in this regard, right?

MR. SASSO: Yes. And I would add uncertainty. It is

evident from this discussion we don't know what standard may be applied at the risk of being sent back to square one and reissue another RFP. The issue about whose RFP is it. If the Commission approves it, is it now the Commission's RFP or is it the utility's RFP if the Commission dictates terms that the utility believes are unwise. So there are a host of issues.

CHAIRMAN JABER: Well, in terms of having the risk associated with issuing a new RFP or that your need case would be denied, you have -- that exists today, doesn't it?

MR. SASSO: Yes, we do. But we prefer the opportunity to explain to the Commission in the context of the overall evaluation and all the facts of a fully developed record why we did what we did and what impact it had, as opposed to looking the at one term in the RFP piecemeal in a vacuum.

CHAIRMAN JABER: As part of a bidder's case in your need filings, can they file their entire bid as part of their testimony?

MR. SASSO: Yes. And, in fact, we usually do that with our filing. We will generally either -- I don't know that we have done it as part of our direct case, but at some point in the course of discovery the entire package is made available. And in some past cases it has been introduced into the record. So, yes, the entire bid package is retained and may actually be introduced into the record.

CHAIRMAN JABER: Okay. Let me switch gears on you. On Page 11, your analysis of Section 14, you say the first part of the language should be stricken because it goes to cost-recovery. My assessment of the second part of that clause goes to cost-recovery, so if we strike the first part of 14, shouldn't the last part be stricken, as well?

MR. SASSO: Well, we would certainly prefer that, but we are also cognizant of the Commission's concerns and Commissioner Baez's point in particular from the agenda that it is important not to lose sight of the fact that the project was determined on the basis of particular cost estimates. So when we come around later to put the project into service and we want cost-recovery, et cetera, and we have had an overrun, we agree that we should be judged in the context of the entire project and the Commission should not lose sight of the fact that we originally had lower estimates and we need to be prepared to explain why we have now come in with higher numbers.

CHAIRMAN JABER: But do you think the current statutory framework allows us to disallow any costs that are not prudently incurred when there are overruns?

MR. SASSO: Yes. I mean, strictly speaking this is not necessary because it is part of existing law.

CHAIRMAN JABER: On your time line --

COMMISSIONER BRADLEY: Madam Chair, along that same

line, what is there in place for you to recover costs from the IPP if you misjudge the RFP?

MR. SASSO: If we enter into a power purchase agreement, those costs are normally passed through to the customer. Now, if there is a misunderstanding on the part of either contracting party, or a dispute arises for whatever reason, which happens, you know, we enter into a contract and we think it means one thing, we think it is going to cost X. We put the project in service, and now all of a sudden our contracting partner says, no, it is going to cost twice X. We read this term differently from you.

Now we have to litigate that if we disagree with their interpretation. And let's suppose there is either a settlement or a court determines that we have to pay some additional amount above X. We would come to the Commission and we would ask the Commission to allow that amount to be passed through to the customer on the ground that that is what a court has determined this contract requires.

Now, there actually have been cases in the past where we have had a similar situation, we, meaning Florida Power and yours personally came to the Commission and asked you to accept jurisdiction over such a dispute, to tell us what the Commission meant when it approved the contract, the power purchase agreement. And the Commission declined to accept that invitation and we went to litigation. And then there was some

question about whether settlement in one case was appropriate or not. But these are difficult issues that will be confronted in the case of power purchase agreements and can result in additional costs being charged to the customer.

CHAIRMAN JABER: Any other questions?

Mr. Sasso, I just lost my train of thought. Tab 6. Mr. Zambo's client makes the request that local governments have a reduced application fee.

MR. SASSO: Yes, ma'am.

CHAIRMAN JABER: And he uses as an example, as I recall, the need to include renewables in the portfolio. And my question is have you all considered whether local government or co-ops should have a reduced fee when you are seeking to expand renewable portfolios?

MR. SASSO: I'm not certain how this ties into a particular power resource. But we have approached it from the point of view that a cost of reviewing proposals will be pretty much the same for all the bidders or at least would fairly be allocated in advance without knowing what the proposals are going to look like, which means that everybody should pay their fair share. If that is not the case, everybody is not asked to pay their fair share, then that means somebody is subsidizing a bidder. In this case it would be governmental entity. Which is a policy judgement. Do we ask the customers to do that; do we ask the other bidders to do that? In a sense we are

indifferent because it is a question of which of the bidders pays. We would have a concern if the customers were asked to pay.

CHAIRMAN JABER: Yes, and I guess that's why I limit my question to expanding the renewable portfolio, especially in light of the study that the Commission has been asked to do. If it is in the public interest to have a certain percentage of renewables, might an exception be warranted for an application fee when you are seeking some percentage of the generation to be devoted to renewable sources of energy?

MR. SASSO: I'm just not in a position to respond to that, Madam Chairman.

CHAIRMAN JABER: When might you be?

MR. SASSO: After the next break.

CHAIRMAN JABER: Okay. We are going to be taking a break soon. Your time line, that's where I was. The blue section in the time line. Your estimation of the total number of days, 482. Let me make sure I understand that that does not include or envision a complaint process. I understand your belief that a complaint process may not be permissible here.

MR. SASSO: That is correct.

CHAIRMAN JABER: And then finally, the Louisiana example again talks about if a company knows that an evaluator, an independent evaluator is going to be used, they are required to include that language in the RFP. Would you have any

objection to including as part of the articulation of the methodology that you are going to use a statement that an independent evaluator may be used? And if you know who it is, stating who that is?

MR. SASSO: Again, I would prefer to respond after I have an opportunity to consult with my client and the other IOUs. I am struggling a little bit because the way that this has been used in the past, at least in connection with Florida Power's project with which I am most familiar, the independent evaluator did not make the decision, did not conduct the evaluation. He simply watched and shadowed and gave some assurance to the Commission after the fact about what we did and how we did it. But the evaluator himself was not making the evaluation so would not, strictly speaking, be part of the methodology for making the decision.

CHAIRMAN JABER: Is there anything wrong with stating in the RFP exactly what you just stated, that the company reserves the right to consult with an independent evaluator, but that the independent evaluator is not the sole source of the decision?

MR. SASSO: I think that may depend on how some of these other issues are resolved. For example, that could give rise to a complaint about what do we mean by independent, and is it truly independent, and who is it, and should it be somebody else, then I would have a concern about it. If it

were something that we could say and reserve it as a right, and then use that procedure and then bring that before the Commission in a need case, I would have less concern about that.

COMMISSIONER BRADLEY: Well, who pays the independent evaluator?

MR. SASSO: Well, when the utility retains somebody for assistance in reviewing the project, the utility has paid in the past. Now, I want to be careful not to mix what we are talking about when we have talked about independent evaluators with what PACE is talking about, because they are talking about a very different procedure, and they have some proposals about who should pay for the type of evaluator they are proposing. That is not the kind of independent evaluator we have used in the past. It served a different function.

COMMISSIONER BRADLEY: Madam Chair.

CHAIRMAN JABER: Commissioner Bradley.

COMMISSIONER BRADLEY: What is the new and expanded proposal, who pays the independent evaluator under the new and expanded concept?

MR. SASSO: Under PACE's concept?

COMMISSIONER BRADLEY: Yes.

MR. SASSO: I believe PACE has proposed that the independent evaluator be paid out of the bidders' application fees. But as I said before, the bidders' application fees in

our experience has only partially offset the cost of evaluating the proposals. So if you stack onto that the cost of -- yet another cost incrementally, that application fee isn't going to really cover it.

COMMISSIONER BRADLEY: So that means then that the independent evaluator works for whom?

MR. SASSO: Well, that is a good question. Because as a practical matter if the utility were expected to conduct the evaluation that it does and do whatever else it does in the process, and pay the entire fee essentially to the independent evaluator, the utility would be actually subsidizing the rest of the project, and in turn its customers.

CHAIRMAN JABER: Commissioners, any other questions before we go to the next presenter? Okay.

Thank you, Mr. Sasso.

MR. SASSO: You're welcome. Just one other observation, following up on the last point. Ms. Clark was just pointing out to me that the Louisiana order or rule rejects the concept of an independent evaluator.

CHAIRMAN JABER: As described by PACE, but not the independent evaluator scenario I'm describing. Actually I'm not describing -- I'm not referencing the independent evaluator idea that PACE wants. I am simply asking if you have made your decision to rely or consult with an independent evaluator regardless of the weight you put on that person's opinion, do

you have any reservations about including a statement to that effect in the RFP?

MR. SASSO: That's the way I understood your question, yes.

CHAIRMAN JABER: Good. Thank you. And your answer was?

MR. SASSO: My answer was provided we don't draw objections, and all we were doing is making that statement, I don't think that would be objectionable. If after the break I am advised that it is, I will let you know.

CHAIRMAN JABER: Thank you, Mr. Sasso.

On my list next we have the Office of Public Counsel. Is there anyone here from Public Counsel that wishes to address us at this time?

MR. WRIGHT: Madam Chairman.

CHAIRMAN JABER: Mr. Wright.

MR. WRIGHT: Just before we proceed, I don't know what your pleasure is in terms of the logistics for the remainder of the hearing, but I have been asked to relay a request. If it is at all possible, could Mr. Vaden just please make his presentation before we quit today? It can be at 6:00 o'clock, but he would like to get back to New Smyrna for some utility business tomorrow. And he can go ahead of me, that's fine.

CHAIRMAN JABER: You know, if you and Mr. Green have

reached an agreement on the order of presenters, I don't have any problem with that. But I will leave it up to the parties. Let me do this, we need to take a 15 or 20-minute break, so I will let you work it out. Rather than my making that decision, you can talk to Mr. Green.

Commissioners, let's plan on coming back at 3:30.

(Recess.)

CHAIRMAN JABER: Let's go ahead and get back on the record.

Mr. Wright, you indicated to me that Mr. Vaden was prepared to go next. Mr. Sasso, you had -- there were two questions outstanding you wanted an opportunity to respond to. Let's go ahead and take up your responses and then we will go to Mr. Vaden.

MR. SASSO: Yes, ma'am. I will try to do this very briefly. On the issue about mentioning in the RFP that we would reserve the right to use an independent evaluator, the answer is yes, we believe that would be appropriate.

On the issue of whether the IOUs would be receptive to reduced application fees for governmental entities on renewables projects, the answer is yes, we would be receptive to working with the entities on that issue.

There is another issue that I just wanted to clarify briefly and that grew out of a discussion about how we might clarify the requirement that we provide information about the

net energy for load, and there was a discussion about, well, it would essentially be what is in the ten-year site plan. And then you asked me a question whether that would also involve an obligation to update the information.

And during the break we discussed that with our planning experts and there is a concern about agreeing to an obligation to update, because that might involve shortening the forecast period. And it is very difficult to truncate that and use the same methodology. And it is disruptive and the like just to try to do that if the filing occurs in the middle of the cycle. Because it is done for April, and then the subsequent April, if we had a filing in July, for example, and truncate the period to come up with a new forecast, it would be difficult to do. So we would prefer to be able to use the most recent ten-year site plan information with the filing.

CHAIRMAN JABER: Thank you, Mr. Sasso.

MR. SASSO: You're welcome.

CHAIRMAN JABER: Mr. Vaden.

MR. VADEN: Yes. Madam Chairman, Commissioners, I appreciate the opportunity to be allowed to make a comment about the bid rule for the Utilities Commission of the City of New Smyrna Beach. And basically the Utilities Commission supports Calpine's position to put a nonmandatory provision for electronic option into the bid rule. And what I would like to do is just take a couple of minutes and run through the process

that New Smyrna Beach has taken in the past, and four of the auctions that we have recently been through in the last four months.

New Smyrna Beach is a small utility and visibility in the market to find prices of nonfirm energy and capacity, seasonal capacity out in the marketplace is very difficult. The process that we have been using in the past is mostly just phone solicitation, so we actually work with other utilities over phone conversations and keep working until we think we have got a price that is good for our ratepayers.

The nonfirm energy, we normally go out and we will purchase nonfirm energy for a month in advance. And we start working that process. It usually takes us about 30 days to secure a product that we think is a good price, and then we conclude and sign the contract. Firm capacity we buy on a seasonal basis to meet our winter peak and our summer peak in the same way. We go out and work the market to try to find the best price.

And in the past it has taken us up to about three months to secure this process. And it is lengthy, it's time consuming. We will negotiate with one supplier for a price, we will work with the second supplier, a third supplier. When we get back to the first one he may have already pulled the bid away because the process has just taken so long that the prices are not still in the market.

So we tried using the electronic bid process about four months ago, and we have just had very good responses from it and very good actual returns and savings to our ratepayers. First off, we have the interchange agreements with existing probably 75 utilities and marketers throughout Florida and a lot of the United States that just sets up the terms and conditions of how we make payment, whether we do business with the entities to start with.

Second, we put an RFP out for what we are going to do in the following month, whether it be nonfirm capacity or firm energy. We send these RFPs out, and they are as simple as two to three-page RFPs. The bidders simply go through the RFP, they can take and get the approval process from their respective utility, sign the RFPs and send it back to the Utilities Commission.

If there are no exceptions and everyone meets the requirements of the RFP and their proper signature and so forth, then we will issue the bidder a password to go into the Internet and access the actual bid page the day of the bid. And we are normally doing that real close to when we are actually going to start taking the products. We actually might do this five to seven days before we are going to actually start taking the nonfirm energy or the firm capacity. So it is a big advantage to the bidder, because the bidder at that time when he is putting the prices out, he already knows the terms

and the prices, he is close to the market, so the market is not going to move a lot from when he makes the bid until we actually start taking the product from him.

So the process is very simple. They have the password the day the process starts, they go in and they put their bid in for the capacity, the energy. And when they put the bid in they see the lowest bid out of everyone that is bidding. And so for in all four of the auctions we have had in the neighborhood of a dozen bidders and the first round lasts for about 45 minutes. And during that 45 minutes, you put your bid in, it is all realtime. If you are the lowest bidder, everyone bidding can see that lowest price. Someone else can simply go in and put a lower price and it shows up, and this continues for 45 minutes.

At the end of the 45 minutes, there is some -- you can get extensions if it is bids put in the last five minutes of process, small stuff which I will skip at this point. But basically it is just open bids, everyone sees the lowest bid for 45 minutes. At the end of 45 minutes then the three lowest bidders are notified that they are the three lowest bidders in the process.

There is a half-hour break so everybody can get there ducks in a row for the second round, which is a closed bid, and they can take it back to their respective people and see if they want to bid any further. Now, the second round is closed,

so when everyone enters the second round, which lasts for about half an hour, they know what the lowest bid going into it is and that is all they know. So then they are sitting there for a half-hour in a closed environment making the bids, and then when that is over the process is concluded.

You fax or e-mail your signed sheet to the one that won the bid, they sign it and send it back and the process is concluded. And in the four bids that we have conducted so far, New Smyrna Beach has saved a very, very minimum of ten percent on each one of the auctions of what we can go to the marketplace and find it.

Now, I know this is small. The comments were this has been for small auctions. It has been for 10, or 15, or 20-megawatts. It is very small, but the process of sending the RFP out, everyone signing it, and it coming back to the utility and everyone is on the same page before you negotiate price, in my opinion the experience works very well. It could be for small megawatts as we doing it, or it could be a larger one, so a lot of this stuff could be ironed out up front.

The price is what is the moving target. And if you have got a supplier, and I think that this is just as much of an advantage to a supplier as it is to the purchaser, because if you are putting a bid in an RFP process for something that is four months, six months, or a year down the road, the market changes. So you could actually meet all the criteria of the

RFP, everyone irons out all the details, you conclude that and then when you actually go over the price, you just use the bidding process.

And, again, I thank the Commission.

CHAIRMAN JABER: Thank you, Mr. Vaden. Commissioners, do you have any questions? Thank you.

Mr. Wright, did you want to go back now to Mr. Green or did you have any closing remarks?

MR. WRIGHT: No, these are Mr. Vaden's comments and so we are going to go back to the order. Thank you very much, and thanks everybody else for accommodating Mr. Vaden's need to get back to his own commission meeting tomorrow.

CHAIRMAN JABER: Thank you.

Mr. Green, PACE.

MR. GREEN: Thank you, Madam Chairman. I am Mike Green representing Florida PACE. Florida PACE is pleased to have this opportunity to provide our comments today. And I would like to start by saying we do commend the Commission for recognizing the need to revisit the capacity procurement rule.

PACE believes the sole purpose of this capacity selection process is to ensure that Florida consumers get the full benefits of the most cost-effective supply alternatives available. And we use that basically, that goal if you will, as the litmus test going forward and the principles and the elements we have been espousing.

Throughout these proceedings for probably the last year PACE has consistently advocated three principles that we believe are critical to meeting that objective. And I will focus today on why PACE feels these three principles are important and whether the current amendments by staff adequately address these important criteria. Following my summary, Mr. McGlothlin will address a few other of the issues that were identified in the docket, and then both of us will be available for questions as you see fit.

Again, PACE commends the staff for their efforts, but respectfully submits that the published amendments by staff address some but not all of what is needed to ensure that customers receive the most cost-effective options. PACE has submitted proposed amendments to the published rule language that illustrates how the recommendations in my testimony that has been filed can be more fully embodied. Those proposed amendments are attached to PACE's separate comments.

The first principle is that all terms and conditions of the RFP, including all scoring factors and weighting criteria, should be disclosed in the initial RFP package. Also, the rule should provide the means with which to weed out any onerous or infeasible terms or uncertainties at the outset. Incorporating this provision will benefit consumers, customers in several ways, and let me touch on some of those.

First, if onerous conditions, or terms, or

uncertainties in how the bids will be evaluated exist in an RFP, developers will be discouraged from submitting a bid altogether. Consumers do not benefit if developers are discouraged from submitting a bid altogether. The more robust the bidding, the lower the consumer costs will eventually be. A process in which the terms and conditions are clear and reasonable, thereby attracting the greatest number of viable bidders, best serves consumers.

Secondly, assuming bidders do decide to bid, any onerous or infeasible terms need to be eliminated at the outset of the bid process, such that these bidders do not have to inflate their bids artificially to cover the costs of the uncertainties or the risks associated with any onerous terms. Obviously it is not in the consumer's best interest if the bids that are received are higher than they would otherwise be if the terms had been more reasonable and/or if the need had been more clearly stated. Having a process to identify and remedy potentially onerous terms at the outset before bids are made is in the consumers best interest.

Finally, scoring criterion and weighting factors reflect the relative importance of the various needs of the utility system and should be disclosed at the outset. This will enable bidders to best tailor their proposals to the customers' precise needs. This makes more sense than a process in which bidders are taking basically shots in the dark hoping

to hit on what is deemed to be the most important by the requesting utility.

I think Madam Chairman talked about some other examples of criteria. You know, several criteria have been identified in recent RFPs, like permitability, firm gas transportation, site control. These are things that the issuing utility knows how important this is or how unimportant this is, and what we are saying is identify how important that is by some weighting of that criteria. They certainly know how important it is when they evaluate the bids that are received, because that's what they used to finalize their choice. To suggest that they don't know what is important 30 days prior to that is probably a stretch.

Though Florida has relatively robust energy growth projections and that is a market that is attractive to independent power developers, such as the PACE members, if developers feel they have little chance to win, that they have little choice but to make the conscious decision to not submit bids here. Again, this is not in the best interest of consumers in our mind.

PACE commends the staff for incorporating in their proposal the requirement that the IOUs put all criteria and weighting factors in the RFP. PACE respectfully suggests, however, that the published rules process for challenging the terms or conditions of the RFP should be more clearly stated.

The current reference in the staff recommendation to the opportunity of bidders to submit objections is unclear as to how the objections will be remedied. PACE urges the Commission to articulate in the rule the specific procedure it contemplates for receiving and processing complaints at the outset of the RFP process. Again, to avoid any concerns or late filings or late litigation.

PACE proposes a mechanism that features an early deadline for the filing of any complaints or objections related to the RFP package, an expedited hearing and ruling, and a requirement that the IOU hold RFP activities in abeyance pending disposition of any complaints or Commission initiated review of an RFP.

I would like to stress that PACE's mechanism for vetting terms and conditions would be invoked only when needed. Under PACE's proposal if an investor-owned utility does not place unreasonable or infeasible terms in the RFP, this complaint mechanism would not be invoked and would not impact the RFP schedule at all.

If an issue of inappropriate terms does indeed arise in a particular RFP, PACE believes strongly that customers will be better served by intercepting those terms early in the process. If instead, the defective RFP is processed to completion and the deficiencies are then pointed out in an after-the-fact challenge of the selection, the Commission, the

utilities, the bidders, and the consumers are all faced with the possibility of a potential and time-consuming do over.

And I would like to add also it is not the PACE members -- it is not their intent to litigate issues. The PACE members are here to provide energy solutions to the state, and so to have meaningless, as I think it was characterized as, objections is not the role of what PACE members would do.

A second critical principle is that all bidders, including the IOUs, should submit their bids at the same time and should be held to the terms they propose. Presently if an independent developer was ever to win an RFP, they will sign a contractually binding PPA. It will be contractually binding. They will be bound to the capacity payments. They will be bound to the heat rates. They will be bound to the availability factors. They will be bound to the O&M costs that are part of that contract.

To ensure consumers get the benefits of the most cost-effective alternatives, IOUs must be held to a similar standard if they win the RFP. In the absence of such a requirement, the IOU will have an incentive to potentially include unrealistic or very aggressive projections in its proposal to win the RFP. If the IOU's winning proposal is allowed to erode higher costs or poorer performance criteria after it has been selected over competing alternatives, the IOU's customers may not have received the benefit of the best

bargain that was available.

A lot of discussion has gone on in a past case where the differential was, I believe, $83 million between the winning IOU bid and a second place bid, if you will. And that was on a $6.7 billion revenue basis. So it is 83 million if you include an equity penalty, it was $2 million if you exclude an equity penalty, but again on a $6.7 billion base. The percentages are pretty small.

You miss your heat rate by 200 Btus per kWh, and you will have -- over 30 years you will have eaten up $100 million of net present value. That's the sensitivity. If you don't hold the winning bid to the heat rate, or to the O&M costs, or to the capacity payments, you may not have selected the most cost-effective alternative.

PACE commends the staff for attempting to address this issue, but the language of the published amendment being unforeseen and beyond the utility's control is simply too vague and too lax a standard to neutralize the utility's incentive to use unrealistic projections. If its proposal is chosen, the IOU should be held to the construction costs and the performance parameters which would include availability, O&M costs, and unit heat rate to the same extent that other participants would have been committed to their capacity prices, their heat rates, their O&M costs, and their availability targets under the terms of the power purchase

contract contemplated by the RFP. Again, if the IOU is not held to these terms you cannot guarantee that consumers get the best deal.

Regarding an important element related to the requiring of a utility to honor the terms of its proposal, PACE respectfully requests the Commission to clarify and, in fact, reject the notion that the IOU, alone among contenders, should have a unilateral right to lower its bid in order to win the award. More than fundamental fairness is at stake here.

If ratepayers would benefit from the ability of one participant to sharpen its pencil, they will surely benefit if several, perhaps, short-list participants have that same opportunity to sharpen their pencils.

Further, any indication by the Commission that endorses the unwritten interpretation that an IOU and only the IOU has the extra bite of the apple, which it can always employ to undercut other bids, will have a chilling effect on the willingness of developers to participate in the RFP process.

To put themselves in a position to offer a project, developers such as PACE members must typically expend nearly a million dollars. Developers incur these costs not to provide a market benchmark to the Commission or to the issuing IOU, but to earn a fair and unbiased opportunity to proceed with the project. In this rulemaking it is PACE's hope that the Commission will send a strong message that it intends to

provide a framework under which a nonIOU source of generation has a fair and genuine chance of winning the IOU's RFP. And clearly and emphatically renounce the proposition that the IOU alone has this unilateral last shot.

PACE's third principle is that if an investor-owned utility submits a self-build proposal, the scoring of proposals should be placed in the hands of a qualified and neutral independent evaluator. Again, this principle is linked directly to the Commission's interest in assuring that customers receive the most cost-effective generation.

I believe everyone will agree that an IOU earns the preponderance of its annual earnings from a regulated return on prudently invested capital. And this is not a bad thing and I'm not suggesting it is. But that is the business reality. But to require the IOU to overlook this overriding business reality and be both contestant and judge is an avoidable conflict of interest if an independent evaluator is used.

Consumers should have the absolute confidence that the most cost-effective alternative have been selected. I think Mr. Sasso expressed the concern, I think if I am quoting him correctly, gaming by rational economic entities. Well, the investor-owned entities are rational economic entities as well, and they certainly have an overriding business reality when 90-something percent of your annual earnings come from a return on regulated capital prudently invested.

Over the past year, PACE has refined its recommendation significantly. We have backed off on several proposals and suggestions. For example, PACE has eliminated the requirement that an IOU put its cost estimates in the RFP. Again, suggesting that if they are going to -- on an apples-to-apples basis, if they are going to propose a bid, they don't need to tell us what their bid is on the front end.

We have eliminated the suggestion that IOU allow an IPP to locate a unit on IP property. That was a big concern of the IOUs, and we dropped that recommendation in an effort to find a middle ground.

PACE has also moved from a single round concept if you will of bidding, to a proposal that would allow all participants on a short list to submit a second and binding bid. Again, if there is validity in the thought that a second shot, a second round of bids by one entity is good, a second round of bids by many would be better.

PACE has also moved from the absolute requirement that the Commission approve all RFPs to the concept -- which was in one of our earlier recommendations -- to the concept of a point of entry that can be used at the outset of the RFP process, if and when necessary, as long as there is a well-defined process that can be followed.

However, while the form they take in the rule has been modified, PACE continues to advocate the three principles

I have described, because PACE believes they are essential to the development of a capacity procurement rule that will serve ratepayers' interests most effectively. And that will conclude my comments.

CHAIRMAN JABER: Thank you, Mr. Green.

COMMISSIONER BRADLEY: I want to make sure I have got his three principles.

CHAIRMAN JABER: Commissioner Bradley.

COMMISSIONER BRADLEY: The complaint mechanism, is that one of them?

MR. GREEN: Excuse me, sir, I couldn't hear that.

COMMISSIONER BRADLEY: Compliant mechanism, the complaint process.

MR. GREEN: The three principles. The first principle would that be the criteria and the weighting be established, and with that there be a process, a point of entry such that if there are any onerous terms or conditions identified in that criteria that that --

COMMISSIONER BRADLEY: Scoring and weighting.

MR. GREEN: Excuse me?

COMMISSIONER BRADLEY: Scoring and weighting.

MR. GREEN: Yes, sir.

COMMISSIONER BRADLEY: Okay. And all bidders must submit at the same time, is that one of them?

MR. GREEN: That all bidders should submit binding

bids at the same time. And by binding I mean they would be held to the terms of their proposal consistent with what an IPP would be held to if they were to win and be subject to a PPA under contract.

COMMISSIONER BRADLEY: Okay. And what was the third one?

MR. GREEN: The third one would be the third-party evaluator, if the utility decides to self-build or deal with an affiliate.

CHAIRMAN JABER: Mr. McGlothlin.

MR. McGLOTHLIN: Thank you. If I may, I took a few notes during the discussion that went on before, and I thought I would begin with some observations on some of the things that were said earlier. And I would like to start with the chart that was handed out showing the existing rule time frames in blue and the staff published amendments in green, and the PACE proposal in red.

With any RFP under any of these versions of a rule, with respect to the impact of a complaint there are two possible outcomes. One possible outcome is that either there is no complaint or there is a complaint that does not effect for some reason the time frames involved. What I want to point out to you about this chart is that with respect to the PACE proposal, only one scenario is illustrated, and that is a scenario in which there is a complaint that effects the outcome

by extending it. With respect to the blue time frames for the existing rule, only one scenario is depicted and that is the scenario in which there is no complaint and no impact on the outcome.

As Mr. Green described, PACE proposes a point of entry that may or may not come into play. And if the potential participants choose not to file a complaint or see no reason to file a complaint, then there would be absolutely no impact on the time frames of the RFP, and it will proceed without altering the schedule in any way.

On the other hand, with respect to the existing rule, notwithstanding Mr. Sasso's comments, the staff has advised the Commission on numerous occasions that affected parties can file complaints that can take the form of a separate docket, or alternatively, that can take the form of an issue raised in the hearing on the determination of need. And in either of those circumstances, if the complaining party successfully convinces the Commission that the RFP was flawed in such a way that renders the outcome a nullity, then you are looking at a new RFP and a complete do over that begins to the right-hand side of the most right-hand entry there.

And what would that impact be? Well, we have an example of what that impact could be in the FPL case. You will recall that after Reliant Energy filed a complaint alleging that the original RFP was flawed, FPL chose to reissue a second

RFP. That RFP was issued in April, and the Commission voted in November. That is about seven months impact under a scenario in which FPL was trying to expedite the second RFP. So, that is a real world example of a real world kind of consideration.

And to just preview my next comments for just a second, by this proposal of a point of entry PACE considers that we are volunteering to shorten the time frame under which we can currently file a complaint. We are going to suggest that the Commission by rule indicate that it will when it receives an RFP indicate a deadline for the preparation and filing of complaints. And we think that that can be expedited. We think it would add perhaps 90 to 100 days at the outside for filing the complaint, the convening of an expedited hearing, and a ruling.

Which is why we take issue with the chart, because when you do the arithmetic it appears that the calculation of 195 additional days, the preparer of this chart has assumed that the complaint process would add six months to the schedule. We think there is no necessity of that at all, and that that overstates the impact of an expedited complaint process. For those reasons, we think this chart does not give a fair picture of the alternatives available to the Commission.

I heard Mr. Taylor advance the proposition that if the RFP contains more and more defined criteria that would lead to the possibility of -- heightened possibility of gaming of

the system. It appears to me that that is counterintuitive. And when one considers what is meant by the word gaming, I think that envisions a type of manipulation that is made possible by room to maneuver.

Well, if one has better and more defined criteria, that reduces rather than enlarges one's room to maneuver. So we believe that the additional criteria, in addition to enabling the third-party evaluator to accurately apply what is of value to the ratepayers to the proposal before it, also in the event the Commission chooses not to go with the third-party evaluator, even if the IOU is doing the selecting, which is not something we recommend, but obviously that choice is available to you, the more definitive criteria are needed for the same reason that Mr. Taylor described but in reverse. Because absent criteria, the IOU would be the one in the position to game the system because of the lack of precision in terms of the RFP criteria.

And with respect Mr. Taylor's comments, bear in mind that these criteria will originate with the IOU. And so it is hard to correlate his claim that the bidders are going to be using the criteria to game the system when the criteria originate with the IOU.

I heard Mr. Sasso say on more than one occasion that one concern is that the bidders will try hard to win the RFP and that is not necessarily good because it could not be the

best deal for ratepayers. Well, that doesn't make any sense. If the IOU prepares the criteria on the basis of identifying those factors that are of value to ratepayers, then of course the bidders are going to try to score high on those criteria, and if they do, and the RFP has been correctly prepared, the highest score will enure to the benefit of the ratepayers.

And if, instead, the criteria do not have any correlation to what is of value to the utility, the system, and the ratepayers, that merely means that the IOU has done a poor job of putting together the criteria. So the rules should require the IOU not only to identify all the criteria, but the onus should be on the IOU to do a good job of identifying those criteria which reflect the needs of the system, and which if satisfied well by a bidder will provide value to ratepayers. And if that is done then, of course, the highest score is going to win the RFP and it is also going to deliver the greatest value to ratepayers.

I heard Mr. Sasso say several times that the regulatory compact is when the IOU accepts regulated rate of return, and in return is allowed to recover prudently incurred costs. That is a very truncated version of the regulatory compact. It leaves out that leg of the regulatory compact that says the IOU has the exclusive right to serve retail customers. And it is in return for that monopoly on retail service that the IOU accepts regulation both in the form of a regulatory

rate of return, and in review of the prudency of the expenses. It isn't as though the IOU gives up one in order to get the other. They are both aspects of the requirement that in return for an exclusive monopoly that the IOU is regulated.

And that is not to -- I don't say that to either raise that as an issue or to criticized it. That is the system we have, that is what we are working under. But the point is this: Whenever the IOU refers to the obligation to serve, and I have heard them do it in terms that suggest it is a sacrifice and a burden, but they are nobly going to accept it, bear in mind that it has to do with this exclusive opportunity to serve all customers. And there are any number of business ranging from pizzerias to tire stores that would gladly stand in line for an opportunity to accept a similar obligation to serve and a similar burden.

References were made to the differences between the bidders' prices and the IOU's costs, and references were made to the idea that the IOUs do business based on cost of service. These days that is not strictly true and hasn't been strictly true for a long time. It hasn't been true, for instance, in the fuel adjustment docket for a long time, ever since the advent of the market basket proxy and the ability of utilities to share in any, to the extent they come in under that market proxy. It hasn't been true since FPC and FPL entered into stipulations that involved revenue caps rather than a strict

rate of return regulation. And so for that reason there is already in evidence some good examples of the type of incentive approach that would be analogous to some of the things that PACE has offered here.

In addition, even if there is a difference between the bidders' prices and the IOU's costs, those differences are readily translated into a common denominator. And the common denominator is the revenue requirements associated with each. And so it is possible to evaluate the price and other aspects of a participant's bid apples-to-apples with the proposal of an IOU and treat them both fairly and on the same terms.

And, finally, I heard Mr. Sasso say that the Commission should provide flexibility in the terms of their RFP, and I also heard him say that he wants so much flexibility that the IOU could put some onerous terms in the RFP. And because the RFP is that of the IOU and not the Commission, the Commission should keep its hands off of that. Well, that is bad not only for the -- that idea is bad not only for bidders, but also for ratepayers, who as Mr. Green describes, would be harmed if bidders are either discouraged from submitting bids or have to deal with onerous terms by inflating their prices.

With that I want to turn to the proposed rule language that accompanies PACE's comments. I believe it is Item 7 in the composite exhibit. Our comments are Item 7, and then within the comments, Attachment 8. I want to quickly

highlight for you some of the rule language that illustrates the three principles discussed by Mr. Green and provides an example of how they could be implemented with rule language.

Looking first at Subsection 1 of the draft rule provided by PACE, you will notice that with respect to the scope of the bid rule, we continue to recommend that the scope of the rule be enlarged to incorporate more than projects subject to the Power Plant Siting Act. And in this version we have added -- we have suggested a definition that would include any capacity addition of 75 megawatts or more of any technology, whether new construction or the repowering or expansion of existing capacity.

Very quickly, I don't believe anyone in 1994 when we adopted the existing rule foresaw the development of large capacity additions that could have escaped the rule as it was formulated at that point. And for that reason I think it would be a mistake at this point to assume, for instance, that there will be no more repowerings, or to assume that there will be developments in the nature and type and size of power plants available to the IOUs that could be the subject of RFPs, which if managed well could result in savings to ratepayers or could ensure the selection of the most cost-effective alternative.

We suggest that you adopt language that is more expansive than the published amendments, and we commend this version to you, and we also recommend that you have confidence

in your statutory authority to do so. We have briefed the subject of statutory authority earlier, and those early comments are incorporated here, and I don't intend to do any type of exhaustive discussion of that.

I would like to mention very quickly the most recent case coming out of the First DCA, which to our mind adds to the argument that you have the statutory authority to adopt a rule such as that proposed by PACE. It is the case of Franzden (phonetic) versus the Department of Environmental Protection decided last summer, this most recent summer. In that case, the court considered a statute which provided the following power to the DEP. "The division's duties to are to supervise, administer, regulate and control the operation of all public parks and to preserve, manage, regulate, and protect all park and recreational areas held by the state." And the question was whether this language provided specific authority for the Division of Parks to regulate free speech within the park. The rule said, among other things, "Free speech activities include but are not limited to public speaking, performances, distribution of printed material, displays, and signs. Any persons engaging in such activities can determine what the restrictions as to time, place, and manner may apply in any particular situation by contacting the park manager. The park manager will determine the suitability of place and manner based on park visitor use patterns and other visitor activities

occurring at the time of the free speech activity."

Now, conspicuously there is no mention of free speech activities, or public speaking, or distribution of printed material in the statute on which the DEP relied, but the First DCA, after reciting the history of the Save the Manatee case and others that followed, concluded that the agency was within its statutory authority. And, my goodness, if this agency was within its statutory authority given only this very general language, this Commission certainly has that and more when one takes into account not only the responsibility under 403.519 to choose the most cost-effective unit, but also its grid bill powers and its ratemaking powers to review and prescribe those activities that bear on and affect rates that the utility charges.

So we think you are on strong ground there and we recommend that you understand that you are not constrained by the limits of your statutory authority to keep the scope of the rule as it is presently.

In Subsection 2 of the proposed PACE language, PACE has set out its proposed mechanism for creating a point of entry to be used on those occasions in which potential participants see a problem with the terms and conditions of the RFP. And, again, this is only a point of entry. And we believe as one of the Commissioners indicated by her questions earlier, the very existence of this mechanism may have

something of a disciplining effect on any temptation to include or to load up an RFP with self-serving criteria.

On the other hand, as Mr. Green has described, the developers are not in the business of picking fights where winning a fight doesn't gain them anything. So I think it is unlikely that a developer will choose to spend the time and resources if -- well, let's put it this way, I have yet to find a client who has said to me, "I can live with this, but I want to hire you and go fight it anyway." That is not the way they do business. And I think it is something of a red herring to suggest that this is going to lead to an overly litigious type of mechanism.

In any event, we do want to focus on the fact that we have asked the Commission to adopt rule language that provides an opportunity for point of entry that would then involve -- if invoked would involve the filing of a complaint, an expedited evidentiary hearing, and a ruling during which time the RFP activities are held in abeyance. Again, we think that we are talking about 60 to 90 days.

When you consider that the Commission handles an entire determination of need case in about five months and holds a hearing within 90 days of the filing, something as narrowly defined as one aspect of an RFP package can be handled far more quickly than that. It hasn't been that long since an IOU in Florida filed an RFP that had such terms and conditions

as you shall hold your bid open for 390 days, and if the law changes we get to terminate the contract, and if you are one day late we get to draw down the entire performance bond. With those types of terms, the potential bidder does not need discovery. The potential bidder has a very firm handle on whether that is feasible or not and would not require a long time to be ready to make its case on that.

So we think these matters do lend themselves to an expedited consideration on the part of the Commission. And in response to one of your comments, Chairman Jaber, we believe that it requires a hearing and a ruling of the Commission as opposed to something that the prehearing officer can do, because this is a substantive ruling and not a procedural matter whether a particular term or condition affects the interests of a potential bidder is something we believe that belongs into the category of substantive rights that are affected.

At Subsection 3 and 4, we describe the use of a neutral and independent entity to score the proposals in any case in which the IOU proposes to submit -- intends to submit a proposal. And this is one area in which PACE has modified its original suggestion. Originally we suggested a single round of bidding. We now have adopted and recommend to the Commission a mechanism in which there are two rounds of bidding, and the second round conducted after all members of the short list have

received their transmission and integration costs, is the round in which the sharpened pencils are put to work and all bidders, including the utility if it made the short list, submit binding bids. And that is a variation on the theme that if the ratepayers benefit from one entity able to lower its bid, by all fairness the ratepayers will benefit more if everyone on the short list has that same opportunity.

And then in Sub 6 with respect to the concept of a binding bid, we recommend that this concept be implemented by placing on the IOU the same type of standard that the IPP would face if its proposal were accepted and incorporated in a power purchase agreement.

And I want to address the language in the published amendments for a second. It appears to us that there was an attempt to place a higher standard on an IOU in the published language, but we believe that the standard that was published which consists of whether the additional costs were unforeseen and beyond the utility's control offered too soft, too large a target to be meaningful. And by meaningful I mean would have any offsetting effect on the incentive of an IOU to low ball its estimates of its construction costs, its projections of heat rate and availability in order to win the RFP. Of course if they experience costs beyond those that they included in their assumptions, almost by definition those additional costs were unforeseen and they will argue that they were also beyond

its control.

We think something more stringent than that is required to accomplish the objective of putting some teeth in the rule that will govern the requirement that an IOU be realistic with respect to its projections of its construction costs and its performance parameters.

And, finally, in the last subsection we have included a requirement that all criteria, including all weighting and ranking factors and all price and nonprice considerations that will be applied to evaluate proposals be incorporated in the RFP. This is similar to what has been published. We encourage you to hold fast to that. We think that the ratepayers will win if the RFP is fully fleshed out in that regard.

Our version also says no increase to the public utility's cost of capital shall be imputed, and we will get into this subject matter in a separate phase when we talk about the pros and cons, or the rationale for and against the use of an equity penalty factor. We have suggested that this language be included based upon what, the give and take at the last July workshop.

At a minimum the rule language should perhaps be neutral with respect to that such that if an IOU proposes some mechanism like this, there is nothing in the rule that endorses it before the opportunity to consider it at the outset of the RFP process.

We have also attached a markup -- which is the next attachment -- markup of the published rule language. Our objective was to come up with a rule that was simple and streamlined and that also incorporated PACE's three principles. We found it more efficient to do that in the stand-alone language that I have been talking about to this point. But in the event the Commission prefers to work from the published language, we have attempted to make similar kinds of changes that would also lead to the incorporation of those principles.

And that concludes my comments.

CHAIRMAN JABER: Thank you, Mr. McGlothlin.

Commissioners, do you have any quick questions here? We do need to break for the day real soon, but if there are real quick questions we can take them up now.

COMMISSIONER DEASON: Well, I have just a few if this is the appropriate time.

CHAIRMAN JABER: Let's go ahead and start it, Commissioner Deason.

COMMISSIONER DEASON: Mr. McGlothlin, I'm just kind of hit and miss here a little bit, but one of the things you indicated in your proposed rule language concerning the binding nature of the bid, and I believe the standard that you endorsed was one such that the bid -- the self-build option, if that is a bid and it is declared the winner, that the IOU would be held to the same standard that would be applied to the IPP if they

had won the bid. Am I interpreting that correctly, that is your position?

MR. McGLOTHLIN: Yes.

COMMISSIONER DEASON: How do you know that is not the case now? I mean, you indicated some examples, you know, a heat rate, availability, maybe some O&M costs and things that were perhaps part of the bid. Is there a case that has been before the Commission where there has been a bid, a self-build bid that was approved by the Commission through a need determination that had heat rates or availability factors that were not achieved and we allowed the utility to collect more than was included in the bid?

MR. McGLOTHLIN: I'm not aware that it has ever been made an issue, so I can't say definitively whether it has been done or not. I'm not aware of any case in which it has been made an issue. And that may be due in part to the fact that the more recent ratemaking proceedings have been the subject of stipulations and settlements as opposed to any full blown case where every issue has been the subject of a hearing and issue making. But I can give you an example of the scenario where -- I think would illustrate the fact that there are different standards.

COMMISSIONER BRADLEY: Excuse me, is that a yes, no, or I don't know?

MR. McGLOTHLIN: I said I could not answer

definitively because I'm not aware that it has ever been made an issue.

COMMISSIONER BRADLEY: So that is an I don't know.

MR. WRIGHT: Commissioner, could I jump in for 15 seconds? I asked Mr. Breman whether there was any ex post, ex ante, or achieved heat rate versus projected heat rate comparison in the fuel cost-recovery proceedings a few months ago in connection with this docket, and he advised me that there is no consideration given to that. The heat rate as reported is the heat rate that is used. That is what I can tell you on the subject.

CHAIRMAN JABER: Mr. McGlothlin, go ahead, you were about to finish your response to Commissioner Deason.

MR. McGLOTHLIN: And let me refer to the IOU's proposal in this case. They would have you subject to -- for the language that has been published, the use of the prudency standard. And let's assume a situation in which the IOU in its evaluation of proposals assumed a very aggressive -- let's just be silly about it, a 6,400 standard for heat rate. And after the fact it achieved 7,100, but they show that the industry standard is 7,250.

I'm sure the IOU would argue that it didn't meet its target, but how can you find we are imprudent when we are beating the industry standard. And so that is the type of situation I can envision in which standards would be less

stringent than the one we are proposing.

COMMISSIONER DEASON: But I thought that there was language in the IOU proposal that said something to the extent that we could consider what they bid in their proposal or something to that effect. That it may not be just a strict prudency standard. You would not read that into their proposed language?

MR. McGLOTHLIN: I didn't see that.

COMMISSIONER DEASON: I thought I saw that somewhere. Mr. Sasso, did you have language to that effect, or am I imagining it?

MR. SASSO: No, you are not imagining it. We substituted for unforeseen and beyond control language that is in substance what you just described. If I can put my hands on it, but it was here --

COMMISSIONER DEASON: I think it was in response to a concern expressed by Commission Baez.

MR. SASSO: Exactly. It's at the end of proposed Section 14, and it says that we can seek cost-recovery of overruns essentially if the utility can demonstrate that such costs were prudently incurred taking into account that the self-build option was based on lower cost estimates.

COMMISSIONER DEASON: That is the term. Taking into account. That doesn't give you any comfort, Mr. McGlothlin?

MR. McGLOTHLIN: Frankly, I don't know what it means.

I remember the language, but I did not see in that language any standard other than the prudency review, the traditional prudency review.

COMMISSIONER BRADLEY: Mr. McGlothlin, you made the statement that we should make the IOUs adhere to the terms of their bid. Would that effectively take them out of the regulatory process from that point on as it relates to that particular plant?

MR. McGLOTHLIN: I don't think so. We have examples now which the IOUs are no longer part of strict rate of return regulation, and we have examples in which the Commission has devised incentives that depart from straight rate of return regulation to which they avail themselves. And so I think in this situation where the Commission is looking for that project that is most cost-effective, it is only reasonable to require the IOU to be realistic in the way it is formulating its proposal.

And if the IOU is realistic, then two things happen. First of all, you have an apples-to-apples comparison; and, secondly, there is very little likelihood that the requirement is going to ever require the IOU to get back any costs.

COMMISSIONER BRADLEY: And I guess I'm not understanding, because one of the primary functions of this Commission is to make sure that the consumer gets the best deal. And that means that we are here to deal with underruns

and overruns and to make sure that everything is just as it should be financially so that the consumer gets power that is reliable and at the appropriate price or cost.

And I'm just wondering if we have these stringent terms that deal with the bid process -- I mean, where do you see the Commission, if something isn't just right financially, how do you see the Commission interacting with the bid process if they are to be held to all the terms of the process, even the IPPs?

MR. McGLOTHLIN: Well, the starting point is that the ratepayers should get the benefit of the most cost-effective proposal. And from PACE's point of view that is the purpose, as we see it, of placing on the IOU some standard more stringent than the question was it prudent. So that if the IOU submits a proposal that is unrealistic, and then that proposal is not achieved, unless there is a mechanism there to deal with that, then the ratepayers may not have received the benefit of the most cost-effective alternative because that -- one of the bidders may have been more cost-effective, but was simply ruled out because of overly aggressive projections by the IOU.

CHAIRMAN JABER: Commissioner Deason, were you done with your questions?

COMMISSIONER DEASON: I thought I was, but I have one further question.

CHAIRMAN JABER: Go right ahead.

COMMISSIONER DEASON: Mr. McGlothlin, concerning the need for a point of entry to be able to file a complaint on the front end of the RFP, and I was referring to some terminology, I think you used it as well as Mr. Green, something to the extent of onerous or infeasible terms, I think that was some terminology that was used. Is that what you envision as could rise to the level that would justify a complaint, onerous infeasible terms?

MR. McGLOTHLIN: Those would be the types of terms that would interest bidders in spending the time and resources to contest the terms.

COMMISSIONER DEASON: Well, do you agree there should be some type of standard that we just should not be allowed to entertain any type of complaint, or is that at the Commission's discretion? You can file a complaint and we can look at it and say this is ridiculous and there is no obligation for us to have a hearing, or do we have an obligation to have a hearing if you complain about the size of the paper?

I know that is a ridiculous thing, but I'm trying to understand if there should be a standard employed up front, there should be some requirement for you to show that there is an onerous or an infeasible standard or term, and that there should be some obligation before you file a complaint. It should have to rise to a certain level. Do you understand my question?

MR. McGLOTHLIN: I believe I know where you are going with that, and I believe along the way at one of the workshops or some earlier stage in the process we did work with an attempt to identify a stand along those lines. And if my memory serves me correctly, we had listed onerous, unfair, commercially infeasible because -- and there may have been one more, but I can't remember what it was. But I don't think conceptually we would disagree with the idea that this opportunity is not for the frivolous waste of the Commission's time and resources. As a practical matter --

COMMISSIONER DEASON: And I'm not suggesting that you would. But it just seems like there may be some -- if we could include some type of language, it may make it clear on its face and make the rule more effective if there is such language.

MR. GREEN: Commissioner, if I could add, I think that is what we were attempting to do with out terms onerous, and, you know, unrealistic, or commercially infeasible, or something like that. I agree with you, there is some qualification there. We are going to make sure we're not going to come -- I'm not going to hire this expensive lawyer to come and talk about the size of the paper that it is printed on. That's only when it is a condition that is actually going to effect whether or not PACE members or other independents would bid or not bid on the RFP.

CHAIRMAN JABER: Okay. We are going to stop right

here and pick up with the rest of the Commissioners questions.

Mr. Twomey.

MR. TWOMEY: Madam Chair, would you entertain taking Mr. Bach, he has only got, I think, three or four minutes max and needs to get back if he can.

CHAIRMAN JABER: I wish I could, Mr. Twomey. I've got a Commissioner that needs to pick up a child from school. So we don't want that child waiting outside of the school at night. But we can -- if you talk to Mr. McGlothlin, perhaps we can take him up first thing in the morning. And I apologize for that. In the future we will do a better job communicating what the schedule will be for the conclusion of each day.

Thank you.

(The hearing adjourned at 4:45 p.m. to reconvene at 9:00 a.m., Friday, December 6, 2002 at the same location.)

(Transcript follows in sequence in Volume 3.)

STATE OF FLORIDA)

: CERTIFICATE OF REPORTER

COUNTY OF LEON)

I, JANE FAUROT, RPR, Chief, Office of Hearing Reporter Services, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

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

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

DATED THIS 12TH DAY OF DECEMBER, 2002.

JANE FAUROT, RPR
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FPSC Division of Commission Clerk and
Administrative Services
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