

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 3

PAGES 204 THROUGH 364

PROCEEDINGS: HEARING

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

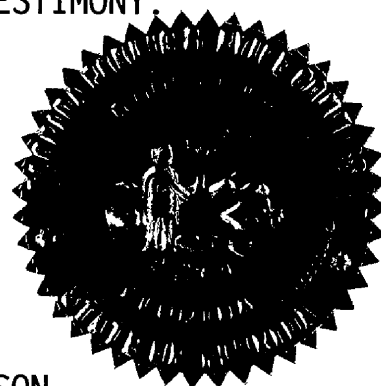
DATE: Tuesday, December 10, 2002

TIME: Commenced at 9:00 a.m.
Concluded at 1:50 p.m.

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

REPORTED BY: TRICIA DeMARTE
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Official FPSC Reporters

APPEARANCES: (As heretofore noted.)



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P R O C E E D I N G S

1
2 CHAIRMAN JABER: Good morning. Let's go ahead and
3 call this hearing to order this morning. Where we left it last
4 night, Mr. Green, you were doing your presentation and
5 Commissioners had questions, but I understand that you've
6 agreed to let Mr. Bach go first this morning, and we'll come
7 back to you.

8 MR. GREEN: That's fine, ma'am, yes.

9 CHAIRMAN JABER: Mr. Bach, you have a short
10 presentation, you said?

11 MR. BACH: Yes, I do, Madam Chairman. Thank you very
12 much, and I thank Mr. Green and staff over there for allowing
13 me. I have an early flight. My name is Ernie Bach, and I'm
14 executive director of the Florida Action also known as FACT.
15 The problem with speaking at the end usually is redundancy.
16 And as the meeting yesterday dragged on, for the sake of
17 brevity today my whole first and second page three minutes to
18 four minutes is going to be forgotten about.

19 If I may, on the lighter side, I'm never disappointed
20 when I come here. There's an awesome presence of corporate
21 casting and fantastic scripts so capably acted out. After all
22 the comments from experts and attorneys that come down the line
23 from that end of the table that eventually reaches this chair,
24 I'm always concerned that my comments, although in clearly
25 understandable English and sometimes naive-sounding

1 terminology, may not be understood by those to whom it's
2 directed.

3 Sometimes after listening to all the corporate
4 Berlitz, especially the very capable talents of Mr. Sasso's
5 command of circuitous verbology, I wonder if I'm in the same
6 country, especially since it's my task to interpret, decipher,
7 and rewrite the world of Tallahassee and take it back to the
8 folks that I do.

9 For the record, there is an addition of another
10 respected organization who has become an associate member of
11 the Florida Action just six weeks ago. The 25-year-old Florida
12 silver-haired legislature while in Tallahassee at their annual
13 session joined the cause on the Bid Rule process. We have
14 provided for your information in the record a copy of their
15 Senate Bill 110 entitled, "Fairness, Equity And Benefit To
16 Florida Electric Consumers." This bill passed unanimously
17 through their joint committee, passed in the Senate unanimously
18 and passed the House 52 to 1 which lone vote was later changed.

19 In the final process of their session to prioritize
20 their bill, the silver-haired legislature found that this was
21 their overwhelming number one priority bill this year. For
22 future reference, please take note that I will be representing
23 that organization and its hundreds of members in 11 area
24 chapters throughout Florida as an associate member of FACT on
25 this issue.

1 It's our opinion that the previous decision by the
2 PSC to approve the recent need determinations presented by both
3 FPL and FPC will most likely end up costing Florida ratepayers
4 of those corporations additional millions of dollars in excess
5 rates. And we're here to object to the methodology leading to
6 those approvals, the monopoly preserving Bid Rule. We've
7 researched the arguments and come to the conclusion that
8 delaying the recent self-build approvals until after this Bid
9 Rule review would not have caused detrimental results in
10 providing Florida's future electric needs. We found the IOUs'
11 argument deficient.

12 As to the approval of the second plant for FPL in
13 order to meet the insignificant, at best, shortfall, it is our
14 opinion that the influence of the IOUs in obtaining that,
15 notwithstanding the significant evidence against its immediate
16 need, again personifies the public's negative perception of the
17 process. Unfortunately, all of that is underwater -- is water
18 under the bridge, and all we can hope for from this body is for
19 you to do the right thing with the current Bid Rule process so
20 that those same ratepayers may possibly benefit in the future
21 from this current laughable process that holds the public
22 hostage and gives the IOUs their continued gold-plated
23 profit-making machine. Failing to open up the process to make
24 it fair, to give it the transparency that we have been seeking,
25 and to permit independent decisions to be made by someone other

1 than the fox in the hen house will in the eyes of the public
2 only expose the PSC and the public as hostages of the Florida
3 utilities.

4 It is our hope that you will act on the realization
5 that this could well be the last chance to derail the
6 utilities' luck and cartel on building power plants in Florida.
7 What we have been asking you is no different than what is
8 prevalent in other states. And as I testified to you some
9 months ago, it was a process used in Long Island, New York just
10 this year where FPL was only too happy to participate in the
11 process that we seek here and which gained them a contract to
12 build a merchant plant up there. And I don't hear them
13 complaining about that.

14 Commissioner, we need to get real with the facts, the
15 facts as they really are, the truth and reality, stop the smoke
16 and mirrors of the IOUs. The citizens of Florida would like to
17 see this agency act like the public's Service Commission. To a
18 more positive note, FACT would like to commend the Commission
19 staff for the most recent revisions that it has proposed to the
20 rule. They do represent a marked improvement over the existing
21 rule and could clearly result in a higher likelihood that
22 Florida's electric consumers will receive overall lower-cost
23 electricity as a result of the PSC being more confident that it
24 has approved only those generating projects that are truly most
25 cost-effective.

1 While we believe that much more needs to be done to
2 the rule in order for the PSC to have the ability to fully
3 carry out its statutory responsibility of approval, FACT
4 appreciates the extent of the revisions already proposed by the
5 Commission staff.

6 Let me close by offering some detail to my
7 suggestions for essential further revisions. Redundantly but
8 important enough to repeat, the bidding process must be fair,
9 impartial, and independently judged. Commissioners, it works
10 in other states. The bidding process must be truly
11 competitive. The bidding process must result in the most
12 cost-effective project. The Florida consumers must be the
13 beneficiaries of this system.

14 After reviewing the proposed rule revisions offered
15 by PACE and by the IOUs, it is our contention that the PACE
16 revisions are the better suggestions and should be adopted by
17 the Commission in order for the Commission to have full
18 confidence in the projects and for the consumers to have that
19 same confidence as well as respect for the decisions made by
20 the PSC. We ask that you curtail the current process which
21 protects the IOUs' monopolistic practices with the guarantee of
22 higher profits for those corporations and their executive
23 salaries but which continues to don Florida electric users with
24 high rates and which have the potential to continue the highest
25 rates in the Southeast and most of the USA.

1 This is a time when the collective hands of corporate
2 America, especially those who are considered involved with the
3 necessities of life, those hands have to be removed from the
4 gasping throats of a growing population of almost defenseless
5 citizens who are daily drained of their ability to meet those
6 needs for health and basic services for a safe and respectable
7 lifestyle, including affordable electricity. These are my
8 constituents and you, the PSC, are a guardian of some of those
9 needs whom those citizens count on. Thank you, Madam Chair.

10 CHAIRMAN JABER: Thank you, Mr. Bach. Commissioners,
11 do you have any questions of Mr. Bach before he leaves? Thank
12 you.

13 MR. BACH: Thanks again.

14 CHAIRMAN JABER: We need to go back to Mr. Green's
15 presentation, and I think, Commissioner Palecki, you were next
16 in line with questions. Did you have questions?

17 COMMISSIONER PALECKI: No.

18 CHAIRMAN JABER: Okay. I do, Mr. Green. But before
19 I do that, staff, you've passed out a one-page amendment to
20 Exhibit Number 1?

21 MR. HARRIS: That's correct, Commissioner. In the
22 process of copying and producing the exhibits a page was left
23 out, and it is from the City of Tampa and the Solid Waste
24 Authority of Palm Beach County which I believe is Tab Number 6.

25 CHAIRMAN JABER: Okay.

1 MR. HARRIS: And there's three numbered pages
2 followed by a second set of numbered pages. This would be
3 Page 4 of the second set, "Changes Suggested By City Of Tampa
4 And Solid Waste Authority Of Palm Beach County." We do have
5 copies for the parties that I will be handing out.

6 CHAIRMAN JABER: Thank you. Mr. Green, when you were
7 speaking yesterday, you went back and forth between scoring
8 factors and the IOUs should know which criteria are important,
9 so that brought me back to a question I asked Mr. Sasso
10 yesterday. Are you more interested in having a numerical
11 evaluation of the criteria, or do your members -- is it enough
12 for your members to know which criteria are more important than
13 others? I need to nail that down for purposes of my
14 understanding.

15 MR. GREEN: Yes, ma'am. I think -- what's important
16 to PACE members is to know what are the important criteria by
17 which the bids are going to be evaluated. And I think there's
18 some misconception yesterday. What PACE members are looking
19 for is not a detailed weighting 1 through 50 of all 50 criteria
20 that could possibly be used in an evaluation. But what we are
21 suggesting, that there are probably five, six key areas of
22 evaluation criteria that are consistently looked at.

23 Price is obviously one. You know, price is, in all
24 likelihood, a very heavily weighted and important criteria on
25 all these evaluations. And what we are suggesting -- and I'll

1 give you some examples of some of these criteria categories, if
2 you will, and these are what we think should be weighted. And
3 by "weighted," again, if you want to rank them 1 through 10,
4 great. And I think I had suggested with Ms. Clark in some
5 off-line discussions that maybe some tiers of weighting is
6 acceptable. But what's important is identify what is important
7 such that bids can respond accurately to what the true needs of
8 the utility and in the end run the consumers really are.

9 Price is probably a very important criteria. And we
10 think you ought -- if it's important and if that's the heaviest
11 weighting, say it's the heaviest weighted thing; that, you
12 know, all things being equal, price is going to determine it,
13 if that's what it is.

14 There are a bunch of operational parameters that are
15 always talked about. For example, ramp rates. Is ramp rate
16 important? If it is, say so. Personally, I don't care if
17 it's -- if that's more important than, say, run time per
18 dispatch call, I don't know. But identify those things that
19 are really critical to you for your operational needs of the
20 system. Run time per dispatch call, down time between dispatch
21 calls, quick starts. Is it important to have a quick start
22 capability of the unit for your operational needs, or is it
23 just a nice to have? Yeah, identify what's really critical on
24 the front end on operational characteristics. And if there is
25 any bonus points to be given for, like, transmission

1 considerations, identify that.

2 In recent RFPs -- responses to RFPs, bidders were
3 sometimes hit with \$120, \$140, \$150 million charges for
4 transmission charges, not knowing that there's a real benefit
5 if you could have located somewhere else on the system. If
6 there are true benefits, if there are I call it bonus points,
7 if you know you can get some -- if it really helps system
8 operational capability on voltage control or something else to
9 be located in a certain region, say that on the front end. The
10 IOUs know this on the front end. They know it certainly when
11 they start evaluating bids because they're ranking people
12 according to this criteria when you review their evaluation
13 process. And they start ranking -- and they start doing this
14 evaluation ten days after they receive the bids.

15 So to suggest to me that they don't know what's
16 important when the bids are submitted but magically ten days
17 later now they know what's important in all this criteria is
18 again a stretch.

19 CHAIRMAN JABER: With the current proposed language,
20 all criteria including all weighting and ranking factors, if we
21 leave that language in, you would understand that that's not a
22 mandate that the IOUs have a numerical weighting and ranking
23 evaluation process. You're just saying -- let me make sure I
24 understand, and you agree or disagree. You're just saying, if
25 you've chosen a numerical process, say that up front, and

1 whatever the process you've chosen, say that up front.

2 MR. GREEN: Yes, ma'am. If the IOU has decided
3 that -- let me list some of these other criteria I think are
4 being used. Price is one; operational parameters which I've
5 already talked about are some others. There is usually a
6 criteria, a broad category which I would summarize as
7 permissibility. You have a fourth one that is probably in
8 there usually, environmental considerations, and maybe a fifth
9 one on fuel supply requirements. And I'll just use those five
10 as examples.

11 But the investor-owned utility knows what is -- you
12 know, which of those are really the most important things. Is
13 it really -- for example, in fuel supply, is it important,
14 really important that the winning bidder be connected to two
15 different pipelines or just that they guarantee that there's
16 going to be adequate fuel? These are the considerations they
17 make in the evaluation process, but our point is that identify
18 what the relative importance of all these broad categories of
19 criteria are. Then identify what are the considerations you'll
20 make in these broad categories.

21 For example, in fuel supply, is dual fuel important?
22 Yes or no? Is hooking up to two pipelines important? Is the
23 fact that you have -- if site control is a broad category, is
24 it important you own the land, or is it adequate that you have
25 an option on the land, or is it good enough to know that I've

1 come in with a letter of intent with Farmer Brown, and he's
2 going to let me put an option on this land? But, you know, how
3 are you going to evaluate that criteria? And I'm not
4 suggesting that if you own the land, you get a 10, and if you
5 have a site option, you've got an 8, and if you've got a
6 letter, it's a 4. I'm not saying that. There will be some
7 subjectivity in this evaluation, and we accept that, but tell
8 us the criteria by which the subjective evaluation is going to
9 be based upon.

10 CHAIRMAN JABER: Now, in response to one of my
11 questions to Mr. Sasso, he said it is so subjective that a lot
12 of this determination can't be made until we see the actual
13 bids. Now, I know you've got a lot of experience, Mr. Green,
14 and I don't want to put you in an awkward position of speaking
15 of your past experience, but generally speaking, is that
16 correct? Is that a legitimate concern that you really -- the
17 subjectivity comes into play after you see the bids?

18 MR. GREEN: First of all, I respectfully disagree
19 with my good friend Mr. Sasso. The people that are actually
20 evaluating these bids and the people that are actually
21 submitting the RFPs and issuing the RFPs, they know what their
22 system needs when they issue the RFP. They know what sort of
23 operational characteristics they are seeking to maximize the
24 efficiency or the reliability of their system. They know what
25 that is on the front end when they issue this RFP. They know

1 how important it is for run time or ramp time or ramp rates or
2 any -- they know how critical it is to them. They know where
3 the good spots are to put generation supply for reactive power
4 that would help voltage control. I mean, they know these
5 things up front.

6 There's nothing in the bids that now awakens them and
7 alerts them, aha, hook it up at Lake Wales, and now it's a
8 great buy for us. They know this system better than anybody
9 does. They're good companies. They know how this system is
10 run, and they know what would benefit the system when they
11 issue the RFP. They don't have to look at bidders who are
12 throwing in, quite frankly, shots in the dark, not knowing
13 exactly what the most important thing is, that somehow we're
14 going to reveal something that they don't already know. They
15 have been operating the system for a hundred years and they
16 know it.

17 CHAIRMAN JABER: You filed comments in this
18 proceeding, so I can ask you about your experience. And my
19 question is simply this: How do you know that companies that
20 should know that? Did you hold positions with your --

21 MR. GREEN: Before I -- I retired from Duke Energy
22 this summer after I closed Duke's offices here in Florida. I
23 was with Duke for 31 years. Twenty-seven of those years I was
24 with the regulated side of Duke, and I was very familiar and
25 active in some of the RFPs that were issued by regulated

1 utilities in North Carolina. I spent time with regulatory
2 commissions in North and South Carolina in my previous
3 positions. And an investor-owned utility knows what it needs
4 when it issues an RFP. To suggest that you can't identify if a
5 ramp rate is real important or if a location on a transmission
6 point is real critical, you won't know that until after a
7 Calpine or a Constellation or a Reliant issues a bid that might
8 propose some far-off plant is, quite frankly, just not true.

9 You know this up front. You know how important it
10 is. You know that if you have a voltage control situation on
11 the grid, you know that if you had supply in this region, it
12 would help that, and you should identify that up front and say,
13 this is what would really help our grid. And if you can locate
14 this megawatt supply we're needing in this region, bonus points
15 are given. I mean, it helps us. It's good for consumers. You
16 ought to identify that up front; not say during the evaluation
17 process, gee, guys, if you had put this over in this region
18 over here, you really would have done well. That's not the
19 time to do it. You know it up front.

20 CHAIRMAN JABER: Mr. Green, I need to move on to
21 Mr. McGlothlin for questions on the legal aspect, but for
22 purposes of developing this record, I want to put you on the
23 spot. If that language, including all weighting and ranking
24 factors, remains in the rule, I need to hear a commitment from
25 you on behalf of your members that you understand -- this is

1 one Commissioner speaking. This may not be the view of other
2 Commissioners. I need to hear that you understand that would
3 not be a mandate on the companies to numerically score the
4 criteria, but rather, it's my understanding, it would be
5 whatever method they use to identify the importance of the
6 criteria be disclosed up front in the RFP.

7 MR. GREEN: Can you refer where you're looking at in
8 the language? I'm sorry. I've lost my big green book.

9 CHAIRMAN JABER: No problem. In the rule, it's sub
10 5 -- it's Paragraph 5 sub F. Is that the correct cite? All
11 criteria, is that sub 5F? It's 5 sub F, isn't it?

12 MR. BALLINGER: Yes, Commissioner.

13 CHAIRMAN JABER: It might be 6F.

14 COMMISSIONER DEASON: I believe it's 5F, Madam
15 Chairman.

16 MR. BALLINGER: Commissioner, that's also taken with
17 5E. That goes along with it and all of -- above that with the
18 methodology. Those things need to be taken in total.

19 CHAIRMAN JABER: Okay. It's the paragraph,
20 Mr. Green, that reads, "All criteria, including all weighting
21 and ranking factors, that will be applied to select the
22 finalists."

23 Let me finish my questions, Commissioner Bradley.
24 I'll be right with you.

25 MR. GREEN: And your question is, if that was to be

1 taken out or that was -- be remained? I'm sorry.

2 CHAIRMAN JABER: No. If it's my intent to leave that
3 language in, do I have a commitment from your members that it
4 would be your understanding that weighting and ranking factors
5 does not mandate that the public utilities numerically score
6 those factors for purposes of issuing an RFP, but rather,
7 whatever evaluation process they use to grade the importance of
8 the factors be disclosed up front? So if they use their
9 subjectivity to say, it looks like site control is really going
10 to be important to us and obviously price is the most
11 important, they so state, but that they don't necessarily have
12 to say, price is number 1, and site control is number 10.

13 MR. GREEN: Yes. The PACE members can support
14 language in here. And I'm not the lawyer, so I'll assume that
15 my attorney will look at it and make sure it's right. But, I
16 mean, if the language is such that they will identify what's
17 important, not by exact numerical ranking, but identify what's
18 important, what's somewhat important and what's a nice to have,
19 and I don't know how else to say it, and I'm a little simple
20 probably in my -- but if that can be identified on the front
21 end, then the IOU must then stick to that. They can't come in
22 with surprise criteria that, you know, if you had a fuel oil
23 storage tank there, that's what we're really looking for.

24 As long as the criteria that they are going to use is
25 identified clearly up front, how you're going to make the

1 evaluations within that criteria are summarized in a way that
2 is clear and can't be gamed. The exact rank as 1 through 10 is
3 not critical to us. However, I would suggest that you can rank
4 them in general categories.

5 For example, I think price is more important than
6 perhaps site control, and if so, say that. And if a numerical
7 ranking works and if you ever think there's going to be some
8 independents to the evaluation, that would certainly help the
9 independent evaluation of these bids. And that's what we were
10 striving for in our request for, you know, as much numerical
11 ranking as possible. And if you really do know, I guess I
12 wouldn't preclude them from -- if they do know that this is the
13 first, second, third, fourth, and fifth, so identify it. But
14 to sit there and just say that these are all the criteria we
15 are going to consider, and we really don't know which is most
16 important yet, that's not quite far enough for us.

17 CHAIRMAN JABER: So saying all of that, what I also
18 heard you say is, if they have in their business decisions made
19 the call to numerically rank, you want that so stated.

20 MR. GREEN: Exactly. Another good example is in a
21 recent RFP, a bidder was dinged -- that's a technical term,
22 dinged -- for a --

23 CHAIRMAN JABER: What did you say?

24 MR. GREEN: Dinged. That's a Tennessee thing,
25 D-I-N-G-E-D. They were penalized for minimum air standards,

1 for example. The DEP might have minimum air standards out
2 there, requirements. Well, someone else was -- you know,
3 perhaps did a little bit better than the standard. Well, is
4 that important or not? Is it good to have something that's
5 better than the minimum standard, or do you just have to meet
6 the minimum standard?

7 These criteria are known up front. Say it up front.
8 And is that real, real important that you beat the standard, or
9 is it okay just to meet the standard? That's the type of
10 weighting we're talking about, is what's important what's real
11 important and what's a nice to have, but stick to it. And I
12 guess that's the biggest thing, is stick to the criteria once
13 you've established it in the evaluation process that we a
14 third-party evaluator will do.

15 CHAIRMAN JABER: Now, Mr. McGlothlin, yesterday you
16 said in your presentation you really don't believe we can have
17 an objection mechanism. I think you referred to it as the
18 complaint mechanism, but the proposed rule allows for
19 objections to be filed. You really don't think that kind of
20 mechanism can be included in the rule without an opportunity
21 for a hearing. Would your position still be the same if it was
22 between that and having no objection mechanism in the rule?

23 MR. MCGLOTHLIN: I think our preference would be to
24 have the complaint mechanism. However, if there is an
25 alternative that has the effect of alerting the Commission to

1 the possibility of terms and conditions that are either by
2 virtue of being infeasible or discriminatory bears on the
3 ability of the potential bidders to participate, and if the
4 mechanism -- if it doesn't involve a complaint mechanism, at
5 least reserves the ability of the bidders to raise that at some
6 point so that there is at some point an adjudication, then I
7 think the more guidance we can have in the process, the better.
8 We've stated our druthers, but there may be something short of
9 that that would be an improvement over no mechanism at all.

10 CHAIRMAN JABER: Have you thought about what those
11 alternatives are, or you haven't, you haven't really come at
12 this from that standpoint?

13 MR. McGLOTHLIN: No. I'm aware of the discussion of
14 what other states are looking at or doing. I'm not personally
15 familiar with that to the extent that I can say it's a good
16 idea or not, but Mr. Green may have more knowledge than I about
17 what the alternatives are.

18 MR. GREEN: Clearly, we like the idea of -- if there
19 are onerous terms identified or if we think there are some
20 infeasible terms, 390 days keeping your bid open that just make
21 it commercially undoable, you know, we need to vet these
22 concerns early. And we're looking for a quick, expedient
23 resolution of it. You know, hearings seem to be the best way
24 we could see going about this as far as providing evidence, you
25 know, to whomever, the Commission, whatever. But if there's a

1 more expedient way of doing it that still gets what we're
2 seeking -- again, what we're seeking is an opportunity to raise
3 potentially onerous, infeasible terms on the front end and get
4 a resolution to that on the front end very quickly such that we
5 can -- so that members of PACE or other independents can make a
6 decision consciously that we're going to go forward and bid on
7 this with these terms, where the terms are going to get
8 revised, and we can bid on it, or, you know, we know up front
9 going in what the outcome of this is going to be.

10 Other states are doing it different ways. I think,
11 Madam Chairman, you mentioned Louisiana on a couple cases, and
12 they do it in -- I'm not sure exactly how they do it, but I do
13 think they rely on staff to hear the concerns. I think they go
14 to a hearing officer, I think, and somehow it is worked out
15 with the IOU. But there is a concern with the Louisiana folks.
16 And I think some of the same members that are sitting on the
17 other side of the table here filed comments in Louisiana
18 against Entergy, that that process still allows them, I think,
19 in one of their letters to manipulate the result or manipulate
20 the terms if the staff isn't successful in getting them to
21 revise some onerous terms.

22 CHAIRMAN JABER: I hear you say quick, expedient way
23 of resolving the dispute. You want an expedited process, but
24 in your comments, you also ask us to consider holding in
25 abeyance any need case, and I can't reconcile the two. If we

1 can come up with a mechanism that allows us to resolve
2 objections or complaints -- I don't know what the ultimate
3 language would be -- in an expedited process that gives you the
4 opportunity to address the objection in front of us and the
5 IOUs an opportunity to respond to that objection, would you
6 withdraw your position related to holding the need cases in
7 abeyance?

8 MR. McGLOTHLIN: May I speak to that?

9 CHAIRMAN JABER: Mr. McGlothlin.

10 MR. McGLOTHLIN: The purpose of this portion of the
11 PACE proposal that would have the IOU hold the RFP proceeding
12 in abeyance was very simply to enable the potential bidders to
13 bring the objections or complaints, however they're
14 characterized, and get a resolution in time to be able to
15 submit their bids before the deadline. It's a sheer matter of
16 timing.

17 And if the mechanism that is arrived at is that
18 expedient so that the answer is given or the indication is
19 given in time for the bidders to be able to play, then there's
20 no reason to hold that RFP proceeding in abeyance. But the
21 only reason for that part of it was so that a bidder who has a
22 contention to present doesn't miss the boat by bringing it to
23 the Commission first.

24 CHAIRMAN JABER: I understand your point. How long
25 do bidders usually have to bid to the RFP process?

1 MR. GREEN: Usually about 60 days.

2 CHAIRMAN JABER: Okay.

3 MR. GREEN: And that was the purpose for having that
4 putting in abeyance because we recognize if it went to a
5 hearing, it might be 45 days, I don't know how long it takes,
6 40 days. And if then all of a sudden the bidder has to wait
7 until the results of the hearing to see if there's going to be
8 any change in terms or conditions of the RFP, then all of a
9 sudden he's only got seven days or something to complete it,
10 that would be kind of a fire drill that we would like to avoid,
11 if possible.

12 CHAIRMAN JABER: So if the whole process related to
13 complaints or objections by some miracle could be resolved in a
14 ten-day period, that should work?

15 MR. GREEN: If you had a magic wand and could resolve
16 this in ten days, then we would drop our request for abeyance.

17 CHAIRMAN JABER: Those are all the questions I have
18 of you. Commissioner Bradley, you had a question, and then we
19 will go to Commissioner Palecki.

20 COMMISSIONER BRADLEY: Yes. My questions go to
21 scoring and the weighting. And I'm trying to figure out how if
22 all of the bidders know what all the variables are and what all
23 the requirements are, how that makes the process more
24 competitive, because I've always been under the impression that
25 an RFP is put out there to let other experts put before the

1 biddee (phonetic) their thoughts and their ideas and to deal
2 with their thoughts and their ideas in terms of
3 cost-effectiveness, cost efficiency and other things.

4 Now, if we're going to -- if the IOU is going to
5 effectively walk the bidder through and reveal all of the
6 variables that they have identified, then I don't see how
7 that's a competitive process. Would you explain to me how that
8 increases competition?

9 Also, in my opinion, what that does also is to allow
10 the bidder to lock the bid -- the IOU into the process because
11 if the IOU later on discovers that there's another variable or
12 another consideration that needs to be out there, then that
13 means then that the bidder is going to say, well, you didn't
14 tell me what that was now. And I'm assuming that the IOUs are
15 looking for individuals to bid on these projects who have the
16 expertise to construct and to run a generation facility. And
17 I'm just not seeing the logic behind scoring and weighting and
18 having all of these variables or the things that might be
19 considered revealed up front to the bidder. And I'm trying to
20 figure out how if you have four bidders, how it makes the
21 process competitive if all the bidders know what all the
22 variables are.

23 MR. GREEN: Commissioner Bradley, I think I've got
24 several subportions in there, so I'll try to hit them. If I
25 don't, please remind me. First of all, for the IOU to identify

1 what is specifically needed just helps bidders make more
2 competitive bids. I would liken it to if you wanted to add a
3 room on your house, and you solicited bids and say, I want to
4 add a room on my house, and it should be about 1,000 square
5 feet. And then you got ten bids come in, but what you really
6 wanted was a fireplace and maybe a hot tub in a corner. I'd
7 want a wet bar, but, I mean, it's -- you know, you as the
8 bidder know what it is you're really seeking. So as much
9 specificity as you can put in your bid request of what is
10 requested, you are going to get more viable bids coming in.
11 Because if you really wanted a fireplace and three of the
12 bidders didn't have a fireplace in their proposal, you are
13 going to throw them out, but you knew on the front end you
14 needed a fireplace.

15 The more specific without just tying the hands of the
16 IOU but the more specific the IOU can identify their need and
17 what's important to them in satisfying the need relative to
18 operational parameters or permissibility, whatever else, the
19 more bids you are going to get that will meet that need. And
20 the less bids will be thrown out because they didn't meet some
21 minimum requirements that were stated in the bid. So it's my
22 belief that just standard economic theory would tell you that
23 the more specific you can be on the RFP, the more detailed and
24 specific the bids are going to be to meet that need, and you'll
25 have a more competitive process.

1 The way it stands right now if you don't tell people
2 what you want, first of all, bidders won't bid because there is
3 so much uncertainty, or secondly, they will bid things that you
4 don't really want which adds no value to the consumers, or you
5 will be bidding things that just are really of no value, and
6 what is really of value goes unknown.

7 COMMISSIONER BRADLEY: But the purpose of a bid is
8 for the bidder to display to the person who is let to bid their
9 level of expertise as it relates to what they are bidding on,
10 in my opinion. And did I hear you say, and you correct me if
11 I'm wrong, that once these factors are put out there to be
12 scored and to be weighted, that no other factors can be
13 considered?

14 MR. GREEN: I believe that once they have identified
15 the factors of criteria that's important to them, and this is
16 the basis of the RFP, that that's what the -- that should be
17 the basis of the evaluation. Yes, sir.

18 COMMISSIONER BRADLEY: What if some unforeseen
19 incident occurs that requires that other factors be considered?

20 MR. GREEN: If, for example, that you've solicited
21 bids and you've identified five areas of criteria you think are
22 important. You've identified how important they are. And then
23 all of a sudden you've determined that -- I'm trying to come up
24 with an example that's feasible. You've decided that you need
25 to have something that's going to have much less water use.

1 You want to now consider air cool combustion turbines or
2 something like that. If it's something significant as that,
3 then I think you need to reissue the RFP because that's a
4 dramatic change, a significant change than what's being
5 required, what's important. So if it's a significant enough
6 change that changes the entire, you know, what's important and
7 what's not important criteria, then I think you need to reissue
8 the RFP.

9 COMMISSIONER BRADLEY: Let me ask you this question.
10 Would you agree that this process is a science as well as an
11 art, bidding itself is?

12 MR. GREEN: I'm not sure what you mean by that, sir.

13 COMMISSIONER BRADLEY: Well, there are certain things
14 that would be -- there are certain variables that would exist
15 or be included in every bid which would make it a science, but
16 then the thing that makes the process an art is those things
17 that would make that bid different from subsequent bids or from
18 other bids. Would you agree that all power plants are the same
19 in terms of their overall structure but very different in terms
20 of other factors that might make them cost-effective and
21 efficient producers of power and effective producers of power?

22 MR. GREEN: Again, I'm not sure I fully understand
23 your question. All power plants are -- what's being bid here
24 in Florida for all of these RFPs are combined-cycle plants.
25 They're basically the same plant. There are operational

1 characteristics that are different. There are pricing
2 considerations that are different.

3 COMMISSIONER BRADLEY: So that's where the art comes
4 in.

5 MR. GREEN: Well, no, sir. I still think it's a
6 science. I mean, your fuel price is based on your heat rate
7 you actually get and how good you are at operating the plant,
8 things like that. I mean, I'm not sure that's an art.

9 COMMISSIONER BRADLEY: Okay. Well, let me state it
10 like this then. Okay. You have Plant A, B, C, and D. Plant A
11 is located in northwest Florida. Plant B is located in
12 northeast Florida. Plant C is located in central Florida.
13 Plant D is located in south Florida, and they are
14 combined-cycle plants. Are these plants going to be identical?

15 MR. GREEN: Are these plants going to be identical?
16 They could be identical plants, yes, sir. Two and one
17 combined-cycle --

18 COMMISSIONER BRADLEY: In every shape, form, and
19 fashion these plants are going to be identical?

20 MR. GREEN: The plant itself could very well be all
21 GE combustion turbines two and one combined-cycle with the same
22 size steam turbine with auxiliary duct-firing. They could all
23 be the exact same plant, yes, sir.

24 COMMISSIONER BRADLEY: With no differences.

25 MR. GREEN: No, sir. Not on the plant itself, no,

1 sir. Where they are located is different but the plant
2 itself --

3 COMMISSIONER BRADLEY: But the location itself would
4 make for some differences; right?

5 MR. GREEN: The location itself --

6 COMMISSIONER BRADLEY: In terms of how you get fuel
7 to the plant. I mean, there's some variables that makes plants
8 different.

9 MR. GREEN: Yes, sir.

10 COMMISSIONER BRADLEY: I mean, we've got one, two,
11 three, four, five, six men sitting at the table here. You all
12 look alike.

13 MR. CLARK: And only one woman.

14 COMMISSIONER BRADLEY: And one woman. You all look
15 alike, but, I mean, I wouldn't say that you all are identical.
16 You know, there are some things that are very similar about
17 you, but there are some things that make you turn you into
18 individuals.

19 MR. GREEN: Is that a question?

20 COMMISSIONER BRADLEY: Because I wanted to bid --

21 COMMISSIONER DEASON: Maybe we should have --

22 COMMISSIONER BRADLEY: If I wanted to bid on Mike
23 Twomey and Mike Green, could I bid the same price?

24 COMMISSIONER DEASON: -- the beauty contest now that
25 we've been talking about.

1 MR. GREEN: My vote goes to Ms. Clark.

2 COMMISSIONER BRADLEY: But really -- and that's what
3 I'm getting at. I mean, the process, in my opinion -- that's a
4 little facetious, but there is a science that's a part of this
5 process, but there is also an art which means that there are
6 some things that are going to make each plant different, which
7 means that if you have a situation where no other factors can
8 be considered, I don't see how that makes a good policy.

9 MR. GREEN: If I could try to respond to you, though
10 I had several good lines about the beauty contest up here, but
11 I will pass on that. Your Plant A up in the northwest corner
12 and B up near Jacksonville and C is near Orlando and D is down
13 near Miami, those plants -- and they are all two and one
14 combined-cycle plants. They are going to have different fuel
15 providers.

16 You know, FGT would be the only one to supply the
17 plant up in panhandle up here. Gulfstream might be able to
18 supply the one in your Plant C. It probably can't get to D,
19 and it won't get to B. So, I mean, C might have two pipelines
20 that could serve it. If reliability of fuel supply is a very
21 critical importance to the investor-owned utility and they
22 know that -- you know, we're just not sure if both of these
23 pipelines are always going to run, and if they can be
24 interconnected to two of them, that's really critical to us and
25 that helps us; we need to identify that up front. And they

1 know that up front if that's important.

2 COMMISSIONER BRADLEY: But wouldn't it be important,
3 though, for the IOU to understand that the bidder understand
4 that that's important and that they just automatically include
5 that in their proposal to indicate that they have the expertise
6 to -- they have studied the situation to the extent that if
7 they win the bid, I mean, wouldn't that be a manifestation or
8 an indicator of that fact that they have studied this to the
9 extent that if they win the bid, that they could also operate
10 the plant because they understand what there is that they are
11 getting into?

12 MR. GREEN: I'm not sure I followed your question
13 again, sir. I think if you're saying, should the bidder be a
14 viable company who can really operate the plant that it's going
15 to bid on? Is that what you're asking me?

16 COMMISSIONER BRADLEY: Well, in my opinion, the
17 bidder should have the expertise to include those things on
18 their own because they should know exactly what they are
19 getting into and what -- I mean, if you say no other factors,
20 then later on it's discovered that something else needs to be
21 included and we're locked into no other factors, then that sets
22 up an instant protest or sets up litigation automatically.

23 MR. GREEN: Let me respond to your last comment.

24 COMMISSIONER BRADLEY: And what I'm trying to figure
25 out -- I'm looking at the three things that you put on your

1 list. I'm trying to figure out what can be included. They
2 seem like good ideas, but what can be included to make for a
3 better process, but what should not be included? Because, you
4 know, we may be stepping off into -- we may not understand the
5 unintended consequences and what the impact may be upon the
6 situation here in the state of Florida, because, you know, the
7 bottom line is that we do have a good situation here in the
8 state of Florida as it relates to generation. Now, I'm not
9 disagreeing that some things can't be done to make the process
10 better in terms of who's bidding and who's building, but we
11 have to be very careful that we don't upset the apple cart
12 here. We want to make sure that we're going to add some apples
13 to the cart and not turn it over, if you understand what I'm
14 trying to get at in terms of policy.

15 MR. GREEN: Yes, Commissioner, I think I understand.
16 The investor-owned utilities are good companies, and they can
17 build good plants. The PACE members are also good companies.
18 They also build very good plants.

19 COMMISSIONER BRADLEY: I agree.

20 MR. GREEN: This whole discussion here that's been
21 going on for the last year is to figure out how can the
22 consumers avail themselves of the best of the best. These are
23 all good companies that can all build good plants. How can the
24 consumers be assured that they are getting the best deal from
25 this wide array of potentially very good companies that can

1 build very good plants? The fact is that no one knows FPL's
2 system better than FPL. No one knows FPC's better than FPC.
3 No one knows TECO's system better than TECO. And when they
4 issue RFPs for capacity and/or energy, they are in the best
5 position to know what it is they need specifically and what it
6 is that is most important to them to maximize the efficiency
7 and the reliability of their grid to the betterment of their
8 consumers.

9 And all the PACE members are asking for is to
10 identify that criteria which is already known to be very
11 important and that which is most important, somewhat important,
12 and nice to have up front, and that will allow these very good
13 companies that can build very good plants to better hone in on
14 the specific need. And if it means that if for some reason
15 being around Plant D, the site, as you characterize it, is
16 really important for voltage control or whatever else, though a
17 bidder has a land option over in Polk County or something like
18 that, they can make the conscious decision to forfeit that land
19 option and try to get some property down in Dade County or
20 something.

21 COMMISSIONER BRADLEY: And I understand where you're
22 trying to get. Let me ask Mr. Sasso a question. Did you all
23 yesterday agree to have a third-party evaluator involved?

24 MR. SASSO: No, sir.

25 COMMISSIONER BRADLEY: Okay. What was --

1 MR. SASSO: There was some discussion that in the
2 event that a utility chooses to ask a third-party evaluator to
3 assist the utility, as in the case of some recent projects, but
4 not to replace the utility in conducting the evaluation and
5 making the decision but as a consultant, that we would agree
6 that we would indicate in the RFP that we reserve the right to
7 use such a consultant in the process. It was more a matter of
8 disclosure in the RFP that we were talking about.

9 What PACE has been suggesting is an independent
10 evaluator who would actually conduct the evaluation and make
11 the decision about which plant should prevail.

12 COMMISSIONER BRADLEY: I want to ask them: Is it
13 possible for you all to get together on some language that you
14 can agree to as a relates to a third-party evaluator? Is it
15 possible to have a little give-and-take here?

16 MR. SASSO: We have discussed that issue at some
17 length in the past several months with PACE, and we're not
18 optimistic that we can reach an agreement on that. We really
19 have a fundamental disagreement on whether that's appropriate
20 under the current system in Florida. We're adamant that it is
21 not appropriate to supplant the utility with some third party
22 to make the decision. In fact, Mr. Green said repeatedly in
23 the past few minutes, no one knows the IOUs' systems better
24 than the IOUs and we agree completely. Plus it's simply our
25 responsibility. The utility is going to be held accountable

1 for the decision, and so for that reason we're not willing to
2 entertain the suggestion that some third party make those
3 decisions for the utility. PACE is completely on the other end
4 of the spectrum. They don't want the utility to make the
5 decision. They don't trust the utility to make the decision.
6 They want somebody else to take that responsibility, and I
7 don't know about accountability.

8 COMMISSIONER BRADLEY: Is there anything that you all
9 can agree to?

10 MR. SASSO: Not on that subject, Commissioner
11 Bradley.

12 COMMISSIONER BRADLEY: What about scoring and binding
13 bids?

14 MR. SASSO: Again, we have discussed that issue, and
15 as I indicated yesterday, we believe the current version of the
16 proposed rule would accommodate the ability of a utility to
17 indicate, if the utility is in a position to do so, that some
18 requirements are threshold requirements, some requirements are
19 mandatory and disqualifying and others are not necessarily
20 disqualifying, but as Commissioner Baez pointed out yesterday,
21 when all other things are equal, any one criterion can become
22 disqualifying. It could become the determining factor. So
23 this idea that we can identify those things that we really have
24 to have is potentially problematic.

25 Currently, in the current process under the current

1 rule with recent RFPs, the utilities have been identifying
2 what's important to them. I don't think it's a secret to
3 anybody in this room, certainly my sophisticated colleagues at
4 the other end of the table, that economics are important.
5 Anybody who's paid attention to any of the need cases know that
6 economics is important.

7 All the factors that we're talking about really
8 are -- haven't played a role in the recent cases. The bidders
9 haven't even come close on price. So some of these other
10 issues simply haven't been determinative. In our recent
11 project, site control was disqualifying for one bidder, and
12 there was no bones made about that. There was open discussion
13 with that bidder before they were eliminated. They were asked
14 to provide evidence of site control. They couldn't do so, and
15 they were eliminated. So all of these factors are important.
16 They are identified as important. I don't know that we can
17 reach agreement on any approach to scoring and weighting that
18 we haven't already discussed.

19 I think the Chairman today has helped us make some
20 progress in flushing out the parties' opinions on what they
21 mean by the scoring and weighting, and I don't think we
22 disagree with the thrust of your questions or comments,
23 Chairman Jaber, that if a utility were going to use numeric
24 weights or some type of scoring or ranking system, that that
25 could be disclosed in the description of the evaluation

1 methodology.

2 COMMISSIONER BRADLEY: I don't want to speak for the
3 Chairman, but I think that I heard her -- it seems like she
4 maybe is getting at permissive language, may to include some of
5 these variables, not shall. Would you speak to the issue of
6 binding bids? And then I'll ask Mr. Green to see if he has
7 some ideas maybe that might offer us some compromise.

8 MR. SASSO: On the issue of binding bids, as we've
9 indicated, it's our position that IOUs cannot be held to costs
10 regardless of whatever else will occur in the future. We
11 certainly recognize, as we've discussed, that when we present
12 estimates of cost to the Commission, that the Commission takes
13 those seriously. We take those seriously; that when we later
14 ask for cost recovery, the Commission will apply a prudent
15 standard and will do so in light of all the facts and
16 circumstances, including the original estimates. But that is
17 the regulatory compact that we're entitled to cost recovery of
18 costs prudently incurred.

19 With respect to whether the utility would be able to
20 make some type of compromise on that issue, again it's a very
21 difficult thing to address without discussing changing the
22 regulatory compact. It's a fundamental premise of the system.

23 COMMISSIONER BRADLEY: Right. And what I'm -- my
24 problem with binding bids is the issue of price versus cost.

25 MR. SASSO: Yes, sir.

1 COMMISSIONER BRADLEY: And I'm concerned that if we
2 go to a price-based model, that -- I don't know if we have the
3 authority to do that because I believe the law says, the
4 statute says cost; right?

5 MR. SASSO: Yes, sir. In fact, on the agenda for
6 today is a discussion about cost-sharing, and Mr. Green or
7 Mr. McGlothlin gave some examples yesterday of situations where
8 there is some type of limited cost sharing. A utility could
9 agree to that in a particular case. As in the case of the
10 examples that Mr. Green discussed, those were stipulations by
11 the utility. That's where the utility agrees to essentially
12 modify the regulatory contract with the Commission or the
13 regulatory compact. And we've indicated in our prefiled
14 comments that in a particular need case, a utility might be
15 interested in entering into a stipulation for some type of
16 sharing of the upside benefit if they manage their costs
17 especially well and the sharing of the downside risk if there
18 are overruns, but that would have to be something the utility
19 would need to agree to.

20 COMMISSIONER BRADLEY: Dealing with cost and
21 eliminating price is a concept.

22 MR. SASSO: Yes, sir. It would be a stipulation by
23 the utility. We essentially have a contract with the
24 Commission, the regulatory compact, and a utility can agree to
25 modify that and accept some downside risk in exchange for some

1 upside benefit, but that should be addressed appropriately on a
2 case-by-case basis with a particular utility. We certainly
3 would answer your question whether the Commission has power in
4 the negative, and we don't believe the Commission could impose
5 that on a utility, but it is something a utility could agree to
6 in an individual case. So it's not appropriate for rulemaking,
7 but it might be an appropriate subject of discussion with the
8 utility in an individual case if they were interested in that
9 savings incentive or benefit sharing and risk sharing.

10 COMMISSIONER BRADLEY: Well, we as a Commission, in
11 my opinion, have the statutory authority to deal with costs and
12 to examine costs to the extent that we ensure that the public
13 is getting the best deal, and I wouldn't feel comfortable
14 moving away from that concept. Statutorily we can't.

15 And, Mr. Green, this is a question -- I mean, I'm
16 going to ask you the same question. Is there something -- can
17 we get away from price and get to cost and deal with some of
18 your binding issues?

19 MR. GREEN: All this is is trying to -- I don't know
20 if this is a price or a cost. All we are looking at is what
21 the consumers are going to pay on their bill. What is the most
22 cost-effective plant that can be put in service to make the
23 consumers as good as they can be?

24 On binding bids, if recent examples, perhaps not
25 Mr. Sasso's client, but on a recent RFP, they quote heat rates

1 of 7,300, 7,350 for the last three years in ten-year site plans
2 through April of this year. And when they issue an RFP, they
3 say they are going to make 6,900 Btu per kilowatt or 6,950 or
4 something for an average of net operating heat rate, a pretty
5 significant swing in the heat rate. I think as I said
6 yesterday on the largest need determination case that you
7 approved in this state in the history of your work here,
8 \$1.1 billion, the spread on the total revenue requirements was
9 \$83 million, I believe, including an equity penalty that your
10 staff said may or may not be most appropriate. Without that
11 equity penalty, it was a \$2 million spread. And if you take a
12 look at the total revenue requirements -- net present value of
13 the revenue requirements over the 30 years, that's \$6 or \$7
14 billion depending on what you want to assume for fuel or
15 whatever else. The spread is very, very small in these bids.

16 A heat rate differential in that one case of 200
17 Btus, not the 350 that was between ten-year site plans and what
18 was used, but the differential of half that much amounts to
19 about \$100 million net present value, more than makes up just
20 by that alone. Fifty cents in O&M spread out over the 30 years
21 makes up -- I think it was \$50 or \$60 million in net present
22 value. I mean, minor changes in these numbers make dramatic
23 swings in who was winning and who was losing these RFPs.

24 If a 6,900 average net operating heat rate is used to
25 win the bid and that is not guaranteed to be the heat rate as

1 charged to the consumers, then they did not get the best bid if
2 an IOU would have beat that with their guaranteed heat rate,
3 because when an IPP signs the purchased power agreement, the
4 contract that goes with that, they are binding themselves to
5 the heat rate. And that's what, you know, fuel charges will be
6 based upon. They are binding themselves to that capacity
7 payment which is basically their construction costs. If the
8 IOU says that they are going to build it for \$226 million but
9 they spend \$250 million and they get recovery for that,
10 consumers may not have gotten the best deal. Binding bids are
11 very, very important. They are critical.

12 And I've heard a lot of talk today about a
13 third-party evaluator and whether or not that's going to be
14 granted or not. Again, using Mr. Sasso's words about rational
15 economic entities, it cannot be questioned that the IOUs have
16 this overriding business reality that almost all of their
17 earnings come from a regulated return on invested capital, that
18 that's the reality of it. The best way to avoid that conflict
19 is to take the opportunity for a conflict away and have a
20 third-party evaluator. If, however, you decide in your wisdom
21 that a third-party evaluator is just not on the table and it's
22 not going to happen for whatever reason, then it just makes the
23 criteria and the weighting as well as the binding nature of the
24 bids that win the RFP even that much more important, because if
25 you take the evaluation independence away on the front end,

1 please make sure you're going to bind the winner to what they
2 say they are going to do.

3 COMMISSIONER BRADLEY: So if you could have your -- I
4 mean, in your opinion, three variables that you would like for
5 us to consider should be referenced with shall rather than may
6 or could.

7 MR. GREEN: I'm sorry?

8 COMMISSIONER BRADLEY: In other words, you are
9 interested in a mandate rather than permissive language.

10 MR. GREEN: I don't know what you mean by that, sir.
11 I'm sorry.

12 COMMISSIONER BRADLEY: Well, a mandate, if I say IOUs
13 shall use scoring and weighting means that it's a mandate. If
14 I say IOUs may use scoring and weighting, it means that it
15 could be a consideration, and it's there for them to use as a
16 guideline or as a guide.

17 MR. GREEN: No, sir, I respectfully disagree. I
18 think it must be a will. I think the rule must say that the
19 IOU will include the criteria that will be used in this
20 evaluation, that they will identify the relative weighting of
21 that criteria identifying what is most important and least
22 important, and they will identify the methodology by which
23 they'll evaluate these bids. I think that's a will. It's not
24 a may. If you just say that they might do it if they feel like
25 it, they're not going to do it. They have an overriding

1 business economic reality that would steer them towards picking
2 their own self-build option. That's in their economic
3 interest.

4 CHAIRMAN JABER: Commission Bradley, I need to
5 respond to a question you asked of me earlier so that we avoid
6 confusion. I wasn't suggesting that the language be
7 permissive. I was just seeking clarification from PACE about
8 what their position is related to what they believe all
9 criteria, including all weighting and ranking factors, mean.
10 You may recall yesterday we heard from Mr. Sasso that they
11 believed that PACE was insisting on a scoring mechanism. And
12 what I believe we achieved this morning is recognition by PACE
13 that whatever evaluation -- let me use a different word than
14 evaluation, whatever technique the IOUs choose to evaluate the
15 factors, whether it be a numerical mechanism or some other
16 mechanism, should be disclosed up front. And that's what I
17 think PACE has agreed to.

18 And I wanted to make sure on the record that PACE is
19 not suggesting that we dictate that the public utilities have
20 to use a numerical value in ranking the factors, but if they
21 do, they should disclose it up front.

22 MR. GREEN: I agree with what you just said, yes,
23 ma'am.

24 CHAIRMAN JABER: That might clear up some of the --

25 COMMISSIONER BRADLEY: Okay. And I want to make sure

1 that I understand very clearly what Mr. Green is saying. What
2 are you agreeing to Mr. Green?

3 MR. GREEN: I'm sorry, sir.

4 COMMISSIONER BRADLEY: What are you agreeing to?

5 MR. GREEN: Excuse me? I'm sorry.

6 COMMISSIONER BRADLEY: What are you agreeing to?

7 MR. GREEN: To what the Chairman just said, that we
8 are not saying that there must be specific weights identified
9 1 through 50 or 1 through 20 or whatever it is; that this is
10 number 1, this is number 2, this is number 3. We are
11 suggesting that relative weights are important, that the IOU
12 does indeed know what's most important, and they should so
13 identify that in the RFP. And they do know what's a nice to
14 have, and they should identify that in the RFP. And most
15 importantly, they should stick to that when the evaluation time
16 comes. If they've said that ramp rating -- a minimum downtime
17 between starts or between -- I don't know. If ramp rates --
18 minimal time to first megawatt, if that's really important, say
19 that up front, but when it comes time to evaluate it, don't say
20 now it's not important. Make them stick to what --

21 COMMISSIONER BRADLEY: If they say what?

22 MR. GREEN: If they say a criteria is very important
23 on the front end and bids are submitted on that basis and the
24 technique is, I think the Chairman says, that the evaluation
25 follows, that that criteria must remain is a very important

1 criteria. They can't go back there and say, hey, it's not
2 important now. We've changed our mind. They can't do that.
3 That's as simplistic as I can say it.

4 COMMISSIONER BAEZ: Can I interject one quick
5 question? But, Mr. Green, having said that, would you agree
6 that based on the surrounding proposals or based on the
7 totality of proposals, a criteria that was said to be very
8 important can essentially become null, all things being equal?
9 I mean, that it can no longer be counted because if you've got
10 the same -- and again, I'm going to use the term loosely, but
11 if you've got the same scoring on a certain criteria as all the
12 other proposals, that somehow doesn't -- you know, the relative
13 differences are no longer there, so it doesn't provide -- do
14 you see what I'm saying? I know I'm being -- I'm using poor
15 words here, but --

16 MR. GREEN: Yes, sir. I'm using simple examples, but
17 if you determine that -- let me pick one that might make some
18 sense.

19 COMMISSIONER BAEZ: I mean, if everybody had -- for
20 instance, if environmental concerns were one of these criteria
21 that were identified as very important on a given RFP and
22 everyone had the same -- every proposal, perhaps even including
23 the self-build option, offered the same advantages in terms of
24 environmental concerns, well, environmental concerns no longer
25 have the stature that they once did because you are working

1 with an even field. There are no differences between them.

2 MR. GREEN: Yeah, I see where you're headed, but I'd
3 submit to you a slightly different view of it. If
4 environmental considerations is determined to be up front a
5 very important criteria and all the bidders come in with a
6 2.0 parts per million emission rate or something like that and
7 they all exceed this, you know, then they are all the same.
8 It's still a very important criteria. And the weight of it, if
9 you will, was very important, but they all meet it. And so
10 relatively they're all -- it's all the same, and so that
11 wouldn't decide the winning bid. Something else has been
12 decided, but it's still an important criteria.

13 You know, my point is that you can't -- after you get
14 it and if there is some differences, and I guess it wouldn't
15 really matter if they all submitted the same 2.0 parts per
16 million, but if there are some differences in these things and
17 there are some subjective rankings made 1 through 8 for the top
18 eight bidders perhaps in this category, and then all of a
19 sudden, they say, well, no, environmental considerations are
20 not really that important, that's what we want to avoid. They
21 know up front if environmental considerations are going to be
22 important, and they know it when the bids are submitted. And
23 that's not going to change ten days later when they start
24 evaluating the bids. It's just not going to change.

25 COMMISSIONER BRADLEY: Precisely. And along that

1 thought, that's what I was getting at at the very beginning of
2 my discussing with you. If all of the bidders know what all of
3 the factors are and all the proposals come in and all of them
4 are doable and all of them are excellent proposals, then the
5 IOU still is going to have to use subjectivity if they want to
6 choose someone other than a self-build option to build the new
7 generation. So why wouldn't that create a conflict? Because
8 you'll have all ten bidders, you know, claiming that they were
9 discriminated against. Why did you chose A over C? Why did
10 you chose D over B? You know, I was close in my bid and my RFP
11 was doable. You're being subjective, so we have ten protests.

12 MR. GREEN: Well, Commissioner.

13 COMMISSIONER BRADLEY: And that's why I said that if
14 some things are not on the table, that means then that the art
15 comes in, the science is there, but the art comes in because
16 then that means then that that indicates that they have a
17 different level of expertise or that they have thought through
18 the process more than thoroughly than, say, their competition.

19 MR. GREEN: Yeah, I'm not sure where your question is
20 there, but let me make this comment, see if it gets to your
21 point. If all these -- if all parameters --

22 COMMISSIONER BRADLEY: Okay. I'll ask this question.
23 You have ten bids. All of the important variables are exposed
24 to all ten of the bidders. How does the IOU pick the best bid
25 if all of the bids are doable and very close in terms of all of

1 the factors that were put out there to be bid upon?

2 MR. GREEN: If they are all very close, you take that
3 which is best of those close --

4 COMMISSIONER BRADLEY: Well, how do you determine
5 what's best?

6 MR. GREEN: Again, you go down through the
7 parameters. Heat rate is a parameter. If everybody else meets
8 permissibility, if they're all exactly the same, and everybody
9 else meets environmental, and they are all exactly the same,
10 and everybody meets the fuel supply requirements, and they are
11 exactly the same -- and first of all, this is never going to
12 happen -- if they have all the same ramp rates, and they all
13 have the same minimum downtime, and they all have the same
14 minimum time for the first megawatt that's going to be
15 available for the grid, if all of that is exactly even, then
16 you simply go to price.

17 What's the best price? Whether it's capacity price
18 or energy price. That's what you do. I don't know how the IOU
19 would do that. I've never seen in my experience ten bidders
20 come in with exactly the same bids. If they are close, that's
21 why it's important to identify the relative weighting of the
22 different criteria. If they are real close, say, in
23 environmental considerations but they are all over the board on
24 fuel supply requirements, but fuel supply requirements you've
25 determined as being a very, very important criteria, but

1 environmental considerations are kind of, you know, just meet
2 the minimums and you've got it, well, then you are going to go
3 with the bidder that has the best offer if fuel supply
4 requirements. That's why weighting is so important, so you can
5 differentiate so that you can use some subjectivity, quite
6 frankly.

7 COMMISSIONER BRADLEY: But isn't each bidder going to
8 feel that his or her bid is the best bid? Because, I mean,
9 what they include in the bid is going to be based upon what
10 they consider as being --

11 MR. GREEN: Yeah, I'm sure every bidder --

12 COMMISSIONER BRADLEY: -- what should be in the bid
13 in order to win the bid. So I'm just -- well --

14 MR. GREEN: I believe every bidder in your example of
15 ten bidders, they all feel they have the best bid when they
16 submit it. They are all submitting a bid. They're spending a
17 million dollars to submit a bid on the hopes they're going to
18 win the bid. So they're putting forth their best bid based on
19 the criteria that's been established, and the methodologists
20 are going to explain how their bid is going to be evaluated.
21 Now, they don't know what the other bids are. So they don't
22 know whether they are the lowest bid or not. And that's why
23 the process has got to be as independent and as unbiased and
24 overseen as much as possible to ensure that the process is run
25 fairly and equitably and consistent with the criteria that's

1 been established on the front end.

2 CHAIRMAN JABER: You two are done? I'm going to
3 switch to Commission Palecki. Yeah, Commissioner Palecki and
4 then Commissioner Baez.

5 COMMISSIONER PALECKI: Yes. Mr. Green, one of your
6 positions is that all bids -- well, that all submitters,
7 including the investor-owned utilities, place a binding bid at
8 the same time and that all bids are final. The utilities have
9 argued that over the course of the past several years they have
10 been able, after the bids or the request for proposal, the
11 RFPs, are submitted, to negotiate with the top bidders and
12 reach a better deal. And they have also pointed out that they
13 have been able to sharpen their own pencils and best all of the
14 bids. And then in that manner, they have provided the
15 customers with the best deal, a much better deal than they
16 would have received if they had just gone with one of the
17 proposals. How do you respond to that? That that last
18 opportunity to either negotiate or to sharpen their own pencils
19 isn't the best for the ratepayers?

20 MR. GREEN: Well, Commissioner, on the last two RFPs
21 that have been done here, I'm not sure that the issuing IOUs
22 ever got to a negotiation stage with any of the bidders because
23 they identified prior to getting to the negotiation stage that
24 they were the least -- or the most cost-effective option. And
25 I don't think they got to a negotiation stage. The way the

1 current rule is that the IOU has the opportunity to take a look
2 at all the other bids, and if they can see a way to better that
3 bid, they can make that known and they do it. At least that's
4 their interpretation of the exiting rule and that's what they
5 are doing. I don't see that in the existing rule. I don't see
6 where the existing rule says they get a second bite of the
7 apple, but that's practice.

8 And I'm not suggesting that a second round of bids
9 isn't good. I think it is a good thing to do, but I think it
10 would be better to have a second round of bids of those folks
11 that make the short list or those folks that meet the minimum
12 criteria. I think you heard testimony yesterday from Mr. Vaden
13 at New Smyrna Beach. Though it is a significantly smaller
14 capacity or energy request and it's probably for a shorter
15 term, the principle is the same, that they basically have a
16 bidding process, and then they have a short list which was
17 either three or five, I can't remember what he said, and then
18 they basically are all sharpening their pencil putting in the
19 bids that they think what is their best offer.

20 If you only have one entity doing that, the
21 investor-owned utility in this case doing it, certainly that
22 has some benefit to the consumers, but if you were to have five
23 entities sharpening their pencil and having a second round of
24 bids, I think you would better the lowest-cost bid that the IOU
25 is offering.

1 COMMISSIONER PALECKI: So under your scenario, all
2 submitters, including the IOUs, would place their bids at the
3 same time, but you would allow -- I guess this would be at the
4 utility's discretion, a second or even third round among the
5 top bidders? I see that Mr. McGlothlin would like to respond.

6 MR. GREEN: I think my attorney wants to say
7 something. He's clicked his button.

8 MR. MCGLOTHLIN: Let me answer first in terms of the
9 PACE proposal that's reflected in the draft rule language. The
10 PACE proposal is that there would be two rounds of bidding.
11 There would be a first round, and this also contemplates the
12 use of a third-party independent evaluator.

13 COMMISSIONER PALECKI: Well, let's not go there.
14 Let's just assume that we're not going to have a third-party
15 independent evaluator. It will still be the utility that does
16 the evaluation.

17 MR. MCGLOTHLIN: In that event, I think the principle
18 of allowing if there is to be a second round, it should be
19 applicable to all bidders and not -- the IOU still applies.
20 Our concept was the first round would be the basis for forming
21 a short list. The utility would provide that those who made
22 the cut --

23 COMMISSIONER PALECKI: And would the utility bid at
24 that time on the first round?

25 MR. MCGLOTHLIN: Yes, the utility would be one of the

1 proposals considered --

2 COMMISSIONER PALECKI: They are in the same position
3 as any other bidder at that point.

4 MR. McGLOTHLIN: Yes. Then those who made the short
5 list would be provided with a detailed examination of
6 transmission integration costs, information they would not have
7 had prior to that point. And those on the short list would be
8 able to incorporate that information into a second and binding
9 bid. We think that would be done simultaneously with any
10 sharpening of the pencil that the IOU would want to do at that
11 point.

12 COMMISSIONER PALECKI: Would that be mandatory, or
13 would it be discretionary with the utility?

14 MR. McGLOTHLIN: The second round?

15 COMMISSIONER PALECKI: The second round.

16 MR. McGLOTHLIN: We envisioned that would be a
17 prescribed method of conducting their RFP.

18 COMMISSIONER PALECKI: So there would always be a
19 situation where the top bidders would be given an opportunity
20 to do even better.

21 MR. McGLOTHLIN: Yes.

22 COMMISSIONER PALECKI: And the investor-owned
23 utility, if it had bid and was one of the top bidders, would be
24 in the same position as the other top bidders who would be
25 given that opportunity.

1 MR. MCGLOTHLIN: Correct. Now, we envision that that
2 second round would all be simultaneously. What we're trying to
3 avoid is a situation where the IOU has a unilateral opportunity
4 after seeing the bids to decide to come under them after having
5 that option no one else has.

6 MR. GREEN: And if I could, Commissioner, let me add
7 to that point. The reason why that is so important is that if
8 you have two rounds of bids but then you are still going to
9 give the IOU the unilateral and sole right to lower that bid
10 again, or if you're going to have three rounds of bids but at
11 the end of that you're going to let them undercut it by another
12 penny, quite frankly, there's no reason for IPPs to submit a
13 bid. If all we're doing is setting the target that's going to
14 get lower and lower but we really never have the fair
15 opportunity to win the bid because someone else always has the
16 ability to trump us, then that has, as I said in my testimony,
17 a very chilling effect on whether or not we want to invest
18 money to even submit the bid. That's why it's important that
19 if you have two -- make it three rounds, it doesn't matter, but
20 everybody has got the same right on the tail end.

21 COMMISSIONER PALECKI: So under your scenario, the
22 utility would be able to sharpen their pencil to come up with a
23 better deal, but the other top bidders would have that same
24 opportunity as well.

25 MR. GREEN: Absolutely. And what I hope is not the

1 case, but as you said, assume there is no third-party
2 evaluator. All -- the IOU and the top bidders, if it's three
3 or five, whatever, submitting a bid to some entity that's going
4 to impartially and fairly evaluate those bids on price, and at
5 that time, they can't come in and throw in some new criteria
6 either that would throw somebody out. I mean, once you've
7 gotten to the point you've got a short list of bidders, they
8 are all technically and operationally feasible. They all meet
9 the minimum criteria. They have passed the go, no-go
10 decision-making process, so then it should really be who's got
11 the lowest price.

12 COMMISSIONER PALECKI: Mr. Wright, I saw that you
13 were leaning up towards your microphone earlier. Did you want
14 to add something?

15 MR. WRIGHT: No, sir. I think I was leaning up to
16 read my notes.

17 COMMISSIONER PALECKI: I wanted to just ask a few
18 questions about other area, and that is, the objections to the
19 bid instrument and the hearing track and whether there is
20 adequate time for a hearing track. The first question I have
21 is: Would discovery be available to a party that objected to
22 the bid, and whether or not this Commission can, through this
23 rule, legally restrict or not allow discovery? And that would
24 be for Mr. McGlothlin.

25 And let me refine my question. It seems to me that

1 we have a bid instrument. We have objections to the bid
2 instrument. So we have a known instrument. We have a party
3 objecting to that bid instrument. And I'm not sure -- well,
4 the Rules of Administrative Procedure provide a hearing track
5 and a nonhearing track, and the nonhearing track is where you
6 do not have, let's see, I guess the language is disputed issues
7 of material fact. So if you have a bid instrument and an
8 objection to a bid instrument, what is the disputed issue of
9 material fact, and why do we need a hearing track?

10 Couldn't we go on a nonhearing briefing track that
11 would allow each party to say -- the utility to say why the bid
12 instrument is fair and the party objecting to say why it's
13 unfair? Why do you have a factual matter that, one, requires a
14 hearing and, two, might require discovery as well? Because the
15 discovery worries me. Discovery takes a lot of time and it's
16 somewhat burdensome as well.

17 MR. McGLOTHLIN: I'll take a first crack at that, and
18 let me start by saying, even if there is a hearing track, as
19 you describe it, our first position is that that is time well
20 invested when you consider the alternative which is the
21 possibility of a determination at the end of the existing
22 process that the RFP was defective to the point that there
23 needs to be a revised RFP reissued. The IOUs circulated some
24 time lines yesterday that we recognized did not include the
25 hearing process on the existing rule.

1 Yesterday evening, as an exercise, I tried to flush
2 out the point I made during the comments about the likelihood
3 that if you take that into consideration, it's going to be on a
4 net basis a longer process than our PACE proposal. And if
5 you're interested in seeing that, I have worked it up, and I
6 think that's where it belongs in the overall equation of what
7 we're talking about. But what I determined is that when you
8 map out what would have to be done if the Commission ordered an
9 IOU to reissue an RFP and compare that against the PACE
10 proposal which I --

11 CHAIRMAN JABER: Mr. McGlothlin, are you speaking
12 from that document?

13 MR. MCGLOTHLIN: Yes.

14 CHAIRMAN JABER: I'd rather be looking at it as
15 you're speaking to it. Thank you.

16 MR. MCGLOTHLIN: What I'm distributing is my longhand
17 markup. This morning it has been typed, but I have not had a
18 chance since it was delivered to the hearing room to proof it.
19 So at some point prior to lunch, I could probably distribute
20 that as well.

21 CHAIRMAN JABER: Go ahead, Mr. McGlothlin.

22 MR. MCGLOTHLIN: The first thing I did was to review
23 the assumptions that the IOUs made regarding the PACE proposal
24 which appear on the upmost right-hand columns. And you'll see
25 I made basically only two adjustments to the IOUs' assumptions

1 which result in a gain, a shortening of the time frames. The
2 first was to reduce the time frame for the submission of bids
3 from 75 days to 35. It is correct that the PACE rule proposal
4 contemplates at the outset that there would be a minimum
5 75 days for the submission of bids following the issuance of
6 the RFP. But that has to do with the original RFP, and it
7 was -- the time frame was selected to, more or less, ensure
8 that bidders would have a chance to file a complaint or a
9 protest at the PSC and have that resolved before the deadline
10 for submitting bids.

11 It would not be our intent to have the same 75-day
12 limitation applied to a revised RFP that culminates from the
13 complaint process, because by that time, the parties have had
14 their say, the terms have been vetted, and there's no dispute
15 at that point regarding the RFP terms. And so I reduced the
16 75 to 35 and think that would be more indicative of what we
17 would expect to see.

18 And then Line 23, contract negotiations and
19 announcement of RFP awards, values assume 63 days for a
20 negotiation process. Well, bear in mind that under the PACE
21 proposal, again, the RFP terms will have been vetted, and there
22 would have been two rounds of bids, and the selection of the
23 most cost-effective proposal or combination of proposals, we
24 contemplate that the RFP terms would include the major contract
25 terms, and so we envision that if there have been two rounds of

1 bidding and there has been the selection of the most
2 cost-effective alternatives, there should be relatively less to
3 negotiate at that point. And so I reduced the 63 days to the
4 35 days to reflect our assumption on that point. Which means
5 that instead of 677 days on the time line, you're looking under
6 the PACE proposal at 609 or at least an order of magnitude
7 there.

8 I then on the left-hand side added to the IOUs'
9 assumptions the part that was missing yesterday which is the
10 scenario which there is also an issue of the RFP terms that
11 arises not in the early part of the process but late in the
12 game. That could happen, for instance, as an issue in the
13 determination of need process. And if that occurred and if the
14 Commission determined that the terms of the RFP were so
15 defective as to taint the process and there's a need to have a
16 revised RFP, I assumed a time frame that is roughly based upon
17 the experience with the FPL revised RFP, not day for day but in
18 terms of order of magnitude, 30 days to issue the revised RFP,
19 three weeks to submit bids to the revised RFP, three more weeks
20 to develop a short list, seven days to initiate negotiations.
21 And some of these time frames are exactly those that the IOUs
22 used in the columns above. And once you get to the
23 announcement of the RFP award and you filed your determination
24 of need, that those time frames are dictated by PSC rule and
25 are exactly duplicative of what the IOUs used above.

1 So when you consider the impact of the do-over,
2 you're looking at not 609 days but 755, assuming that the IOU
3 again is determined to be the most cost-effective. If the IPP
4 is selected, then you have to factor in a longer time frame for
5 the preparation of the determination -- petition for
6 determination of need, but for purposes of comparing the bottom
7 line time frames, I took the shorter of the two, assuming that
8 the IOU is determined to win the RFP award. If that happens on
9 the back end of things instead of being determined early in the
10 process, it is the current rule and not the PACE proposal that
11 is longer, and in this exercise longer by 146 days even if you
12 consider a hearing process of being involved in the PACE
13 proposal. So that's one way to, I think, reinforce our
14 contention that when you consider the alternatives, the hearing
15 track is not necessarily a detriment to the PACE proposal.

16 COMMISSIONER PALECKI: Could you focus on Line Items
17 5 through 10, and at the same time respond to my question about
18 discovery and whether this Commission can at this time through
19 this rulemaking take any action to restrict discovery or to
20 make it so it's not overly burdensome?

21 MR. McGLATHLIN: Our expectation is this: If an IPP
22 sees a term in a proposed RFP and contends that it is either
23 commercially infeasible or discriminatory or onerous, the IPP
24 has little needed discovery to make that case, that the IPP has
25 that information. So I don't think we had thought in terms of

1 precluding discovery entirely, but I think we could design a
2 process that is both expedited and yet provides an adequate
3 opportunity for discovery within that expedited time frame.

4 COMMISSIONER PALECKI: Tell me why discovery would be
5 necessary. I'm trying to think of a scenario where you are
6 stating that the bid instrument is overly broad, didn't define
7 criteria to the extent that you can understand what to bid on.
8 Why would you need discovery in that scenario? I mean,
9 wouldn't you make your argument? The IOUs would make their
10 argument. I'm not even sure why we would need to hear
11 witnesses in that scenario.

12 MR. McGLOTHLIN: And you may have cases like that.
13 I'm reluctant to say there will never be a need. For instance,
14 you could have a situation where the IOU sponsors testimony
15 supporting its proposed term or condition and the IPP may wish
16 to depose the witness prior to hearing. That's a form of
17 discovery that perhaps could be useful in a given context.
18 But, by and large, I agree with your point that there should be
19 little need for discovery if the issue is whether the IPP is
20 correct in its contention that a term should be kicked out of
21 an RFP.

22 COMMISSIONER PALECKI: I'm just concerned about a
23 situation where there could be a -- one of the participants in
24 the bid process that's not as reasonable as you or Mr. Green
25 and that came in with 150 interrogatories and, you know, went

1 ahead and subpoenaed ten people for depositions, and the next
2 thing you know, we are talking about, you know, a two- or
3 three-month discovery process. How can we prevent that from
4 happening at this time so that we don't have to worry about
5 that if we go ahead with this track where there would be an
6 opportunity for objections in a hearing?

7 MR. McGLOTHLIN: I believe the Prehearing Officer
8 would have the authority and the power to devise or to limit
9 discovery to that which would be reasonable under the
10 circumstances, and by limiting the number of interrogatories or
11 the number of depositions, I think you could enforce
12 reasonableness on the process in that way.

13 COMMISSIONER PALECKI: Can we put a time limit, a 7-,
14 14-day time limit for discovery that would apply to all
15 parties?

16 MR. McGLOTHLIN: I believe the answer is yes, as long
17 as it's reasonable under the circumstances. Yes, sir.

18 COMMISSIONER PALECKI: What I'm trying to figure out
19 is some way we could reasonable assure that the number of days
20 between Line Items 5 and 10 remain where they are. And you
21 have them at 45 days both for your -- the PACE proposal as well
22 as the proposed rule, which I think is reasonable, but I'm
23 concerned about scenarios where we might see that 45 days
24 through discovery alone be extended to a 90-day period and
25 that's unacceptable. I just think we need to look at these

1 things up front so that we can ensure that we don't have
2 unintended consequences from what we do with this rule.

3 MR. McGLOTHLIN: PACE proposes an expedited time
4 frame for resolution of this and would be willing to accept
5 those conditions necessary to make that happen.

6 COMMISSIONER PALECKI: So you would be willing to
7 accept a very short discovery period, perhaps even seven days
8 maximum for discovery.

9 MR. McGLOTHLIN: Yes, sir.

10 COMMISSIONER PALECKI: Thank you.

11 CHAIRMAN JABER: Commissioner Palecki, I can't leave
12 this point because I want to make sure I understand PACE's
13 position. If we find a creative way to make the process even
14 shorter than 45 days, you don't have an objection to it as long
15 as you have an opportunity to respond -- to present your
16 complaint and respond to any allegations you need to respond
17 to.

18 MR. McGLOTHLIN: That's correct, Chairman Jaber.
19 This is our proposal, but our objective is a process that
20 enables us to have the opportunity to identify problems with
21 the RFP at the outset of the hearing -- at the outset of the
22 RFP process rather than the tail end. We think that serves not
23 only the bidders but it serves ultimately the ratepayers. And
24 if there are variations on this theme to get that job done,
25 we're certainly receptive to that.

1 CHAIRMAN JABER: Commissioner Palecki, you were done
2 with your questions? Commissioner Baez had some, and
3 Commissioner Deason, you do?

4 COMMISSIONER BAEZ: This question is to Mr. Green and
5 Mr. Sasso. Mr. Sasso, first, I heard you say when we were
6 speaking about the independent evaluator and what your
7 objections were to it. I guess my impression was, and you can
8 correct me if I'm wrong, but your main concern with an
9 independent evaluator has to do with the IOU's ability to make
10 the decision or who's going to be held responsible or who's
11 responsible for making the ultimate decision on adding
12 capacity; is that --

13 MR. SASSO: Yes, that is correct. It's a question of
14 whose project is it and who's held accountable for it.

15 COMMISSIONER BAEZ: Okay. So if that ability or that
16 responsibility was preserved in the IOU, is there anything else
17 that's objectionable about the existence of an independent
18 evaluator, whether you're bound to it or not?

19 MR. SASSO: Yes, sir. As we've discussed yesterday,
20 the independent evaluator is not going to be in a position to
21 make an appropriate judgment for the utility even if somehow
22 his making that judgment could be compatible with the utilities
23 retaining responsibility and accountability which, frankly, we
24 don't to get. We still don't understand how the evaluator
25 could make that decision, and it's still our decision, and

1 we're still accountable for it. But let's assume for the
2 moment, we'll put that to one side.

3 COMMISSIONER BAEZ: You're using the word "decision,"
4 and I think that word or that concept should only be -- at
5 least for purposes of this discussion, it is the IOU's decision
6 to make. That's a given for these purposes. I'm talking about
7 the existence of an independent evaluation. Without making
8 comment on whether your adherence to that evaluation or the
9 weight that you place on that evaluation or even the extent to
10 which you would ever be bound to that evaluation, just I'm
11 talking pure and simple the existence of an independent
12 evaluation.

13 MR. SASSO: Your question is: Would we have a
14 problem with the existence of an independent evaluation as long
15 as we're still making the decision?

16 COMMISSIONER BAEZ: Based on those assumptions, yes.

17 MR. SASSO: Well, the concern we have is that is the
18 Commission's role. Currently, we make the decision. The
19 Commission staff functions as the independent evaluator. The
20 Commission functions as the independent evaluator. The
21 Commission makes the decision. Now, if we introduce yet
22 another individual or entity into the picture, what status,
23 what stature, what weight does that have? Does it have any
24 impact on the Commission's decision? Who picks this person?
25 What are his credentials? How is this person going to be

1 charged with the information and the criteria and the judgment
2 and the knowledge of our system to provide a meaningful
3 evaluation for use by us or by the Commission? There's so many
4 unknowns that we think are fraught with risk. And for this
5 reason, we think -- if anybody is going to make a decision to
6 use an independent evaluator, it should be left up to the
7 utility as a consultant to assist the utility in conducting the
8 RFP, getting feedback on the process. As in the case of hiring
9 many consultants for many of projects. But to inject that
10 person somehow formally into this Commission's work so that it
11 has evidentiary value or the like is troubling to us.

12 COMMISSIONER BAEZ: To your knowledge, do you think
13 that the Commission's -- you've cast the Commission or at least
14 the Commission staff on some level as the independent evaluator
15 or this Commission as the independent evaluator.

16 MR. SASSO: Yes.

17 COMMISSIONER BAEZ: Do you believe that our function
18 or the way we carry out our function is perhaps equivalent to
19 what, say, your consultant would be? Not discounting the fact
20 that they're working for you, in essence, but --

21 MR. SASSO: In many ways it's very much the same, if
22 not identical, especially if there's more communication at the
23 front end with staff. It's very much the same. Now, in the
24 case of our Hines 2 project, we asked Mr. Taylor to help us
25 design the RFP because it had been many years since the company

1 had done it. There were different individuals involved, new
2 employees, and so we wanted some assistance by somebody who was
3 proficient in the area. We wouldn't ask the staff or the
4 Commission to help us design an RFP. We believe that would be
5 inappropriate. So there would be that difference.

6 But apart from that, what staff does and what the
7 Commission does is very, very similar to what Mr. Taylor did.
8 He got the information, looked at the information, looked at
9 the programming that was done and assessed the competence of
10 the evaluation and the fairness of the evaluation which is
11 essentially what the staff and the Commission does.

12 COMMISSIONER BAEZ: Now, is there -- and I may have
13 asked you this yesterday, but I just want to be clear. Is that
14 the totality of the function of an independent evaluator, and
15 forget the independent, of an evaluator hired by the utility?
16 In that respect, I remember that you said the charge could be
17 different.

18 MR. SASSO: I would hate to be definitive about this
19 because it really is going to vary utility by utility, project
20 by project. If you look at an evaluator as a consultant, it's
21 going to depend upon the needs of the utility. Now, if a
22 utility wants to retain an individual to do some shadow
23 programming or whatever else, that's one way to do it. If a
24 utility wants to retain a consultant to look at the outcome and
25 look at the documentation that's been developed and give an

1 assessment, does this look like the way to go, did we do the
2 right things, did we miss something, that's another way to do
3 it. So there are different ways a utility might want to do
4 this.

5 Now, cost is a factor. Do you involve somebody from
6 the inception? Is that cost-effective on a particular project
7 given the resources of the utility? Because consultants cost
8 money. So there's that judgment to be made. There's the
9 utility's own comfort level with its own internal resources.
10 In our most recent project, we had a high comfort level because
11 we had people who were experienced in RFPs, and we've been
12 through the Hines 2 project, and so there was a greater comfort
13 level in managing the process well. And so there are a lot of
14 differences that are going to occur from project to project,
15 utility to utility.

16 COMMISSIONER BAEZ: And just one question of
17 clarification for me. Exactly when you develop -- when an IOU
18 develops the RFP, what is your understanding of what goes on
19 when they submit it to the Commission staff? Is it for
20 informational purposes, or is there -- and I'm not talking
21 about some formalized process certainly, but is there a
22 informal back check? I mean, is there some time with which the
23 staff can -- actually now has an opportunity to say, we're
24 seeing something that gives us concern?

25 MR. SASSO: Under the current rule, there was a

1 requirement of filing the RFP formally with the Commission, so
2 that was formally done, and that was generally done at the
3 inception of the project. Staff has been invited to bidder
4 conferences. So a staff representative can attend and has been
5 welcomed to attend the bidders conference where there's a lot
6 of Q&A and clarification of issues that arise on the RFP. And
7 there was an opportunity for communication by staff to the
8 utility of any concerns or whatever.

9 Now, I don't know that staff felt free to inject
10 itself in the process because of a concern, well, what happens
11 at the back end when we come into a need hearing, is what we
12 say going to be taken as a green light, but under the proposed
13 rule, we have worked in an opportunity for some more informal
14 give-and-takes. Sort of like the Louisiana model. Before the
15 RFP is issued, there's going to be a discussion with potential
16 participants in the process and staff where, I think, everyone
17 will feel freer to provide input.

18 COMMISSIONER BAEZ: I guess I'm trying to narrow down
19 a point in time in which the company in its mind at least says,
20 you know, we can proceed forward because we haven't heard
21 any -- you know, that there hasn't been anything to discuss, or
22 is that an ongoing process? Because, you know, I think I
23 realize if there are concerns, then they're going to have to be
24 addressed at some point.

25 MR. SASSO: It is an ongoing process. I must say

1 that in practice, the companies have had -- or at least I can
2 speak for Florida Power Corporation, has had a great deal of
3 comfort in going forward with the process because we had the
4 model of the Gulf RFP that was approved by the Commission.
5 We've read the rule. We believe we were very conscientious in
6 applying it, and there wasn't any really serious question in
7 the company's mind that the RFP was defective or problematic.

8 A lot of the concerns that have been discussed are
9 theoretical. In actual practice, the criteria have been
10 identified. We don't believe there's been any misunderstanding
11 about the significance of criteria. There have been bidders
12 conferences where bidders have been welcomed to come and
13 there's Q&A. And if somebody has any question about what's the
14 significance of this or the significance of that, they have
15 been free to ask it. They have been encouraged to ask it, and
16 those questions have been answered.

17 And those discussions take place all through the
18 process. It's not just we issue an RFP and then they respond
19 in a vacuum and then we say, gotcha, if you didn't comply with
20 some criteria. There are discussions in both of these
21 projects. They're ongoing discussions between the bidders and
22 the operational people where there are clarifications, or they
23 give us material in response to the RFP, and they may not have
24 given us enough information about this aspect or that aspect,
25 or the utility has a concern with something, and there's back

1 and forth. There's always back and forth.

2 So there's always been a high degree of comfort that
3 the process was okay, that the bidders understood what the
4 ground rules were and what the company's interest was. There
5 was always a lot of communication. There was never in either
6 of our projects an objection during the process by any bidder
7 to the procedure, to the availability of information, to the
8 point that they may be confused or uncertain about what was
9 expected of them. There was never an objection. There was
10 always discussion and open dialogue.

11 So some of the concerns we are hearing, in our
12 opinion, are highly theoretical. And the company has felt
13 comfortable going ahead with these projects through the
14 process, confident that the real issue was going to be at the
15 end of the day which is the best project, and that has come
16 down to price. I mean, all of these other things haven't --
17 you know, we've discussed what can put you on the bubble, what
18 can be outcome determinative. Haven't had to get to that finer
19 order of analysis because the bidders haven't come close on
20 price. And everybody knows that that's important. And so the
21 issue has always been for us when we come into the need
22 hearing, have we done a good job, can we demonstrated to the
23 staff and the Commission how we reached this conclusion, has it
24 been transparent, will you understand the considerations that
25 went into the decision, if any bidder was eliminated, why, and

1 can we explain that and do we have the documentation. That's
2 always been the consideration. There's never really been an
3 issue, do we feel okay now to go ahead with the RFP. That's
4 really not been an issue.

5 (Technical difficulty with audio system.)

6 (Brief recess.)

7 CHAIRMAN JABER: Let's get back on the record.

8 Mr. Twomey.

9 MR. TWOMEY: Thank you, Madam Chairman.

10 Commissioners and Madam Chair, again, I appreciate your
11 accommodation. I apologize to the Commissioners and the other
12 parties for the inconvenience. I'm Mike Twomey representing
13 the Florida Action Coalition Team, and I want to thank the
14 Commission again for the opportunity to appear here and for all
15 the effort the Commission and your staff has put toward the
16 proposed rule we have before us today.

17 I'd like to take just a minute and recount how we got
18 to where we are, at least how FACT sees how to we got to where
19 we are. The reality is that the statutes in general in the
20 Power Plant Siting Act and the need determination, in
21 particular, require this Commission to see that only the most
22 cost-effective generating alternative is approved and that that
23 unit or alternative is reflected through the customers' rates.
24 That's a statutory obligation you have. You're aware of that.
25 In most cases, for all utility plant and supplies and expenses

1 and so forth, the best way we've seen through experience to
2 see -- or be comfortable that the cost is only that it's
3 prudent and reasonable is to see that the plant or the service
4 was obtained through a fair competitive bid process. It's easy
5 to do those things for staples and vehicles and fuel supplies
6 and that kind of thing. It's a little bit more troublesome to
7 do that for power plants, and as a consequence, apparently in
8 1994, the Bid Rule was promulgated to take a step toward
9 interjecting competition as a safeguard, if you will, and
10 providing you all with some assurance that the plants that you
11 were asked to find a need for were, in fact, the
12 most cost-effective.

13 I think the additional reality is, is that the -- or
14 at least a strong perception is in many quarters, is that the
15 1994 rule was flawed sufficiently to the point that it just
16 doesn't work or you can't be confident that it's working at all
17 times. I think another reality that would suggest that is that
18 I think it's correct that no successful bid has won an RFP
19 under the current rule in the eight years it has been in
20 existence. So that suggests a problem.

21 The perceived problem from many of the vendors, the
22 IPPs, and the customer community as well, at least as
23 represented by FACT, was that the information in the RFP was
24 inexact, was not specific, was not objective as it could be,
25 and therefore, bidders had to guess at their peril what was

1 desired by the utility in the end run in terms of what would
2 make a winning bid. There was the objection that the utilities
3 served as the judge of their own beauty contest, and that they
4 being rational businesses, economic interests, corporate bodies
5 that wanted to benefit their shareholders, they would, if given
6 the opportunity, make decisions that benefited their self
7 interest. And lastly, there was a criticism that the IOUs
8 always got to take -- they got to deal themselves the extra
9 card, that concept of undercutting the successful bidders by
10 sharpening their pencil and coming in with the notion that was
11 somehow necessarily in the best interest of their customers.

12 Now, those were the major perceived problems. You
13 all have considered those objections in a number of proceedings
14 the last year or more. And the work product we have before us
15 now basically I see it is yours. And it's the result of an
16 agenda conference at which you all made a number of decisions.
17 You made specific decisions. You directed your staff to try to
18 incorporate those decisions into a proposed rule, and that's
19 the rule we have in front of us. And I think it would be fair
20 to say that the rule represents a compromise.

21 Commissioner Bradley's wisely always looking for
22 compromise. The rule before you now incorporates some of the
23 things that the IPP customer community wanted to see
24 incorporated in a changed rule but not everything they wanted.
25 The rule contains some of the things that the IOUs didn't want

1 in, but they didn't get everything stripped out that they would
2 like to see removed. So the product is yours. It represents
3 compromise. And while FACT is interested in seeing the rule
4 further improved by the adoption of the further revisions
5 sought by PACE, a primary concern we have right now is not to
6 lose what we have attained. FACT would like to see there to be
7 no backsliding on what improvements have been made in the rule
8 thus far.

9 Now, yesterday, the IOUs in their presentation
10 started out and they said, at least I thought I heard them say,
11 that the PACE people and the others of us wanted to make
12 sweeping changes, that the IOUs only wanted to make incremental
13 changes in the rule. Having said that, Mr. Sasso proceeded for
14 the next two hours plus to suggest ten major infirmities with
15 the rule. Well, I went back and counted. I don't think there
16 was more than ten major revisions of any substance to the
17 entire rule.

18 Bottom line being that what the IOU said was that if
19 you adopted their changes, effectively you would gut the rule,
20 we would be at status quo, we would have the current rule which
21 is largely suggested not to work. And I would add that another
22 reality I think that you face, and I don't think it's
23 controverted, is that the IPP community has told you that
24 unless they have confidence that the process is fair and they
25 have a chance of winning, they can't afford to continually come

1 in here and spend a quarter of a million dollars, a half a
2 million dollars, a million dollars, whatever it takes in order
3 to properly prepare a bid year after year after year. And I
4 think aside from the other problems in the industry and with
5 the economy, the history demonstrates over the last eight years
6 that the number of potential bidders in each successive need
7 determination has been reduced. And eventually if there's no
8 hope for these people to make a winning bid, it will stop.
9 They can't throw good money after bad.

10 Now, there are times when in these proceedings where
11 sometimes you don't believe what you're hearing. It's almost
12 like the emperor's new clothes. I thought I heard the sum and
13 substance of what the IOU said was their problems with the
14 draft rule to be in part that they didn't like specificity,
15 that they didn't like objectivity, that they feared the
16 unintended consequences of unreasonable bidders or vendors
17 interpreting reasonable language. I think I heard that.

18 They were critical of the fact that bidders -- that
19 vendors out there would try and fully utilize the criterion in
20 the RFP to win. Well, dah. I mean, that's the idea; right?
21 The idea is to win the bid. And if you've got a bad bid --
22 pardon me, whether you've got a well-written RFP or a poorly
23 written one, you can only expect the vendors to try and operate
24 within the confines of that document.

25 Now, I would suggest to you in contravention of what

1 the IOU said yesterday that when you are going to give somebody
2 a test, and this is the nature of a test, you want them to
3 succeed, presumably. Like Mr. Green said, if you want to buy
4 an addition to your house and you want a wet bar in the thing,
5 tell them. Don't make them guess what your lifestyle is.

6 I believe with the advent of the combined-cycle
7 combustion turbine units that many of these units, they're just
8 basically big widgets. You know, this is not rocket science.
9 They are all fed with natural gas, by and large. They are all
10 basically made by the same manufacturers. They are big
11 widgets, and these utilities, as Mr. Green suggested to you,
12 know what they need up front. They can specify it to the Nth
13 degree, and if they know they need a plant in a certain
14 geographic local because it results in certain transmission
15 efficiencies and that kind of thing, they know that up front,
16 and they can include that in a bid.

17 And I would suggest to you that while we still
18 maintain that you need an independent third-party evaluator,
19 you need a third-party evaluator less when you have an RFP that
20 is specific, objective, thorough, complete, and that contains
21 evaluation criteria that to the greatest extent possible can be
22 objectively or mathematically reviewed, to the extent that you
23 have things that can be reviewed, whether it's access from two
24 pipelines, it's better than having just one. To the extent you
25 can put those things into math, then the Commission is better

1 able to audit and see if a fair result was obtained.

2 So we would think that you need to keep, to the
3 extent you've already included it in your proposed rule,
4 specificity as much as possible in the RFPs. And to the extent
5 that you can make it audible, make it weighted and that kind of
6 thing. We think that the provision for having an independent
7 third-party evaluator is desirable. Whether you do it or not
8 is a different issue. We think it's desirable.

9 One of the other things, though, is that the -- with
10 the criticism that the utilities always undercut the last bid.
11 Okay? Now, we've discussed at some length in previous
12 proceedings why we don't think that necessarily results in the
13 lowest bid. FACT thinks that having two bids or three bids and
14 allowing the utility to bid, too, simultaneously and just
15 taking the lowest number would probably take care of any
16 problems with an evaluation like that.

17 Lastly, though, we have to see that the bid, if it's
18 self-bid, that is won by the utility that that's the amount
19 that's included in rate base, absent extreme circumstances;
20 otherwise, they can afford to lowball, win in the process, and
21 then come in later and seek a higher recovery.

22 So FACT, once again, appreciates the effort the
23 Commission has put into this document which is essentially the
24 efforts of your staff. We'd ask you to retain the improvements
25 we see in the rule thus far and consider improving it further

1 by adopting the revisions proposed by PACE. Thanks for your
2 time.

3 CHAIRMAN JABER: Thank you, Mr. Twomey.

4 Commissioners, do you have questions of Mr. Twomey before he
5 leaves? Thank you.

6 MR. TWOMEY: Thank you.

7 CHAIRMAN JABER: Okay. Commissioner Baez, you were
8 finishing up questions to Mr. Green.

9 COMMISSIONER BAEZ: Thank you, Madam Chairman. Going
10 back to the questions that I had asked Mr. Sasso. Do you
11 believe in reality that an independent evaluation and the
12 accountability or the binding nature of that independent
13 evaluation are inexorably linked? I mean, is that a nonstart,
14 or they have to be linked? Or is there any value to
15 independent evaluation outside of actually making the call?

16 MR. SASSO: Well --

17 MR. GREEN: I think there's great value in
18 independent evaluation again. I liken back to this overriding
19 business reality the IOUs have, and they have this regulatory
20 compact, and they make all their earnings on a return on
21 invested capital. And that's a good thing. Don't get me
22 wrong. But it's there and it's an overriding -- it's just an
23 inherent conflict that makes it awfully hard to have an
24 unbiased internal evaluation of external bids.

25 So again, our premise was what is the best way, the

1 most transparent way that you can have a process, a rule in
2 place that would show the consumers that indeed very
3 transparently you're getting the best deal. If the evaluation
4 is hidden in a black box within an internal evaluation, that
5 will always be a question in my mind. I think your question
6 is, is a third-party evaluator a nonstarter or --

7 COMMISSIONER BAEZ: Well, I guess the linkage
8 between -- the IOUs seem to make a valid point that -- I mean,
9 there is the issue of accountability. There is the issue of
10 whose project is it, and when time comes for cost recovery,
11 certainly I for one wouldn't be want to be having to stare the
12 prospect of having the utility say, well, you know, it's not
13 our fault, it was the independent evaluator. So I guess on
14 some level, I think the accountability issue needs to get
15 settled or perhaps remain where it is.

16 And my thinking is perhaps there is some other
17 incarnation of an independent evaluation that can lend -- that
18 can create the proper tension. I mean, you're really only
19 using -- the suggestion of an independent evaluator is really
20 only to create some tension to, quote, keep everyone honest, if
21 you will. And so is there some alternative incarnation of an
22 independent evaluator that doesn't bring with it the
23 accountability issues that we've identified?

24 MR. GREEN: Well, once again, our goal here is to
25 have a fair and unbiased evaluation of the bids. That's our

1 goal. And we thought what's the best way to do that that would
2 be as transparent as possible, and in our view, a third-party
3 evaluator is the best way to do that transparent, and there's
4 absolutely no conflict of interest anywhere. And I'm not the
5 lawyer, and I'm not the regulatory expert. And I think my
6 attorney is going to --

7 COMMISSIONER BAEZ: We can let Mr. McGlothlin --

8 MS. GREALY: -- say something about that. But if
9 that creates accountability issues, again our goal hasn't
10 changed to have a fair and impartial evaluation of the bids.

11 A couple terms have been thrown around about
12 independent evaluator, and I think yesterday someone mentioned
13 independent monitor. I mean, Arizona uses an independent
14 monitor that the staff actually hires, paid for by the
15 investor-owned utilities with receipt of, you know, application
16 fees. And they issue reports to the Commission on, is this
17 running fair, is this not running fair. A fallback position to
18 consider, perhaps.

19 The investor-owned utilities in Arizona have the same
20 obligations, if you will, that the investor-owned utilities
21 have here. And they have seen that some independents in that
22 case in a monitoring role is needed and prudent. A lot of
23 discussion -- and we had a witness yesterday that was almost
24 portrayed like an independent evaluator or something, and I
25 want to make sure that everybody understands that the people

1 that have been hired by the utilities in the past to either
2 help structure the RFP or to assist in the evaluation at the
3 tail end is not an independent evaluator. I would call it an
4 independent arithmetic checker, perhaps. But, I mean, they are
5 charged to -- you know, given the assumptions that we're using,
6 we the IOUs, and given the assumptions used in these bidders,
7 you run the same net present value calculations, they run the
8 same PROMODs or the same PROVIEWs (phonetic) or the same
9 whatever programs they're using, and see if you get the same
10 results. And quite frankly, you will get the similar results,
11 you know. The IOUs, they're good at these models, and they
12 don't make math errors. So the answer is going to be the same.

13 But what is lacking in that hired consultant -- and
14 that's what it is, a consultant -- is an independent assessment
15 of whether or not the assumptions are prudent, prudent's not
16 the right word, are the assumptions reasonable that the IOU is
17 using? Are the O&M rates apparently in line with industry
18 standards? Are the heat rates consistent with what the vendors
19 are going to guarantee for the 30-year life of this project?
20 Some independent assessment of that which we feel is looking in
21 the hired consultants. Again, those are the type of questions
22 that need to be asked and responded to with the independent
23 assessment, and to make sure that the evaluation is done fairly
24 consistent with the criteria that has been established in the
25 RFP up front. That's the independence we seek.

1 The best way we saw to do that was to have an
2 independent evaluator that just does that. Now, if that causes
3 regulatory concerns of who owns the process then or whatever
4 else, as long as the goal is achieved -- and I guess if you're
5 asking me for options, the independent monitor that Arizona
6 utilizes might be something to consider. And I think my lawyer
7 will now correct me in all my legal --

8 COMMISSIONER BAEZ: Yeah, Mr. McGlothlin had
9 something to say.

10 MR. MCGLOTHLIN: No, I'm not going to alter anything
11 that Mr. Green said, and nor do I want to detract from his
12 statement that there may be an alternative or a fallback to
13 consider, but I want to address the idea of an accountability
14 issue for just a second. Bear in mind that as we have
15 envisioned it, when the third-party neutral evaluator performs
16 its task, it will be applying to the proposals criteria that
17 the IOU has developed.

18 As we see it, the IOU would be the origin of the
19 entire RFP package, subject to the up-front potential vetting,
20 but in term of the obligation to serve and carrying that out,
21 we think the IOU performs that obligation by recognizing the
22 need for capacity, planning to meet that capacity, identifying
23 the type of capacity and the quantity of capacity in the time
24 frame, developing the contract terms, including the performance
25 guarantees that are appropriate for the circumstances and

1 incorporating all of those in the RFP package.

2 And as we see it, the function of the independent
3 evaluator is simply to eliminate the conflict of interest that
4 the IOU has in those instances in which it also presents a
5 proposal. So by and large, any accountability lies in the
6 criteria that are included in the RFP.

7 And then also, I wanted to make the point that as we
8 have envisioned it, all participants in the RFP process,
9 including the IOU, would have the right to challenge the
10 selection of the independent evaluator on the basis that it has
11 incorrectly applied the criteria developed by the IOU. So not
12 to diminish the possibility of an alternative, but I take issue
13 with the idea that there is some inherent accountability issue
14 involved in the use of a third-party evaluator.

15 COMMISSIONER BAEZ: Well, let me ask you this. There
16 was some discussion earlier when we were talking about
17 weighting and the tiering, or what have you, of criteria. I
18 thought I heard some consensus that you can't eliminate
19 subjectivity on some level. I mean, you can -- we can score
20 them, and we can weight them, and we can identify their
21 importance and establish a hierarchy as much as we want, but
22 you cannot eliminate subjectivity and that somehow that's to be
23 expected, and it's understood and it's accepted. Am I
24 overstating it or --

25 MR. McGLOTHLIN: I think I'd agree that you can never

1 eliminate 100 percent subjectivity, but I believe you can by
2 devising the criteria and the methodology to be applied in
3 evaluating, you can reduce the amount of subjectivity such that
4 you have reasonable bounds within which the -- either the IOU
5 on the independent evaluator is going to operate.

6 COMMISSIONER BAEZ: But then subjectivity is
7 acceptable at a -- on a minimal level or some nominal level,
8 but you do agree that subjectivity, in fact, is probably
9 necessary at some time.

10 MR. McGLOTHLIN: I think I would agree that we cannot
11 eliminate it entirely. That's my own view. Perhaps, Mike, you
12 want to say anything.

13 COMMISSIONER BAEZ: Well, and I guess what I'm trying
14 to nail down is whether you think that subjectivity plays a
15 role in the process only it shouldn't be so much, or rather,
16 that subjectivity is a necessary evil, and you've just got to
17 live with it. Is that your attitude or is it the former?

18 MR. GREEN: If I could take a shot at it,
19 Commissioner.

20 COMMISSIONER BAEZ: Sure.

21 MR. GREEN: Generally, we would think you should try
22 to make the evaluations as objective as possible. I think that
23 should be a goal. We recognize that subjectivity is going to
24 take a place in some of these evaluations, and I can't help but
25 give examples of what I'm talking about. In a recent RFP, they

1 had permissibility as a consideration. And the IOU made a
2 subjective evaluation and ranked bidders 1 through 6, I think,
3 on how permissible their proposal was. And that's a subjective
4 evaluation. And I will grant that that subjectivity comes into
5 play there. But if you are going to use subjective analysis at
6 least identify the criteria you're going to consider in that
7 subjectivity. And don't just say we're going to evaluate
8 permissibility but not say what you're going to consider in
9 that. If subjectivity takes a place in it, then it needs to
10 take a place in it. But if you are going to be subjective, at
11 least identify the parameters you're going to consider, the
12 elements you're going to consider.

13 COMMISSIONER BAEZ: And do you see -- and you don't
14 see any conflict between a neutral independent third-party
15 evaluator and whatever need there may be for subjectivity? You
16 think a neutral third-party independent evaluator can exercise
17 subjectivity in a way that's productive?

18 MR. GREEN: Yes, sir. If the investor-owned utility
19 has done their job and done a good job of identifying all the
20 criteria that needs to be considered, the broad categories, and
21 has given general weights in how important that is and has
22 given as much objective guidance as it can give where
23 objectivity is going to take the place, like if they feel that
24 locating a plant right here is most important, that's worth an
25 awful lot and worth a lot of points, then say that if they know

1 that. If they don't and subjectivity comes into play, give
2 guidance to the independent evaluator. Say, we think
3 permissibility is important. We think you need to make sure
4 that -- and, for example, rate people higher if they have
5 already filed for their air permits. Rate them higher yet if
6 they have received their air permits. Rate them higher if they
7 have received consumptive use permits for water. Rate them
8 lower, if they haven't. But, I mean, subjectivity may come
9 into play there, but give them the guidance, give the
10 independent evaluator the guidance they need to understand
11 what's important to the investor-owned utility and the
12 consumers.

13 COMMISSIONER BAEZ: Thank you. That's all I've got.

14 CHAIRMAN JABER: Commissioner Deason.

15 COMMISSIONER DEASON: I have just a few questions
16 about the PACE overlay of time lines. And I guess, first off,
17 I have a procedural question, Madam Chairman. Are these
18 exhibits? Are they part of the record?

19 CHAIRMAN JABER: No one has asked for them to become
20 exhibits, part of the record. No one has asked for them to --

21 COMMISSIONER DEASON: Okay. I'm just curious.

22 CHAIRMAN JABER: -- but we're not prohibited from
23 making them; right?

24 MR. HARRIS: You can accept anything you choose to.

25 COMMISSIONER DEASON: That's just up to them. Okay.

1 I'm free to ask questions about it, though. That's no problem.

2 Mr. McGlothlin, the times that you have included for
3 the complaints or objections, whatever we want to call them, I
4 guess it's primarily Lines 6 through 14, I suppose, or 13,
5 these amounts, these time lines, they were -- these amounts
6 were actually part of the original exhibit, and you just
7 adopted those as reasonable for purposes of your comparison?

8 MR. MCGLOTHLIN: I would say it's slightly
9 differently, Commissioner. This is done late at night and in a
10 short time frame, and I identified two that jumped out at me as
11 unreasonable.

12 COMMISSIONER DEASON: I'm sorry, could you repeat
13 that again? Which ones?

14 MR. MCGLOTHLIN: Yes. I said I identified two
15 entries by values that appeared to me to be quite unreasonable
16 and adjusted those. I chose not to try to redo the entire
17 exhibit, so that's what I would say about that. I have not
18 really studied each entry to the same extent that I dealt with
19 those two. But I think ballpark reasonable, yes.

20 COMMISSIONER DEASON: But these are just -- they're
21 illustrative. We're not trying to write into the rule that
22 we're going to allow so much time for this or for that,
23 obviously.

24 MR. MCGLOTHLIN: That's correct.

25 COMMISSIONER DEASON: Nobody is proposing that we do

1 that. This is just to try to get a feel for how much time
2 conceivably could be added, and your point being that if there
3 are objections up front, it could save time on the back end.
4 And you've put in time frames to illustrate what could happen
5 if there is actually the need for a new RFP to be issued after
6 the first RFP.

7 MR. McGLOTHLIN: Yes. And I think that the
8 assumptions here are ballpark reasonable, yes.

9 COMMISSIONER DEASON: Okay. Would you agree then
10 that if the language in the proposed rule which allows for
11 there to be objections, complaints, whatever, that the handling
12 of the time lines, the process, the procedure, that that's
13 something that could come before the Prehearing Officer?

14 MR. McGLOTHLIN: Yes, sir.

15 COMMISSIONER DEASON: And that would be expedited to
16 the extent he or she felt was appropriate after consulting with
17 the parties, if necessary.

18 MR. McGLOTHLIN: Yes. Neither our rule nor the
19 published amendments attempt to prescribe exact time frames so
20 that would be something for the Prehearing Officer to control.

21 COMMISSIONER DEASON: Let me ask that same question
22 to Mr. Sasso, or that same series of questions. Is there
23 anything in there that you disagree with with what
24 Mr. McGlothlin indicated?

25 MR. SASSO: Well, there were a lot of questions asked

1 and answered. Is the question whether --

2 COMMISSIONER DEASON: Let me back up then because I
3 don't want to catch you off guard. Because the original
4 exhibit was yours and the times indicated in there, they are
5 just for illustrative purposes; correct?

6 MR. SASSO: Yes, they were for illustrative purposes.
7 They were intended to be conservative on our part. We didn't
8 include, for example, special time for discovery, any time
9 different from what's provided for the provision of testimony.
10 For example, in a normal case, you would have a period of
11 discovery set aside. We didn't provide for that. We didn't
12 provide time for reconsideration or review. This is a fast
13 track. We thought it was a fast track, highly conservative
14 assumption of what a hearing would look like in the best case.

15 CHAIRMAN JABER: Reconsideration is on here, though,
16 just to correct you.

17 MR. SASSO: I'm sorry. Yeah, that's one item that
18 was included, but not any type of request for interlocutory
19 review.

20 COMMISSIONER DEASON: Okay. Now, Mr. Sasso, I
21 understand that it's your position, the IOUs' position that
22 there should not be the provision which would allow for the
23 filing of complaints or objections to the RFP.

24 MR. SASSO: That's correct.

25 COMMISSIONER DEASON: But if that is to stay in the

1 rule, would you agree that the process for handling such a
2 complaint or objection, that the time lines in the procedure is
3 something that could come before the Prehearing Officer?

4 MR. SASSO: Well, that assumes a lot. If the
5 Commission says so, then that's what would happen. Now,
6 whether that should happen is the subject for discussion. I
7 suppose if the Commission wanted to go ahead with this and have
8 some type of procedure, the Commission might chose to provide
9 to govern it like any other case where you'd have a Prehearing
10 Officer. There might be time for discovery and so on. Now, I
11 can comment further on that, but if the question is, might it
12 occur that way, it's sort of tautological because it's up to
13 what you say it will be. Whether it should occur that way is a
14 different question.

15 COMMISSIONER DEASON: Let me direct your attention to
16 Line Item 2 and Line Item 4. This is the pre-RFP meeting and
17 the post-RFP meeting. Do you believe that there is the
18 possibility or maybe even the likelihood that potential
19 complaints or objections could be identified and perhaps
20 mitigated or eliminated during the process of a pre-RFP meeting
21 and a post-RFP meeting?

22 MR. SASSO: Yes, sir. And in fact, again, we would
23 submit that that is what occurs today in any meaningful sense.
24 Because if a bidder has a concern about some lack of clarity
25 about the RFP, they ask the question and they get an answer.

1 And that's the way these things are worked out. That's why we
2 have not drawn any objections to the process.

3 COMMISSIONER DEASON: Okay. Now, let me -- this
4 question and answer, is there any give-and-take in the sense
5 that at the pre-RFP meeting if you indicate that you're
6 wanting, I don't know, that you're wanting some type of bond up
7 front, an amount of a bond by the bidder and the bidders
8 indicate that's unreasonable, is that a give-and-take, or you
9 just say, no, this is what's required, and I've answered your
10 question, let's move on to the next question?

11 MR. SASSO: Speaking about our projects, Florida
12 Power Corporation's projects in particular, there has been a
13 substantial amount of give-and-take and actual negotiation in
14 the process. For example, while the company in the last
15 project put out contract terms and conditions, it invited
16 redline response which was the beginning of negotiation. So
17 bidders were invited to begin to provide feedback right from
18 the inception of what they could live with and what they didn't
19 want to live with.

20 The bidders conference was one opportunity for
21 bidders to show up and ask whatever they wanted to ask. And in
22 fact, one bidder showed up with counsel and served 30
23 interrogatories on us and got responses which were posted on
24 the Web and clarifications, but it wasn't the only opportunity
25 because a contact person was identified, a Web site was

1 established, and bidders were invited continually to send in
2 questions to the contact person, and any matters of general
3 applicability were answered and posted on the Web site for all
4 bidders.

5 So, yes, there was give-and-take, and there was no
6 occasion where somebody said, this term in your RFP is
7 unreasonable, and we can't proceed because of it with our bid.
8 If there were concerns about the project, they were expressed
9 in terms of questions. What can we do here? What do you need
10 there? There were opportunities for bidders. In some cases,
11 they were indulged with additional time to provide information.
12 So there was a lot of back-and-forth. And the RFP was the
13 starting point, an important starting point. It was a packet
14 about that thick. There was a lot of detail in there, and you
15 just can't put everything in an RFP. It can't be a phone book.
16 But it was an important starting point for discussion between
17 the parties.

18 And if a bidder said, well, you know, to pick an
19 example, permissibility, what do you mean by permissibility?
20 There could have been a discussion about that. In fact, no
21 bidder was eliminated on that ground except one who had no
22 evidence of site control, provided no information about
23 permissibility, and so that was just a nonstarter. So, yes,
24 there is back-and-forth. And it doesn't take the form, though,
25 of saying, modify your RFP. It takes the form of saying, you

1 have this provision. How can we respond to it? Is it
2 important to you? Can we work around it? And if it's a
3 question of general applicability to all bidders, it was
4 answered, and then the answer was posted for all bidders to
5 see. So in a sense it was a fluid process.

6 COMMISSIONER DEASON: Let me ask the question to
7 either Mr. Green or Mr. McGlothlin. You just heard Mr. Sasso
8 explain the process, and he indicated there was some
9 give-and-take as well as explanation answers to questions. Why
10 then do you need the ability to file a complaint or an
11 objection?

12 MR. MCGLOTHLIN: If those early opportunities to seek
13 clarification and have the give-and-take intercept problems and
14 rectify what otherwise would be a problematic RFP, well and
15 good. In that event, this point of entry will not come into
16 play. There would be no complaint, and the point of entry
17 opportunity will have no impact at all on this schedule.

18 What if these early opportunities are unsuccessful
19 and there remains a term or condition in an RFP that is a
20 genuine bone of contention that either has the effect of
21 discouraging bidders from participating or causes them to hedge
22 in their bids until they can get it unraveled, which absent
23 this opportunity would happen at the back end of things? We
24 think this opportunity needs to be there in cases needed for
25 situations like that.

1 COMMISSIONER DEASON: Do you think the ability to
2 file an objection or complaint will enhance your ability to
3 engage in meaningful discussions at the pre- and post-RFP
4 meetings?

5 MR. McGLOTHLIN: Personally, I think that has a --
6 that would have that effect.

7 MR. GREEN: If I could add, Commissioner. I think
8 the -- as Mr. McGlothlin said, the pre-RFP meetings give an
9 opportunity to raise concerns. It doesn't suggest that there's
10 going to be an absolute fair and unbiased resolution of any
11 concerns that are raised. And I agree with what Mr. Sasso
12 says. On the recent FPC case, there was fairly good
13 give-and-take. And I would suggest that the RFP that his
14 client submitted probably had much less onerous conditions than
15 a previous RFP that came out. And I think what Mr. Sasso is
16 referring to is his client's RFP pre-bid meeting.

17 Other pre-bid meetings when onerous conditions had
18 been identified such as 390 days of keeping the bid open and
19 the resolution is, well, that's what it says, and that's what
20 it shall be, that's what we're looking for some resolution for.

21 COMMISSIONER DEASON: Let me shift focus for just a
22 moment. I want to ask a few questions on this concept of
23 bidding cost versus bidding price. And, Mr. Sasso, I
24 understand that it's your position that when the IOU under the
25 regulatory compact when they submit a bid, they're bidding

1 cost. Is that -- am I capsulizing that too much?

2 MR. SASSO: Well, I may have created this problem by
3 using the term "bidding costs." But I'm not comfortable with
4 that characterization because we're not really bidding. The
5 way it works is there's a ten-year site plan process. We're
6 required to plan. We're required to look ahead, look at
7 options, plan for the next planned alternative, develop a
8 profile of that. We're required to publish that to the bidding
9 community. And we have cost estimates. And we evaluate those
10 cost estimates. What we anticipate it will cost us to provide
11 that power to ourselves versus what we will have to pay for
12 contracts, and we get bids on those contracts. So those are
13 the true bids. The estimates are not technically a bid. I
14 have a lot of problems with this idea of someone saying --

15 COMMISSIONER DEASON: Well, when you've put in your
16 final bid after you sharpen your pencil and you say that we've
17 evaluated everything, and we think our proposal is the most
18 cost-effective, and this is what we're bidding, you're bidding
19 cost or bidding price?

20 MR. SASSO: We're not bidding. Again, the utility is
21 making a decision about how to provide needed capacity on its
22 system. And we can do it ourselves at a certain cost, or we
23 can get bids from others. Those are the bids. We're not
24 bidding. We're not in a beauty contest.

25 COMMISSIONER DEASON: Okay. And I accept that

1 clarification. It's not a bid; it's a decision. But when it
2 comes time to file your need determination and this Commission
3 has the issue in front of it to determine the most
4 cost-effective alternative, we have to evaluate your decision
5 to self-build versus the bids that were received and were
6 rejected as being not the most cost-beneficial option.

7 MR. SASSO: Right.

8 COMMISSIONER DEASON: And I guess the question that I
9 have is, how do we get this proverbial apples-to-apples
10 comparison if we're comparing a decision to do something at
11 your cost versus bids which are submitted at a price?

12 MR. SASSO: Well, it's not ever going to be
13 completely apples to apples because we're dealing with building
14 a plant in regulation and being a plant through contract. It's
15 never going to be complete apples and apples. As I think maybe
16 Mr. Green said yesterday, or maybe it was Mr. McGlothlin, there
17 is a way to compare them through impact on revenue
18 requirements, so that is the measure of the impact of both of
19 these projects. But there are attributes of each that neither
20 shares.

21 In regulation, there are certain advantages to the
22 customer. PACE would argue there are different attributes of a
23 contract. But in regulation, you are dealing with entities
24 that you know and who are accountable to you. You have the
25 costs. They're transparent to you. There are differences in

1 how the customers are charged.

2 As staff pointed out in its recommendation in the FPL
3 case, there may be regulatory delay in passing on the costs of
4 a self-build unit to the customers which is arguably an
5 advantage to the customers as opposed to a pass-through for a
6 contract. There are off-system sales that utilities can make
7 to optimize the value of their plant for the customers which
8 returns benefits to the customers under regulation, not
9 available under a contract arrangement. There may be
10 advantages to the operation of the system through a self-build
11 plant. So it's never completely apples to apples. That's
12 why there has to be room for --

13 COMMISSIONER DEASON: Let me interrupt you for just a
14 second. When you get into the subjective part of the
15 evaluation, then aren't there other things, for example, maybe
16 if you self-build, there's the question of plant obsolescence
17 versus a contract, that maybe there are things that work in the
18 other direction. There are risks associated with self-build,
19 and there's risk avoidance associated with self-build. There
20 are risks associated with signing a contract, and there's risk
21 avoidance associated with signing a contract. Would you agree
22 with that?

23 MR. SASSO: There are risks both ways. It would be
24 our position that there are fewer risks for the customer with
25 self-build.

1 COMMISSIONER DEASON: When do we make that
2 evaluation? And this goes beyond the scope of just a -- I
3 would assume this goes beyond the scope of just a straight
4 comparison of net present value of revenue requirements of one
5 option versus another.

6 MR. SASSO: That's correct. There are a variety of
7 factors that the Commission could take into account. Various
8 Commissioners in the past have expressed their view that, all
9 things being equal, they would prefer self-build for many of
10 the reasons I mentioned. Now, how you evaluate it in an actual
11 need case, perhaps if it's a close case on the dollars, you
12 then start looking at some of these other issues, and you start
13 weighing some of these other factors. There are a whole
14 variety of criteria that could come into play on a project.

15 Let's suppose you're absolutely equal on impact on
16 revenue requirements, then we start ticking down to some of the
17 other issues of diversity, of some of the other criteria that
18 Mr. Green was mentioning. Permittability can have an impact on
19 the delay or the timing of the project; maybe we look at the
20 contract terms, that we can get with a contract partner to see
21 what risks the customer has to shoulder under those contract
22 terms if there's a delay in the project; maybe we look at the
23 viability of the contract partner. What is their financial
24 viability? Are they going to be around? Are they going to be
25 able to put the project into service on time? There are a lot

1 of other things that come into play, including some of the ones
2 that you've mentioned, Commissioner Deason.

3 Perhaps the Commission would like testimony on some
4 of these risks. I know it was provided, for example, in the
5 FPL case because PACE's witness was arguing that some of those
6 should at least partially offset imputed debt. Because if you
7 are looking at the inherent risks of these contract, a big fat
8 one is the impact on cost of capital, and so if you want to
9 layering in the inherent risk, you have to put imputed debt on
10 the table, too, for contracts. So there are a whole variety of
11 issues.

12 The occasion to consider them is in a need case in
13 the appropriate case. If, as in the case of our last project,
14 there's such a wide discrepancy on the economics, we didn't
15 have to get to the issue of imputed debt. Neither did the
16 Commission, didn't have to confront that decision. Didn't have
17 to confront some of these other factors. None of the bidders
18 was eliminated on all these criteria that Mr. Green mentioned.
19 So they didn't come into play as decision points except for one
20 bidder who didn't provide any information on them.

21 COMMISSIONER DEASON: Let me throw out a hypothetical
22 which may have a basis in reality, it may not, may never will,
23 but it's just an illustration, maybe something to talk about.

24 Let's assume that there is a self-build option and
25 that there is a bid from an IPP, and that in that bidding

1 process, there was some -- there was a risk that there would be
2 some new environmental requirement. And the IPP was not
3 willing to take that risk that they would -- so they included
4 in their bid an amount to cover their exposure to that risk
5 that they would have to add on some new environmental
6 requirement.

7 The IOU is also aware that there is a potential
8 environmental requirement, but they didn't include that in
9 their bid because they were confident that if this new
10 environmental rule passed, or requirement, you could pass it
11 through the environmental cost recovery clause. And that was
12 the difference between the IOU self-build being the most
13 cost-effective and the IPP bid being second best, because that
14 differential right there. How do we account for things like
15 that when we start making these comparisons? And is that
16 something that we should be concerned about?

17 MR. SASSO: Well, the Commission can ask about that.
18 It's not a perfect process for anybody involved. We all live
19 and learn. The Commission lives and learns as we go through
20 these need cases and so on. As additional ideas or concerns or
21 factors arise, we think to deal with them in the next case
22 either as the utility or as a bidder or as a Commission.

23 In the situation you mentioned, it's not quite as
24 straightforward as you described, because let's take that
25 hypothetical where a bidder, for example, anticipates some

1 development.

2 COMMISSIONER DEASON: They would write that in the
3 contract?

4 MR. SASSO: The environmental up front and maybe they
5 don't even tell us. They just give us a contract price, but
6 they have put in a cushion for themselves on it, okay? Which
7 has an immediate price impact to us. So we're paying for their
8 assessment of the risk right off the bat, and we can't manage
9 that risk.

10 If that were transparent to us, and it isn't because
11 they won't give us that information, but if it were transparent
12 to us that that's how they monetized and quantified that risk,
13 our people might well say, we still want the self-build over
14 this, knowing that that's the factor that accounts for the
15 discrepancy because we can manage that risk.

16 We have greater confidence in our ability to manage
17 that permitting risk and it's better -- and we're better
18 protecting the customer if we don't pay for that insurance
19 policy that they're selling us but we manage the risk ourselves
20 and try to hold down the costs to our customer. Because we
21 think in the long run we can negotiate the permitting process
22 or we can engineer the plant in such a way so that we don't
23 have to pay, say, \$50 million for an insurance policy. If we
24 do have to pass it through to the customer, it's only going to
25 cost \$20 million.

1 COMMISSIONER DEASON: When do we as a decision maker,
2 the Commission, get that information to either agree with you
3 that your mechanism of managing that risk and meeting
4 environmental compliance to the least cost to the customer is
5 the preferred route and make that decision with trying to get
6 the comparison as much apples to apples as possible?

7 MR. SASSO: When do you make that decision?

8 COMMISSIONER DEASON: Yes. Is it during the need, or
9 is it after the fact when you try to flow that through the
10 environmental cost recovery clause?

11 MR. SASSO: Well, it's generally going to be in the
12 need case. Now, there may also be another opportunity to ask
13 those questions at the back end. My colleague just pointed out
14 to me that there's another complexity in the hypothetical you
15 mentioned, and that is, bidders can and often do propose
16 reopener clauses in their contracts for environmental
17 contingencies or other contingencies. That's one of the hooks
18 in the contracts. There are conditions that may be triggered,
19 and that's one way that they can use to ameliorate that risk.

20 CHAIRMAN JABER: What was that? I'm sorry,
21 Mr. Sasso. You faded away from the microphone. They often
22 propose what?

23 MR. SASSO: A reopener clause in the contract for
24 some contingency. It might be an environmental contingency.
25 If there's some identifiable risk, that's contingent on some

1 event occurring in the future.

2 But to answer your question, Commissioner Deason,
3 that is what a need hearing is for. The utility tries to
4 anticipate as many of these issues as it can. They are
5 identified. They're flagged as part of the evaluation. It's
6 not a black box. We produce every scrap of paper generated in
7 this evaluation. The decision makers are subject to
8 questioning either before the Commission or, in our last case,
9 by deposition. Staff can ask questions. Staff is invited to
10 ask these questions, very competent, sophisticated, a lot of
11 depth on the staff, expertise in a lot of different areas, and
12 sometimes they think of questions that we haven't anticipated,
13 and then we have a dialogue with staff.

14 And it's an effort on the part of all concerned again
15 to work through a world with some imperfect knowledge with
16 imperfect people to make the best judgment we can for the
17 customer. We all share that concern. And perhaps there are
18 need cases where we miss something, staff misses something, you
19 miss something, the intervenors miss something, and we learn
20 about it five years later. That's the way the world works.
21 But what we're all working toward is to try to identify these
22 things as they're pertinent and to lay them out, and for you to
23 review them and make a decision.

24 COMMISSIONER DEASON: Let me ask another example.
25 We've heard some concerns expressed about heat rates that are

1 contained in bids. And you mentioned in some answers to
2 previous questions both today and yesterday the concept of the
3 regulatory compact and the prudence standard.

4 MR. SASSO: Yes, sir.

5 COMMISSIONER DEASON: Let's say that there's an IOU
6 that bids 6,900 heat rate, Btu per kilowatt hour. And that was
7 done in good conscience. It was based upon the best available
8 information, substantiated by experts, engineers, whatever. So
9 I'm not trying to impugn the integrity of anyone. It was based
10 upon good information. And that was one of the key factors
11 which caused the self-build option to be the most
12 cost-effective. Okay.

13 That project comes to fruition, that unit is on-line,
14 it's operating. It does not achieve 6,900. The best it can do
15 is 7,100. And there may be some reason for that, and there may
16 be a logical reason for that. And there is some complication
17 that developed, and there's an engineer that takes the stand
18 and said, we were not aware of this, and it was unexpected,
19 unforeseen, and we tried to mitigate it to the best extent that
20 we could. We did the prudent thing, and now we're operating at
21 7,100, and that was the prudent action.

22 But there was a bid at the time two years before that
23 bid 7,100, and they felt like based upon their best information
24 that was what could be achieved, and they are saying they would
25 have had to have stuck by that, and that either they would have

1 had to have achieved 7,100, and if they didn't, they would have
2 to eat the difference.

3 Now, when you come in for fuel cost recovery, do you
4 come in with your actual 7,100 heat rate, or do you make an
5 adjustment to put that down to 6,900 which is what you bid?

6 MR. SASSO: 7,100. What you're describing is
7 serendipity. We have to make and the Commission has to make
8 the best judgment at the time based on the best information
9 available at the time, and then we move forward. If our best
10 information, based on what the manufacturers are telling us,
11 what the experts are saying, is that 6,900 is the number, then
12 for us to accept a bid based on what we know at that time, at
13 7,100 that's priced higher is for us to pay for an insurance
14 policy that our best information tells us is not
15 cost-effective. We're paying to avoid risk that our best
16 information tells us is not a credible risk by your hypothesis.

17 Now, if it turns out two years later we were wrong,
18 that is a coincidence. We could turn out to be right. We
19 could turn out to do better. In which event, the customer
20 benefits. But we can only work on the best information we
21 have. Now, yes, with the benefit of hindsight we can look back
22 and say, gosh, knowing then what we knew now, that would have
23 been a good deal, but that's not the way we can make decisions.
24 That's not the way the Commission can make decisions. We have
25 to decide at the time we make that decision is that insurance

1 policy worth it based on the best information we have available
2 to us today.

3 And we can't have any regrets about that because
4 neither we nor you can achieve perfection. All we can do is
5 make the best judgment with the best information we have. And
6 then we have to feel good about that and move on, because we're
7 as likely to be right as to be wrong. We're as likely to beat
8 our number as to go over our number. We don't know how the
9 future is going to turn out. We don't have that crystal ball.

10 COMMISSIONER DEASON: Mr. McGlothlin, what would be
11 your response to that question? That under this scenario that
12 I laid out that the 6,900 that was included in the IOU bid was
13 based upon best available information, not impugning anybody's
14 integrity. It was thought to be achievable, perhaps
15 aggressive, but achievable and then it just doesn't work out.

16 MR. MCGLOTHLIN: We believe that in that circumstance
17 the IOU should be held to its 6,900 because under your
18 hypothetical there's an action based upon best evidence, but
19 the policy and the standards that you set have to take into
20 account other scenarios.

21 I can remember a case in which the documents of an
22 IOU indicated it had been told to be as aggressive as possible.
23 So what if you have a situation where the 6,900 is not based
24 upon best evidence but based upon a conscious decision to be
25 aggressive in order to get the award? You have to have the

1 discipline of a standard that holds the IOUs to the proposal
2 they put forward to overcome the incentive that they have to be
3 aggressive and not base their decisions based on what is
4 realistic. Also, they have to have that standard because you
5 could have a situation which the IPP was the entity that bid
6 the 6,900 and under the terms of a contract would have been
7 held to that and for that reason would have been the most
8 cost-effective choice had it been chosen.

9 So under the scenario you provide here where the
10 6,900 proposal slipped to 7,100, we would contend that for the
11 other considerations it doesn't matter what the mind set of the
12 utility was at the time for the purposes of providing the
13 correct incentives and to ensure that the ratepayers get the
14 best, most cost-effective deal. You have to have the IOU held
15 to the same -- standards similar to that of the IPPs when they
16 bid a heat rate.

17 COMMISSIONER DEASON: What about the argument that
18 the IOU, that if they were able to achieve greater than 6,900,
19 greater meaning better, 6,700, which may be beyond the realm of
20 possibility. I'm not an engineer. But assuming they did
21 remarkably better than what they even included in their
22 decision to self-build, that benefit goes to customers.
23 Whereas, the customer never has the opportunity to share in the
24 benefit of the IPP bid. If they bid 7,100 and they won the bid
25 at that and they achieved 6,900 or 6,700 or whatever, that's

1 just more profit they make, and there's nothing wrong with
2 making a profit. But do you see the argument that it is not
3 parallel?

4 It's not the same. There are risks associated with
5 self-build, but there are potential benefits to customers that
6 get passed through to customers. There may be some risk
7 avoidance with the contract because you get locked in at 6,900,
8 but the customers don't have any potential sharing benefit.

9 MR. McGLOTHLIN: The response is in two parts. First
10 of all, if you have a situation where the rules are devised in
11 a way that promotes robust, full-blown competition, transparent
12 competition so that the participants are bidding their costs
13 and bidding the state-of-the-art equipment and they know they
14 have to be really sharp in order to get the award, and that
15 includes the IOU, then the idea that there's going to be all
16 this extra gain to be had, I think, is somewhat academic. But
17 recognizing --

18 COMMISSIONER DEASON: You're saying they're going to
19 air on the side of aggressiveness. It's going to be based upon
20 reason and fact, but they're going to be airing on the side of
21 aggressiveness to win the bid, and therefore, the potential for
22 there to be additional savings for customers are going to be
23 minimal.

24 MR. McGLOTHLIN: I think that's right. I think if
25 you have that situation where there's a wholesome kind of

1 competition going on with lots of players who know that they
2 have to perform extremely well to get the award, then they are
3 going to propose something that is at or near their costs, and
4 they're going to propose performance standards that are state
5 of the art. And so the idea there's going to be a lot of money
6 left on the table, I think, is somewhat unrealistic.

7 But let's assume that there is. PACE has said as a
8 matter of its position that in that circumstance, we're not
9 opposed conceptually to some sort of incentive-sharing
10 mechanism as long as that occurs after the IOU has fairly won a
11 contest that has all of the bells and whistles that we believe
12 are necessary to ensure that there's been a full and fair
13 competition.

14 COMMISSIONER DEASON: What about the argument that --
15 and I don't mean to be putting words in Mr. Sasso's mouth, but
16 something to the effect that a lot of the risks associated with
17 unforeseen circumstances, that conceivably the IOU could pass
18 through because it was unforeseen, and they took prudent action
19 and it just increased costs, that you've got reopener
20 provisions in the contracts, and you're evaluated or have the
21 same opportunity to be protected from those risks as well.

22 MR. McGLOTHLIN: It's a function of what's in the
23 contract. I'm told by people who are in the business and know
24 more about it than I that, by and large, their experience has
25 been that the provisions of the contract are not that

1 forgiving. And I'll let Mr. Green address it in more detail.

2 MR. GREEN: Yeah, if I could just add to it. I mean,
3 the contracts -- there may be some re-up, if that's the word
4 used, considerations. It's for, like, if EPA decides they're
5 going to tell you to put scrubbers on all combined-cycle
6 plants, and that's a consideration you can come back in and
7 renegotiate something, but these are either catastrophic or
8 extremely, you know, unusual circumstances.

9 You don't get reconsideration for your heat rates.
10 You don't get reconsiderations for your O&M costs. You don't
11 get it for your availability guarantees, and you don't get it
12 for your capacity payment that you're requesting to cover your
13 construction costs. Those are things you don't get
14 reconsiderations for, in my experience.

15 COMMISSIONER DEASON: Thank you.

16 MR. GREEN: And if I could add. You know, on your
17 previous question, and my attorney tells me, don't talk so
18 much, but, I mean, when you talk about the potential upside
19 that consumers may get, I mean, I'd suggest you weight the
20 probabilities. If a 6,900 Btu is being bid, what's the
21 probability or possibility of them, of anybody beating that
22 6,900 for the 30-year life of a facility? It's very slim.

23 What's the possibility when you have evidence in the
24 docket that tells you that they were told to be very aggressive
25 in setting that heat rate? The probability of it being worse

1 than 6,900 is probably greater than the possibility of it being
2 less than 6,900. So if you're weighting the upsides versus the
3 downsides, I think the mitigated risk probably outweighs the
4 potential upside of reduced heat rates.

5 COMMISSIONER DEASON: Okay.

6 CHAIRMAN JABER: Commissioner Palecki, did you have
7 questions?

8 COMMISSIONER PALECKI: I just have one follow-up to
9 Commissioner Baez's question and the answer that Mr. Green gave
10 regarding an independent monitor as opposed to an independent
11 evaluator. And my question is: If the whole reason for the
12 entire process is to ensure that the customers get the best
13 deal on new generation, would the Office of Public Counsel be a
14 reasonable choice as an independent monitor?

15 MR. GREEN: Again, the goal is a fair hearing of
16 potential onerous or infeasible terms, and I'm not sure I know
17 what authority the Public Counsel has. I might have to ask my
18 attorney to add to this. But, I mean, if they can do it and
19 provide it in an expedient manner that has some authority over
20 the investor-owned utilities that if indeed they have found
21 some term that is onerous or they have found something that is
22 commercially infeasible that needs to be remedied that indeed
23 can get remedied in a timely manner, then we'll support that.
24 I don't know what the authority is. Maybe I could ask Joe to
25 speak.

1 MR. McGLOTHLIN: In terms of their independence of
2 the IOU, they certainly qualify. I don't think it's any -- I'm
3 not casting aspersions, but that role requires certain skills
4 set in experience, and I don't know if they would have that
5 in-house without adding that type of credentials to what
6 they're doing now.

7 COMMISSIONER PALECKI: Mr. Sasso.

8 MR. SASSO: Office of Public Counsel has an advocate
9 role on behalf of the citizens, on behalf of the customers. I
10 don't think they would feel comfortable accepting
11 responsibility to be, quote, independent. I believe if they
12 were asked to be involved, they would become involved as an
13 advocate against the utility. I'm not sure how that would all
14 play out. And again, I have the same question in terms of
15 their resources, but they have historically not been very
16 active in these need cases, and I'm not sure how they would
17 assess their role or responsibility or whether they would truly
18 be dispassionate about it.

19 COMMISSIONER PALECKI: Well, I'm not sure I would
20 agree that they would be against the utility, but I think
21 certainly they would be very actively advocating for the best
22 possible deal for the customer, which is what we're trying to
23 achieve through this entire process.

24 MR. SASSO: I think there's a difference between
25 advocacy and judgment. Where advocacy sometimes involves -- in

1 our experience with the Office of Public Counsel, they're
2 taking very, very aggressive positions on behalf of the
3 customer, expecting the Commission to be the independent
4 evaluator of those positions.

5 COMMISSIONER PALECKI: Thank you.

6 MR. WRIGHT: Could I respond to Commissioner
7 Palecki's question?

8 COMMISSIONER PALECKI: Yes.

9 MR. WRIGHT: Thank you. Very briefly. I've made --
10 probably looked at the Arizona model more than any other. The
11 independent monitor that Arizona will be using to govern
12 solicitations by their state's two large IOUs over the next
13 five months will be hired by the Commission staff, accountable
14 solely to the Commission staff, will essentially participate in
15 reviewing and evaluating all aspects of the solicitation
16 regardless whether it's an RFP type or an auction type
17 solicitation, both of which are authorized.

18 They will monitor communications, provide status
19 reports, frequent reports, including very specifically a
20 prerelease of the solicitation report, a report on the winning
21 bids and a final report. They will also be -- the independent
22 monitor will also be potentially called on to be an expert
23 witness in any subsequent proceedings.

24 I don't see any impediment myself to the independent
25 monitor being hired in Florida by the Commission or the

1 Commission staff on the same basis as they are doing it in
2 Arizona or to such an entity being hired by the Public Counsel
3 to do exactly that role, to monitor the process soup to nuts
4 and provide reports and provide the independent assessment of
5 all aspects of the project from start to finish. So I think it
6 would work equally well if that independent entity were to be
7 hired by the Public Counsel as by the staff.

8 Just to be clear, the independent monitor in Arizona
9 is an independent monitor. It's not an evaluator. Strictly
10 advisory; it's not decision making. Thanks.

11 COMMISSIONER PALECKI: Thank you.

12 CHAIRMAN JABER: Okay. Commissioners, let's do an
13 assessment. By my list, we only have one more speaker left,
14 but let me make sure. Next on my list is FIPUG. Ms. Kaufman
15 indicated to me yesterday, Commissioners, that she would like
16 to rest her case on the submitted comments. So she will not be
17 here to make a presentation today. Florida Crystals, same
18 thing. City of Tampa and Solid Waste Authority of Palm Beach
19 County, that was Mr. Zambo.

20 MR. HARRIS: I've been contacted by Mr. Zambo. He
21 was not able to make it. He did want the Commission to
22 consider his comments as filed as his comments that he would
23 have presented today with a special emphasis on the comments
24 regarding the municipals not having to pay the same evaluation
25 fee as perhaps the for-profit entities would.

1 CHAIRMAN JABER: Well, to be clear, the message left
2 with me was with respect to the acknowledgement by Mr. Sasso
3 that an exception could be crafted for the renewable portfolio
4 for municipalities and co-ops, Commissioners. That was one of
5 the main points Mr. Zambo wanted us to remember.

6 And that leaves Calpine on my list. Mr. Wright,
7 that's you. But let me make sure, is there anyone else in the
8 audience that wants to address the Commission? I know,
9 Mr. Moyle, you made an appearance.

10 MR. MOYLE: We'll waive and just have the right to
11 engage in any closing remarks.

12 CHAIRMAN JABER: Okay. Anyone else in the audience?
13 All right. That leaves Calpine. Commissioner Palecki, you
14 were going to say something?

15 COMMISSIONER PALECKI: Yes. I had a question for the
16 other parties about a position that's been taken by Florida
17 Crystals. Can we -- is this the time to ask those questions,
18 or should I just wait until --

19 CHAIRMAN JABER: How about at the very end when we're
20 done? We'll open it up for other questions that remain
21 outstanding; is that all right?

22 COMMISSIONER PALECKI: Thank you.

23 CHAIRMAN JABER: Okay. Mr. Wright, go ahead. Remind
24 though, Commissioner. Go ahead, Mr. Wright.

25 MR. WRIGHT: Thank you, Madam Chairman. I'll be as

1 brief as I can. They grew slightly from yesterday morning but
2 I think not a lot. Thanks very much for the opportunity to
3 present comments here today. Calpine does support PACE's
4 comments and proposals, but Calpine also proposes and urges the
5 Commission to include a permissive nonmandatory provision in
6 the rule that would authorize, allow, not require, public
7 utilities to utilize an anonymous electronic auction process as
8 an alternate means of complying with the requirements of the
9 rule.

10 Auctions are being used increasingly to procure power
11 supply products around the country and around the world. You
12 heard yesterday from Mr. Vaden that they're already being used
13 in New Smyrna Beach to the significant, substantial benefit of
14 that utility's Commission's customers. I hear through the
15 grapevine that other Florida utilities may be using auction
16 processes themselves in the not too distant future.

17 New Jersey has used one auction for the provision of
18 all energy, virtually all energy that's being provided in that
19 state today. Their Board of Public Utilities has recently
20 authorized a new round of what they call their basic generation
21 service auctions for the provision of the next batch of power.
22 In that case, it will be -- two-thirds of the power will be
23 supplied for 10 months. One-third will be supplied for 34
24 months, almost 3 years. Arizona has essentially -- I think
25 they have finally adopted it. I know they are proceeding with

1 it. And the press release from New Jersey and the Calpine
2 comments and the Arizona staff's Track B Report which outlines
3 their whole process, including the independent monitor's role,
4 are likewise included in our comments.

5 Arizona has specifically authorized the use of
6 auctions, although they are leaving it up to the utility
7 whether to use an RFP or an auction, just like we're
8 recommending to you today. And they are looking at procuring
9 between 2,500 and 3,500 megawatts of capacity over the next 5
10 to 8 years through such a process. The New York ISO uses
11 auctions for certain capacity products. The New England ISO
12 uses auctions for certain capacity products, so do others.
13 Also, large power consumers in Canada and the U.S. have found
14 some success using auctions.

15 Auctions come down to basic economics in terms of
16 making markets work like they're supposed to. You want a
17 process -- and this would apply equally to an RFP. You want a
18 process that is going encourage entry and participation, that's
19 going to prevent collusion and gaming, and that's going to
20 prevent perdition by stronger participants in the process.
21 Properly designed auction can provide many benefits.

22 They're mostly likely to get the lowest prices for
23 customers. They're truly objective. They solve the beauty
24 test problem. They solve the judge and jury and contestant
25 problem that we believe exists here today. They eliminate the

1 need for lengthy administrative hearings on the back end as to
2 whose proposal really was or is the best or how the proposal
3 should have been evaluated or anything else.

4 An auction based on a utility-developed power
5 purchase agreement -- and I think this is exactly the kind of
6 wish list that the Chairman was referring to yesterday. We
7 don't have any problem with a utility having flexibility in
8 saying what it needs and determining what's in the best
9 interest of its ratepayers. We just want them -- you know,
10 we'd prefer that they do it on the front end. In this
11 proposal, we give them the option of doing it on front end by
12 specifying all the nonprice terms and conditions in a wish list
13 PPA that parties could then bid on. And this also solves the
14 marriage of two worlds problem identified yesterday by
15 Mr. Taylor where the IOU specifies the nonprice terms that it
16 wants that best serve its ratepayers' needs, and then let the
17 bidders bid on price.

18 An auction system is truly fair to all participants.
19 Each and every participant. The IOU, any IOU affiliate, and
20 any IPP has a fair, equal opportunity to win. Auctions give --
21 a properly designed auction -- and I'll come back to that
22 qualifier in a moment -- a properly designed auction gives
23 incentives to participate in the process because whoever
24 actually submits the best bid will win the contract.
25 Stimulating the participation by bidders means you are going to

1 get more competition which means, you know, with unusual
2 exceptions you are going to get lower, better prices for
3 customers. Probably, in my opinion, using an auction process
4 will save you a lot of time.

5 Arizona has allowed five months, start to finish,
6 from this past November the 4th, and the time line is actually
7 laid out in the Arizona staff's Track B Report that are in
8 Calpine's comments. They have allowed five months from start
9 to finish, from starting to gather resource data and put the
10 solicitation materials, resource plans, et cetera, together
11 that began at the beginning of last month to the submission of
12 bids in response to an auction, if the utility chooses to use
13 an auction track, on March 31st.

14 Even if you add in 90 or 120 days for a hearing, you
15 are up to 240 or 270 days, and you've got really, really,
16 really strong evidence that you've gotten the most
17 cost-effective alternative out the back end. So that issue is
18 not going to be very susceptible to litigation.

19 Now, I qualified my comments a couple of times by
20 saying "a properly designed auction." Just to say you're going
21 to use an auction does not imply that you have got a panacea.
22 There are problems with various forms of auctions in various
23 markets. In a nonanonymous auction, there is a frequently
24 prevalent problem of intimidation by bidders by other bidders,
25 especially where other bidders are very strong. In the

1 literature, they are reported threats of litigation. We're
2 going to sue you if you keep bidding. And while this sounds
3 outrageous, it has happened, folks.

4 There is a problem of deterrence of entry in some
5 cases. If you've got a badly-designed auction, folks are going
6 to say, why should I show up for this? Why should I spend my
7 million dollars to do this? And there are also problems of
8 signaling and collusion among bidders. Fortunately, these are
9 generally solved with an anonymous electronic Anglo-Dutch
10 auction such as advocated by Professor Klemperer, and I've
11 cited his paper in our comments. And this is exactly the
12 process that's being used by the Utilities Commission in New
13 Smyrna Beach. I think it's particularly applicable in this
14 context myself, and Professor Klemperer writes, "The main value
15 of the Anglo-Dutch procedure arises when one bidder (for
16 example, the incumbent operator of a license that is to be
17 re-auctioned) is thought to be stronger than potential rivals."

18 I'd like briefly to address why I think this should
19 be in the rule and then to address the utility's critique in
20 their responsive comments. One more point auctions generally.
21 You need to get them right. Professor Klemperer says very
22 clearly, auctions are not one size fits all. Certain markets
23 call for different types of auctions. New Jersey, for example,
24 uses what's called a simultaneous descending clock auction.
25 That's been written about by Professor Krampton (phonetic) at

1 the University of Maryland. I actually talked to him a little
2 bit about it. And he says that's the state of the art for that
3 type of auction. But the crucial point is that you need to
4 specify the rules clearly on the front end, the rules of the
5 auction, that is. They need to be free from bias, and they
6 need to apply to all participants equally and equitably.

7 Now, why put it in the rule? In the first place, it
8 doesn't cost you anything to put it in the rule. It doesn't
9 cost the IOUs anything to put it in the rule. It's
10 nonmandatory, and the reason to put it in the rule is that
11 without it -- I mean, it's a good thing. People are using it.
12 Other states are using it. At least one utility here in
13 Florida is already using it. Without it being in the rule, if
14 you just leave it up to the utility to think about it, they'd
15 have apply for a waiver to do it. This would take out the
16 possibility of a waiver step.

17 Finally, responding to the IOUs' critique of our
18 proposal in their comments. They somehow suggest that you've
19 rejected the concept because it's not included in the published
20 proposal that was published by the staff following your
21 directions after September 30th. The fact that the proposal is
22 not in the proposed rule is of no legal significance. Our
23 earlier comments that were on the table as of September 30th
24 didn't specify the proposal was for permissive nonmandatory
25 auction process. Our November 15th do so. And second, we're

1 here to decide what the rule is to be. If the fact that the
2 Commission had had something proposed to it and decided not to
3 include it in a proposed rule doesn't really matter, I don't
4 think, when you get to a rulemaking hearing. If that were
5 true, if it were binding in some way, you know, why would we
6 have the hearing? You'd have the rule and that would be it.

7 As to the IOUs' suggestion that Calpine's proposal
8 could be considered exclusive or preclusive, this is just plain
9 illogical. Our proposal -- and we've engrafted it not only on
10 the PACE rule. I've got two separate exhibits in our comments
11 that shows where it would go on the staff's rule and then also
12 shows where it would go on the PACE rule. You can put it on
13 either one or whatever one you want, but it would clearly
14 appear close to the end of the rule following all of the
15 proscriptive requirements that apply to the RFP process and
16 just say, in lieu of an RFP process, a utility may comply with
17 the rule by using an anonymous electronic auction process.
18 Clearly, clearly, our proposal is not mandatory. It's
19 permissive and therefore not limiting in any way.

20 Finally, the IOUs' suggestion that -- I'm quoting
21 from their comments -- that many factors are not reflected in
22 the bid price and should be considered by the utility during
23 the evaluation process, unquote, is in my opinion a bootstrap
24 argument. The reason that these certain factors may not be
25 reflected in the bidder's bid prices is that the IOUs continue

1 to oppose identifying specifically what products they want to
2 buy, as reflected by their opposition to specifying the
3 criteria, weights, and the scoring system by which they would
4 judge responses to an RFP. This criticism is directly parallel
5 to the assertion made yesterday, and also addressed by my
6 colleague Mr. Twomey this morning before he went to the
7 dentist, that winning the bid is not the same as getting the
8 best deal for the ratepayers. If it's true that winning the
9 bid is not equivalent to getting the best deal for the
10 ratepayers, it's a direct admission that the utility hadn't
11 designed the RFP right. The point is, as Mr. Twomey pointed
12 out, you want to design the RFP to get the best deal for
13 ratepayers.

14 If the IOUs would specify the products they want to
15 buy, the nonprice terms and conditions on which they want to be
16 supplied, and I would view this as being done in a proposed
17 power purchase agreement embodying the utility's wish list, and
18 then give every interested bidder a fair opportunity to provide
19 the desired products at the lowest cost for consumers in an
20 auction process, a properly designed anonymous auction process.
21 They would get more bids at lower prices for the benefit of
22 their customers. Auctions can work. Auctions do work here, in
23 other states, around the world, and we'd really ask you to
24 please include this permissive provision in your rule. Thank
25 you.

1 CHAIRMAN JABER: Thank you, Mr. Wright.

2 Commissioners, do you have questions of Mr. Wright?

3 COMMISSIONER PALECKI: I have one question, Madam
4 Chairman. Under your nonmandatory ruling which the winning
5 bidder shall be presumptively entitled to a determination of
6 need, and my question is: If after the bid process the
7 Commission is not happy with either the number of bids or the
8 level of competitiveness and they just don't think the bid
9 price is the best deal, would this language tie the hands of
10 the Commission?

11 MR. WRIGHT: Commissioner Palecki, two things. One
12 is a prefatory thing. The statement that you quoted is
13 conditioned on the Commission preapproving the auction process.
14 So I just want to make that clear. But secondly, as to tying
15 the Commission's hands, if you're not happy that it was a fair,
16 productive auction process, I would certainly not envision it,
17 and Calpine would certainly not envision it, as tying your
18 hands. If you don't think it got the best deal, throw it out.

19 COMMISSIONER PALECKI: Because I certainly appreciate
20 the fact that this is an optional section. It's just that
21 particular provision -- I understand it's after the Commission
22 approved the process, but there are some times where even
23 though a process might look good up front, when all is said and
24 done, it doesn't work well. And I think we have seen lot of
25 examples of that in California, and I think California would

1 probably like to undo a lot of the bidding that went on there.

2 MR. WRIGHT: Remember, I said properly designed
3 auctions.

4 COMMISSIONER PALECKI: And so I just think there
5 needs to be some sort of parachute or some sort of specific
6 safety device that gives the Commission a final power to
7 determine after the bid is over that it was a good bid that
8 resulted in --

9 MR. WRIGHT: And we would completely agree with that.
10 And just to give you a real world example, you need a number of
11 bidders. And if you go in -- I think Mr. Vaden said yesterday
12 they're getting real good results typically with about a dozen
13 bidder in each of their auctions so far. I think going into
14 this if you were to do this for a capacity auction for a long
15 term, 5 years to 25 years PPA, whatever it would be, I think
16 realistically you would expect to see 10, 15, maybe more than
17 that, bidders show up for such an auction in Florida.

18 If you only had four show up, I think you'd have to
19 wonder whether you are getting the right results. And we would
20 have no objection at all to including the parachute, as you
21 described it, to allow the Commission to vacate the process if
22 it didn't look like it worked like it was supposed to.

23 COMMISSIONER PALECKI: Mr. Sasso, if we changed the
24 language of Calpine's nonmandatory proposal to provide some
25 sort of safety mechanism, why would the investor-owned

1 utilities be opposed to something that would be wholly within
2 their discretion? If they want to use it, they can. If they
3 don't want to use it, it's absolutely not in any way required
4 that they go forward.

5 MR. SASSO: Well, Calpine's proposal does more than
6 give us an option. It tells you how to do it. And we believe
7 that under the current rule, the utility has the option of
8 running an auction. We believe that the current rule would
9 accommodate it or the proposed rule. Just issue an RFP and
10 describe -- the methodology we're going to use is an auction
11 and structure it so that we could do that. Calpine has
12 prescribed a certain way of going about it. And before we do
13 that, I think we would need a whole lot more discussion and
14 investigation of auctions to the utilities' satisfaction that
15 they knew how best to do.

16 Among other things, if we were going to do it in lieu
17 of an RFP as opposed to -- as a way to implement an RFP, we
18 would need to deal with another Commission rule that describes
19 the contents of a petition, and there are a lot of unintended
20 consequences and collateral ramifications of the proposal. So
21 the short answer is, we think we've got the option now, and
22 Calpine's proposal would actually limit our discretion, not
23 extend it.

24 COMMISSIONER PALECKI: Would you have any objection
25 just to a simple statement within the rule that you do have the

1 option now without going into a lot of detail with regard to
2 the mechanics?

3 MR. SASSO: If we're going to have a break before
4 concluding today, I'd like to have an opportunity to discuss
5 that with my clients. My concern, just quickly to that, is if
6 it's in the rule, does that give somebody standing to invoke
7 it? If it's clearly optional, perhaps not, but I'd like to
8 think through that and talk to my clients, and we can come back
9 and discuss it if we have an opportunity.

10 COMMISSIONER PALECKI: Thank you.

11 CHAIRMAN JABER: Commissioner, I think we are going
12 to end up taking a break. I'm told that the parties want to
13 address at least two of the four additional issues that were
14 raised on the order on procedure; is that correct?

15 Let me get clarification on that because it really
16 determines how long of a break we take. There was an order on
17 procedure issued not too long ago that identified four
18 questions: Bid protest and dispute resolution, which we have
19 discussed somewhat; the need for an equity adjustment, we've
20 discussed somewhat; utility staffing of bid proposal
21 evaluation; and sharing of benefits flowing from under-budget
22 self-build projects, which we've discussed somewhat. Is there
23 additional discussion on those four questions?

24 MR. SASSO: Mike Green and Susan Clark have talked
25 about one additional item which we could address in about 30

1 seconds. Really, I think it amounts to an agreement about how
2 we should approach one of those issues, but beyond that, I
3 don't believe --

4 MR. CLARK: Yeah, it's on the equity penalty. And we
5 discussed the fact that we will put on the record that we
6 consider putting in the RFP the method for calculating an
7 equity adjustment if one is going to be applied, that that
8 would be part of the methodology and criteria you would put in
9 the RFP.

10 MR. GREEN: And I guess I agreed with Ms. Clark that
11 if the utility is going to consider using an equity penalty,
12 they should identify that on the front end and identify what --
13 and quantify the amount of that equity penalty on the front
14 end, and that would then give us the opportunity to, you know,
15 raise a concern if we think there is concern.

16 I would like to add, though, PACE does not concede
17 that we think equity penalty is a viable cost. It's clearly a
18 consideration that rating agencies use, but they also use many,
19 many other considerations in their evaluation of the risk
20 associated with a potential, you know, self-build versus PPA.
21 But given the way Ms. Clark read it, I would agree that if they
22 are considering to use that equity penalty consideration
23 identified in the RFP, it gives us an opportunity to look at it
24 and see if we agree with it or not.

25 MR. CLARK: Just to clarify, we would put in the

1 methodology to calculate it because it is a calculation
2 depending on what's bid.

3 MR. GREEN: I'm fine with that as long as it's a
4 calculation I can do too.

5 CHAIRMAN JABER: Okay. I think that's very good
6 clarification for purposes of the record.

7 Commissioners, do you have -- it sounds like if we
8 take a break it's going to be a very short break. So does 20
9 minutes give you, Mr. Sasso, enough time?

10 MR. SASSO: Yes, it would. Just one other question
11 about procedure, if we may, before we break. Although I
12 appreciate there has been some give-and-take today by both
13 sides, we would request an opportunity, perhaps not to exceed
14 ten minutes, to respond to some of the points that our friends
15 at the other end of the table have made today. They had the
16 benefit of hearing our presentation and then could incorporate
17 that in some of their remarks going forward, but we haven't had
18 that.

19 CHAIRMAN JABER: No, actually, you have. I'm not
20 going to grant your request, and here's why: The presentations
21 and how it was going to be governed was fully noticed, and the
22 Commissioners have been really, really good about asking a
23 question here and turning around and asking you what you think
24 and vice versa. So I really want to draw a line in the sand,
25 and I think the Commissioners have done a really good job

1 asking both sides to speak to the issues.

2 MR. SASSO: One other question --

3 CHAIRMAN JABER: Go ahead, Mr. Sasso.

4 MR. SASSO: -- along those lines and that is on these
5 time lines. We did not ask to have ours included in the record
6 yesterday because of the objection that was raised, and we
7 anticipated that the others would want an opportunity to review
8 it and comment, which they have done now. We have not had the
9 opportunity to comment on theirs. If we could have two minutes
10 on that, then we would be comfortable having both of them go
11 into the record since they have been the subject of some
12 discussion today.

13 CHAIRMAN JABER: Well, the other side has not asked
14 for that to occur, so your request is not granted. It was your
15 exhibit, you started it.

16 MR. SASSO: Well, then could we put ours into the
17 record?

18 CHAIRMAN JABER: I don't -- yes, if you have a
19 request to identify your exhibit and put it into the record --

20 MR. SASSO: We would ask that it be identified as
21 Exhibit 2, I guess it is, and then we would ask that it be
22 taken into the record.

23 CHAIRMAN JABER: Okay. There are two exhibits,
24 right, Mr. Sasso? And I'm assuming you're asking for the
25 identification of both of them.

1 MR. SASSO: As a composite exhibit, yes. Thank you.

2 CHAIRMAN JABER: Okay. Composite Exhibit Number 2
3 will be identified for the hypothetical RFP process flowchart
4 and for the Bid Rule time lines.

5 (Exhibit 2 marked for identification.)

6 MR. McGLOTHLIN: Chairman Jaber, I will make a
7 similar request for the exhibit captioned, "Bid Rule Time
8 Lines, PACE Overlay."

9 CHAIRMAN JABER: Without objection, composite
10 Exhibit Number 2 is admitted.

11 (Exhibit 2 admitted into the record.)

12 CHAIRMAN JABER: Mr. McGlothlin, you handed out one
13 page entitled, "Bid Rule Time Lines, PACE overlay."

14 MR. McGLOTHLIN: Yes. And I have had a chance to
15 proof the typed version of that. If you wish, I'll substitute
16 the typed version for the longhand markup that was distributed
17 earlier.

18 (Exhibit 3 marked for identification.)

19 CHAIRMAN JABER: Okay. Bid Rule time lines, PACE
20 overlay will be admitted into the record as --

21 MR. SASSO: Well --

22 CHAIRMAN JABER: Go ahead, Mr. Sasso. You're about
23 to object.

24 MR. SASSO: Well, I object to the extent that we
25 haven't had an opportunity to comment on this, and would

1 request that we have two minutes simply to comment on the
2 exhibit before it's admitted.

3 CHAIRMAN JABER: Mr. McGlothlin.

4 MR. MCGLOTHLIN: No objection.

5 CHAIRMAN JABER: Okay. Two minutes, but remind me,
6 we'll come back to you. With that, Exhibit Number 3 is
7 admitted into the record.

8 (Exhibit 3 admitted into the record.)

9 CHAIRMAN JABER: Did we address all the Commissioner
10 questions for Mr. Wright?

11 COMMISSIONER BRADLEY: No.

12 CHAIRMAN JABER: Okay. Commissioner Bradley, you've
13 got questions?

14 COMMISSIONER BRADLEY: Your suggestion of an auction,
15 is this -- are you thinking maybe about replacing the RFP
16 process with an auction altogether, or is this just another
17 option?

18 MR. WRIGHT: Commissioner Bradley, it's strictly an
19 option up to the utility's discretion whether they want to use
20 it. It would authorize them to use an auction in lieu of the
21 RFP process that's laid out in some detail in the rule. Our
22 proposal would provide the opportunity for the IOU, if it wants
23 to do so, to ask the Commission on the front end to come in and
24 describe the auction process and get preapproval for that
25 process. And again, we don't have any objection at all. In

1 fact, I agree with Commissioner Palecki's suggestion that there
2 be some form of parachute, that if the auction appears to the
3 Commission not to have worked properly, that the Commission can
4 throw it out.

5 COMMISSIONER BRADLEY: Two other questions. Would an
6 independent evaluator be involved in determining the fairness
7 of an auction?

8 MR. WRIGHT: You would not need one to be involved in
9 an auction. That's my opinion. I will tell you that Arizona
10 contemplates using an independent monitor or using the
11 independent monitor whom they are going to hire to also
12 evaluate the development of the auction instrument in the
13 auction process if a utility in Arizona decides to utilize an
14 auction process. The independent monitor will monitor,
15 evaluate, assess the development of that instrument, assess the
16 process and provide reports to the Commission staff out there
17 on that, but it's not necessary.

18 COMMISSIONER BRADLEY: You didn't mention anything
19 relative to cost and who assumes the cost for an auction.
20 What's the cost of putting on an auction? Who pays for it, and
21 what are some of the cost benefits?

22 MR. WRIGHT: Commissioner Bradley, I would view that
23 as being -- the cost as being paid for out of bidder's fees. I
24 got an estimate from a company that runs these auctions that to
25 do something like this would probably -- on a fee basis, I

1 think what they would like to get would be some kind of, you
2 know, small percentage commission of the savings derived from
3 the auction, but to do it on a fee basis, I got an estimate of
4 \$35,000 to \$50,000.

5 COMMISSIONER BRADLEY: Okay. One other question and
6 I'll be finished. If an auction is perceived as being unfair,
7 who would the complaint be filed against and to whom would the
8 complaint go?

9 MR. WRIGHT: It would depend on when it came up. I
10 think it would come to the Commission at the latest in the need
11 determination proceeding.

12 COMMISSIONER BRADLEY: Well, who would the complaint
13 be against? Against the IOU or against the person who has been
14 hired to conduct the auction?

15 MR. WRIGHT: It would depend on who the alleged -- I
16 apologize for using this word, but I can't come up with a
17 better one -- yeah, I can. It would depend on whose fault the
18 alleged problem was. If it was an alleged fault in the design
19 of the auction as designed by the utility, I guess the
20 complaint would be against the utility. Actually, it would
21 probably be against the utility in any event, but if alleged
22 fault was an as-applied defect in the auction, that is a
23 problem with the auction as run by the auctioneer.

24 It would be a -- I think technically I -- just as a
25 technical legal matter, I think it would have to be against the

1 utility because it would be in a proceeding in which the
2 utility was presumably seeking approval of the winning bid or
3 bids, but in that case, the alleged defect would be that the
4 auctioneer messed up. You know, suppose there was a breach of
5 confidentiality or breach of anonymity. If the auction were
6 designed to be an anonymous electronic auction and there was a
7 breach of anonymity that compromised the integrity of auction.
8 I mean, I can conceive of such a thing happening. I don't know
9 that it ever has, but if that would happen, technically, I
10 think you would have to file a complaint against the
11 utility's -- or against -- raise it as an issue in the need
12 determination; say, this ain't right because there is this
13 breach of confidentiality. But it would be clear, you know,
14 whoever was filing any such complaint would have to allege what
15 the problem was.

16 COMMISSIONER BRADLEY: Would the IOU have the option
17 also to participate in the auction?

18 MR. WRIGHT: Yes, sir, and their affiliates if they
19 want to.

20 COMMISSIONER BRADLEY: Okay.

21 CHAIRMAN JABER: Mr. Sasso, in reading your supply
22 comments I know you didn't respond to the auction idea in great
23 detail because we didn't include that concept in our proposed
24 language, but you make the statement in here that I just didn't
25 understand. You said, "Including the auction language in the

1 proposed rule is inappropriate because the auction represents
2 just one method by which an IOU could comply with the Bid Rule.
3 Specifically listing this method could create a presumption
4 that any other means of selecting capacity is imprudent." What
5 other means?

6 Forgive my ignorance on this issue. There's the RFP
7 method where proposals are submitted in response to the RFP,
8 and then my understanding of auction is in lieu of the request
9 for proposals method. There is an opportunity for the
10 utilities in some states to establish the threshold of what
11 they are looking for in generation, construction, and then call
12 it -- call for an auction. What are the other means for
13 selecting generation capacity?

14 MR. SASSO: Well, in the context of this rule, it
15 would be the RFP method or, in lieu of that, the auction
16 method. So those would be the two issues.

17 CHAIRMAN JABER: Okay. So then including -- if this
18 Commission was inclined to allow to include permissive language
19 regarding the auction methodology in lieu of an RFP, then
20 you're concern is alleviated.

21 MR. SASSO: I'm sorry, I didn't hear --

22 CHAIRMAN JABER: Your concern seems to be, as
23 articulated in the reply comments, that listing a specific
24 method creates a presumption that any other means of selecting
25 generating capacity is imprudent.

1 MR. SASSO: Yes, ma'am.

2 CHAIRMAN JABER: What I heard you just say is you
3 acknowledge that there are two methods: Either the RFP
4 approach or the auction approach. I think it's really the
5 sentence that confuses me. I don't know that we're saying
6 different things.

7 MR. SASSO: Again, I would ask the Chair's indulgence
8 to afford me the opportunity to consult with others in the IOU
9 community to respond fully, but if it's truly optional, then we
10 can do that now. I mean, we have the discretion, I think, to
11 do that now as a way to manage the RFP.

12 If it's proposed in lieu of the RFP, that raises
13 questions. Some of them have been already asked. What does
14 that do to the process? What are the bidders' rights? What
15 are the procedures? How does the Commission fit into that?
16 Calpine envisions that we come to the Commission for some
17 preliminary approval of certain terms that are pulled out and
18 shown to you in advance, which is not contemplated by the
19 statutes. There's a need proceeding contemplated by the
20 statutes where we have to lay out our whole case to you, not
21 ask you to look at certain criteria in a vacuum. So we're
22 concerned about this form of alternative being prescribed by
23 rule.

24 There's a question of authority. There's a question
25 of how it's going to be done. And are we going to be

1 expected -- are we going to be encouraged by the Commission to
2 do it when we have all of these concerns? Whereas, if we stick
3 with the proposed rule and the utilities after investigation
4 decide that it's something that can be managed appropriately,
5 it will benefit the customer, then we feel more comfortable
6 dealing with it in that respect.

7 CHAIRMAN JABER: Yeah, and I have to tell you, I
8 agree with your concern. I think I'm just -- and perhaps these
9 are questions better addressed to Mr. Wright, but I do want to
10 get them out there before you take your break, so you can
11 discuss with Mr. Wright what his concept of auction is and be
12 prepared to address it when we come back.

13 I want to preserve the opportunity for the public
14 utilities to use an auction, whether that gets articulated in a
15 rule or there's an understanding, a meeting of the minds that
16 companies can exercise the options to use an auction, I want
17 that fully understood. But I'm looking at the beginning of the
18 proposed rule, and it says, "The intent of this rule is to
19 provide the Commission with information. The use of an RFP
20 process is an appropriate means to ensure that a public utility
21 selection." So the distinction between are you asking for an
22 auction in lieu of the RFP process, or are you asking for an
23 auction to implement the RFP process, I think, is very
24 important in keeping with the spirit of the rule.

25 So we need to take a break -- when we take the break,

1 make sure your request, Mr. Wright, is consistent with their
2 understanding.

3 MR. BALLINGER: Chairman Jaber, I'm sorry. If I
4 could. Maybe it would help in both parties to consider the --
5 part of the existing rule which is the waiver language of this
6 rule that says, the utility can ask for a waiver if it can be
7 shown that what they're doing would result in a more
8 cost-effective alternative than going through a process. I see
9 that as an auction process. I see that as a bilateral
10 contract. A deal came up, things of that nature. That's
11 what's envisioned in that waiver. So I think consider that
12 when you all get together and discuss. It may be available as,
13 Mr. Sasso, said under the existing rule as an option.

14 CHAIRMAN JABER: And do discuss that because my
15 understanding of rule waivers results in a PAA process, and
16 litigation with respect to whether you can seek a waiver to use
17 an auction to implement an RFP I would want to avoid. So in
18 your discussions, let's see if we can nail that down too.

19 Commissioner Palecki, let's go head and address your
20 question from the Florida Crystals comments, and then we'll
21 break.

22 COMMISSIONER PALECKI: Yes. And I only have one
23 question primarily for Mr. Sasso but also for the other parties
24 if they would like to participate. Florida Crystals basically
25 asked for two things. One, they ask that the bidding or the

1 RFP process not be tied to the need determination criteria.
2 And the second thing they ask for is that capacity additions of
3 75-megawatt or less to existing steam plants and capacity
4 commitments of less than three years be excluded from the
5 definition. And I'd like to talk about the second. I don't
6 want to bring up the issue of modifying the criteria that are
7 already stated in the draft rule with regard to tying that to
8 the need determination statute.

9 But it is my understanding that Florida Crystals has
10 a small cogeneration situation that they may be contemplating
11 adding some capacity to that plant, a very amount. They are
12 tied to the need determination, and they don't want -- which
13 may be tied to the deed determination because you're talking
14 steam, and they don't want to have to go through an RFP
15 process. Would you have any objection to exempting from the
16 definition of those tied to this rule capacity additions of
17 75 megawatts or less to existing steam plants and capacity
18 commitments of less than 3 years?

19 MR. SASSO: I may be confused by the question, but my
20 understanding is that plants with a steam component of under
21 75 megawatts are already exempt from the Power Plant Siting Act
22 process. Now, to the extent the rule is coextensive with that,
23 they would be exempt from this rule.

24 COMMISSIONER PALECKI: I think you're correct, but I
25 believe that what they are anticipating is a capacity addition

1 to an existing plant that might bring it over the 75 megawatt
2 threshold. They have a very specific circumstance, and they
3 were here and present at the prior workshop, but were very
4 hopeful that they could have their situation removed from this
5 rule so that they could make a small addition to their existing
6 capacity without having to go through this process.

7 MR. SASSO: Well, I suppose to the extent it calls
8 for an interpretation of the statute, whether they are exempt
9 from the statute --

10 COMMISSIONER PALECKI: Well, they actually aren't
11 asking to be exempt from the statute, and they believe that
12 they would not be exempt from the statute. They are asking to
13 be exempt from the rule.

14 MR. SASSO: Well, I suppose if one utility were
15 granted an exemption, it would need to be applied uniformly to
16 all utilities unless they applied for a waiver and demonstrated
17 that they qualified for a waiver. As Mr. Ballinger points out,
18 there is a waiver provision in the rule, and perhaps they could
19 apply for a variance. I don't want to give them legal advice,
20 but there might be some options available to them.

21 COMMISSIONER PALECKI: So you would be against then a
22 specific exception for capacity additions to existing plants of
23 75 megawatts or less?

24 MR. SASSO: Well, if it were put in the rule in those
25 terms, it would apply evenhandedly to everybody. If the

1 Commission wants to create an exemption, I don't see any
2 difficulty with that.

3 COMMISSIONER PALECKI: Well, I think what the point
4 that they have made in their pleading is that, really, this
5 should be a rule that applies to significant additions. And
6 they believe that capacity additions of 75 megawatts or less to
7 an existing steam plant, they have suggested that that's not
8 significant.

9 MR. BALLINGER: Commissioner Palecki, maybe I could
10 help. First think is, is the rule, existing rule and even the
11 proposed rule would not apply to Florida Crystals. They are
12 not a public utility. They are an independent generator. This
13 rule lays out procedures for investor-owned utilities only.
14 That's the bidding procedure. Whether they come under the
15 Power Plant Siting Act or not is a different matter, and that's
16 not addressed by the rule.

17 But what they're asking for is basically a
18 clarification of what would constitute a waiver. And I think
19 in some earlier versions of staff proposals we had language
20 similar to this, that if the utility was contemplating a
21 three-year deal, a short-term procurement, it would not have to
22 go through the RFP process. And that's the way I read their
23 proposed revisions. So that if a utility was looking at
24 something that was a short-term deal, they would not have to go
25 through the whole RFP process to secure that deal. They could

1 just sign a bilateral contract and be done with it.

2 COMMISSIONER PALECKI: And it's my understanding that
3 the earlier language is no longer in the rule, and now we have
4 waiver language that would give the Commission some flexibility
5 depending on whether we felt that it was a significant addition
6 or not.

7 MR. BALLINGER: Correct. And the waiver language
8 says it can be granted if it can be shown that the process the
9 utility wishes to proceed would result in a more cost-effective
10 alternative or better reliability, that kind of thing.

11 COMMISSIONER PALECKI: And you're saying their
12 concerns about making a small addition to their existing plants
13 really are not founded because since they're not a utility,
14 they would not have to comply with the rule anyway?

15 MR. BALLINGER: Correct. I'm not a lawyer, but that's
16 the way I read it. This rule would not apply to them.

17 COMMISSIONER PALECKI: What if they made a small
18 addition to their existing plant with the intent or with a
19 contractual obligation with the utility to provide that
20 capacity to the utility? Would that kick in the rule or not?

21 MR. BALLINGER: No. It's driven by the utility's
22 needs and when they need capacity and if the unit they're
23 planning to construct would go through the Power Plant Site Act
24 or not. It has no relation to what the independent is
25 building.

1 MR. HARRIS: And, Commissioner, I think the
2 definition of public utility is laid out on, I think, the
3 second or third page of the rule and clearly does not
4 contemplate anything other than, I think, a regulated utility
5 in Florida which I believe are the four IOUs.

6 COMMISSIONER PALECKI: So are you basically telling
7 me that Florida Crystals' concerns are unfounded, and they
8 really didn't even to --

9 MR. BALLINGER: No. I didn't read anything in their
10 comments about them expanding their facility in their unique
11 circumstances. But what it would do is if they did expand and
12 they wanted to enter into a short-term contract with the
13 utility, they don't want to have to go through the RFP process
14 as a respondent in order to do that type of contract. They
15 want to just be able to sit down at the table and negotiate a
16 three-year deal. That's permissible today and under the
17 proposed rule.

18 CHAIRMAN JABER: Mr. Sasso wanted to response to your
19 question, Commissioner Palecki.

20 MR. SASSO: Yes. Just looking at their comments, I
21 don't understand the thrust -- I didn't certainly until now
22 understand the thrust of their comments to certain a particular
23 project they envisioned. I understood their proposed rule
24 change to expand the rule to capacity additions of 75 megawatts
25 or more, which would expand the coverage beyond the Power Plant

1 Siting Act, and then they wanted to create an exemption from
2 that to make it less far reaching.

3 Now, that's a rule proposal or rule revision that
4 we've addressed in different ways at different times and
5 opposed. But to the extent they have some individual issue or
6 individual project, they have not put that on the table, and I
7 feel uncomfortable discussing the circumstances of an
8 individual project without knowing the facts and in a rule
9 hearing context, especially since it's not what they put on the
10 table.

11 COMMISSIONER PALECKI: Yeah. I was going back to the
12 comments that they made at the last workshop, where they talked
13 about their own circumstances and not wanting to need to go
14 through this process just for a small addition to their
15 existing plants' capacity. But it seems to me that they
16 wouldn't need to go through the process anyway. So I'll just
17 withdraw this from --

18 MR. SASSO: That might have been a reaction to an
19 earlier version of the rule.

20 MR. CLARK: I think what it has to do with the
21 earlier version expanded what the rule applied to, and they
22 would have had to go through the rule. So they would have
23 needed a waiver. Now that you have limited it to those that
24 have to go through the Power Plant Siting Act, the utilities
25 can still do those bilateral short-term contracts. You didn't

1 make the rule applicable to them. So the waiver is no longer
2 needed.

3 COMMISSIONER PALECKI: I think I'm through with this
4 line of questioning. Thank you.

5 CHAIRMAN JABER: Commissioner Bradley.

6 COMMISSIONER BRADLEY: And, you know, I don't know
7 what this does to the call, but I'm assuming that being the
8 optimist that I am that this all works out, and the IPPs get
9 the opportunity to do some contracting. And what I would like
10 the staff to consider is how we deal with outsourcing as it
11 relates to the IPPs, because being that my background is in
12 economic development, I have a keen interest in what happens on
13 the economic scene here in the state of Florida.

14 And what would give me some additional comfort when
15 we get this additional participation is to have the IPPs also
16 come to this Commission and give us a plan that deals with
17 their outsourcing process because, in my opinion, an RFP is an
18 outsource process. And I'd like to know what the IPPs' plan --
19 and this is something you all can think about in the future
20 when all this comes to fruition. How you intend to outsource
21 with some of the other entrepreneurs and interested parties in
22 the state of Florida as it relates to the creation of
23 additional businesses and job opportunities. I think that
24 that's important because, you know, none of this works in the
25 state of Florida if we create a situation where we export

1 dollars to another state. I'm interest in making sure that
2 Florida captures as many entrepreneurial opportunities and jobs
3 as we possibly can as a result of what we're doing here today.

4 So I need to put the IPPs on notice to the fact that,
5 you know, once we've dealt with your outsourcing issue, then
6 you're going to have to come back before this Commission, in my
7 opinion, to give us a plan for what you're going to do for the
8 state of Florida and how you're going to create additional
9 entrepreneurial opportunities and jobs and who you're going to
10 outsource with and how you're going to structure your RFPs to
11 achieve that.

12 CHAIRMAN JABER: Okay. We're going to come back at
13 1:30. We're going to start with Mr. Sasso. I'm going to let
14 you have two minutes to address Exhibit 3, and then you can
15 respond to the auction questions. And then the Commissioners
16 and I are going to discuss what happens next.

17 (Brief recess.)

18 CHAIRMAN JABER: Let's get back on the record.

19 Mr. Sasso, you were about to tell us you have
20 negotiated the final rule.

21 MR. SASSO: A tiny little piece of it. We have had
22 an opportunity to discuss with Schef Wright some language on
23 the auction, and we have been able to reach an agreement.

24 CHAIRMAN JABER: He said the "A" word. All right.

25 MR. SASSO: There must be something wrong with this,

1 but we haven't been able to identify it yet.

2 CHAIRMAN JABER: Only that you don't do it enough.

3 MR. SASSO: Would you like to hear the language?

4 CHAIRMAN JABER: Yes.

5 MR. SASSO: In implementing an RFP under this rule,
6 the public utility may use or incorporate an auction process.

7 CHAIRMAN JABER: Say that one more time.

8 MR. SASSO: In implementing an RFP under this rule,
9 the public utility may use or incorporate an auction process.

10 CHAIRMAN JABER: I like that. Everyone agrees?

11 MR. WRIGHT: Yes, ma'am.

12 CHAIRMAN JABER: Staff?

13 MR. BALLINGER: I'm just wondering does this need to
14 be incorporated in rule language or just part of the proceeding
15 that this is an agreement outside --

16 MR. WRIGHT: It needs to be in the rule, because
17 otherwise you have to comply with 120.542, which is a lengthy,
18 rigorous variance requirement.

19 MR. BALLINGER: We will find a place to put it in.

20 CHAIRMAN JABER: Thank you.

21 Okay. Thank you, Mr. Sasso; and thank you, parties.

22 Now, you were also going to have two minutes to
23 address Exhibit 3.

24 MR. SASSO: Yes, ma'am. With respect to the markup
25 of our time line, I would point out that PACE has taken about

1 70 days off of the time line with respect to their proposal,
2 and they have done so on the premise that because of the
3 complaint process we will have vetted the considerations
4 concerning the RFP and will expedite the ability for them to
5 submit bids and negotiate contracts.

6 In fact, just the opposite will occur. Because as I
7 have described, under the existing rule there is pretty much
8 continual discussion from the outset through this time when a
9 complaint procedure will be going on under PACE's proposal,
10 which is true vetting, it is meaningful vetting. If we have
11 litigation instead of that, the informal discussions are likely
12 to grind to a halt. Both sides are going to be squared off in
13 an adversarial setting, and the true vetting is actually going
14 to stop. So I would imagine it is going to lengthen the time
15 to submit bids and to have contract negotiations.

16 The time they have added onto the existing rule, a
17 number of days which were initially penned in by hand, needs to
18 be transferred over to the PACE proposal in the proposed rule.
19 Those additional days were tacked on on the premise that there
20 is a risk that at the tail end of the process, at the end of
21 the day the RFP will be set aside and we will have to do it all
22 over again.

23 That risk exists with the proposed rule in the PACE
24 proposal, also. And, in fact, it is heightened because PACE
25 wants to eliminate any flexibility in deviating from the

1 published criteria, even if good cause can be shown. So we are
2 going to be subject, under their proposal, to attacks for
3 hypertechnical discrepancies and potentially sent back to do it
4 over again. So those days have to be tacked on to their side
5 as well.

6 There is one more matter in which I would ask the
7 chair's indulgence, and that is to add new facts which we were
8 just able to obtain on the heat rates for Hines 1.

9 CHAIRMAN JABER: Before you open your mouth, just
10 know that I am going to give the other side an opportunity to
11 respond to those new facts, so take that into account.

12 MR. SASSO: Yes, ma'am. I understand. No argument,
13 just facts.

14 The Hines 1 need study was premised on two
15 225-megawatt combined cycle units with summer full load heat
16 rates of 8,000 megawatts summer; winter, 7,920. The actual
17 performance data for Hines 1 shows that the average monthly
18 heat rate achieved has been 7,281. Keeping in mind that full
19 load is generally lower than the average, the achieved
20 substantially beats the estimates in the need study in Hines 1.

21 If we paid for a contract based on the estimates for
22 Hines 1, we would have been overpaying for an anticipated
23 performance that we beat. The customer got the full benefit of
24 that better achieved rate than the estimated rate. And Ms.
25 Clark is mentioning that that was true also in Fort Myers for

1 FPL.

2 CHAIRMAN JABER: Okay. Thank you, Mr. Sasso, Ms.
3 Clark.

4 Mr. McGlothlin, before we move on, are there any
5 comments?

6 MR. GREEN: Having had a great deal of time to study
7 the comments, I commend FPC for improving upon their heat rate
8 from -- I didn't get the exact number, 75 or 800 to 7,281
9 Btus --

10 (Sound system difficulties.)

11 CHAIRMAN JABER: We're back on. Okay. Great.
12 Mr. Green.

13 MR. GREEN: Yes, ma'am. Again, commending FPC to
14 beat their assumed heat rate. But I think it just goes to show
15 you that, you know, in Hines 1 they had to use estimates from
16 suppliers, estimates from vendors. Westinghouse proposed
17 operating, you know, parameters and everything else, but now
18 they have Hines 1 actually operating. And Hines 1 is
19 operating, as he just said, at 7,281 Btu. And coincidentally,
20 that is fairly consistent with the last three years of the
21 ten-year site plans that FPC has had out there where they said
22 that their average net operating heat rate was going to be
23 about 7,306 for Hines 3; 7,306 versus 7,281, fairly close.

24 But it is curious that in the RFP process, given that
25 they have now actual operating performance of 7,281, that they

1 utilize, I believe, an average net operating heat rate for
2 Hines 3 in the RFP of 6,900, or some -- 6,900 and some odd
3 Btus, I'm not sure of the exact numbers anymore. The point
4 being significantly less than their actual operating history of
5 Hines 1, all Westinghouse, Siemens/Westinghouse units.

6 MR. SASSO: Madam Chairman, I would appreciate an
7 opportunity to correct either an misunderstanding or a
8 misstatement of fact that has been repeated several times.
9 Because it is inaccurate, I feel an obligation to ask to
10 correct it.

11 CHAIRMAN JABER: Mr. Green, were you done?

12 MR. GREEN: Yes, ma'am.

13 CHAIRMAN JABER: Mr. Sasso, I am going to let you
14 make that correction, and then we are moving on.

15 MR. SASSO: Yes, ma'am.

16 The published heat rate for Hines 3 in the ten-year
17 site plan as shown in the record of that case, 7,306, was an
18 average heat rate. The full load heat rate was 6,900. It is
19 very, very different. They are different values. Full load is
20 more efficient than the average. The 7,306 estimated for Hines
21 3 is actually less efficient than the achieved average for
22 Hines 1.

23 MR. HARRIS: Commissioners, I'm sorry, I have a
24 little bit of concern about talking about an open docket. I
25 mean, there hasn't been a ruling issued in the Hines 3 need

1 determination case yet.

2 CHAIRMAN JABER: Okay. Well, we are going to stop
3 talking about it and let the record speak for itself.

4 Commissioners, I think we are at the stage where we
5 can wrap this up for today and start talking about the future.

6 I want to take a minute to recognize all the hard
7 work by the parties before I let you know what my desires are
8 going forward.

9 Commissioner Deason, do you have a question?

10 COMMISSIONER DEASON: I'm sorry, I didn't have my
11 microphone on. Can I ask one last question before we get
12 started with the closing?

13 CHAIRMAN JABER: Absolutely.

14 COMMISSIONER DEASON: We had some discussion earlier
15 about if there is to be a provision for a complaint and how it
16 would be handled and that sort of thing, and there was some
17 suggestion that perhaps some of these questions could come up
18 before the prehearing officer and that sort of thing. And I
19 started thinking that, well, we need to have a prehearing
20 officer if that is to be the process. And I noticed that there
21 is a requirement within the existing rule, which I think is
22 maintained in the proposed rule, that once the IOU issues an
23 RFP that they have to give notice to the Commission.

24 And I guess my question maybe for you or for staff is
25 that once we get that notice, even though there has not yet

1 been a filing for a determination of need, can we open a docket
2 in contemplation of that filing, go ahead have a prehearing
3 officer assigned, and if matters come up concerning objections
4 or that sort of thing, we already have a docket, we already
5 have a prehearing officer assigned and we probably could
6 expedite those matters.

7 CHAIRMAN JABER: Mr. McLean can correct me if I'm
8 wrong here, Commissioner Deason, but I don't think there is
9 anything that precludes the Chairman's Office from assigning a
10 prehearing officer to a case whether it is officially docketed
11 or comes in on an informal basis. I think that as part of my
12 administrative duties I can assign a prehearing officer to
13 govern a proceeding. And it seems to me, though -- and, Mr.
14 McLean, I'm going to let you comment, you or Mr. Harris on
15 this -- it seems to me that if we pursue the idea of the
16 objection resolution process, or the complaint resolution
17 process, that when we receive notice of an RFP, whether it is
18 in the draft stage or not, that it would be -- for the sake of
19 administrative efficiency we may want to go ahead and assign a
20 prehearing officer.

21 MR. McLEAN: Yes, ma'am, I don't think there is
22 anything wrong with that. (Inaudible. Microphone not on) -- I
23 also understood that one possibility is to initiate a -- that
24 complaint docket itself could have a prehearing officer. If
25 the complaint were separately docketed, is one possibility.

1 And I --

2 COMMISSIONER DEASON: Well, I guess my question, and
3 maybe that is something -- I was assuming that there would be
4 one docket, one prehearing officer for complaints, and then
5 that would carry through right into a need determination --

6 MR. McLEAN: I think that works, too.

7 COMMISSIONER DEASON: -- just for ease and
8 efficiency. But I suppose you could create a docket for a
9 complaint, but it seems to me it would be less than the
10 efficient thing to do.

11 MR. McLEAN: I think either way is legal.

12 CHAIRMAN JABER: My preference, I have to tell you
13 because this issue came up last year, my preference for the
14 sake of consistency and administrative ease would be that you
15 have one prehearing officer rather than putting me in that
16 position, awkward or not.

17 I mean, we are blessed with a very collegial body
18 right now, and I have never had a prehearing officer tell me I
19 can't take a docket from him. But it seems to me just to avoid
20 that sort of concern it should be one docket, one prehearing
21 officer.

22 MR. McLEAN: Sure. I don't see any problem with
23 that.

24 COMMISSIONER DEASON: I'm sorry for that
25 interruption. I thought I would just kind of throw that out

1 there and see what the reaction would be.

2 CHAIRMAN JABER: I think those are great
3 considerations.

4 Commissioners, are there any other questions? My
5 thought here, Commissioners, no one can say that this process
6 has not been clearly vetted and dialogued and that this rule
7 has not been given the appropriate attention by this agency and
8 by the Commissioners.

9 I want to take a minute to commend the parties for
10 their patience and their willingness to lend their expertise on
11 these issues. I think a lot of compromises were made. I will
12 leave it at that. I think the Commissioners went over and
13 beyond in facilitating those compromises, and Staff did a good
14 job on this rule rewrite.

15 I think I heard a lot of compromises in the last 24
16 hours, even in addition to what is contained in the rule. So I
17 would love the opportunity to think about all of that and how
18 it gets incorporated into the rule.

19 I think we have heard enough, though. And I am ready
20 for not entertaining post-hearing comments, I really don't need
21 to hear anymore. I don't want post-hearing comments as one
22 Commissioner. I am ready for a staff recommendation. I want
23 that staff recommendation to come on December 20th, and I want
24 a special agenda conference to be held on January 3rd.

25 That is where I am, Commissioners. I am certainly

1 willing to entertain discussion. And at that special agenda
2 conference, to put people on notice if the Commissioners agree,
3 I don't want to hear from parties at that agenda conference,
4 either. I think that is enough. I am ready to vote out a
5 rule.

6 Saying all of that and, again, recognizing I haven't
7 heard from the Commissioners on this, I would hope that
8 whatever rule comes out on January 3rd that your clients, Mr.
9 Sasso, and your client, Ms. Clark, and everyone else that is
10 sitting in the audience -- Mr. Stone, don't think we have
11 forgotten about you, and Mr. Beasley. I hope that you go over
12 and beyond in implementing the rule.

13 I think you all know from listening to us for the
14 past year, you understand what the intent is and you understand
15 the spirit of what we have tried to accomplish. It is not to
16 take away from the great job the IOUs have done providing
17 electricity in the State of Florida. If anything this year has
18 given you an opportunity to reinforce to us what a great job
19 you do. And I think you have heard this Commission recognize
20 that.

21 This has always been and will continue to be how do
22 we make it better. And to the degree we can make it better, I
23 think it is our responsibility to entertain any revisions to
24 our rule where appropriate.

25 Saying all of that, Commissioners, you have heard

1 what I would like to accomplish, and I am interested in your
2 feedback.

3 COMMISSIONER DEASON: Well, Madam Chairman, when I
4 first heard the January 3rd date, it gave me some pause for
5 concern because I was thinking that Florida State was going to
6 be playing in the Orange Bowl on the evening of January 2nd.
7 But now since they are playing in the Sugar Bowl on the evening
8 of January 1st, there is no problem. So I think January 3rd is
9 a go.

10 COMMISSIONER BAEZ: And along the same lines as
11 Commissioner Deason, we won't mention names, but if we can get
12 out by 8:00 that will be really great.

13 CHAIRMAN JABER: Well, if parties don't get to
14 speak --

15 COMMISSIONER DEASON: Was there some little game
16 involved on January 3rd?

17 COMMISSIONER BAEZ: It's a Pop Warner Championship
18 Game and --

19 CHAIRMAN JABER: I get no respect. I have to tell
20 you, this is on the heels of hearing complaints about no lunch.

21 Okay. Commissioners, by everyone else's silence, I
22 take that to be that our next course of action will be a staff
23 recommendation December 20th, and a special agenda conference
24 on January 3rd.

25 One final thing, it is a thank you for the parties in

1 accommodating something that happened last week, and your
2 willingness to be prepared to have a hearing today and
3 yesterday. I appreciate that from the bottom of my heart,
4 thank you.

5 (The hearing concluded at 1:50 p.m.)

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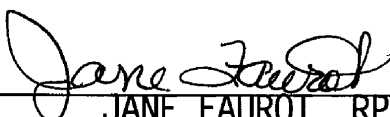
1 STATE OF FLORIDA)
 2 : CERTIFICATE OF REPORTER
 3 COUNTY OF LEON)

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

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

11 We FURTHER CERTIFY that we are not relatives, employees,
 12 attorneys or counsels of any of the parties, nor are we
 13 relatives or employees of any of the parties' attorneys or
 counsel connected with the action, nor are we financially
 interested in the action.

14 DATED THIS 12THE DAY OF DECEMBER, 2002.

15 

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 18 FPSC Division of Commission Clerk and
 Administrative Services
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