

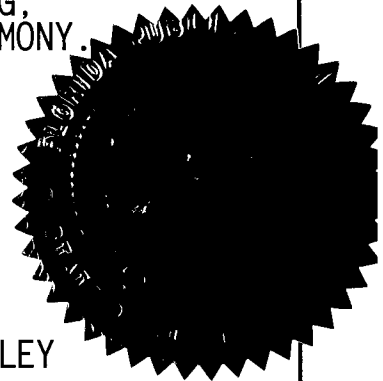
BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 020398-EQ

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

In the Matter of  
PROPOSED REVISIONS TO  
RULE 25-22.082, F.A.C.,  
SELECTION OF GENERATING  
CAPACITY.

ELECTRONIC VERSIONS OF THIS TRANSCRIPT ARE  
A CONVENIENCE COPY ONLY AND ARE NOT  
THE OFFICIAL TRANSCRIPT OF THE HEARING,  
THE .PDF VERSION INCLUDES PREFILED TESTIMONY.



PROCEEDINGS: SPECIAL AGENDA CONFERENCE  
BEFORE: CHAIRMAN LILA A. JABER  
COMMISSIONER J. TERRY DEASON  
COMMISSIONER BRAULIO L. BAEZ  
COMMISSIONER MICHAEL A. PALECKI  
COMMISSIONER RUDOLPH "RUDY" BRADLEY  
DATE: Friday, January 3, 2003  
TIME: Commenced at 9:30 a.m.  
Concluded at 3:20 p.m.  
PLACE: Betty Easley Conference Center  
Room 148  
4075 Esplanade Way  
Tallahassee, Florida  
REPORTED BY: TRICIA DeMARTE, RPR  
Official FPSC Reporter  
(850) 413-6736

1 PARTICIPATING:

2 HAROLD McLEAN, MARTHA CARTER BROWN, LAWRENCE HARRIS,  
3 CHRIS MOORE, and JENNIFER BRUBAKER, FPSC General Counsel's  
4 Office.

5 TOM BALLINGER, FPSC Division of Economic Regulation.  
6 MARK FUTRELL, FPSC Division of Competitive Markets  
7 and Enforcement.

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

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

1  
2 CHAIRMAN JABER: Good Morning. Let's get started.  
3 As I was saying, Happy New Year. Okay. We're at a special  
4 agenda conference, and we're going to pretend like Commissioner  
5 Baez was not wearing that hat.

6 MS. BRUBAKER: Commissioners, by notice published  
7 October 25th, 2002, the Commission proposed certain revisions  
8 to Rule 25-22.082, Florida Administrative Code, selection of  
9 generating capacity. Prefiled comments were filed by  
10 interested parties, and a hearing was held on December 9th and  
11 10th in Tallahassee.

12 Before you this morning is staff's post-hearing  
13 recommendation on the proposed rule and staff's recommended  
14 modifications thereto. Staff has a few minor corrections to  
15 make to the recommendation. We shall proceed at this time.

16 At Page 7, the first full paragraph, third sentence  
17 should be deleted and should read instead, "Finally, within 30  
18 days from the date of the objection, the Commission panel  
19 assigned shall determine whether the objection as stated would  
20 demonstrate that a rule violation has occurred."

21 At Page 8, first full paragraph, first sentence, the  
22 word "proposed" should be replaced with the word "recommended."

23 And at Page 9, first full paragraph, fourth sentence,  
24 "Subsection 12" should read instead "Subsection 14," and the  
25 word "proposed" should be substituted with the word

1 "recommended." And staff is prepared to answer any questions  
2 the Commission may have at this time.

3 CHAIRMAN JABER: Commissioners, I think we should  
4 just open it up for questions by you to staff. It seems like  
5 that's the best way to organize the discussion today. So if  
6 there are any questions and there's a Commissioner that would  
7 like to go first, feel free.

8 COMMISSIONER DEASON: There seems to be some  
9 reluctance, Madam Chairman.

10 CHAIRMAN JABER: I know. I've got some too,  
11 commissioner Deason, if you --

12 COMMISSIONER DEASON: Madam Chairman, maybe it's best  
13 if you proceed, and then I do have some questions, but you may  
14 have some of the same ones I do. And we'll just proceed and  
15 see where we are, if that's okay.

16 CHAIRMAN JABER: Sounds fine. Staff, there was --  
17 you addressed one of my questions that related to the 10-day  
18 versus 30-day resolution period for objections.

19 The second question I had was on Page 6 of the staff  
20 recommendation. Let's see if I can find it now. Oh, from the  
21 hearing through questioning, we clarified that PACE's position  
22 was not that there had to be a numerical evaluation of the  
23 criteria, but if there was a numerical evaluation, that it  
24 would be stated up front in the RFP. By the same -- and that's  
25 what you all called addressing the quantitative concerns.

1 In addressing the qualitative concerns, I think, and  
2 I need you to correct me if I'm wrong, I think we need to go  
3 back and add the word "criteria" to the rule language in -- on  
4 Page 18 in Section E. It's 5E, Tom.

5 MR. BALLINGER: Yes, ma'am.

6 CHAIRMAN JABER: In trying to address the concession  
7 that was made at the hearing about the numerical evaluation, I  
8 think we may have taken out the word "criteria" when really we  
9 should not have. "A detailed description of the methodology,"  
10 I'm not sure that that completely covers that if there are  
11 criteria to be evaluated, those will be stated in the RFP up  
12 front. As I look at Sub D, the listing of those terms, those  
13 are criteria.

14 MR. BALLINGER: Right. And they're referred to as  
15 attributes in D, and that's why we used the term "attributes"  
16 in 5E.

17 CHAIRMAN JABER: To be absolutely certain and to  
18 avoid confusion later on, is there anything wrong with  
19 adding -- changing E to be "A detailed description of the  
20 criteria and the methodology, including any weighting and  
21 ranking factors, to be used to evaluate alternative generating  
22 proposals"?

23 MR. BALLINGER: Off the top of my head, I don't think  
24 so. I'd have to think. Since we haven't defined the  
25 difference between criteria or attribute in the rule, are we

1 being duplicative, or is it a common enough term that we can  
2 understand what it means?

3 CHAIRMAN JABER: Well, see, on the -- in Sub D, you  
4 ask for a description of all the attributes. In E, we ask for  
5 a description of the methodology to be used to evaluate the  
6 attributes. If you're saying by the use of attributes in the  
7 later part you mean criteria --

8 MR. BALLINGER: To me, it's the same thing. To me,  
9 Subsection D is the criteria you're going to use. You have  
10 these attributes, criteria, water supply, fuel supply, things  
11 of that nature, that you're going to evaluate on the proposals,  
12 and E is the methodology: How are you going to put all of  
13 those together? Are you going to favor one or the other? And  
14 that's how those two work together. And that's why we used  
15 common wording throughout -- you know, from the existing rule.

16 I don't know, if you throw the word "criteria" in  
17 front of "methodology," are you suggesting something new than  
18 just reviewing the -- I don't know.

19 CHAIRMAN JABER: It's not my intent to suggest  
20 something new. It would be capturing what was in the proposed  
21 rule from the hearing. But clarifying that whatever it is you  
22 will use to evaluate bids, what you will use to consider bids,  
23 and I don't care if it gets called attributes or criteria, I  
24 really don't care, but to be perfectly clear that whatever it  
25 is you will use to consider bids and whatever it is you will

1 use to evaluate bids needs to be stated up front in the RFP.

2 MR. BALLINGER: Maybe the placement of it is instead  
3 of before methodology would read, "A detailed description of  
4 the methodology, including any criteria and weighting and  
5 ranking factors." Maybe that better fully describes the  
6 methodology.

7 CHAIRMAN JABER: Commissioners, was I the only one  
8 that had trouble in that paragraph? I don't want to take away  
9 from the intent which is to make all of the evaluation -- the  
10 consideration and the evaluation process transparent. And if  
11 attributes is walking around -- the same as criteria, I'm okay  
12 with that. It may be that I was reading too much into it.

13 COMMISSIONER PALECKI: Madam Chairman, the way I read  
14 this is that the attributes are the attributes of the  
15 generation itself, the fuel supply, water supply,  
16 dispatchability. Criterion is really more of a judging and an  
17 evaluation factor. So I view criterion and attributes as being  
18 quite different from each other, and I would agree with your  
19 comments, Madam Chairman.

20 CHAIRMAN JABER: Commissioner Baez, you started to  
21 say --

22 COMMISSIONER BAEZ: No, I guess I just wanted to  
23 clear up if we were using attributes and criteria  
24 interchangeably. And I think I --

25 MR. BALLINGER: I used to think they were.

1 COMMISSIONER BAEZ: -- more agree with Commissioner  
2 Palecki on that.

3 MR. BALLINGER: In my simple mind, I thought they  
4 were. I viewed D as the items you're going to look at, and E,  
5 the methodology, how you're going to put those items together.  
6 So if you want to call them criteria or -- to me, criteria  
7 follows more in the methodology, you know, what I'm going to do  
8 now that I have all of these pieces and information.

9 CHAIRMAN JABER: You know, I would propose that we  
10 add criteria in front of methodology. "A detailed description  
11 of the criteria and the methodology, including any weighting  
12 and ranking factors." I hope it's not duplicative but just to  
13 avoid misinterpretation a year from now.

14 MR. BALLINGER: I don't think it is.

15 CHAIRMAN JABER: The other question relates to  
16 Page 19, Sub 6, and your explanation of Paragraph 6, which is  
17 on Page --

18 MR. BALLINGER: 6.

19 CHAIRMAN JABER: Okay. Page 6. When I read -- is  
20 it?

21 MR. BALLINGER: Yes, at the top of the page.

22 CHAIRMAN JABER: Okay. When I read your explanation  
23 it says, "The new Subsection 6 would require that the public  
24 utility not change the price and nonprice attributes or the  
25 evaluation identified absent a showing of good cause." That's



1 a little bit more flexible than the actual words in Paragraph  
2 6 on Page 19. And I'm trying to reconcile the explanation with  
3 the actual words. The words in Subparagraph 6 use "expressly  
4 identified."

5 MR. BALLINGER: I don't see those two as different.  
6 The intent is, lay out in the RFP what your methodology is  
7 going to be and all that, and don't change it unless you've got  
8 good cause. To me, a change means an addition, a subtraction,  
9 a modification to one of our methodologies or attributes,  
10 something like that. So in my thought they read the same. I  
11 don't see one as less flexible than the other. Perhaps the  
12 language in the staff recommendation might be a little clearer  
13 to understand; that is, the basic premise is, you put forth  
14 your best shot, don't change it unless you have a good reason.

15 MS. BRUBAKER: And, Madam Chairman, if I may just  
16 simply point out, that is the same language as it was  
17 originally proposed. You know, the textual explanation in  
18 staff's recommendation wasn't meant to change the intent. I  
19 believe the intent is saying whether you're looking at the  
20 textual explanation or the language of the rule.

21 CHAIRMAN JABER: Okay. Because the point is do not  
22 deviate from the evaluation methodology you've put in the RFP,  
23 but if you do, there has to be an expressed showing of good  
24 cause.

25 MS. BRUBAKER: That's correct.

1 CHAIRMAN JABER: That's the intent. In that  
2 regard -- go ahead, Commissioner Baez.

3 COMMISSIONER BAEZ: No, I was going to ask, since  
4 we've got some consensus on a change to the prior -- is that  
5 what you were going to ask -- that maybe the same -- include  
6 criteria in addition to attribute or methodology?

7 CHAIRMAN JABER: Oh, I hadn't even thought about  
8 that, but maybe to be consistent, no attribute, criteria, or  
9 methodology pursuant to Subsections 5D shall be employed -- I  
10 guess I'm having trouble with the word "expressly." I mean,  
11 wouldn't it be expressly identified in the RFP? It would be  
12 stated in the RFP, so shouldn't that sentence just read, "Shall  
13 be employed that is not identified in the RFP absent a showing  
14 of good cause"? I kept reading more into the word "expressly"  
15 than probably I should.

16 MR. BALLINGER: That's fine too. And I think, like  
17 Jennifer said, we pulled language that was originally in 5F and  
18 put it here when we made the new Section 6 because that was  
19 what the Commission had proposed in September, taking the word  
20 "expressly" out.

21 MS. BRUBAKER: If the Commission feels removing the  
22 word "expressly" would aid to clarification of the matter, I  
23 certainly think that would be permissible. I don't believe it  
24 would actually change the intent of that section.

25 CHAIRMAN JABER: Well, let me ask you this. Was

1 there a reason you put "expressly" in there? I just want to  
2 understand. Is there a reason that particular word was used  
3 that I'm missing?

4 MS. BRUBAKER: I don't believe it was meant to add a  
5 stricter standard certainly. I just suppose staff didn't  
6 believe it provided -- you know, it simply clarified it had to  
7 be expressly in the RFP. I think that's where we were coming  
8 from.

9 CHAIRMAN JABER: Okay. Well, if we delete the word  
10 "expressly" and in light of the changes we've made to what has  
11 to be included in the RFP -- I mean, again, the intent is to  
12 make the RFP process and the evaluation of it more transparent;  
13 right? If all of the criteria, the methodology, and the  
14 attributes have to be identified clearly in the RFP, then we've  
15 accomplished that goal.

16 MS. BRUBAKER: Absolutely.

17 CHAIRMAN JABER: Okay.

18 MR. BALLINGER: I'm sorry, on that section, would we  
19 add the word "criteria" also?

20 CHAIRMAN JABER: Yeah, so I would propose that  
21 Subsection 6 read, "No attribute, criteria, or methodology  
22 pursuant to Subsections 5D and E shall be employed that is not  
23 identified in the RFP absent a showing of good cause."

24 And, Commissioners, again, these are just my  
25 questions and proposals. I recognize you may have additions to

1 this as we go along.

2 COMMISSIONER DEASON: Madam Chairman, this may sound  
3 overly picky, but let me ask the question anyway, and my  
4 expertise certainly is not in grammar and proper use of words.  
5 But criteria is the plural, is it not? And criterion is the  
6 singular? And we're talking about we'll use attribute  
7 singular, methodology singular. To be consistent, shouldn't we  
8 use criterion, or else change the others to plural so we have  
9 all singular or all plural? Just a question.

10 MS. BRUBAKER: I think that would be fine. Singular  
11 criterion.

12 COMMISSIONER DEASON: Criterion?

13 MS. BRUBAKER: For consistency sake, I should think  
14 so.

15 CHAIRMAN JABER: And I think it goes without saying,  
16 make all of our changes grammatically correct. Could you  
17 please help us out in that regard.

18 Commissioner Bradley, you had a question.

19 COMMISSIONER BRADLEY: Yes. When you read your  
20 proposed changes to Subsection 6, my question was, did you --  
21 is your suggestion that we delete "expressly"?

22 CHAIRMAN JABER: Yes, sir.

23 COMMISSIONER BRADLEY: Okay.

24 CHAIRMAN JABER: Okay.

25 COMMISSIONER DEASON: Madam Chairman, while we're on

1 that subject matter, may I interject a question at this point?

2 CHAIRMAN JABER: Please.

3 COMMISSIONER DEASON: In Section 6, we refer  
4 specifically to Subsections 5D and 5E when referring to  
5 criteria and attributes, methodology. And my question to staff  
6 is, is there any significance in the fact that you did not  
7 reference 5G?

8 Now, I know 5G is best available information and then  
9 regarding certain matters such as locations and transmission  
10 constraints and voltage considerations and things of that  
11 nature which is very valuable information to have. My question  
12 is, if these considerations, if these matters are something  
13 that are going to enter into the judgment as to which is the  
14 best bid, shouldn't it also -- shouldn't 5G also be included  
15 within Section 6?

16 MR. BALLINGER: I think those would be reflected in  
17 5D or E if they are going to be used in the evaluation. 5G is  
18 just a listing -- a better description of the utility system  
19 for the bidder to look at. Remember, all of Subsection 5 is  
20 information that must be contained in the RFP, so it includes a  
21 description of the costs of the self-build unit and other -- it  
22 has load and demand forecast, things of that nature. The only  
23 evaluation component of that is D and E, in our opinion. So G  
24 would be another one of those bits of information just like  
25 including an application fee. I think if it was going to be

1 used in the evaluation methodology, it would be listed in  
2 either D or E.

3 COMMISSIONER DEASON: So you're saying to the extent,  
4 for example, location or voltage considerations play into the  
5 selection of the winning bid, there's an obligation to list  
6 that within 5D -- I mean, for that to be within the confines of  
7 5D and 5E?

8 MR. BALLINGER: Yes. I think if they're going to say  
9 in their evaluation that we really want a generator at X, they  
10 need to describe that in 5E as part of their methodology.

11 COMMISSIONER DEASON: Where does 5E say that?

12 MR. BALLINGER: That's just the methodology used to  
13 evaluate the attributes, and then an attribute would be the  
14 deliverability, let's say, of the location of it.

15 COMMISSIONER DEASON: So you're saying it would be  
16 redundant to include 5G then within Paragraph 6; that it is  
17 already implicit in the meaning that those considerations  
18 listed in 5G would already be captured somewhere else.

19 MR. BALLINGER: I think so.

20 COMMISSIONER DEASON: Well, with that understanding,  
21 that's fine. I just want to make sure that we are not  
22 overlooking anything.

23 COMMISSIONER PALECKI: Well, let me ask a question on  
24 that same issue. On 5G, it appears that some of these factors  
25 could be the deciding factor as to whether a plant gets chosen,

1 especially things like the preferred location proximate to load  
2 centers, transmission constraints. These are what appear to me  
3 to be some of the factors that could be determinative. I mean,  
4 win/lose based on those factors. And if that's the case,  
5 shouldn't they be included and identified by the RFP?

6           It almost seems because of the nature of these  
7 factors it's very important that they be included in Subsection  
8 6. If they were minor factors that didn't really make a  
9 difference that -- I know in, for example, several need  
10 determinations we've denied because of proximity or lack of  
11 proximity to the load center. I believe there was one up in  
12 Amelia Island where this Commission determined that because of  
13 the distance from the load centers it wasn't needed. And these  
14 type of factors seem like they're so important.

15           MR. BALLINGER: I understand your question, and  
16 I'm -- again, I would say I come back to that I view 5G as more  
17 of a description of the utility's wants or needs. That if they  
18 were building a plant, they would want it here, or they would  
19 want -- you know, we need some voltage support in this area.  
20 They're telling the bidders what they need, and presumably  
21 their self-build option would reflect all of these issues here.  
22 That they have looked at their system and decided they need to  
23 build a unit here maybe because of location or for voltage  
24 support, stuff like that, and they are telling the bidders  
25 that, that based on my system configuration, this is what I

1 need and why. Bidders are free to give something different  
2 than that, and it may sway the decision.

3           And I think if it's going to be used in the  
4 methodology, that, you know, there will be penalty points,  
5 let's say, if you're going to be far away from a load center,  
6 something of that nature, or penalty points if you locate in a  
7 certain place because we've got transmission constraints. They  
8 need to let that be known up front, that that's part of our  
9 evaluation, is, you know, don't even consider locating here  
10 because it's too congested, that kind of thing.

11           CHAIRMAN JABER: Tom, wasn't there testimony in the  
12 hearing though that one of the allegations was that they  
13 weren't even -- companies are not always clear on location  
14 points?

15           MR. BALLINGER: It's difficult because they don't  
16 know who has land rights where, actually which substation it  
17 would be in. I don't expect them to give a listing of each  
18 substation, where he'd connect, how it would be. But this is  
19 more a description of their own -- when they assess their  
20 system, based on these things, they said, we need a unit, you  
21 know, in X year, and we'd really like to place it over here,  
22 but for voltage support, we need to put it over here instead.  
23 And I think that's what I'm envisioning in 5G, is a more  
24 detailed description of why their self-build option is the way  
25 it is.



1           How to measure that into an evaluation, I'm not quite  
2 sure, but I do understand and I appreciate this. I really  
3 hadn't thought of it until this morning that that is also. I  
4 guess I envisioned that if it was going to be, like, location  
5 and evaluation methodology or criteria, that would be discussed  
6 in E.

7           MR. FUTRELL: Or, Commissioners, it could be in the  
8 Subsection D3, deliverability, which that's a pretty broad term  
9 which could encompass location penalty or how it's going to be  
10 integrated -- how the power is going to be delivered to the  
11 load centers. So that term is going to cover -- I think cover  
12 some of those concerns.

13           COMMISSIONER BAEZ: Does 5G have some alternate  
14 purpose? I guess if that's part of an RFP -- you're describing  
15 what for reasons of transmission constraints and locational  
16 preference, et cetera, would be your ideal -- doesn't that  
17 somehow take the meaning -- you know, isn't that establishing  
18 in essence the benchmark against which -- aren't you then  
19 making it a criteria or some evaluation point just by including  
20 it?

21           MR. FUTRELL: Probably it would be better if this was  
22 located more with the listing of information that the utility  
23 is providing about itself and its self-build option. Probably  
24 tacking it on to the end maybe gives some impression that was  
25 not intended, because again, it's part of those points that

1 they're to divulge about themselves to give the bidders a good  
2 transparent picture of what they're going to be bidding  
3 against. And so there's no -- that's probably an unintended  
4 consequence of tacking it on at the end.

5 MR. BALLINGER: Another --

6 COMMISSIONER BAEZ: I'm sorry, Tom. Let me just ask  
7 my question --

8 MR. BALLINGER: Yeah, go ahead.

9 COMMISSIONER BAEZ: -- another way and see if --  
10 because I think, you know, it may just be as simple as adding  
11 5G to the general statement in 6. But, I mean, is there any  
12 value or is there any purpose to listing these things, these  
13 factors that are in 5G other than to give them some role in the  
14 evaluation process?

15 MR. BALLINGER: I don't think so. And I have another  
16 suggestion that might have the same result. We could possibly  
17 delete the reference to Subsections 5D and E, and just have it  
18 read that no attribute, criterion, or methodology shall be  
19 employed that is not identified in the RFP absent a showing.  
20 It leaves it open so if they come in with a -- this location  
21 becomes an important thing that's in the RFP and stick with it  
22 until the end, and maybe not get so specific with the  
23 references back to the sections, because, yeah, these may or  
24 may not be criteria. And again, you know, Section G is "which  
25 may include but not limited to," so it's not even specific of

1 anything.

2           COMMISSIONER DEASON: Let me express what my concern  
3 was. And I'm comforted by your explanation as to how you  
4 envision the interpretation to be, but we all know that there  
5 are ingenious ways to interpret language in rules, and at some  
6 point this will be brought back to us. And I would not want it  
7 to be interpreted that items listed in 5G are somehow in a  
8 different category and are not subject to the requirements of  
9 Section 6. Now, I understand that's not your intent, and  
10 you've got very clear explanation as to why it's not. But with  
11 it listed like it is, I could just see where it could be  
12 interpreted that these items that are contained in 5G are  
13 somehow not subject to the requirement of Section 6, and I  
14 would not want that to be an interpretation because I think  
15 it's not the intent of the Commission.

16           MR. BALLINGER: No, and I agree.

17           CHAIRMAN JABER: But, Commissioners, actually, I like  
18 Mr. Ballinger's idea to delete the sections because as I've --  
19 I tried to look at this rule from an outline perspective.  
20 Paragraph 5 articulates all of the items that have to be  
21 included in the RFP. So all of those items have to be included  
22 in the RFP and that would include G. To then in Subparagraph 6  
23 limit the importance of any part of 5 is inappropriate and  
24 hindsight now.

25           COMMISSIONER DEASON: I agree with that, Madam

1 Chairman, and maybe we should just delete the reference to  
2 particular subsections within Section 5 --

3 CHAIRMAN JABER: Exactly.

4 COMMISSIONER DEASON: -- and just make it clear that  
5 Sub -- that Section 6 applies to all of the criteria and  
6 considerations within Section 5.

7 CHAIRMAN JABER: Right. And just to bring it home,  
8 Mr. Ballinger, Subparagraph 5 includes the attributes, the  
9 criteria, and the methodology that we expect to be followed.  
10 Okay. So Subparagraph 6 should read, "No attribute, criterion,  
11 or methodology shall be employed that is not identified in the  
12 RFP absent a showing of good cause."

13 Commissioner Bradley, you had a question; right?

14 COMMISSIONER BRADLEY: Yes, but I think we need to  
15 finish discussing this section before I ask my question because  
16 my question is to another subsection.

17 CHAIRMAN JABER: Okay. Thank you, Commissioner.

18 MR. BALLINGER: I'm sorry, Madam Chairman?

19 CHAIRMAN JABER: Yes.

20 MR. BALLINGER: You would strike all reference, or  
21 just reference back to just Subsection 5 in its entirety and  
22 strike the sub-subsections of 5?

23 CHAIRMAN JABER: Yeah, I deleted all the sections.  
24 "No attribute, criterion, or methodology shall be employed that  
25 are not identified in the RFP absent a showing of good cause."

1           You all need to make this grammatically correct.  
2 Work with Commissioner Deason's office.

3           COMMISSIONER DEASON: I'm sorry I asked the question.  
4 I'm not the expert on grammar. Maybe the motion should be that  
5 staff will make it grammatically correct.

6           CHAIRMAN JABER: There you go.

7           COMMISSIONER DEASON: Before we leave Section 6, I do  
8 have an additional question if now is the right time.

9           CHAIRMAN JABER: Commissioner Deason.

10          COMMISSIONER DEASON: Tom, when you were describing  
11 the purpose for Section 6, I don't mean to be putting words in  
12 your mouth, but I thought you said something to the effect that  
13 the intent is such that there would not be any changes that  
14 were not -- there wouldn't be any changes made at the last  
15 minute. And I guess my question is, the term "employed," what  
16 do you mean by "employed"? Are you trying to get at, there's  
17 going to be no changes to all of the requirements listed in  
18 Section 5 without there being some showing of good cause? I  
19 guess I just need an explanation as to why you chose the term  
20 "employed."

21          MR. BALLINGER: I think "employed" captures not only  
22 using a value, let's say, that was listed, say, a heat rate or  
23 something of that nature, but also the methodology, how you put  
24 the pieces together. To me, employ is like a verb. You kind  
25 of -- the working part of it, but I think it captures not only

1 the data that goes into it but the methodology as well.

2 COMMISSIONER DEASON: Well, I guess the question I  
3 have then is that with the changes that we're making, are we  
4 being too restrictive that there is not the opportunity to  
5 employ -- that we're putting a requirement up front? And this  
6 is the intent, just to explain it, that we're requiring  
7 everything that is going to be considered in the evaluation to  
8 be identified up front, and there is no latitude whatsoever for  
9 there to be any considerations beyond those that were contained  
10 within the requirements of Section 5.

11 MR. BALLINGER: No, that's not my intent to be  
12 absolutely binding. I think it's --

13 COMMISSIONER DEASON: Isn't that what Section 6 does  
14 when you used the term "employed"? Because I guess my concern  
15 is, no matter how detailed the RFP may be, there may be a point  
16 when there needs to be something that enters into the  
17 evaluation process which was not part of the RFP. And I can't  
18 give you an example right off the top of my head, but there may  
19 be. It may be something very critical, and we find ourselves  
20 in a situation where that consideration can't be made because  
21 it was not part of the RFP to begin with.

22 Now, I agree that the RFP should be as detailed as  
23 possible, and maybe this situation would never come up, but  
24 it's going to be very difficult to have the RFP include every  
25 conceivable thing which at the time when you start making the

1 evaluations you say, oh, I wish I included that in the RFP  
2 because now I wish to make an evaluation based on some other  
3 criteria.

4 MR. BALLINGER: I agree. And I think the couple of  
5 changes that were made and the existing language covers that.  
6 Taking out the word "expressly" may help a little bit. To me,  
7 utilities have the ability to come in and show a good cause for  
8 adding a new criteria that came up after they issued the RFP or  
9 deleting one or changing it, and that's the intent of that  
10 absent of showing a good cause. So they have the ability to  
11 come in and request a change to what was published in the RFP.  
12 They can demonstrate that there is good reasons that things  
13 change, they didn't know it at the time or something of that  
14 nature.

15 COMMISSIONER DEASON: So you're saying that that  
16 language allows the utility to come in at this point and say,  
17 we didn't include this in the RFP, but we could not have known  
18 that at the time, and now it is a significant matter which  
19 needs to be considered, and this is the good cause why we think  
20 we now should be able to consider it.

21 MR. BALLINGER: Yes. A perfect example would be, in  
22 the last FPL RFP, they had a respondent who filed a bid, filed  
23 a response, went through the screening process, but in the  
24 interim found out this was an entity that had a previous  
25 contract with FPL, and they backed out of that contract. And

1 FPL decided then we're not going to do business with this  
2 bidder. If we couldn't deal with them on the first one, we're  
3 not going to go through the procedure of this. That wasn't in  
4 their RFP but that makes perfect sense to me. And the utility  
5 came in and explained their decisions of what they did, and  
6 that's something that came up as the process goes along and  
7 they reacted to it. So that's a real world example of things  
8 that I think the utilities would have the opportunity to make  
9 those types of management decisions and then explain it to the  
10 Commission.

11 COMMISSIONER DEASON: Okay. Thank you. I think I  
12 understand what you're trying to accomplish.

13 CHAIRMAN JABER: Mr. Ballinger, my last question for  
14 now relates to the agreement I heard from Mr. Sasso, it was  
15 Mr. Sasso or Ms. Clark, on the reduced application fee for  
16 munis and co-ops and other companies that may want to bid on a  
17 renewable portfolio or renewable aspect of generation. And the  
18 IOUs agreed to work with folks in considering a reduced charge,  
19 and I went back and forth on whether that agreement should be  
20 reflected in the rule. And you chose not to reflect it in the  
21 rule. So help me understand what your thought process was.

22 MR. BALLINGER: Okay. The reasoning behind that was,  
23 the question posed was predicated on an action by the  
24 Legislature, that if the Legislature decides that a renewable  
25 portfolio is in the public interest, a certain percentage of



1 renewable generation, would you work with these entities to  
2 reduce the fees in order encourage them to meet that portfolio.  
3 That's what the utilities agreed to. So to me, it doesn't make  
4 sense to put in a rule something that would require legislative  
5 action first before we know what the reduced fee should be. So  
6 I would propose to wait.

7           And I think our current waiver language at the end of  
8 the rule, if you look at Page 22 of the recommendation, general  
9 waiver language is in there that gives the utility the ability  
10 to request a waiver of any part of this rule if something is in  
11 the public interest. So I think obviously if the Legislature  
12 came up with a renewable portfolio percentage, a utility could  
13 request a waiver of the fee that it be cost-based for the local  
14 governments or for renewables, whoever they may be, and satisfy  
15 that agreement that they met at the hearing.

16           The second reason we didn't is, municipalities  
17 typically have municipal solid waste facilities as their  
18 generation. That is a -- I think is still an unsolved debate  
19 at the Legislature whether municipal solid waste is a true  
20 renewable. So the Legislature may have a renewable portfolio  
21 but not include municipal solid waste, and therefore, local  
22 governments would not be entitled. So it's -- I didn't want to  
23 put the cart before the horse in the rules, I guess.

24           CHAIRMAN JABER: Let's take it one step at a time.  
25 With respect to the waiver language you pointed to,

1 Subparagraph 16, and it's Page 22, can anyone seek a waiver of  
2 this rule? The language says, "The Commission may waive this  
3 rule or any part thereof upon a showing that the waiver would  
4 likely result in a lower cost supply."

5 MR. BALLINGER: I'll let the lawyers answer that one.

6 CHAIRMAN JABER: It seems open-ended; right? Anyone  
7 can seek a waiver. Legal.

8 MS. BRUBAKER: I believe it's open-ended the way it's  
9 currently written, yes.

10 CHAIRMAN JABER: Can the Commission waive this rule  
11 on its own motion?

12 MS. BROWN: Madam Chairman, I've had discussions with  
13 the JAPC on this point. They indicated some concern that the  
14 language of this waiver provision would conflict with 120 and  
15 the waiver and variance section of 120. Discussions --

16 CHAIRMAN JABER: This very language right here?

17 MS. BROWN: Yes.

18 CHAIRMAN JABER: Oh, that would have been helpful to  
19 have in a recommendation.

20 MS. BROWN: Well, this was an informal discussion  
21 that then sort of petered out when it became clear that this  
22 waiver provision is not really a general waiver provision.  
23 It's really more like an exemption. There are particular  
24 reasons for it. If you read on, it talks about the showing  
25 of -- here, let me find it. Upon a specific showing that the

1 waiver would likely result in lower cost supply of electricity.  
2 So the criteria is there to really make it more of an exemption  
3 or an alternative way to comply with the rule rather than just  
4 a general waiver provision. And for that reason, we left it  
5 the way it was because we think it complies with the current  
6 statutory scheme for waivers.

7 CHAIRMAN JABER: Let's say the City of Tampa -- I  
8 understand it better if I use an example. Let's say the City  
9 of Tampa files a petition for a waiver of this rule seeking a  
10 reduced application fee. Do we use this rule as the standard  
11 for a waiver, or do you go back to 120 and the standards found  
12 in 120?

13 MS. BROWN: Well, I think this provision -- in my  
14 mind, I disagree, I think, with Jennifer. This provision I  
15 think applies to the RFP process itself, not -- and that would  
16 primarily be the utilities that would want to exercise this  
17 provision of the rule. If another party wanted to have a  
18 change in the fees for the RFP, I think probably at first they  
19 would exercise the expedited process to complain about the  
20 terms of the RFP before us. That would be one way to do it.  
21 If they wanted to have some other waiver with respect to this  
22 rule, I think they would use the 120 provisions.

23 CHAIRMAN JABER: Well, I guess you've given me a lot  
24 to think about. As I look at the new 16, we've put in the  
25 agreed upon language related to auctions. That seems

1 appropriate now to stand alone as a Section 16, and if there  
2 has to be a waiver part of this rule, that should be a new  
3 paragraph. But then that brings me to my next question. If  
4 parties -- any party can use Section 120 and petition this  
5 Commission for a rule waiver, then why is this paragraph even  
6 appropriate? Was that the basis of JAPC's concern too?

7 MS. BROWN: Yes, that was the basis of JAPC's  
8 concern. But it's my understanding, and Chris can help me out  
9 here if she feels so inclined, that we have other rule  
10 exemption type provisions in our rules that really are an  
11 alternative way to comply with the rule, and we don't consider  
12 those to be general waiver provisions that would be covered  
13 under the APA. And that is because of the particular criteria  
14 that follow that waiver language. It said, if you show us that  
15 there is another way to achieve lower cost supply of  
16 electricity rather than following the provisions of this rule,  
17 then you show us that, and we'll allow you to follow that  
18 course rather than comply with these provisions.

19 CHAIRMAN JABER: Ms. Moore, help me out here. I look  
20 at this language and now I'm finding inconsistencies with 120,  
21 and again, in an effort to avoid confusion in the future, 120  
22 says you can petition for a rule waiver if you can show that  
23 the intent of the statute is met and that there's a substantial  
24 hardship and whatever the third one is, I don't recall. This  
25 says you can get a waiver if you can show us that your approach

1 results in a lower cost supply of electricity, it will increase  
2 the reliability supply of electricity. I don't see them being  
3 reconcilable necessarily.

4 MS. MOORE: That's why I think it's appropriate to  
5 include this provision in the rule because we're saying it  
6 doesn't have to comply, and we can make an exception to it for  
7 standards other than what are required by 120, the general  
8 waiver provision.

9 CHAIRMAN JABER: By a rule you can trump waiver  
10 provisions in a statute?

11 MS. MOORE: Well, what you're doing is just saying  
12 there are alternate ways of -- we recognize that this rule, you  
13 know, needs some flexibility, and we are including the language  
14 for that reason. And, yes, I do think it's acceptable.

15 CHAIRMAN JABER: And JAPC sent you a letter saying  
16 they agree with that?

17 MS. BROWN: No, no. They have not sent us anything  
18 written with respect to this. This is also a provision that's  
19 been in the rule. It's not been -- it's not new to this rule  
20 proceeding, and we've received no written comments from JAPC on  
21 the proposed rule.

22 CHAIRMAN JABER: Do you agree, Ms. Moore, that if  
23 this part stays in it should probably warrant another  
24 provision? It should become a new 17 to distinguish it from  
25 what's articulated above?

1 MS. MOORE: Yes, I think so, but Jennifer may or  
2 Martha may have some information on the substantive -- or  
3 reason why it was not separated.

4 MS. BRUBAKER: I don't think there would be any harm  
5 certainly in separating it. I think the reason we put it  
6 together with the existing language in what's currently listed  
7 as Section 16 is simply, since the auction process would  
8 probably be a variation from the normal RFP process, that we  
9 felt it flowed with the idea in 16 that there may be  
10 alternative processes available. But I don't know that there  
11 would be any harm in separating the two out.

12 CHAIRMAN JABER: Okay. And let me come back to my  
13 original question. If the Commission accepts that this is an  
14 alternative way of applying the rule, do you all -- I heard  
15 Ms. Brown say that this would only apply at the utility's  
16 request. I'm reading the words literally, and it doesn't say,  
17 upon request by the utility, the Commission may waive this  
18 rule. I think this is left open-ended. There's nothing to  
19 preclude another stakeholder or potential participant in the  
20 process from seeking a waiver.

21 MS. BROWN: Well, I think -- I suppose you're right.  
22 It just doesn't seem to really make sense since the rule is  
23 really about the utility's RFP, what's going to be included in  
24 it, how they're going to evaluate it. And there is encompassed  
25 in the rule the process for other stakeholders to come and

1 complain about what the RFP says, and then we have our usual  
2 complaint process and then we had the need determination. I'm  
3 not certain of this, but I think this waiver really applies to  
4 the RFP, what's in it, how it's used, and how it's evaluated.  
5 And so for that reason, I would think that it would be the  
6 utilities that would come forward and say, we don't want to do  
7 it this way, we want to do it another way.

8           CHAIRMAN JABER: Let me follow up on one point you  
9 raised, and then Commissioner Deason has a question. You just  
10 said that there's a complaint process that parties may use as  
11 it relates to what's stated in the RFP. If we don't include in  
12 the rule anything about a reduced application fee, the RFP,  
13 Mr. Ballinger, won't state anything about the possibility of a  
14 reduced application fee for companies who want to present a  
15 renewable plan. So would the City of Tampa, as an example,  
16 have an opportunity to file an objection under the objection  
17 process?

18           MS. BRUBAKER: If you're speaking of the normal  
19 complaint process available at the Commission versus the  
20 special objection process we're proposing in the rule,  
21 certainly you can always file a complaint. The objection  
22 process is really meant to capture violations of the rule, and  
23 if there's nothing specific in the rule, I guess I need to  
24 think through how that could be identified in the objection  
25 process itself.

1 CHAIRMAN JABER: Commissioner Deason, you had --

2 COMMISSIONER DEASON: Well, Madam Chairman, that was  
3 precisely the question that I had, because according to this  
4 discussion, it appears that staff is thinking that the  
5 objection process would allow just about anything to be  
6 explored. And there is specific language -- I'm looking at  
7 Section 12 -- which limits it to specific allegations of  
8 violations of the rule. And I think that's very, very narrow.

9 So, first of all, the question is, if it's staff's  
10 intent to allow participants to file objections which pretty  
11 much covers the waterfront of the RFP, why do we have this  
12 language in here that limits it to specific allegations of rule  
13 violations? It seems to make it very narrow. That was my  
14 question.

15 MS. BRUBAKER: The direction we were trying to take  
16 is to formulate a process by which parties and Commissioners  
17 and everybody could take kind of a first shot across the bow at  
18 identifying any potential problems with the RFP itself. There  
19 are several considerations one has to take into account in  
20 making this kind of quick and easy, quick and dirty look at the  
21 RFP. One of the foremost is time. We didn't want to formulate  
22 something that was going to delay or slow down the need  
23 determination case in chief, and that would incorporate perhaps  
24 the need for not having a full-blown evidentiary proceeding of  
25 not entertaining discovery in this up-front objection period.



1           And so the concern is, if we open it to everything,  
2 for instance, how the bids themselves are actually evaluated,  
3 that information wouldn't be had until later in the process.  
4 And so the concern is, if we're going to have something that's  
5 going to be kind of a quick heads up about identifying the  
6 problems in the RFP, if we start broadening it until we're  
7 looking at a full-blown evidentiary proceeding, we're kind of  
8 losing the purpose of having a quick up-front proceeding. And  
9 we just didn't know how to reconcile -- you know, if you open  
10 it up to everything, I think the concern is you might as well  
11 just fold it into the need determination case in chief.

12           COMMISSIONER DEASON: Well, it just seems to me that  
13 it is overly restrictive and narrow just to say that the only  
14 thing you can object to is if there's a rule violation. There  
15 may be other things out there which need to be -- it seems to  
16 me need to be brought to our attention. I recall at the  
17 hearing we had discussions about that, and I believe that PACE  
18 gave some examples, and they used some different standards, I  
19 believe. And they used something about infeasible or  
20 burdensome or unfair, things of that nature.

21           You know, there could be -- it seems to me it's  
22 conceivable there could be something in the RFP which meets the  
23 strict letter of the law of the rule. And it is, it's -- on  
24 its face, it's unfair or it's onerous or it's infeasible, and  
25 there's no opportunity for that objection to be brought to our

1 attention.

2 MS. BRUBAKER: Well, here's the real benefit to  
3 having this kind of up-front objection process. If -- in the  
4 process of determining is there an apparent rule violation or  
5 not, I think the Commission certainly has the discretion at the  
6 agenda to say, it does not appear that this is an apparent rule  
7 violation; however, the Commission has identified concerns.  
8 And certainly if the utility wants to proceed with the RFP as  
9 it exists, you know, no party is foreclosed from raising those  
10 substantial --

11 COMMISSIONER DEASON: Well, now, how is that brought  
12 to our attention, if a participant cannot file an objection  
13 other than a rule violation?

14 MS. BRUBAKER: Well, the objection would be brought  
15 to the Commission before the Commission panel at an agenda, and  
16 that would afford an opportunity to discuss freely whatever  
17 concerns there are. Whether it's an actual apparent rule  
18 violation or not, those concerns can still be aired and  
19 addressed, and it provides a certain amount of notice to both  
20 the utility --

21 COMMISSIONER DEASON: Aren't we going to get a motion  
22 for that objection to be a motion to have it --

23 MS. BRUBAKER: Dismissed.

24 COMMISSIONER DEASON: -- deleted or whatever the  
25 legal terminology is, stricken? Because the rule says the only

1 thing they can object to are items such that would constitute a  
2 rule violation. And if they're complaining about something  
3 else in the RFP which does not violate the rule, it would be  
4 subject to a motion to dismiss or motion to strike or whatever  
5 and would even be brought to our attention.

6 MS. BRUBAKER: Well, simply because it may or may not  
7 strictly be a violation of the rule does not mean it cannot be  
8 entertained in the case in chief.

9 COMMISSIONER DEASON: Now, what do you mean by "case  
10 in chief"? At what point in time?

11 MS. BRUBAKER: The need determination, the full-blown  
12 need determination hearing.

13 COMMISSIONER DEASON: See, that's just the problem  
14 I'm having, is that to me one of the advantages of this  
15 complaint process is that we get everything ironed out up front  
16 and potentially and hopefully, maybe optimistically but  
17 nevertheless hopefully, that we would eliminate a lot of the  
18 issues which would be in the subsequent need determination.  
19 And you're saying, well, we'd have to wait until the need  
20 determination to tell the -- that the RFP somehow was flawed.

21 MS. BRUBAKER: One of the problems is we're  
22 recommending an accelerated process, and the bids themselves  
23 won't actually be evaluated at the point that this objection  
24 process is being taken through.

25 COMMISSIONER DEASON: It's possible to have

1 objections before any bids are even filed, and hopefully you're  
2 going to have the objections and have them looked at by the  
3 Commission before bids are even filed. So hopefully the bids  
4 are going to be more -- the bidding process is going to be  
5 fair, more fair, and the bids are going to be more responsive  
6 to what is really intended by the RFP.

7 MS. BRUBAKER: That's correct.

8 COMMISSIONER DEASON: I think this is a flaw in what  
9 we have here, and I think it needs to be corrected.

10 MS. BRUBAKER: Commissioner Deason, I do understand  
11 your concerns. I think staff has struggled to find a good  
12 solution to the problem, and frankly, I just don't know that  
13 there is a perfect solution. What we've tried to do is come up  
14 with a process that will permit an airing of initial concerns  
15 without slowing down or delaying the need determination itself  
16 which is on such a fast track to being with.

17 COMMISSIONER BAEZ: Hold on a second. I mean, here's  
18 a concern that I have. I think we're gearing -- and there  
19 was -- at least I know I expressed a fair amount of frustration  
20 about everybody, you know, running to the need determination  
21 and all of a sudden this needed capacity and we're feeling  
22 rushed, and that's why we want to try and have some more  
23 comfort as part of the process for us to make a determination  
24 at the end of the day as part of the need determination  
25 process. And what I'm hearing now again is that we're running,

1 you know, we're running scared from this need determination.  
2 That all of a sudden, the need and the concern over getting it  
3 off on time is what's driving these abbreviated complaint  
4 processes and whatnot. And I think again the tail is wagging  
5 the dog here. And if there's a better way of putting it or a  
6 better way of saying, you know, this is where our concerns are,  
7 but I'm not concerned about -- the need determination creates  
8 its own timetable. And I think I have some questions along  
9 these lines on something else, but what's the problem with  
10 having -- you know, if this is going to be an initial airing of  
11 concerns, why not have it be real?

12 I mean, at this point in the process when this  
13 process kicks in you've already had one, if not two, pre-bid  
14 post-issuance meetings at which real substantive discussions  
15 are going to be had not over proposals individually but  
16 certainly about the intent behind the language of the RFP,  
17 et cetera. I mean, there is going to be some knowledge of  
18 facts and circumstances and intents that goes beyond the four  
19 corners of the paper. And I guess I would agree with  
20 Commissioner Deason that to limit it by its language, to limit  
21 this complaint process to the four corners of the paper, I  
22 mean, it's very easy to have an RFP that complies with the  
23 letter of the rule, but aren't we really trying to foreclose a  
24 misinterpretation of the spirit of the rule as well?

25 That's where the intent of all of this that we're

1 doing comes in. And I think there has to be an appropriate  
2 avenue to take all that into account no matter how much time it  
3 takes. I mean, I don't want to stop things dead in their  
4 tracks, but at the same time I don't want to say, oh my gosh,  
5 we've got this big need determination, so let's rush, rush,  
6 rush and limit, limit, limit, and at the end of the day this  
7 process didn't mean a thing.

8 MS. BRUBAKER: Absolutely. I understand your  
9 concerns, Commissioner. And I suppose the one thing that this  
10 objection process that we've developed would provide that the  
11 preliminary meetings would not -- is an opportunity to discuss  
12 and raise these same concerns before the full Commission or  
13 before a Commission panel at the agenda. Whereas, prior to  
14 that, the decisions would be taken largely placed between the  
15 affected parties, utilities, the IPPs, staff. It's an  
16 opportunity to, based on comments made at agenda, to have an  
17 idea of where the Commission might go with these concerns and  
18 these thoughts.

19 CHAIRMAN JABER: Let me throw an idea out,  
20 Ms. Brubaker, because I think the Commissioners are all saying  
21 the same thing using different examples. Again, the purpose,  
22 as I saw it, in discussing the complaint process was to ensure  
23 that the bidding process was as transparent as possible,  
24 afforded potential participants an opportunity to fully  
25 evaluate whether they wanted to participate in the bidding

1 process. And I used the example of the City of Tampa. There  
2 are other examples. If you picked a biomass facility that was  
3 thinking about submitting a proposal but the application fee  
4 was \$10,000 and they needed clarification from whoever the IOU  
5 was on whether the fee should be reduced, they participate in  
6 the pre-bid meeting, the post-bid meeting, and the IOU comes  
7 back and says, we just can't reduce the fee, no explanation,  
8 and I'm not saying this will ever happen, but let's say it does  
9 and there's no explanation, can the biomass facility file a  
10 complaint here?

11 That's an example. There's another one that  
12 Mr. Green brought up. I think this is what Commission Deason  
13 was referring to at the hearing. To follow the literal  
14 interpretation of the rule, a company now will have to say,  
15 this is the heat rate we anticipate, if they know it. If they  
16 know it, they've got to say it. From the testimony we heard at  
17 this hearing, they should know something like that, and  
18 therefore, it should be clearly stated in the RFP.

19 But a potential participant may think that heat rate  
20 is completely not achievable. Infeasible, I think, is the word  
21 that Mr. Green used. Under the current complaint process,  
22 there hasn't been a technical violation of the rule because the  
23 IOU has said, this is the heat rate we anticipate. So here's  
24 my idea, let's see how it flies. Is there anything wrong with  
25 up front, before we ask for the descriptions of the things that

1 have to be included, is there anything wrong with saying, all  
2 terms in the RFP must be fair and feasible?

3 I think the words Mr. Green used in the brief and in  
4 the testimony were he wanted an RFP that was not onerous, not  
5 unfair, not unduly discriminatory, or infeasible. I don't  
6 think we have to be that specific, but if we don't do something  
7 like that, and I don't know if that's the right thing to do,  
8 but if we don't do something like that, I find myself searching  
9 to put more into the rule just to give people an opportunity to  
10 file an objection, and that's the wrong way to handle it.

11 See, I could be comfortable not including language in  
12 the rule about a reduced application fee, for example, if I  
13 knew potential participants had a point of entry here. Does  
14 that make sense?

15 MR. HARRIS: Commissioner, maybe I'm misunderstanding  
16 you. What I'm hearing, I guess, from the Commission and from  
17 yourself is essentially an opportunity to have a separate  
18 proceeding at the beginning of this process, and I think that's  
19 of concern -- a great deal of concern to me.

20 CHAIRMAN JABER: No, it's not a separate proceeding.  
21 Let me go back to Rich Zambo. If Mr. Zambo wants to file an  
22 objection saying their RFP didn't include any language  
23 regarding a reduced fee for my client, and that's not fair, I  
24 would anticipate a good attorney on the other side filing  
25 something that says, well, that's an inappropriate objection



1 pursuant to the rule because we met the technical requirements  
2 of this rule.

3 MR. HARRIS: Correct.

4 MS. BRUBAKER: I suppose if you wanted to incorporate  
5 ideas of feasibility and fairness into this up-front objection  
6 process, I suppose we could do it. I think the concern is,  
7 that's going to incorporate a great deal more investigation. I  
8 think it would anticipate the intake of evidence, of discovery.  
9 We can do that, but my understanding of what we're going for is  
10 something that would be a streamlined process that would not  
11 impede the processing of the need determination itself. So  
12 that would be my concern about broadening it to that extent.  
13 We can certainly address that if that's the way you want to  
14 take it.

15 COMMISSIONER BAEZ: I think you're presupposing a  
16 need determination even existing and it doesn't. All you have  
17 is an RFP. A need determination as such has not been filed and  
18 can't be -- I mean, the way the process has developed at least,  
19 it won't get filed until this thing gets finished. So, I mean,  
20 exactly -- are we working backwards? I know we are. That's a  
21 silly question. But, you know, you're saying things like, we  
22 don't hinder the need determination or the progress of the need  
23 determination, there is no need determination. There is no  
24 need determination.

25 COMMISSIONER DEASON: Let me make a comment, Madam

1 Chairman, if I might. I understand your concern about perhaps  
2 increasing the amount of time on the front end. First of all,  
3 let me say that I think there's potential that that may  
4 decrease the amount of time on the back end. It may be time  
5 well spent, so having said that, but I also want to draw the  
6 attention to Section 11 which sets out the requirement that  
7 there be these meetings that take place. And I think this is  
8 something I expressed at the hearing, and I still expressed it  
9 again here, that if you're going to put meaning into this  
10 meeting process, there has to be an opportunity, it seems to  
11 me, for there to be an objection filed beyond just where there  
12 is a rule violation.

13           These meetings are -- it's where all the potential  
14 participants can get down and can discuss what is suggested to  
15 be in the RFP, and they can get down and they can talk heat  
16 rates, they can talk all of these things beyond the scope of  
17 the rule. They can get down to the nitty-gritty and try to  
18 determine if they think that the RFP is something that is fair  
19 and something that they want to submit a bid for.

20           If there's no opportunity for there to be an  
21 objection filed with the Commission -- and I'm not looking for  
22 the objections. My intent is that if the participants in this  
23 meeting process know that there could be an objection filed,  
24 that it's going to make the meeting process more productive and  
25 that hopefully there won't even be a need for any objections to

1 be filed. That's what I'm trying to accomplish. And it seems  
2 to me that if the scope of the objection is just a rule  
3 violation, we're taking all opportunity for there to be  
4 meaningful discussion at this pre-meeting process which is  
5 contemplated in Section 11.

6 CHAIRMAN JABER: Just to add on to that. Don't  
7 underestimate the power of negotiation. You also seem to  
8 prejudge the need for an evidentiary hearing on a given  
9 complaint. Sometimes an opportunity for the Commission to  
10 provide direction to the parties goes a long way too. It may  
11 be something -- it may be resolution that just says, you know,  
12 perhaps there's no violation of the rule, but be aware that  
13 when the need case is filed, this may not fly, so go forward at  
14 your own risk.

15 MR. HARRIS: I think that's what staff was trying to  
16 get at here. The way we envision it is somebody has a problem,  
17 and they file something, and they say, Commissioners, we have a  
18 problem with this. And you all listen to the sides, and you  
19 either decide it's a technical rule violation and it's not  
20 going to fly under the rule, redo it, or you decide, well,  
21 under the terms of the rule, you've met what you need to do,  
22 but we have a problem with this. We don't like it. It sounds  
23 like it might not be fair, whatever that means. It sounds like  
24 it might be infeasible, whatever that means, go forward at your  
25 own risk. If you decide not to negotiate, not to change it, we

1 may have a problem later on.

2 CHAIRMAN JABER: Right, but, Mr. Harris, I think what  
3 we're picking up on, at least the sensitivity I have to the  
4 exact language related to the technical violations of the rule,  
5 parties wouldn't file the concern or the complaint or the  
6 objection because they would think they couldn't.

7 COMMISSIONER BAEZ: That scenario that you're  
8 presenting never takes place.

9 CHAIRMAN JABER: Right.

10 MR. HARRIS: I as an attorney would not file  
11 something unless I was absolutely sure there was binding  
12 precedence that I couldn't. I'd take my chances with filing  
13 something and risking a motion to dismiss unless my  
14 interpretation of the law said that I clearly could not do  
15 that.

16 COMMISSIONER BAEZ: But see, then even in that -- and  
17 I agree, that would be the right way to go, the prudent way to  
18 go, but then all of a sudden this rule becomes a weapon against  
19 the Commission.

20 MS. BRUBAKER: Certainly, Commissioners, we proceed  
21 at your discretion. If it's your preference to broaden it as  
22 it stands now, we can do that. You've heard our concerns which  
23 is simply that we keep this a tailored streamlined process that  
24 there is the opportunity to air concerns about fairness and  
25 infeasibility built into this process. If you would prefer to

1 take a different --

2 CHAIRMAN JABER: Commissioners, I'm not looking to  
3 broaden it, I'm looking to clarify it. If we keep it strict to  
4 technical violations of the rule, my tendency is to put more  
5 into the rule so that the situations fit under technical. But  
6 I'm open to suggested language, Commissioners.

7 I mean, I've thought about -- and recognize first  
8 that we really should commend the parties on the work that  
9 they've done related to this aspect of the rule. This took a  
10 lot of work in reaching consensus on even a mechanism like  
11 this. But, Commissioners, I hear you be more sensitive to the  
12 kinds of objections that get filed. If absent any suggested  
13 language from you all, maybe we should consider a potential  
14 participant may file with the Commission objections to the RFP  
15 within ten days of the post-issuance of the RFP and leave the  
16 interpretation of whether the objection is appropriate or not  
17 to the date we get the objection. I'm throwing that out. I  
18 don't know if that's the right thing to do or not.

19 COMMISSIONER DEASON: Well, let me express a concern  
20 about that, and it may be the right thing to do. Maybe that's  
21 going too far in the direction that it just leaves everything  
22 up to be objected to. It seems to me there may be some  
23 standard that we need to employ when we're looking at these  
24 objections, that it's got to meet some -- that it is  
25 discriminatory or that it is unduly burdensome or that it is

1 infeasible. There needs to be some basis for it to send a  
2 signal out there that there's got to be some basis for the  
3 objection. Just because you don't like the size of the paper  
4 the RFP is going to be printed on, don't file an objection with  
5 us. It's got to meet some standard of some sort. And so I  
6 have that concern.

7 Mr. Ballinger, you've got a suggestion?

8 MR. BALLINGER: No. I agree with your caution  
9 because when you start getting to criteria like infeasible or  
10 burdensome, it may be burdensome to one respondent but not to  
11 three others over here, and they're willing to pony up to the  
12 bar and come to the table. So how do we evaluate that? That's  
13 where you get real tricky if somebody does that. I think they  
14 have the right to --

15 CHAIRMAN JABER: But doesn't that go into the  
16 evaluation? Wouldn't -- if you're trying to show that it's --

17 MR. BALLINGER: You wouldn't know that until the back  
18 end, until you got zero responses. Then you'd say, boy, your  
19 RFP must have been pretty tough out there, you didn't get any  
20 responses. It's an awkward thing. A lot of this comes out at  
21 the meetings. Mark has been to meetings where bidders will  
22 stand up and say, you know, this term is terrible, we can't  
23 live with it, and others say, we're ready to go, you know,  
24 let's go. Well, you've called out some. That's the whole  
25 process of this.

1 Remember, in my view, it's really not a competition  
2 between the utility and the IPPs. It's a competition amongst  
3 the IPPs. And that's what you want. You want them competing  
4 amongst each other to bring forth their best proposal.

5 CHAIRMAN JABER: And other IOUs that want to bid.

6 MR. BALLINGER: Right. I mean the respondents, the  
7 nonnative, you know, serving utility for that territory.

8 CHAIRMAN JABER: I want to come back to that because  
9 there's so much misunderstanding related to this process. Has  
10 another IOU ever been awarded a bid?

11 MR. BALLINGER: No.

12 CHAIRMAN JABER: I keep saying it, and I'll say it  
13 until the day this thing gets implemented: This isn't about  
14 IPPs versus IOUs. And I want us to be real clear in the record  
15 that this is about creating a transparent process that allows  
16 potential participants a fair evaluation of whether they want  
17 to play in this market. And the market is not defined by IPPs  
18 versus IOUs, it's the complete spectrum of energy providers in  
19 the state of Florida.

20 MR. BALLINGER: I agree. I think anybody can  
21 participate. The other thing I would point out that if you  
22 make that change of removing -- that the objections are  
23 unlimited basically or saying they are, the review by the  
24 Commission would still be confined to rule violations for the  
25 shortened time frame. If you have an objection about

1 infeasible or burdensome, that may require a whole other  
2 hearing and the time line may get expanded. Now, that's fine.  
3 I just wanted to let you know that the two relate.

4 MS. BRUBAKER: I think that was what made this an  
5 attractive proposal for staff, is that you treat it almost like  
6 a motion to dismiss or something like that. On the four  
7 corners of the complaint, is there an apparent violation? It  
8 made the standard concrete and easy to approach and manageable  
9 in a fairly short time frame. If we're talking about something  
10 that passes on a substance, is it fair? Is it feasible? I  
11 think the concern is we're looking at opening the door to a  
12 whole additional proceeding, and this was our attempt to keep  
13 it on a more manageable level.

14 COMMISSIONER DEASON: And the question I have is, if  
15 we're going to do that, is it better to go ahead and get that  
16 determined up front instead of waiting until a need  
17 determination and you have somebody file -- they intervene in  
18 the need determination and say, this provision in the RFP was  
19 infeasible, so it violates the whole process? You cannot  
20 choose the most cost-effective unit because absent this we  
21 could have put together a project which, you know, was the most  
22 cost-effective but this particular provision was not necessary  
23 but it made our project infeasible. And then we're on the back  
24 end saying, well, if we had known that on the front end, it may  
25 have made a difference, but we need capacity by X date, and we



1 are subject to the constraints on the back end. And we feel  
2 pressure to go ahead and make a decision. That's what I'm  
3 trying to get at.

4 Is it better if we're going to add -- if it may even  
5 add some time on the front end, is it time well spent to make  
6 sure that the process is more fair, more open and we get more  
7 assurance that the decision from a need determination is, in  
8 fact, the most cost-effective alternative available? That's  
9 what my concern is.

10 COMMISSIONER PALECKI: I have a legal question based  
11 upon this issue. It appears to me that you're basing your  
12 decision legally on whether or not -- I think what you're  
13 saying is, if you find a finding that there is a rule violation  
14 does not require an opportunity for a hearing, but a finding on  
15 other issues as to whether the objection is well-founded,  
16 whether it's a fair process, nondiscriminatory would require a  
17 hearing. And I don't see that distinction. And if you can,  
18 tell me where in the law you find that distinction. I don't  
19 see that there's any difference between this Commission finding  
20 a rule violation or making some other determination that would  
21 say one requires a hearing and one does not.

22 MR. McLEAN: Commissioner Palecki, Harold over here.  
23 I don't think there's a distinction either, and I think that's  
24 a sound point. Let me speak to this issue briefly, if you  
25 will, please, Madam Chairman. And that is, you mentioned

1 earlier the outline aspect of the rule, and Section 5 tells the  
2 IOUs what you expect in the RFP. And Section 12 says what  
3 you -- it affords a limited point of entry for a party  
4 aggrieved by the RFP. The way staff does this, we try to set  
5 up a summary procedure by which you could determine these  
6 things up front. And I think that it is a fair interpretation  
7 now that it is maybe overly restrictive at least in technical  
8 rule violation using the term advisedly. I would say that if  
9 you want to deal with the inherent fairness, the unfair, unduly  
10 discriminatory, onerous, or commercially infeasible aspects,  
11 why don't you require that in the RFP? Why don't you tell the  
12 IOUs in Section 5 when they write their RFP that the RFP should  
13 not include any of those things?

14 I would urge you not to abandon the summary procedure  
15 because I think it can work pretty well. It can give everybody  
16 an early heads up as to where the Commission is on a particular  
17 aspect of the RFP. So if you want to include those kind of  
18 considerations in the objection process, my recommendation  
19 would be is put that in your requirements for the RFP because  
20 then it would be a rule violation.

21 CHAIRMAN JABER: I see what you're saying. Okay. I  
22 see what you're saying. In Subsection 5, you would say, "And  
23 such terms shall not be unduly discriminatory, onerous" --

24 MR. McLEAN: Precisely. But, Commissioner, let me  
25 add this before we abandon that point. Page 14, Section 1

1 where you're setting out the intent of this rule, at the end of  
2 that first paragraph you say, "The use of a request for  
3 proposals, RFP, process is an appropriate means to ensure that  
4 a public utility's selection of a proposed generation addition  
5 is the most cost-effective alternative available;" it may be  
6 the case.

7           Commissioner Deason wisely pointed out a while ago  
8 that anyone who brings a complaint to the rule forward under  
9 the existing rule -- I'm sorry, under the proposed rule as it's  
10 written is going to face a motion to dismiss, no doubt about  
11 it. But an answer to that motion to dismiss might be it is  
12 inconsistent. It is a rule violation. It amounts to a rule  
13 violation because it is inconsistent with that sentence I just  
14 read to you out of Section 1. Now, I think that would give  
15 some comfort. If you want to give additional comfort, then I  
16 would urge you to add the language that Commissioner Jaber just  
17 read in Section 5.

18           COMMISSIONER DEASON: Language being, what,  
19 discriminatory, burdensome, things of that nature?

20           MR. McLEAN: Yes, sir. Section 5 tells the IOUs what  
21 you want in the RFP. Section 12 deals with parties who believe  
22 they have been aggrieved by the RFP. So if you want to address  
23 other aspects other than a simple technical rule violation,  
24 then I would urge you to put it in Section 5. But that said,  
25 maybe way back in Section 1, maybe Section 1 accomplishes that

1 anyway.

2 COMMISSIONER PALECKI: The question I have is with  
3 regard to a ruling on -- let's say, we put in those standards  
4 regarding unduly, discriminatory, et cetera, and we make a  
5 ruling. This Commission decides that an RFP is discriminatory  
6 and has a problem, and tells the utility to take it back and  
7 make some changes. Where is the opportunity for a hearing?  
8 That would be a preliminary ruling? Is that why we can do this  
9 in a more summary fashion at this point, because there would be  
10 then an opportunity at the need determination or some later  
11 point for a full-blown evidentiary proceeding?

12 MR. McLEAN: Yes, sir. I think there's kind of a  
13 continuum. If you want an up-front, quick and dirty, to borrow  
14 the term, determination of where the Commission is on a  
15 particular point, then you can afford the due process rights at  
16 the full-blown hearing of the case in chief. And that can be a  
17 very summary quick proceeding. But to the extent that you  
18 finally determine these things, I mean, you find that this is  
19 an onerous item, onerous term of the RFP, and the Commission  
20 finally and conclusively determines that that is an offensive  
21 term, that I think you need to afford a pretty good measure of  
22 due process to get there. In other words, you trade off due  
23 process for summary procedure essentially because the due  
24 process foregone in the summary procedure can be made up later  
25 in the whole hearing. I don't know if that makes sense.

1           What I'm saying to you is that if you do a summary  
2 procedure, you can dispense with a good measure of due process  
3 because all you're doing is giving sort of an advisory opinion  
4 to say, if that term survives to the end of this process, we  
5 may well find that that was a very wanting and flawed term.  
6 That's an advisory opinion. However, if you want to set up a  
7 procedure whereby you say that is an offensive term and we  
8 reject the RFP, and if that RFP survives, it will fail, you  
9 have to afford some due process to get to that point. So I  
10 suppose -- I don't think there's a better way to say it. You  
11 trade off due process for summary -- for time. If you want  
12 this up-front summary process, then I would suggest that you  
13 not go through all the due process to get there because you can  
14 cure it later. I hope that makes sense.

15           COMMISSIONER PALECKI: Thank you.

16           CHAIRMAN JABER: Commissioner Bradley.

17           COMMISSIONER BRADLEY: Yes. I've held my question  
18 because I really wanted to listen to a little bit more of the  
19 discussion. My question goes to 5F, and this is a question to  
20 staff. Wouldn't an objection -- might an objection increase  
21 the cost of evaluating or assessing an RFP, an objection?  
22 Because it would appear to me that as we -- in a perfect world,  
23 we would have an RFP process that is finite and understood by  
24 everyone. And once the RFP is put out and the companies have  
25 had an opportunity to respond, that the process would end at

1 that point, but when objections start to occur, doesn't that  
2 also increase the cost of evaluating an RFP because of the fact  
3 that the objections also have to be assessed and evaluated and  
4 a determination has to be made by the Commission itself?

5 MR. McLEAN: Commissioner Bradley, did you mean --  
6 I'll try to answer the question. Yes, sir, it could. It  
7 certainly has that potential, but as Commissioner Deason  
8 pointed out, it may have the potential to save later on both  
9 time and money. So it's tough to say. It's a very difficult  
10 call. It could -- you're adding some complexity earlier in the  
11 hearing in the hopes that later in the hearing things will be  
12 less complex.

13 COMMISSIONER PALECKI: Mr. McLean, could you repeat  
14 the amendment to Section 5 that you stated earlier?

15 MR. McLEAN: I don't know that I drew one up,  
16 Commissioner, but it has been pointed out to me by Ms. Brown  
17 that Section 6 also tells the IOUs what you expect in terms of  
18 an RFP, and it may well fit better there. But my general  
19 notion trying to read the Commission and see what your concerns  
20 are with respect to what you expect in an RFP, it seems that  
21 you would like the RFP to be able to be tested early in the  
22 process for any provisions which might be unfair, unduly  
23 discriminatory, onerous, or commercially infeasible.

24 If you want that tested early in the process, and I  
25 would urge that you do so in summary fashion, that it seems to

1 me that that could fit into Section 6 or to Section 5. It's  
2 probably ministerially more easy to fit it into -- easier,  
3 rather, to fit it into Section 6.

4 CHAIRMAN JABER: Mr. McLean, let's say we accept that  
5 idea.

6 MR. McLEAN: Yes, ma'am.

7 CHAIRMAN JABER: And frankly, I wrote it -- and  
8 again, I don't think it matters, but I wrote it in as you were  
9 speaking as the first sentence of Sub 5 because that's where we  
10 start to articulate what should be --

11 MR. McLEAN: I think it works there too.

12 CHAIRMAN JABER: Okay. So let's say we accept that  
13 idea. Would 12 stay the way it is?

14 MR. McLEAN: Yes, ma'am.

15 CHAIRMAN JABER: Because, again, violations of the  
16 rule would go back to anything contained in the rule.

17 MR. McLEAN: That would unquestionably encompass  
18 those things in violation of the rule, again, with the  
19 reservation that you may already be doing so back in Section 1  
20 but with less surety than here.

21 CHAIRMAN JABER: Well, okay. Let's talk about that  
22 because on one it's clear that the intent of this rule is to  
23 allow a selection process that will result in the most  
24 cost-effective alternative available. What precludes a  
25 potential participant from filing a complaint using that part

1 of 1 as the basis for a violation of the rule?

2 MR. McLEAN: Well, that's a point I was trying to  
3 make. I believe they could. It is a less sure case than if  
4 you enumerate some criteria in Section 5 or 6, but it is an  
5 answer to a motion to dismiss in any case.

6 CHAIRMAN JABER: Commissioners, I'll tell you my  
7 hesitancy in accepting right off the bat including a standard  
8 is only that I'm thinking ahead about what our agendas would  
9 be. The potential participant will come in and file something  
10 that says that heat rate is commercially infeasible. In five  
11 days, under the current structure, in five days the IOU is  
12 going to say, no, we're going to prove to you it is  
13 commercially feasible, and as a matter of fact, you should  
14 encourage us, Commission, to get to that heat rate because  
15 that's going to result in savings. But we can't do that,  
16 Commissioners, absent an evidentiary process that puts the  
17 witnesses, the expert witnesses on the stand -- you're shaking  
18 your head, Harold, and that's good because I need to hear the  
19 other side -- without putting on witnesses that show you what  
20 the industry standard is.

21 And I'm wondering if my concern related to clarifying  
22 the nature of the objections is better answered by recognizing  
23 in the record that potential participants may use Paragraph  
24 1 to file an objection rather than introduce a standard that  
25 may force us into a lengthy evidentiary process.



1 MR. McLEAN: Yeah, I agree with that. What I was  
2 shaking my head about was, I thought for the moment that you  
3 were suggesting that that would force a lengthy evidentiary  
4 hearing. Here's the way I see it. If you're going to argue  
5 about something like heat rate, you ought to take that to the  
6 main hearing. That's complex stuff.

7 If you're going to do something like, this is  
8 discriminatory, the filing fee is too high, it doesn't require  
9 the kind of technical thing. You could probably do it in  
10 summary. My sense has been all along that there may be  
11 converted issues that you don't want to handle in a summary  
12 fashion, and you may want to refer that and handle that in the  
13 case in chief, but we ought not --

14 CHAIRMAN JABER: And that could be done in the  
15 ten-day process? There's nothing to preclude us in considering  
16 the complaints in the ten-day process to say, we just need  
17 evidence on this. We're going to roll it in --

18 MR. McLEAN: I think you could. You could do it  
19 early, but I think you might be better advised to do it later  
20 because you're going to have demands for discovery and the  
21 normal challenges that go along with those things which start  
22 eating up time like crazy. So it may be the case that a  
23 complaint comes before you and you say, this is too technical.  
24 We're going to handle it, and this is the main thing. We're  
25 trying to give you folks an up-front view of where the

1 Commission is going here. You have brought us an issue which  
2 requires evidence. We don't want to decide it at this time.

3           With respect to the enumeration of criteria in  
4 Section 5 or 6, I still believe that Section 1 gives you some  
5 opportunities, maybe not the kind of opportunities you'd have  
6 if you actually enumerate them. But with opportunities  
7 sometimes come challenge, and that is, if you enumerate  
8 criteria in Sections 5 and 6, people are going to ask you  
9 exactly what those criterias mean. And you are publishing  
10 rules, so you're responsible for fairly precise criteria.

11           CHAIRMAN JABER: Commissioners, I think we have  
12 options here, and I could be amenable to whatever the majority  
13 decides. I think what all the stakeholders have in common in  
14 this regard is a desire to resolve the objections early on  
15 perhaps for different reasons. The potential participants want  
16 a quick resolution because they're evaluating whether they want  
17 to participate at all. And the expedited process allows them  
18 that remaining 30 days to put their proposals together.

19           The IOUs want it expedited because I think they're  
20 hoping for a smooth need case at the tail end, and frankly,  
21 they don't want delay in their need process. So there are some  
22 mutual goals, and I'm amenable to ideas here.

23           COMMISSIONER DEASON: Madam Chairman, as it relates  
24 to the language in Section 1, that last sentence in Section 1,  
25 to me, that's just a finding by the Commission that the use of

1 an RFP process is an appropriate means to ensure  
2 cost-effectiveness. There's no -- I don't read that as that  
3 there's a requirement. That language is not a requirement that  
4 the RFP be fair or not unduly burdensome or onerous or  
5 whatever. So I find -- I have some difficulty using that  
6 language as a means to entertain an objection.

7 MR. BALLINGER: Commissioner Deason, perhaps this  
8 language might -- if you go to Page 21 of the recommendation,  
9 it's Section 14 of the rule where it says, "The public utility  
10 shall evaluate the proposals received in a fair comparison with  
11 its unit." Now, again, that's after they've been received, so  
12 it's --

13 COMMISSIONER DEASON: But, see, that's just precisely  
14 it. That is after the RFP has been issued and you have the  
15 responses in. And those responses have to be evaluated in a  
16 fair comparison, but that doesn't address whether the RFP  
17 itself was fair.

18 MR. BALLINGER: I understand. And I think the -- in  
19 getting to that concern of both parties is to resolve these  
20 conflicts up front. The pre-RFP meeting and the post-RFP  
21 meeting, I think, goes a long way.

22 COMMISSIONER DEASON: And that's my desire, is that  
23 meeting process is going to result maybe not in unanimity but  
24 at least a general consensus that the RFP that gets issued is  
25 fair and people can live with it and we don't have any

1 objections.

2 CHAIRMAN JABER: Well, Commissioner Deason, do you  
3 have any concern with the first sentence of Paragraph 5 being  
4 amended to say, "No term in the RFP shall be unfair, unduly  
5 discriminatory," and I think Harold said, "onerous and  
6 commercially infeasible"? "No term in the RFP shall be unfair,  
7 unduly discriminatory, onerous, and commercially infeasible"?

8 MR. McLEAN: Or commercially infeasible.

9 CHAIRMAN JABER: Or?

10 MR. McLEAN: Or commercially infeasible,  
11 Commissioner, I think makes more grammatical sense, although I  
12 have never been known as an authority on that.

13 CHAIRMAN JABER: Do you have any concern with adding  
14 that to Paragraph 5 and then leaving Paragraph 12 the way it  
15 is?

16 COMMISSIONER DEASON: I think that accomplishes it.  
17 I want the ability -- hopefully we don't have any objections at  
18 all, but if there is an objection, that should be something  
19 that we have the discretion to entertain and that it should not  
20 be subject to a motion to dismiss simply because it does not  
21 allege that there's been a rule violation. I think the rule  
22 violation requirement is too narrow for the objection. And I  
23 think that it takes away from the opportunity for there to be  
24 meaningful discussions at the -- in the meeting process. But  
25 to answer your question in a short manner, yes, I think that

1 would accomplish it.

2 CHAIRMAN JABER: Now, Mr. McLean, while you're on --  
3 get back on -- I am worried about this waiver language. And I  
4 hadn't thought about it until today in light of the  
5 conversation Ms. Brown had with JAPC. I mean, why even go  
6 there? If Chapter 120 has a rule waiver point of entry for all  
7 participants in the PSC process, perhaps this language is just  
8 unnecessary.

9 MR. McLEAN: Commissioner, are you back on Page 22?

10 CHAIRMAN JABER: Yes.

11 MR. McLEAN: As I understand, and I can easily be  
12 corrected, the language that you see there that's not  
13 underscored is in the existing rule as is; correct?

14 CHAIRMAN JABER: I don't know that that matters. You  
15 all need to correct me if I'm wrong, but this will go back  
16 through the JAPC process.

17 MS. BROWN: No. JAPC hasn't objected to this section  
18 of the rule in writing as it's required to do under the --  
19 under 120. If there are going to be any further comments or  
20 objections from JAPC, they will go to the changes, the notice  
21 of changes that you publish.

22 CHAIRMAN JABER: I see. They don't go to the  
23 existing language.

24 MS. BROWN: Right. And the standards -- you know,  
25 Chairman Jaber, that we've been through these things with this

1 waiver section of 120. The standards are very stiff and strict  
2 and hard to comply with. The standards in the rule are much  
3 more specific to the need determination process and much more  
4 relevant to it. I don't suppose they really do need it, but it  
5 might be harder for people to get a waiver of the rule under  
6 120 than it would under the existing rule that we have.

7 MR. McLEAN: And, Chairman Jaber, let me add this.  
8 There's something to be said for leaving it as is in the change  
9 language that you see there which really addresses something of  
10 a different topic, namely, the auction. I think it might make  
11 sense to leave Section 16 as it is and add a Section 17 which  
12 deals with the auction.

13 As I say, there's something to be said for leaving  
14 that waiver language there. It's not challenged by anyone.  
15 It's been around for several years. So let's leave -- I would  
16 suggest that you leave that as is and add your auction  
17 language, which is a genuine change, down in a separate Section  
18 17.

19 CHAIRMAN JABER: Okay. I could accept that,  
20 Commissioners. I just don't want any confusion related to the  
21 waiver being limited to that auction process. It seems  
22 stand-alone. It would be more appropriate as a stand-alone.

23 And with your statement related to how JAPC will look  
24 at this rule, I'm fine with that. And I think with respect to  
25 the change we made to Paragraph 5 my concern on the application

1 fee is addressed.

2           And, Mr. Ballinger, I see your point with respect to  
3 the Legislature has not defined renewables. At the same time  
4 the state goal is to encourage the use of renewables. So I  
5 would hope even if we don't include that language in the rule,  
6 Commissioners, that we send a real strong signal to  
7 participating IOUs that they should consider taking into  
8 account expanding the renewable portfolio, and that may include  
9 reducing an application fee or anything else that may be  
10 appropriate given the circumstance.

11           MR. BALLINGER: I forgot to point out the last time  
12 we were discussing this, there's a third reason why, in my  
13 view, municipalities already have a benefit over other forms of  
14 generation. They're one of the three types of facilities that  
15 are eligible for standard offer contracts which are no hassle,  
16 no negotiations. They can sign on the dotted line and get it.  
17 They may not be priced the way they want them to be, but it is  
18 available to them as a separate entity, recognizing the  
19 promotion of renewable and municipal solid waste facilities.  
20 So that's already out there and in place.

21           One thing I have to, I guess, request or give you my  
22 concern about is the language you're adding to 5 of the onerous  
23 or commercially infeasible. I'm struggling with how as a staff  
24 we'll evaluate that in a rule. I just wanted to caution you on  
25 that. I know it's what was brought out and all that, but from

1 my perspective, I'm a little concerned of how we're going to  
2 make those judgments if they come in.

3 CHAIRMAN JABER: The same way we make judgments every  
4 day of the week: Very carefully, very professionally, and very  
5 thoroughly. And a lot of it depends on the pleading you get.  
6 You know, it's -- the burden of proof is going to be on the  
7 company that says, this term is unfair, unduly discriminatory,  
8 and burdensome, and the quality of the response you get; right?  
9 Isn't that the way we do everything here at the Commission? We  
10 get the pleading; we get the response; we take a very objective  
11 view of the arguments.

12 MR. BALLINGER: I think -- but when, like, Harold  
13 said, when you put a criteria in the rule, you have to be able  
14 to define that criteria and how you're going to use it. Fair  
15 and unduly discriminatory I understand, and I can define those  
16 pretty clearly. You get to onerous or commercially infeasible,  
17 like I said before, it might be commercially infeasible for one  
18 but not for another. But our rule says, if it's commercially  
19 infeasible, you can file, we'll have a hearing and delay the  
20 process and go on. I don't know that that makes much sense,  
21 and that's what I'm struggling with.

22 CHAIRMAN JABER: Dr. Bane, this may be an opportunity  
23 to get the market monitoring folks more engaged in these kinds  
24 of discussions because, of course, that section is charged with  
25 a better understanding of what goes into day-to-day market



1 operations. And perhaps commercial feasibility is better  
2 addressed by a different group.

3 MR. BALLINGER: I understand. And I didn't want  
4 to --

5 COMMISSIONER PALECKI: Madam Chairman, with concern  
6 to your concerns regarding renewable resources, what about just  
7 putting in some permissive language saying that the utility may  
8 allow a reduced application fee for applicants presenting  
9 proposals utilizing renewable resources? And that would allow  
10 the utilities to have the discretion if they, after the  
11 Legislature acts, feel that there's a very high priority for  
12 renewables. Then they could go ahead and on their own allow a  
13 reduced application fee.

14 CHAIRMAN JABER: Say the language again,  
15 Commissioner.

16 COMMISSIONER PALECKI: And this is just something I  
17 scribbled off the top of my head. "The utility may allow a  
18 reduced application fee for applicants presenting proposals  
19 utilizing renewable resources." And it would be discretionary  
20 with the utility. And that would allow flexibility to the  
21 utility if the Legislature did pass some statutes that  
22 prioritize renewables and made them more desirable economically  
23 for the utilities to place in their system.

24 CHAIRMAN JABER: And you don't think the -- that  
25 language is fine, but you don't think that flexibility is found

1 in F right now? And is that where you would propose that  
2 language?

3 COMMISSIONER PALECKI: Let me look at F.

4 CHAIRMAN JABER: Page 18. I don't think it should be  
5 mandatory, so your choice of the word "may" I think is  
6 appropriate.

7 COMMISSIONER PALECKI: Yes. I think that it would  
8 fit at the end of F very well. And it would give the utility  
9 some flexibility especially in the event that the Legislature  
10 passes some statute or statutes that did make renewables a  
11 priority.

12 COMMISSIONER BRADLEY: You know, while I agree with  
13 Commissioner Palecki's intent, I think that it's a stretch  
14 maybe to get ahead of the Legislature by including any language  
15 that might refer to anything that they have not clearly  
16 defined. That's just one of the Commissioner's opinion.

17 CHAIRMAN JABER: Read the language one more time,  
18 Commissioner.

19 COMMISSIONER PALECKI: "The utility may allow a  
20 reduced application fee for applicants presenting proposals  
21 utilizing renewable resources."

22 CHAIRMAN JABER: And your point, Commissioner, would  
23 be they haven't yet defined renewable resources?

24 COMMISSIONER BRADLEY: Exactly.

25 CHAIRMAN JABER: It brings me back to my original

1 question, Commissioner Palecki. I think Paragraph F gives the  
2 company flexibility on its own to establish the application  
3 fee.

4 COMMISSIONER PALECKI: I think I'd agree. And I  
5 think that it would also allow the flexibility to have an  
6 application fee of some dollar amount for all proposals, and if  
7 the utilities wish it to be at a lower dollar amount for  
8 certain particular proposals, maybe renewables, I think that  
9 they certainly would have that discretion.

10 CHAIRMAN JABER: And this is a good time to remind  
11 the IOUs and the renewable providers that there was an  
12 agreement to work with renewable providers on a reduction in  
13 the application fee, and I'm hoping that those discussions  
14 happen at the post-RFP meeting and the pre-RFP meeting. And  
15 now we've clarified what objections could come in. I think  
16 we've covered the gambit of possibilities there.

17 COMMISSIONER BRADLEY: Madam Chair.

18 CHAIRMAN JABER: Commissioner Bradley.

19 COMMISSIONER BRADLEY: Since we're talking about  
20 application fees, that was the issue that I was discussing  
21 earlier that Harold responded to. You know, the process of  
22 establishing the application fee is going to be difficult  
23 because of maybe some unforeseen variables interjecting  
24 themselves into the process. Is there any objection to adding  
25 language that clarifies or states that the IOU has the

1 authority to establish the application fee and to take out the  
2 suggested criteria that we have before us?

3 CHAIRMAN JABER: I think -- let me make sure I  
4 understand your question, Commissioner Bradley. The way the  
5 rule is drafted now, the utility does have authority and  
6 complete flexibility to establish the application fee. It  
7 says, "Any application fee that will be required of a  
8 participant would be articulated in the RFP," but they would  
9 establish it.

10 COMMISSIONER BRADLEY: But the language says that  
11 participants -- I'm just looking at the description of proposed  
12 changes. It says that it requires participants to be notified  
13 up front of any application fees to be limited to cover the  
14 costs of the RFP, and it requires the application fees to be  
15 cost-based. I would think that that would be contrary to what  
16 you just said in terms of intent.

17 CHAIRMAN JABER: I don't think so. The IOUs did not  
18 express concern that they wanted to add -- and you all need to  
19 correct me if I'm wrong. The IOUs did not express concern that  
20 their application fee needed to include anything more than  
21 cost. The fee is incurred to cover the cost of the evaluation  
22 process. Nothing more, nothing less. And I think the sentence  
23 that it needs to be cost-based -- staff, you agree with that?  
24 You don't make a profit through your application fee.

25 MR. BALLINGER: Right.

1           CHAIRMAN JABER: It's just going to be used to cover  
2 the cost of evaluation.

3           MR. BALLINGER: The actual discussion at the hearing  
4 was, though, the IOUs allege that even at \$10,000 a fee, that  
5 didn't even cover their costs. I can't tell you whether that's  
6 true or not, I don't know. I think what Commissioner Bradley  
7 is getting to is that they've got to tell the cost up front.  
8 They may incur additional costs down the road, and how do they  
9 include that in their fee? I don't know how you reconcile  
10 that. I think it's -- this really came about, if you go back  
11 to prior iterations of this thing, it had originally  
12 application fees and we put a cap on them of \$10,000, an  
13 earlier version. That notion was discarded and instead we went  
14 to a cost-based, recognizing that costs may increase as we go  
15 through time and this rule will go. I don't think it's ever  
16 intended to provide a profit-making mechanism for the  
17 utilities.

18           COMMISSIONER BRADLEY: Okay. Well, let me ask the  
19 question this way then. And just to clarify what you just  
20 said, certainly as I understand it, would the cost of an IOU  
21 coming before this Commission to deal with an objection that  
22 was filed with the Commission by someone who has submitted an  
23 RFP but disagree with the IOU's assessment of their RFP, would  
24 that be included -- I mean, at what point would that be a part  
25 of the cost scenario? Would that be a part of the application

1 fee, or would that be considered as a part of the application  
2 fee, or would that be an issue that will be dealt with as a  
3 part of the rate base when all the determinations have been  
4 made?

5 MR. BALLINGER: I believe your latter assessment is  
6 correct. It's a part of cost of doing business that the IOU  
7 bears of any regulatory costs they incur. It's not a cost of  
8 analyzing the application. To me, the application fee is  
9 assuming no complaints, nothing. You get the information in,  
10 the manpower, the computer time and all that stuff to evaluate  
11 it, that's the cost of evaluating the RFP.

12 COMMISSIONER BRADLEY: Okay. And let me take that  
13 one step further then. How then do we make a determination as  
14 to the most efficient means of construction of plant if we have  
15 no means of predicting what some of the process might be past  
16 the RFP in terms of objections and other dealings that might be  
17 necessary in order to clarify some of the objections and other  
18 issues that might come before this Commission?

19 And what I'm foreseeing is this Commission getting  
20 into full-blown hearings as it relates to the RFP process, and  
21 I'm just grappling with the concept of how do we determine what  
22 the cost is going to be to the ratepayer if that transpires.

23 MR. BALLINGER: Right. I don't think we have ever  
24 looked at combining litigation costs, if you will, into a  
25 cost-effectiveness evaluation of a proposed project. Off the

1 top of my head, I don't know that it would make a significant  
2 impact. You know, it may be a couple million dollars compared  
3 to a two billion dollar project of costs. I'm not sure how  
4 you'd reconcile that. And each one is different. You may have  
5 a lot of controversy in one case and not in the another, and it  
6 may not show up until the tail end.

7 COMMISSIONER BRADLEY: Where is the language in this  
8 proposal that limits the time frame with respect to how long an  
9 objection can drag out?

10 MR. BALLINGER: I believe it's in Section 12.

11 CHAIRMAN JABER: Page 20 of the recommendation,  
12 Commissioner. A potential participant would file an objection  
13 within ten days of the RFP, and the public utility could file a  
14 response within five days. And then within 30 days from the  
15 date of the objection, the Commission panel assigned would  
16 determine whether the objection demonstrates a rule violation.

17 COMMISSIONER BRADLEY: Okay. And is there language  
18 that would deal with an objection to an objection?

19 CHAIRMAN JABER: No. Companies can file a response  
20 to the objection, and that's consistent with all legal  
21 pleadings.

22 COMMISSIONER BRADLEY: So if there's an objection to  
23 a finding by this Commission, then where would that objection  
24 go, before the Supreme Court or the Court of Appeals?

25 CHAIRMAN JABER: The electric cases -- you all -- the

1 electric cases go to the Florida Supreme Court.

2 MR. McLEAN: But, Chairman Jaber, I think an  
3 objection to this particular determination would not go  
4 anywhere. It's an interlocutory appeal at best to an advisory  
5 opinion -- at worst, perhaps. I think that would be the end of  
6 the process. The way staff drew it, what we are hoping to do,  
7 Commissioner Bradley, is draw a process that would last 30 days  
8 and then it would be over. There would be nothing further on  
9 that until you got to the main hearing.

10 If you look at the bottom of Page 20, just up from  
11 the Page 20 you would see the term "would," and I think that's  
12 a very important term. The Commission is determining whether  
13 the objection as stated would demonstrate that a violation has  
14 occurred. That is conditional language. That says the  
15 Commission -- if the case goes to its fruition, the Commission  
16 would find -- is likely to find that particular term  
17 objectionable. But I think to your question, Commissioner  
18 Bradley, the process would be over 30 days after the objection  
19 was filed. And when I say "process," I mean this summary  
20 objection process would be over.

21 And if I could answer an earlier question you asked.  
22 What about the cost? And again, there is some risk that this  
23 process is going to bring costs that would not otherwise be  
24 incurred, but it is brought on by the hope that there will be  
25 less costs later on by resolving these issues up front or at



1 least giving all the affected parties a good indication of how  
2 the Commission would resolve those issues if they remained in  
3 the process. So there is some risk. We incur some risk when  
4 we go to this up-front process, and the risk is cost. But I  
5 think it's the sense of staff, and if I read the Commission  
6 correctly, that there is hope and good hope that it would  
7 lessen the costs later on.

8 CHAIRMAN JABER: I think -- Mr. McLean, just to add  
9 to that, my additional hope is that we actually reduce the  
10 costs. If you think of the Reliant complaint that was filed to  
11 the first FPL bid, first FPL RFP, that was going to be a  
12 complaint process that was not going to be expedited, that was  
13 going to entail discovery, perhaps a separate hearing, although  
14 I know the Prehearing Officer in that case chose to consolidate  
15 the need case with the complaint process, but it didn't have to  
16 be. So, to me, there was more cost under the current rule than  
17 under this procedure. The expedited nature of this procedure  
18 will actually reduce costs to everyone and has the added  
19 benefit of reducing time and expense at the tail end through  
20 the need case.

21 MR. McLEAN: Yes, ma'am. I didn't mean to imply it  
22 was a zero sum game. The issue is you can pay now, or you can  
23 pay me more later, and that's what our hope is.

24 COMMISSIONER PALECKI: Can this be analogized to the  
25 PAA procedure where we have a preliminary ruling on a very

1 expedited basis and then all parties at a later time will have  
2 an opportunity for a full evidentiary hearing?

3 MR. McLEAN: Yes, sir, with one major exception, of  
4 course, and that is that the PAA is rather formal. There's a  
5 formal protest period, and they can take you to full hearing.  
6 But to the extent that you laid out the analogy, I think that's  
7 exactly correct. You go forward in a summary fashion on the  
8 best information that you have available to you at that time,  
9 and you give what is little more than an advisory opinion as to  
10 what you'd do if you had to litigate these issues later. From  
11 the IOUs, they can see that perhaps you're not too happy with  
12 one of their RFP provisions. From the IPP provision -- or  
13 perspective, they can see whether you are persuaded by a  
14 particular RFP -- that a particular RFP provision is flawed or  
15 that you think it's okay, and then they can make their  
16 financial and commercial decisions up front rather than wait  
17 until the end of the game.

18 And that's what we're trying to do with Section 12.  
19 We're not trying to finally determine these issues forever and  
20 for all time. Section 12 is staff's attempt to lay before you  
21 a procedure by which the affected parties can have a pretty  
22 good idea what the Commission would do if they had to do it at  
23 the end of the case, and I don't think it's anything more than  
24 that.

25 And let me say this too. And Mr. Ballinger is right,

1 I did warn you all to some extent about criteria and rules and  
2 so forth. But remember, this is advisory in nature  
3 essentially. I don't know how you can do better. You're  
4 giving it a quick and dirty shot early in the case to let them  
5 know where you're likely to go. And that's all we're doing in  
6 Section 12.

7 CHAIRMAN JABER: Commissioner Deason, you had a  
8 question.

9 COMMISSIONER DEASON: Well, yes, and I'm glad -- this  
10 is one of the questions that I wanted to discuss eventually at  
11 some time during today's proceeding, and obviously now is the  
12 right time since we're talking about it. I had concern about  
13 the language at the bottom of Page 20 and the top of Page  
14 21 where it talks about rule violation. And the language  
15 precisely says, "demonstrate that a rule violation has  
16 occurred," and we're going to be doing that without any type of  
17 an evidentiary hearing.

18 It seems to me -- my concern was that if we made a  
19 finding there had been a rule violation, that's one of those  
20 things where you can fine the utility \$5,000 a day and that  
21 sort of thing, and we're going to do that without an  
22 evidentiary hearing. It seemed to me that those concepts were  
23 incompatible. You're saying that you do not contemplate this  
24 as a finding by the Commission that there has, in fact, been a  
25 rule violation.

1 MR. McLEAN: That's correct.

2 COMMISSIONER DEASON: You're analogizing it more to  
3 an advisory opinion to at least advise the parties of how we  
4 preliminarily view an objection, and everybody just proceeds at  
5 their own risk.

6 MR. McLEAN: Yes, sir. And that's because to the  
7 greater extent that you get that opinion, the greater extent  
8 you have to afford due process to get there. So if that  
9 opinion comes out of this process written in stone, the Court  
10 will find you wanting perhaps because you didn't afford due  
11 process to the parties along the way. If all it is is an  
12 advisory opinion, and I'm using that term probably too loosely,  
13 but if it says what you would do in the end were these the  
14 situations, I think frankly that you can dispense with more due  
15 process because what you're trying to do is give the parties an  
16 up-front view of where you are likely to go eventually if you  
17 have to go there.

18 CHAIRMAN JABER: Is it more akin to a declaratory  
19 statement, and do you envision an order?

20 MR. McLEAN: When you say "declaratory statement,"  
21 you import a body of law that we may not want to deal with  
22 here. But it is analogous to a declaratory statement, but  
23 probably more to the PAA. We're trying to tell everybody up  
24 front where the Commission is likely to go with a particular  
25 RFP provision should they ever have to finally litigate the

1 issue. And the reason for that, as I understand, is to avoid  
2 the need of having to litigate, because if you speak  
3 unequivocally to a term in the RFP that you don't like, the IOU  
4 has a good opportunity to change that on the one hand or to  
5 take their chances in the case in chief on the other.

6 COMMISSIONER DEASON: Well, given that explanation,  
7 would it be best to change the terminology to "demonstrate that  
8 a rule violation may have occurred"? I mean, the terminology  
9 is saying a rule violation has occurred. Or do you think that  
10 the modifier "demonstrate" -- or the verb "demonstrate" somehow  
11 characterizes that it's not an actual finding but that there's  
12 a preliminary basis that demonstrates that a rule violation has  
13 occurred?

14 MR. McLEAN: Commissioner, I think it's stated  
15 conditionally as it is, but of course, I want you all to be  
16 comfortable. It says, "The Commission panel assigned shall  
17 determine whether the objection as stated would demonstrate  
18 that a rule violation has occurred."

19 MS. BRUBAKER: For purposes of clarification, the  
20 analogy I would raise would be almost like the standards that  
21 are used in things like motions to dismiss or summary judgment.  
22 The facts, if taken true as alleged, if we make the assumption  
23 that these are correct based on simply what's placed before us,  
24 it would indicate that this might be the case, that sort of  
25 thing, rather than a full-blown concrete decision.

1           COMMISSIONER DEASON: And those facts would come out  
2 at a subsequent hearing --

3           MS. BRUBAKER: Exactly.

4           COMMISSIONER DEASON: -- if there was no change in  
5 the RFP.

6           MS. BRUBAKER: Correct.

7           COMMISSIONER DEASON: And those facts may demonstrate  
8 that the objection was without merit, that the item was not  
9 unfair or onerous or whatever.

10          MS. BRUBAKER: Uh-huh.

11          CHAIRMAN JABER: Commissioners, any other questions?

12          MR. BALLINGER: Commissioners, if I could, while  
13 we're on Subsection 12. This had come up earlier in staff  
14 internal meetings of this section when legal drafted this  
15 language up, and we had a disagreement about the timing of this  
16 thing. And now that I've heard your discussions, I think --  
17 and I've talked with counsel and they agree with this -- if you  
18 read this, it says that the objections would be filed within  
19 ten days of the issuance of the RFP, but the section above that  
20 shows that there will be a post-issuance meeting within two  
21 weeks. So you could have an objection filed before you even  
22 have that second meeting to resolve your disputes potentially.  
23           And I've checked with counsel and I think they're  
24 amenable to taking out that thing and go back to the language  
25 of ten days of the post-issuance RFP meeting. So you have the

1 two weeks, you have the meeting, and then you have ten days  
2 from that meeting to file your objection.

3 CHAIRMAN JABER: I actually like the fact that there  
4 would be an objection pending during the meeting.

5 MR. BALLINGER: I just wanted to point that out.  
6 It's your choice. Do you want that meeting to be more of an  
7 avoidance of objections, or if somebody files the objection and  
8 then they go to the meeting?

9 COMMISSIONER BAEZ: You can retract an objection.

10 CHAIRMAN JABER: Yeah, exactly. If an objection is  
11 pending and it's resolved during the meeting, they withdraw the  
12 objection.

13 MR. BALLINGER: Okay.

14 CHAIRMAN JABER: I guess I thought you did that on  
15 purpose. Commissioners, do you have any other questions to the  
16 entire rule, not just this section?

17 COMMISSIONER BAEZ: I do. I do or I don't. We had a  
18 lot of discussion on what's now deleted Section 14 on Page 21.  
19 And although I think I understand the logic behind the staff's  
20 recommendation, I would submit, Commissioners, that there has  
21 to be -- I think the concept deserves preserving on some level.  
22 And I know that maybe the language that was in the proposed  
23 rule perhaps wasn't the most efficient one or led to the most  
24 workable address of the concept.

25 The reasons I say this are this. We've also had a

1 lot of talk about contemporaneous bidding. To me, that  
2 suggests that we would have to put the IOUs in the same posture  
3 as other participants, and I'm not sure that I agree with that  
4 initial concept.

5 But the one thing that I do agree with is, you know,  
6 from the beginning we've tried to address changes to this rule  
7 in order to make it more transparent, in order to make it fair,  
8 in order certainly at the end of the day to give whichever  
9 Commissioner is sitting up here, whichever Commissioners are  
10 sitting up here, you know, the comfort that the RFP process is,  
11 in fact, a good indicator that results in a good indicator that  
12 the most cost-efficient alternative has been chosen by the IOU.

13 And in an effort to make it more transparent and  
14 provide that comfort, one of the things that I thought was  
15 important, and I've said it before, is if we give -- that we  
16 have to have -- have to give meaning to these -- to the  
17 prevailing numbers, whether they come from a bidder, a  
18 participant, or whether they result -- or whether they are the  
19 resulting numbers of the self-build option. Either way, those  
20 numbers have to have meaning when at the end of a longer  
21 process we're at a need determination and we're at the end of  
22 an even longer process than that we come up for cost recovery.  
23 The reason I say that is because it all reverts back to this  
24 RFP process which has become essentially the one true proof,  
25 you know, or at least the most prevalent proof.



1           As I said before, I understand the logic behind  
2 not -- perhaps an aversion to mixing ratemaking and cost  
3 recovery concepts with a bid rule, but I still think that there  
4 has to be some representation of that relationship in the rule  
5 for the reason that we do need to have these numbers. Meaning,  
6 if a self-build option is successful as the most cost-effective  
7 alternative and it has a number tied to it that made it the  
8 most cost-effective alternative, that number has to carry  
9 through with some meaning to the day when the Commission  
10 considers whether it should be included in rates at a certain  
11 time or not.

12           Without that, then I don't believe that even the  
13 participant numbers have meanings. And I don't mean to get  
14 into the argument over whether ones are cost-based or not and  
15 the participants being a market or whatever they think they can  
16 win the proposal with or the RFP with. I don't mean to get  
17 into that kind of analysis. I understand it, and on a certain  
18 level I agree with it. My main concern is that there has to be  
19 some relationship, there has to be some acknowledgment of the  
20 relationship to the greater process. And for that -- that was  
21 the reason that I certainly pushed for and was in favor of  
22 having some kind of language in here that at least acknowledges  
23 that there is a cost recovery phase that employs the result of  
24 this RFP process in the actual RFP rule.

25           Perhaps the language is something that we need to

1 work on, but, Commissioners, I would tell you that I'm  
2 certainly not comfortable leaving it open-ended like this. And  
3 I think if we can discuss it a little bit, perhaps we can come  
4 to some kind of solution, if you think that's appropriate.

5 CHAIRMAN JABER: My recollection of on my part a  
6 desire to take out that section post the hearing was there was  
7 a general concern that I agreed with frankly, that mixing up  
8 the cost recovery mechanism with how proposals are evaluated in  
9 the bidding process would create confusion in the rule but be  
10 unnecessary because the language that staff originally included  
11 was the way we conduct our business anyway. In cost recovery  
12 cases we look at the prudence of the costs incurred. So I was  
13 only coming at it from that standpoint.

14 But we did have a lot of discussion with respect to  
15 having an incentive put in place, whether it be in the rule or  
16 someplace else, that gives the IOU the proper signal to stick  
17 to the projected cost estimates. And I think -- remind me,  
18 Mr. Ballinger, where did we say that might be a better place?  
19 Was it the need cases?

20 MR. BALLINGER: I'm sorry. I was reading through the  
21 rec to try to find some language that I think might answer  
22 this. I look at Page 7 of the rec. It kind of summarizes the  
23 basic philosophy of how we do cost recovery in need  
24 determinations. And at that middle paragraph there, the last  
25 two sentences say, "An affirmative determination of need is not

1 a guarantee of future cost recovery." And then when a  
2 Commission approves the purchased power agreement, "The  
3 Commission may address the manner and extent of cost recovery  
4 based on the facts presented at that time." And I think that  
5 enunciates the general philosophy that while you go through a  
6 need determination, it's not a blank check and the numbers have  
7 meaning. I don't know if that helps get to it or --

8 COMMISSIONER BAEZ: Tom, and this is -- these are  
9 mantras that we've -- you know, everybody knows this, I think.  
10 And I'm trying to remember whether it was at the workshop or  
11 when we were voting out at least a proposed rule. You know,  
12 first of all, I don't agree that increments over, for whatever  
13 reason, over a number that was used as a basis for making a  
14 capacity selection should be subject to the same scrutiny as  
15 the original dollars. Okay. I think that that increment  
16 represents or has much more back-reaching ramifications that we  
17 don't get to readdress. Okay. And I remember saying this,  
18 that somehow some higher standard had to be in place over the  
19 increment. I'm not averse to having some, and I may be mixing  
20 terms here, but having some cause shown, some level of cause  
21 shown for that increment, but it shouldn't be the same  
22 standard.

23 Now, I say that not for the other Commissioners to  
24 agree with me or not. That's just my opinion. But going back  
25 to what you've offered, I mean, that much we understand. Yes,

1 if we all understand that cost recovery takes place, you know,  
2 certainly after the in-service date or at some point near the  
3 in-service date, that much we all know. That would imply that  
4 finding a need determination -- a determination of need doesn't  
5 guarantee cost recovery; otherwise, we wouldn't go through the  
6 pain and suffering of the cost recovery process.

7           And because of what I said before, I don't think  
8 that's enough acknowledgement, that the number that was given  
9 nine months before, or I miscalculated, two years or three  
10 years and nine months before, is going to get remembered and  
11 have the same meaning three years and nine months after. And  
12 that is really the acknowledgment that I'm after. I don't know  
13 if there is a process that can keep that number in the  
14 forefront. I mean, there may be some way in terms of  
15 surveillance or so on to continue identifying cost overruns or  
16 that there be some reckoning at some point of where we stand on  
17 the number, if that's enough.

18           But my purpose for all of this is to really create  
19 what I think is necessary is a certain tension and certainly a  
20 heightened sense of risk on the part of a self-build option  
21 that if that is the most cost-effective alternative, those  
22 numbers do have meaning, and that it is not the easiest thing  
23 in the world, and always be remembered that it's not the  
24 easiest thing in the world to then come back three or four  
25 years later for cost recovery and say, you know what? We

1 poured \$500 million, what's 150 more? Yeah, at that point,  
2 sure, it was prudent. I mean, you're already 500 million in;  
3 right? That's the kind of discussion and certainly that's the  
4 kind of write-up that I'm interested in avoiding, because when  
5 all of a sudden it comes out to be 650, I would like to take  
6 that number and go back and see how many -- potentially how  
7 many proposals would have fallen under. And that's really  
8 what -- you know, that's a nagging feeling that I get. And I  
9 would like the transparency of the process to avoid those kinds  
10 of nagging feelings.

11 COMMISSIONER PALECKI: Commissioner Baez, I agree  
12 with you completely. The previous Section 14, which is now  
13 stricken in the staff recommendation, that is a section that we  
14 all voted on. And I don't recall hearing anything at the  
15 evidentiary hearing that would cause me to change my vote at  
16 all on that particular provision. I would leave 14 in as is.

17 We've designed a procedure here that has a purpose,  
18 and the design is there to ensure that the ratepayers get the  
19 best deal on new power plants. And I think we've done a pretty  
20 good job on making modifications to our existing rule. And I  
21 think because of that, we perhaps have reduced some of the work  
22 that will be involved in the prudence review because we've had  
23 a very fair process designed to reach the best price. And  
24 given that, I think we do need a provision that says, well, if  
25 we have a utility self-build, the utility will be held to that

1 price absent some extraordinary circumstances or event, and  
2 also, if a nonutility is awarded a contract, that the  
3 nonutility will be assured cost recovery absent some sort of  
4 extraordinary circumstances or event.

5 I don't have any objection to the prior language that  
6 was already voted on by this Commission in Section 14, or I'm  
7 willing to listen to any other optional language, but I  
8 certainly think that that is a direction we should be going in  
9 this rule.

10 CHAIRMAN JABER: Commissioner Baez, let me get  
11 clarification, and then Commissioner Bradley. I don't know if  
12 I heard your concern to be necessarily the cost recovery, but  
13 that up front the costs that are used in the IOU's  
14 consideration of the self-build option be as accurate of a  
15 projection and include all the foreseen circumstances such that  
16 at the tail end the prudence review is not -- doesn't tie our  
17 hands necessarily.

18 I think my concern about Paragraph 14 was that it  
19 truly became a cost recovery provision when really I'm looking  
20 for transparency and how the terms are defined, how the terms  
21 are evaluated, and how the bid is selected, you know.

22 COMMISSIONER BAEZ: And I would agree with you.

23 CHAIRMAN JABER: The question is, with what we added  
24 to Paragraph 5, do we get to the same place?

25 COMMISSIONER BAEZ: I'm sorry. Let me go back to

1 Paragraph 5.

2 CHAIRMAN JABER: If we want the costs to be  
3 accurately reflected and all the foreseen events to be  
4 included, does that come under the terms "have to be fair and  
5 commercially feasible"?

6 COMMISSIONER BAEZ: Well, here's what I see. I mean,  
7 unfortunately, we deal with somewhat of a bifurcated process,  
8 and cost recovery is appropriately held out to the appropriate  
9 date after the unit has been placed in service because then is  
10 when you get the true number, presumably.

11 What these numbers and what the clarity and the  
12 specificity of the criteria and the cost estimates and so forth  
13 that we are requiring as part of the rule, no matter what they  
14 may be, this process, and I think on some level rightfully so,  
15 recognizes the obligation of the IOU to serve, and it is their  
16 obligation and certainly their discretion and responsibility to  
17 determine what the most appropriate alternative is. And  
18 certainly it's going to be something that they can support.

19 Well, if a self-build option -- I guess essentially  
20 what I'm saying is a self-build option at that point in time  
21 has to be something that they're willing to support later on.  
22 The reason I say that is because that's going to place the  
23 appropriate incentive for them to be right about the number  
24 ahead of time or as much as possible. I mean, I do realize  
25 that there are situations that can't be foreseen. But it's

1 going to put as much incentive as possible on the front end for  
2 them to be correct with their numbers and thereby make the  
3 analysis that much more meaningful. Even though it's never  
4 happened and we don't anticipate it to happen, I certainly  
5 wouldn't want it to happen and then have talked about it for  
6 hours and hours and said, you know, really, it doesn't matter  
7 because it's never happened.

8           So my concern is that we do what might be appropriate  
9 in order to make the choice of that self-build option after the  
10 IOU has been allowed, and appropriately so, an opportunity to  
11 sharpen its pencil after the proper acknowledgment that it is  
12 the IOU that has the ultimate responsibility to serve and the  
13 ultimate responsibility to choose the most cost-effective  
14 option. Once they have taken all of that into consideration,  
15 then their decision to use a self-build option has to have some  
16 meaning in relation to all the other foregone opportunities.

17           And in order to make that meaningful in my mind,  
18 again I could be wrong, it has to have some meaning carrying  
19 forward to the date when all of this really comes -- when all  
20 of this really matters to the ratepayer. And the day that that  
21 really matters to the ratepayer is not the day that they made  
22 the decision to go with the self-build option or another  
23 alternative, it's the day that those costs get passed on to the  
24 ratepayer, because at the end of the day this whole process is  
25 involved in determining the most cost-effective or the best



1 deal for the ratepayer. We keep using that, you know, whatever  
2 that means.

3 So it has to have some life after the RFP. I'm not  
4 smart enough to tell you that it's a bid rule that it has to be  
5 in, although I think some acknowledgment will be appropriate.  
6 But perhaps there is somewhere else that it has to be. I don't  
7 know. That's what I would appreciate conversation on. But  
8 certainly we're dealing with related concepts here, you know.

9 CHAIRMAN JABER: Right. Commissioner Bradley, you  
10 had a comment or a question.

11 COMMISSIONER BRADLEY: Well, I was just wondering  
12 how -- and I don't totally disagree with what Commissioner Baez  
13 is proposing, but I'm just wondering what -- and I need for  
14 staff to maybe help me with this. What happens if we marry a  
15 need determination with cost recovery? I mean, doesn't that  
16 create two separate entities?

17 MR. BALLINGER: If you marry the two, you're saying?

18 COMMISSIONER BRADLEY: Cost recovery with a need  
19 determination.

20 MR. BALLINGER: With a need determination. I think  
21 it starts tying the Commission's hands. And you're making -- a  
22 need determination is done, you know, three, four years in  
23 advance of building the unit, and a lot of things can change.  
24 And, you know, we're a regulatory body. We look at things  
25 after the fact of what happened in reviewing management's

1 decisions of how they behaved over that period of time. It may  
2 be perfectly appropriate. You look at a need determination and  
3 the cost is right on. And as they build the unit, the costs  
4 are still right on, but the load has gone away. Should they  
5 have stopped construction of that unit? Should they have  
6 looked to sell it to somebody else? And you look at those kind  
7 of decisions come time of cost recovery.

8           Don't get me wrong, a need determination is sort of a  
9 cost recovery approval. I mean, for all intents and purposes,  
10 you're looking at it and you're saying these costs are prudent  
11 at this time on what you know, it looks like the best deal. So  
12 you do have a little bit of a difference in my mind of  
13 incremental costs above and beyond that. You've kind of  
14 already taken a look at those base costs and, all things else  
15 being equal, you've basically approved cost recovery.

16           CHAIRMAN JABER: You know, what's one of the issues?  
17 Going off of memory, but in the standard issues related to need  
18 cases, isn't there -- aren't the costs prudent?

19           MR. BALLINGER: Are the costs reasonable? That's  
20 where you look at the cost of technology, basically, as it  
21 appears, you know, profit, cost per kilowatt, things of that  
22 nature. You look at it as the most cost-effective alternative.  
23 You look at options such as DSM, other power purchases delaying  
24 the unit, things of this nature. So you've done basically a  
25 prudence review of the unit -- of the selection type. Again,

1 it's based on estimates of what the unit will cost. It's based  
2 on the best information you have at that time. That's why it's  
3 not a pure T cost recovery approval. You haven't got all those  
4 things. So it's a good baseline, though, for you.

5 CHAIRMAN JABER: Commissioner Bradley.

6 COMMISSIONER BRADLEY: If we include Provision 14,  
7 would that create a situation where the IOU has to up front  
8 provide information as it relates to the cost of construction  
9 that the biddees (phonetic) would be able to see and maybe to  
10 structure their bid by, be able to structure their bid by?

11 MR. BALLINGER: I don't think so. And the utility  
12 already puts out its estimated costs for the whole plant based  
13 on either potential bids they have gotten from vendors, from  
14 GE, Westinghouse, things of that nature, from existing  
15 contracts that they have with vendors of what it would cost to  
16 build a unit, based on their own experience. They have their  
17 own engineers designing and cost estimating, if you will, a  
18 power plant. Leaving 14 in, in my opinion, is pretty much  
19 making the standard statement of how we deal with cost  
20 recovery. So it's not a harm to put it in there.

21 I think staff just pointed out it didn't quite fit  
22 because the rest of this rule is a process for doing this.  
23 This is more of a statement of how we're going to do cost  
24 recovery. You can leave it in, it's fine. We just wanted to  
25 point out it didn't quite fit with the mesh of the rule. I'm

1 not particularly bothered if you put it back in either.

2 COMMISSIONER PALECKI: Where does it state that the  
3 utility can then sharpen its pencil and modify construction  
4 costs and/or performance parameters? Doesn't that belong in  
5 Section 14?

6 MR. BALLINGER: No. Fourteen is after-the-fact cost  
7 recovery of what the actual costs turn out to be. I don't know  
8 that we explicitly say that a utility can sharpen its pencil,  
9 but we do at least make them evaluate it to what was in the  
10 RFP. So they would have to provide two evaluations, if they  
11 will, and that section is the new Section 14 now. It's on  
12 Page 21.

13 COMMISSIONER PALECKI: Yes, that's what I'm looking  
14 at.

15 MR. BALLINGER: Okay.

16 COMMISSIONER PALECKI: I'm talking about the new  
17 Section 14.

18 MR. BALLINGER: And quite frankly, that was put in  
19 there to hopefully stop what happened in the FPL case of  
20 switching units at the last -- and, I mean, we want them --  
21 again, the whole purpose of this thing is take your best shot  
22 up front, put out as much information as you can for all  
23 bidders, let them respond, and evaluate it to what you had out  
24 there. If something else changes, you can do that, but at  
25 least give us that and then why you made the changes.

1           COMMISSIONER PALECKI: But you believe the new  
2 Section 14 which used to be Section 13 does give the utility  
3 the authority to sharpen its pencil and come out with updated,  
4 modified construction costs, performance parameters, et cetera,  
5 in order to come up with the best price for the customer.

6           MR. BALLINGER: I think there, and I think also the  
7 new Section 6 that says you won't change any attribute or  
8 methodology absent a good cause. If they got better cost  
9 estimates, they can do that.

10          COMMISSIONER PALECKI: Because that's one of the  
11 things I like the best about the existing rule is it does give  
12 that opportunity for pencil sharpening. And I'm somewhat also  
13 persuaded by the PACE proposal that there be given further  
14 opportunity for pencil sharpening by the competitors.

15           I would just like to run some language by the  
16 Commission that would be appended to Section 14, and I'm  
17 talking the new Section 14. "Based on updated information, the  
18 public utility may modify the construction costs and/or  
19 performance parameters affecting revenue requirements in its  
20 next planned generating unit that it included in the RFP.  
21 However, if it chooses to do so, it must inform participants of  
22 its intent, provide the participants (limited to those  
23 remaining on a short list if one has been developed) a  
24 corresponding opportunity to revise their bids."

25           And my question is, would it not be best for the

1 ratepayers to give both the utilities and the competitors an  
2 opportunity to sharpen their pencil so we truly get the best  
3 price on this generating unit?

4 MR. BALLINGER: Off the top of my head, I would say I  
5 don't see a problem with that. And in the past when that has  
6 happened, when a utility has revised its cost estimates, they  
7 have given respondents an opportunity to revise their bids.

8 COMMISSIONER BRADLEY: By doing that, doesn't that  
9 also increase the cost of evaluating an RFP? Because it  
10 effectively sends the process back to the beginning.

11 MR. BALLINGER: Yeah, it could. But I think it is  
12 somewhat fair if -- and again, I would go at it this way, that  
13 since Section 14 says they have to at least compare it to what  
14 was published in the RFP, and then if they change their  
15 costs -- all right. Let me back up.

16 When they compare it to what was in the RFP and they  
17 were better than all the proposals, let's assume that, and then  
18 they lowered their costs again and made it even better, I don't  
19 know that the proposals would drop down below that cost.

20 Now, if the opposite were true, that compared to what  
21 was in the RFP they were not the best proposal and then they  
22 lowered their costs to become the best proposal, I think staff  
23 would have questions about that. So it's relative to where you  
24 are, I think, of -- and in that case, yes, I think they  
25 probably should do it, and it would incur additional costs.

1           On the first case, I think they should do it, just  
2 explain it, and they really don't need to have a need for  
3 additional inputs. The bidders saw the utility's costs in the  
4 RFP. If they couldn't beat it the first time, I don't know how  
5 they're going to beat it the second time. That's where I'm  
6 having a little trouble with it.

7           CHAIRMAN JABER: Commissioner Bradley.

8           COMMISSIONER BRADLEY: Would that proposal require a  
9 new application fee or an amended application fee?

10          MR. BALLINGER: I don't think so. When Power Corp  
11 did theirs, they just notified everybody and said, we've got  
12 better estimates from our vendors. It dropped to this much.  
13 You know, we're giving you so many days. If you want to update  
14 your bids, here you go. And a few people did, others didn't.  
15 And there was no additional fee or anything. They just did it  
16 as part of gathering additional information in the dialogue  
17 that starts with the RFP process.

18          COMMISSIONER BRADLEY: But would not that be an  
19 additional cost of assessment or evaluation?

20          MR. BALLINGER: Yes. I don't know that it would be  
21 that cost prohibitive. But, yes, you're right, it would.

22          CHAIRMAN JABER: Something you said brings us back to  
23 Commissioner Baez's point. I think you said if potential  
24 participants didn't beat the bid the first time, you don't know  
25 why they would the second time. Well, I think that's the point

1 Commissioner Baez was making at the cost recovery discussion,  
2 which is what if four years down the line because of the actual  
3 costs potential participants really could have beat -- you  
4 know, we don't -- it isn't after the fact. I guess the  
5 potential for it to be an after-the-fact discussion is there  
6 without language like this.

7 Commissioner Palecki, are you proposing your addition  
8 instead of the language that's been stricken with the old 14?  
9 I wasn't clear --

10 COMMISSIONER PALECKI: No, it would be in addition  
11 to. I think it's kind of a separate issue. And I was -- it  
12 was Commissioner Bradley had brought up the new Section 14 and  
13 the issue of pencil sharpening, and so I was just -- since that  
14 was one of my questions for later on, I brought it in. I hope  
15 I didn't muddy the water because I know we're really kind of  
16 discussing these cost recovery issues.

17 CHAIRMAN JABER: Well, Commissioner Baez, I confess,  
18 I'm torn on your good point, not because I don't agree with the  
19 concern, but just focussing on the literal purpose of the rule,  
20 selection of generating capacity. I don't know that cost  
21 recovery belongs in this rule. It's just my humble opinion,  
22 but it absolutely belongs someplace. Maybe it's the discussion  
23 in the order, and I think that was also Commissioner Baez's  
24 question. Where does it go? If it doesn't go in this rule,  
25 where is it appropriate? Is there an opportunity in this order



1 to reiterate our cost recovery philosophy and the need to have  
2 the estimates be as accurate as possible because there may not  
3 be cost recovery absent something higher than a prudency  
4 review?

5 I mean, I'm talking out loud, Commissioners, to see  
6 what your feelings are about this. And related to Commissioner  
7 Palecki's question, Mr. Ballinger, that is a second bidding  
8 opportunity; right? It would be --

9 MR. BALLINGER: I understand the concept. I don't  
10 disagree with it. I don't know how often it would come to play  
11 and in the current rules that it shakes out where -- you know,  
12 again, the whole rule -- you know, the utility is making these  
13 decisions as they go along. I think they're smart enough to  
14 realize that if they do lower their costs and that's what they  
15 want to do, they're going to have to show that they gave others  
16 an opportunity to address those costs and things of that  
17 nature.

18 We can make it explicit in the rule. That's not a  
19 problem, that if a utility lowers its costs or changes it -- I  
20 hate to go to changing any attributes because then it could be  
21 anything, and we'd have to start the whole process. That could  
22 get really cumbersome. But if they lower their costs, they  
23 should give others the opportunity to do the same. I mean,  
24 that seems fair. I think it's covered in this fair evaluation  
25 language, quite frankly. I've been brought up with rules

1 trying to be fairly broad because you don't know everything  
2 that's going to come down the road and address them. To me, I  
3 think allowing people to update their costs is a fair  
4 evaluation.

5 CHAIRMAN JABER: Commissioner Baez, does your concern  
6 get satisfied if we leave old 14 out of the rule and accept  
7 Commissioner Palecki's language?

8 COMMISSIONER BAEZ: First of all, let me clarify  
9 this. It would not -- I'm not sure that it would be my intent  
10 to marry cost recovery -- or to set the terms of cost recovery  
11 as part of a bid rule. I think that might be -- that might not  
12 be entirely appropriate.

13 I do believe there has to exist an appropriate place  
14 to address the two concepts together because that's really what  
15 I -- that's really what concerns me the most, is that we're  
16 saying, no, they're two different things, and I don't believe  
17 that they are. I mean, I can accept philosophically the fact  
18 that cost recovery probably doesn't need to get set in a rule  
19 that essentially sets the terms of how companies are going to  
20 issue an RFP and what has to be in them and so forth, but I  
21 can't accept the fact that those are two separate -- they are  
22 not. And somewhere there has to exist a proper place to marry  
23 the two or to acknowledge that they both go together, and  
24 that the decisions that are made pursuant to this bid rule, in  
25 compliance with this bid rule and as a result of this bid rule

1 have impacts or potential impacts that are much farther down on  
2 the time line.

3 CHAIRMAN JABER: Where does that exist now? I mean,  
4 obviously we're not -- we don't see petitions for cost  
5 recovery. We haven't in the last few years. But in the yearly  
6 fuel proceedings, maybe there's another accounting that we  
7 should require of the companies to ensure that the costs that  
8 were included in the self-build option are the same costs or  
9 lower that are included in the annual proceedings. And if  
10 they're higher, there needs to be that justification at that  
11 point. And if they're lower --

12 MR. BALLINGER: Well, remember, a self-build option  
13 will not go through the fuel adjustment clause.

14 COMMISSIONER DEASON: Well, now, hold on just a  
15 second. But if they self-build and they have in their bidding  
16 they assumed certain heat rates, and that was -- and they go  
17 through their calculation of the present value of cumulative  
18 revenue requirements, or whatever the terminology is, a certain  
19 heat rate was assumed, that does have a direct impact upon fuel  
20 costs which are the subject of a fuel proceeding. So it seems  
21 to me that it is incumbent upon this Commission when we review  
22 fuel costs to review heat rates and anything else which have a  
23 direct impact upon fuel costs in that proceeding and look back  
24 and compare to what was bid in the bid. Would you not agree  
25 with that?

1 MR. BALLINGER: Well, I'm glad you raised that up. A  
2 difficulty with heat rate is it changes based on weather, based  
3 on load, based on everything. What they've done in --

4 COMMISSIONER DEASON: Tom, I don't -- I'm debating  
5 with you how difficult it is. And I know that our jobs are not  
6 easy. I'm not saying it's easy. I'm saying, do we have an  
7 obligation to look at what was bid in comparison when it comes  
8 to any type of cost recovery?

9 MR. BALLINGER: Yes. Yes, I think we do. And I  
10 think we do look at that. You have mechanisms also through the  
11 fuel adjustment, through the GPIF that you can set targets for  
12 heat rates and availabilities for units to either reward or  
13 penalize the utility if they make those certain things. So you  
14 have opportunities from a utility perspective that you can do  
15 to ensure that those kind of things are in there.

16 For example, if a utility came in a self-build  
17 proposal with a heat rate of 7,000, when that unit came on-line  
18 and when into rate base, you could potentially set a heat rate  
19 target of 7,000 in the GPIF and say, that's what you told us  
20 before, go forth and do it. So you have those mechanisms  
21 already in place, I think, to keep a track on that.

22 CHAIRMAN JABER: Can we pick up on this in ten  
23 minutes? I was just reminded we haven't even taken the  
24 first break. So let's take a ten-minute break.

25 (Off the record.)

1 CHAIRMAN JABER: Go ahead and contact the  
2 Commissioners. What we'll do is go ahead and break for lunch  
3 and come back at two o'clock.

4 (Lunch recess.)

5 CHAIRMAN JABER: Let's get back on the record. Where  
6 we broke was in relation to a question on the current fuel cost  
7 recovery proceeding and how heat rates are reflected in those  
8 proceedings. Mr. Ballinger, could you repeat what you said?

9 MR. BALLINGER: I think the question was, should they  
10 be held, like, to their heat rate that was in the RFP, and I  
11 was mentioning that a heat rate is a dynamic number. It  
12 changes on weather and all that stuff, but with a utility, we  
13 have the ability to employ the GPIF where we can set a heat  
14 rate target for a specific unit, and the utility then has an  
15 opportunity to be rewarded or penalized based on the  
16 performance of that. And I think one would look at in setting  
17 that target look at what was disclosed in the RFP of getting an  
18 average number.

19 COMMISSIONER BAEZ: Is that what's done now?

20 MR. BALLINGER: It's been so long since I've been  
21 with the GPIF. My understanding of that is that the GPIF is a  
22 flexible process. You basically look at a historic actual  
23 performance of a unit to get a feel and then set a target, and  
24 you can adjust that target based on certain circumstances. For  
25 example, if you've done some recent maintenance on the unit,

1 you know the heat rate is going to improve, so you set a lower  
2 target. So I think the ability is there to set a target based  
3 on what was in the RFP.

4 COMMISSIONER BAEZ: The GPIF doesn't get set from the  
5 outset?

6 MR. BALLINGER: No.

7 COMMISSIONER BAEZ: You do wait for some  
8 historical --

9 MR. BALLINGER: Yes, it calls for some historical  
10 performance first.

11 COMMISSIONER PALECKI: And do you set that for  
12 individual units, or is it for the entire system across the  
13 board?

14 MR. BALLINGER: No, it's individual units, and it's  
15 typically the base-loaded units of the utility's system that  
16 compromise the bulk of the fleet. And the reason being is,  
17 when you get to base-loaded units, your heat rates tend to be  
18 more stable and your availabilities tend to be more stable than  
19 you have with peaking or intermediate units.

20 COMMISSIONER PALECKI: Thank you.

21 CHAIRMAN JABER: Commissioner Baez, I don't know if  
22 that addresses your concern related to the cost recovery  
23 clause, but I wanted to have an understanding of what currently  
24 goes on in those proceedings.

25 MS. BRUBAKER: Commissioners, if I might on that very

1 subject, just to clarify that Commissioner Baez had asked if  
2 there's a way to acknowledge or tie that the cost recovery in  
3 the RFP processes aren't alienated from each other. Typically  
4 orders in which rules are adopted are very simple. Here's the  
5 rule we're adopting. Certainly, however, if it would be some  
6 measure of comfort, we can put that sort of information in the  
7 body of the rule -- or in the body of the text of the order if  
8 that would give you any measure of comfort.

9           COMMISSIONER BAEZ: I guess, Commissioners, right now  
10 I'm sort of leaning on going back and including at least some  
11 form of that Section 14, that deleted Section 14 -- or at least  
12 I would propose that. Although, I think that that three-headed  
13 standard that was proposed might be a little cumbersome, and my  
14 suggestion would be just to leave it as some extraordinary  
15 circumstances and leave that at that.

16           And then I guess if we're including one, I'm not sure  
17 if it's appropriate to include the scenario at the beginning of  
18 that section concerning power purchase agreements. I'm happy  
19 to discuss other language if there's things that you think need  
20 clearing up.

21           COMMISSIONER PALECKI: I do have one concern about  
22 the word "authorized" with regard to a purchased power  
23 agreement. I would prefer -- rather than it appear that we're  
24 preapproving something, I would prefer to see the word  
25 "presumed," or "presumptively recover the prudently incurred

1 costs," or "it shall be presumed that the utility shall  
2 recover," and then that would be a rebuttable presumption if it  
3 was shown that, you know, they weren't -- the costs were not  
4 prudently incurred. The word "authorize" to me is a little  
5 bit -- indicates --

6 COMMISSIONER BAEZ: Final.

7 COMMISSIONER PALECKI: -- finality that really  
8 probably should not tie the hands of future Commissions.

9 CHAIRMAN JABER: Okay. Let's take them a paragraph  
10 at a time. Commissioner Baez, what I heard you say relates to  
11 that second sentence; right?

12 COMMISSIONER BAEZ: Yeah. I think --

13 CHAIRMAN JABER: "If the public utility selects a  
14 self-build option, any costs in addition to those identified in  
15 the need determination proceeding shall not be recoverable  
16 absent extraordinary circumstances." Is that what you're --

17 COMMISSIONER BAEZ: Or unless a utility can  
18 demonstrate. I mean, really, where I had made my change, and I  
19 guess this goes back to the grammar check, "demonstrate that  
20 such costs were incurred due to extraordinary circumstances."

21 COMMISSIONER DEASON: Let me ask -- can I ask a  
22 question on that? Any costs in addition to those identified,  
23 are we looking at costs in their total, in combination of  
24 capital and operating? Or does that mean that one component of  
25 their bid, for example, heat rate was a certain amount and



1 there was another amount for capital costs, would you allow one  
2 to offset the other? So the bottom line -- I mean, maybe  
3 that's more detailed than we need to get into here, I don't  
4 know.

5 COMMISSIONER BAEZ: Well, to be honest with you,  
6 that's probably a little bit more detailed than I've thought  
7 out. I mean, I'd be curious to know what the value is one over  
8 the other. I was thinking more in the aggregate, but there may  
9 be a very good reason to -- there may be good reasons to not  
10 deal with it in the aggregate.

11 COMMISSIONER DEASON: You know, it says "any costs."  
12 That could be interpreted to mean that if there's a  
13 component --

14 COMMISSIONER BAEZ: Individual costs.

15 COMMISSIONER DEASON: -- even though they may have --  
16 they have overachieved on 99 items, if there's one item they  
17 underachieve on, well, then they get hit for it. And I just --  
18 I don't think that's what you contemplate.

19 COMMISSIONER BAEZ: I'm comfortable with an  
20 aggregate. I guess that would be the opposite of what you're  
21 describing.

22 COMMISSIONER DEASON: Well, maybe we shouldn't use  
23 the term "any costs." Maybe it should be left "cost" or maybe  
24 "total cost" or something of that nature. I think there should  
25 be an incentive for the company -- I mean, if there is going to

1 be language like this, there should be an incentive for the  
2 company to manage their construction and operation and be able  
3 to maybe offset a cost overrun in one area with an underbudget  
4 somewhere else. And while it may not necessarily be in the  
5 rule, you know, there's also we discussed the possibility that  
6 if there are operations such that they even exceed their own  
7 bid, there may be an opportunity for a reward.

8 COMMISSIONER BAEZ: Absolutely. And I think that  
9 that kind of flexibility for the company --

10 COMMISSIONER DEASON: We need to maintain that  
11 flexibility if that's your intent.

12 COMMISSIONER BAEZ: Exactly. And whatever changes  
13 we -- you pointed to one. And I'm looking at crossed -- I'm  
14 looking at strike-through language, so I'm having a hard time  
15 seeing it.

16 CHAIRMAN JABER: "If the public utility selects a  
17 self-build option, costs in addition to those identified in the  
18 need determination proceeding shall not be recoverable" --  
19 finish it for me -- "shall not be recoverable" --

20 COMMISSIONER BAEZ: "Unless the utility can  
21 demonstrate that such costs were incurred due to extraordinary  
22 circumstances."

23 CHAIRMAN JABER: Okay. Now, as it relates to the  
24 first paragraph, Commissioner Palecki, the concern I have there  
25 with your proposed language is that it changes what is

1 currently done. As I understood staff's concern with the  
2 first part of 14, and the concern I agree with, is that this  
3 articulates what is currently the practice. They are  
4 authorized to recover prudently incurred costs. To put in a  
5 rebuttable presumption changes that practice.

6 COMMISSIONER PALECKI: There are actually two reasons  
7 I would like to see some language which gives some assurance of  
8 cost recovery. One is it's my understanding that that type of  
9 language makes it more likely that a competitor can get  
10 financing. The second, and perhaps the more important, is  
11 we've had numerous discussions about the equity penalty, and I  
12 would like to send a message to Wall Street that when we  
13 approve one of these, that the -- and whether it's an  
14 investor-owned utility or a contract that's awarded, that cost  
15 recovery is assured by this Commission.

16 This is not California. We don't break contracts.  
17 We don't change things after a year or two when we see that,  
18 you know, the contract is no longer all that favorable. I  
19 mean, even with our QF contracts, we encouraged our utilities  
20 to renegotiate, but we didn't say, well, we're going to break  
21 this contract, and we're not going to give cost recovery. This  
22 Commission has never done that. And I think that there is a  
23 time to send a message to Wall Street, and I think this rule  
24 may be the time we want to do that.

25 CHAIRMAN JABER: But in that regard doesn't "shall be

1 authorized" accomplish what you're trying to do? See, I think  
2 it's more definitive to say, "The public utility shall be  
3 authorized to recover the prudently incurred costs." The only  
4 question there will be, are those costs prudently incurred?

5 COMMISSIONER PALECKI: Yes, that's perfectly  
6 satisfactory to me. I was just concerned. I thought I had  
7 heard somebody say that that was prejudging the issue, and I  
8 didn't want it to appear that we were prejudging anything. But  
9 I think that that's the message we need to send.

10 COMMISSIONER BRADLEY: Was the intent of the  
11 language? What are we trying to accomplish by combining cost  
12 recovery with need determination? I'm still not quite clear,  
13 and I'm getting a little uncomfortable when I start hearing --  
14 the more I hear words like "competition."

15 COMMISSIONER BAEZ: Who said competition?

16 COMMISSIONER BRADLEY: Well, that's what Commissioner  
17 Palecki just -- that's what he just used.

18 COMMISSIONER BAEZ: Oh, okay. I'm sorry.

19 COMMISSIONER PALECKI: I meant to say nonutility. I  
20 used the word "competitor," but I just meant a nonutility  
21 generator.

22 CHAIRMAN JABER: Let me take a stab at a your  
23 question, Commissioner Bradley, because you're asking --

24 COMMISSIONER BRADLEY: And I'm hearing it and I'm  
25 just trying to get clear in my mind what there is that is being

1 put forth because when I hear words like "competition" or  
2 "competitor" and I hear statements that maybe compare what  
3 we're doing to California, I get even more nervous, because  
4 I've always been under the impression that we're working with,  
5 number one, in terms of intent, and that is to ensure that  
6 generation is built at a cost that's to the advantage of the  
7 consumer or the ratepayer. I'm not interested in opening up  
8 markets just for the sake of having people in them. I'm more  
9 interested in what the end product is as it relates to the  
10 ratepayer.

11           And also, I'm beginning to get a little concerned  
12 because, you know, we're making some very substantive changes  
13 here without any input from the folks who are going to be  
14 impacted by this, I mean, the ratepayers, the IOUs, and the  
15 IPPs, and I'm just wondering what these substantive changes are  
16 going to do and what the unintended consequences might be. It  
17 seems like we have opened this up, and we're redoing now what  
18 we did a couple of weeks ago.

19           CHAIRMAN JABER: Well, let me start. And,  
20 Commissioner Palecki, I think that comment is probably  
21 addressed to your comments, but with respect to opening it up  
22 and making changes, I think, Commissioner Bradley, with all due  
23 respect, we've heard ad nauseam from the parties, so I am not  
24 nervous discussing this rule and the implementation of the rule  
25 and the effect on the rule because we have heard from the

1 parties. The last two years has been hearing from the parties.

2 With respect to Paragraph 1 of the rule, absolutely,  
3 I agree. The intent of the rule is as articulated in Paragraph  
4 1. I think the rest of your comment I should let Commissioner  
5 Palecki respond to because those were your words, not ours.

6 COMMISSIONER PALECKI: Well, Commissioner Bradley, I  
7 think I agree with you 100 percent. And I think that's the  
8 point I was trying to make is that the state of Florida is not  
9 like California, that we have over the years had a tremendous  
10 amount of reliability and predictability both with regard to  
11 the building of generation and with regard to cost recovery.  
12 So I think that I agree with you completely on that.

13 With respect to the language that we're discussing,  
14 it is actually the language that we voted in favor of just  
15 about three or four weeks ago. So this is something there is  
16 abundant record evidence on. Our staff believes that it should  
17 be omitted. I personally believe that it's necessary.

18 CHAIRMAN JABER: Commissioners, are there any other  
19 questions related to this section of the recommended rule or  
20 any other section? And I would note we don't have a motion  
21 with respect to this part of the rule. I think we're just  
22 entertaining questions and comments, and I envision having a  
23 comprehensive motion at the tail end of this discussion.

24 COMMISSIONER PALECKI: Well, there was the one other  
25 point regarding the pencil sharpening that I discussed with

1 Mr. Ballinger earlier. And I think he agreed that if the  
2 utility has an opportunity to sharpen their pencil, that the  
3 other participants in the RFP should be given a similar  
4 opportunity, and I read some language into the record at that  
5 time. I could read that language back if you'd like.

6 CHAIRMAN JABER: Please, do that, Commissioner  
7 Palecki. This would be adding to the new 14.

8 COMMISSIONER PALECKI: Yes. Adding to the new 14,  
9 and the language is, "Based on updated information, the public  
10 utility may modify the construction costs and/or performance  
11 parameters affecting revenue requirements of its next planned  
12 generating unit that it included in the RFP. However, if it  
13 chooses to do so, it must inform participants of its intent,  
14 provide the participants (limited to those remaining on a short  
15 list if one has been developed) a corresponding opportunity to  
16 revise their bids."

17 COMMISSIONER BRADLEY: With all due respect to the  
18 Commission, I'd like for staff to respond to that language.

19 MR. BALLINGER: I think we said earlier I agree with  
20 that concept. It might be a little wordy of saying that, that  
21 if a utility changes its costs, it should allow respondents to  
22 also update theirs costs. I mean, I agree with the philosophy,  
23 though, that if a utility does update its costs, it should give  
24 respondents a chance to update theirs if that's what they  
25 intend to. I think though that that kind of stuff is covered

1 in our existing 14 under a fair comparison. To me, a fair  
2 comparison that is if you're changing numbers, you need to let  
3 others also do it. And that's part of justifying that it was a  
4 fair process.

5 COMMISSIONER BRADLEY: Well, again, doesn't that, in  
6 effect, generate a new RFP?

7 MR. BALLINGER: No.

8 COMMISSIONER BRADLEY: Why wouldn't it?

9 MR. BALLINGER: I don't think it does. I think as we  
10 saw in the Power Corp case, they updated their costs. They  
11 asked people to respond if they wanted to. They updated it.  
12 They reran the numbers. It took a few days is all and it was  
13 done.

14 COMMISSIONER BRADLEY: Doesn't that also create some  
15 additional opportunities for some objections to be included in  
16 order to delay the process?

17 MR. BALLINGER: I don't see how. I think not  
18 allowing them to do it could get an objection. I think if a  
19 utility did it, changed its costs and didn't allow anybody else  
20 to update theirs perhaps, and the effect of a utility changing  
21 its costs brought it from being Number 4 on the list to Number  
22 1 on the list and they didn't allow anybody else to update  
23 their costs, that could cause some serious objections.

24 COMMISSIONER BRADLEY: But if a utility jumped from  
25 Number 4 to Number 1, might not Number 1 start to object?



1 MR. BALLINGER: Right. And that's what I said. I  
2 think if that were the case, then it could cause some  
3 objections if they didn't allow others to also update their  
4 costs.

5 COMMISSIONER BRADLEY: And, Madam Chair, I respect  
6 what you said about the parties having -- giving us quite a bit  
7 of input, but, you know, ultimately there are always unintended  
8 consequences when experts get involved such as us. And I'm  
9 just beginning to get a tad bit more uncomfortable as we  
10 change -- make these substantiative changes without hearing  
11 from the impacted parties. But that's just one Commissioner's  
12 opinion.

13 CHAIRMAN JABER: Well, and I certainly respect your  
14 opinion, but you and I both know that we shouldn't be  
15 uncomfortable with change.

16 COMMISSIONER BRADLEY: Change is very uncomfortable.

17 CHAIRMAN JABER: No, change for the sake of making  
18 things more transparent and fair is a positive. Plus there is  
19 an ability to have recourse in light of this proceeding. So  
20 that doesn't give me discomfort at all. And nothing post-lunch  
21 has given me discomfort, you know, from pre-lunch and where the  
22 discussion was going. So in that regard, I'm ready to move  
23 forward.

24 My question though related to Commissioner Palecki's  
25 suggested language, Mr. Ballinger. What currently happens in

1 giving potential participants an opportunity to sharpen their  
2 pencil? From the hearing, I walked away thinking this is  
3 exactly what happens today, that if there are changes in the  
4 costs that the IOU discovers before the bidding process is  
5 completely over, they do go back to the short list and give an  
6 opportunity for negotiation and sharpening of the pencil. So  
7 Commissioner Palecki's suggestion, is that very different from  
8 what happens today?

9 MR. BALLINGER: I don't think so. Again, I'd have to  
10 look at the wording, but I don't think so. I think the basic  
11 concept is there, that it's happened once so far, and the  
12 existing rules the utility has updated its costs. They went  
13 out and told the participants, we did this, do you want to  
14 respond? And some did, some didn't. So the processes work.  
15 So I don't think it's materially different from what's going on  
16 today.

17 CHAIRMAN JABER: Is it fair to say this is an  
18 articulation of what is happening today? I mean, I really  
19 would like to accomplish that. I would like to accomplish in  
20 the rule an articulation of going back to the bidders and  
21 allowing that opportunity to sharpen the pencil to be  
22 consistent what the current practice is, which is the public  
23 utility can modify the construction costs. They can do that  
24 today.

25 MR. BALLINGER: Yes.

1           CHAIRMAN JABER: And if they do that, they do inform  
2 participants on the short list that there's a change in the  
3 costs.

4           MR. BALLINGER: Yeah, that's why I don't think it  
5 gives me any real heartburn to include it.

6           CHAIRMAN JABER: Okay. Now, the heartburn I have is,  
7 when does that process ever stop? There has to be a finality  
8 to the process.

9           MR. BALLINGER: Well, the utility has a time line  
10 they're looking at. If they're looking at building a unit, you  
11 have to build in permitting and all that. They have to start a  
12 clock running sometime. And they are evaluating these things  
13 and backing into this time frame.

14           CHAIRMAN JABER: So there's no potential for creating  
15 a delay unintentionally by looking at those costs periodically  
16 and allowing people to sharpen their pencils?

17           MR. BALLINGER: I'm not sure I understand your  
18 question.

19           CHAIRMAN JABER: Well, the IOUs know what date  
20 they're trying to back into; right?

21           MR. BALLINGER: Right.

22           CHAIRMAN JABER: If they're modifying their costs,  
23 they've taken into account what pressures they have on their  
24 own time schedule; right?

25           MR. BALLINGER: Yes. They have a filing date that

1 they've got to meet to --

2 CHAIRMAN JABER: Okay. And in taking that into  
3 account, I'm guessing that they also take into account an  
4 objection and what kind of time pressure that may put on that  
5 time line.

6 MR. BALLINGER: Yes, they might.

7 CHAIRMAN JABER: Okay. Commissioners, do you have  
8 any other questions or comments or a motion? I'm ready to  
9 entertain a motion.

10 COMMISSIONER DEASON: Well, Madam Chairman, we've  
11 gone through quite a bit here today, and I think we've come to  
12 acquiesce on some changes, but there actually has not been a  
13 formal motion and a vote on that, and maybe it would be  
14 preferable if we did that. And I just have tried to keep notes  
15 here as we've gone through. And so I'm willing to try to at  
16 least identify some of the things and see if we can go ahead  
17 and get some matters out of the way, if that's okay.

18 CHAIRMAN JABER: Absolutely.

19 COMMISSIONER DEASON: On Subsection 5E, we had some  
20 discussion about adding the term "criteria," to include  
21 "criteria and methodology," and I think in addition to that  
22 that we were going to add the term "criterion" to Section 6 to  
23 be consistent with what we were changing in 5E. And if it's  
24 appropriate, I would move that we would incorporate those two  
25 changes.

1 CHAIRMAN JABER: Commissioner Deason, does that  
2 include in 6 the deletion of the word "expressly"?

3 COMMISSIONER DEASON: Yes, deleting the word  
4 "expressly," and also deleting the reference to 5D and 5E.

5 CHAIRMAN JABER: Right. So 6 would read, "No  
6 attribute, criterion, or methodology shall be employed that is  
7 not identified in the RFP absent a showing of good cause."

8 COMMISSIONER DEASON: Yes.

9 COMMISSIONER PALECKI: Second.

10 CHAIRMAN JABER: There is a motion and a second to  
11 accept the changes to 5E and 6 that we just discussed. All  
12 those in favor say "aye."

13 (Unanimous affirmative vote.)

14 CHAIRMAN JABER: Opposed, "nay."

15 Okay. Incorporating the changes to 5E and 6 passes.

16 COMMISSIONER DEASON: Also, Madam Chairman, I think  
17 we had some discussion as it related to the waiver language.  
18 And I think that we -- I believe we decided to create a new  
19 Section 17 where we would incorporate the language concerning  
20 the possibility of an auction process, and that we would leave  
21 the waiver language which exists in the current rule in place  
22 as Section 16; is that correct?

23 CHAIRMAN JABER: Yes.

24 COMMISSIONER DEASON: I would so move --

25 COMMISSIONER PALECKI: Second.

1 COMMISSIONER BRADLEY: I have a question.

2 CHAIRMAN JABER: Commissioner Bradley.

3 COMMISSIONER BRADLEY: So basically what does that  
4 do? Maintain the status quo?

5 CHAIRMAN JABER: Right. Instead of the change with  
6 respect to the auction process being part of 16, we would be  
7 making that a new 17, and the current waiver language remains.

8 COMMISSIONER BAEZ: Just a question. I mean, is  
9 there any particular reason that we have to keep the waiver  
10 language in its current order or --

11 CHAIRMAN JABER: Oh, in the current order?

12 COMMISSIONER BAEZ: I'm just wondering, instead of  
13 calling it 16 or 17 --

14 MS. BRUBAKER: I don't think the order would matter  
15 particularly.

16 COMMISSIONER BAEZ: I'm asking as to -- Madam  
17 Chair --

18 CHAIRMAN JABER: My preference would be to leave it  
19 at the end just because that's where I've seen it in other  
20 rules, but honestly that's --

21 COMMISSIONER DEASON: Well, then we can make --

22 COMMISSIONER BAEZ: Renumber it.

23 COMMISSIONER DEASON: Renumber it such that the  
24 auction process provision would be 16 and then 17 would be the  
25 existing waiver language.

1 COMMISSIONER BAEZ: Second.

2 CHAIRMAN JABER: Commissioner Bradley, that was your  
3 question?

4 COMMISSIONER BRADLEY: Yes.

5 CHAIRMAN JABER: Okay. There's a motion and a second  
6 to separate the waiver language found on Page 22 of the  
7 recommendation in a new Section 17. All those in favor say  
8 "aye."

9 (Unanimous affirmative vote.)

10 CHAIRMAN JABER: That motion carries.

11 COMMISSIONER DEASON: And, Madam Chairman, as it  
12 relates to Section 5, we had discussion concerning the addition  
13 of reference to standards that would be required of the RFP,  
14 and I believe that I made notes from when Mr. McLean was  
15 describing that, and he used the terminology that the RFP  
16 should not be unfair, unduly discriminatory, onerous, or  
17 commercially infeasible. I believe I wrote that correctly.

18 CHAIRMAN JABER: Uh-huh, no term in the RFP shall be.

19 COMMISSIONER DEASON: No term in the RFP shall be  
20 unfair, unduly discriminatory, onerous, or commercially  
21 infeasible. And I would move that we would add that  
22 terminology to Section 5.

23 COMMISSIONER PALECKI: Second.

24 CHAIRMAN JABER: There's been a motion --  
25 Commissioner Bradley.

1           COMMISSIONER BRADLEY: Before we entertain the  
2 motion, isn't that duplicative? Isn't that already in  
3 Section 1?

4           COMMISSIONER DEASON: There is, Commissioner, a  
5 reference in Section 1 that the use -- that we basically are  
6 making the statement that the use of an RFP process is an  
7 appropriate means to ensure cost-effectiveness. And I think  
8 Mr. McLean even indicated that that language could be the basis  
9 for an objection to an RFP that a potential participant felt  
10 was infeasible or onerous. I think this language in 5 just  
11 makes it clear that that's what we're doing.

12           CHAIRMAN JABER: There's been a motion and a second  
13 to accept an addition to Paragraph 5 that will read, "No term  
14 in the RFP shall be unfair, unduly discriminatory, onerous, or  
15 commercially infeasible." All those in favor say "aye."

16           COMMISSIONER DEASON: Aye.

17           COMMISSIONER PALECKI: Aye.

18           CHAIRMAN JABER: Aye.

19           COMMISSIONER BAEZ: Aye.

20           CHAIRMAN JABER: Opposed, "nay."

21           COMMISSIONER BRADLEY: Nay.

22           CHAIRMAN JABER: The motion passes 4-1.

23           COMMISSIONER DEASON: And, Madam Chairman, we've had  
24 some extensive discussion concerning the old paragraph -- or  
25 Section 14 and the new Section 14, and in all honesty, I think



1 that those concerns were expressed by Commissioners Baez and  
2 Palecki, and I would just defer to them for any motion that  
3 they felt --

4 CHAIRMAN JABER: Thank you, Commissioner Deason.

5 And, staff, as Commissioner Baez and Commissioner  
6 Palecki think about their motions, double-check us and make  
7 sure we haven't forgotten anything.

8 COMMISSIONER BAEZ: And I can -- I would move  
9 reinserting the deleted Section 14 as we've changed -- as it's  
10 been rewritten.

11 CHAIRMAN JABER: Okay. Commissioner Baez, something  
12 I meant to ask you earlier and I forgot. On that  
13 first sentence, "absent evidence of fraud, mistake, or similar  
14 grounds sufficient to disturb the finality of the approval  
15 under governing law," you weren't proposing changes to that;  
16 right?

17 COMMISSIONER BAEZ: No, I wasn't.

18 CHAIRMAN JABER: Okay. So it would be reinstating  
19 the original 14 with some changes.

20 COMMISSIONER BAEZ: With at the -- at the end where  
21 it says, "unless the utility can demonstrate that such costs  
22 were incurred," so strike "prudently incurred," and then strike  
23 through the end of the sentence and insert "due to  
24 extraordinary circumstances."

25 CHAIRMAN JABER: And you would also strike the word

1 "any"?

2 COMMISSIONER BAEZ: That's correct.

3 CHAIRMAN JABER: Okay. So the motion would be to  
4 reinsert Paragraph 14 with the modifications to the second  
5 sentence to read, "If the public utility selects a self-build  
6 option, costs in addition to those identified in the need  
7 determination proceeding shall not be recoverable unless the  
8 utility can demonstrate that such costs were incurred due to  
9 extraordinary circumstances"?

10 COMMISSIONER BAEZ: Right. And I'm wondering if this  
11 needs to be renumbered, if there's renumbering that needs to  
12 be --

13 MR. BALLINGER: We'll fix the numbering.

14 COMMISSIONER BAEZ: You can fix the numbering?

15 MR. BALLINGER: Yeah.

16 COMMISSIONER BAEZ: Okay. Renumber as necessary. So  
17 I would move that new insertion.

18 COMMISSIONER PALECKI: Second the motion.

19 CHAIRMAN JABER: There's been a motion and a second.

20 COMMISSIONER DEASON: Let me ask a question.

21 CHAIRMAN JABER: Commissioner Deason.

22 COMMISSIONER DEASON: I take it that this is -- with  
23 this modified 14, it pretty much modified old 14.

24 CHAIRMAN JABER: Uh-huh.

25 COMMISSIONER DEASON: That this pretty much codifies

1 the existing way the Commission has been handling those  
2 matters. Would you agree with that or is it --

3 COMMISSIONER BAEZ: Well, my understanding or  
4 certainly my intent, and again this may raise a question for  
5 you all to consider, and I had stated it before, I'm not sure  
6 that the incremental costs or costs over and above what's used  
7 to -- as a basis for awarding a capacity addition should be  
8 subject to the same scrutiny of prudence. Now, if it's  
9 extraordinary --

10 COMMISSIONER DEASON: You mean that there should be  
11 some heighten burden?

12 COMMISSIONER BAEZ: Yeah. So if it's extraordinary  
13 circumstances -- if extraordinary circumstances doesn't create  
14 that burden, then maybe we need to look for other language. I  
15 mean, at least in my mind it does, but --

16 COMMISSIONER DEASON: Well, let me express what my  
17 thoughts are. And I believe that -- I agree with the concept  
18 that we should not be combining unnecessarily cost  
19 recoverability in the bid rule. But I think it's important to  
20 put all participants on notice that if they submit a bid, that  
21 they need to live by the bid, and that applies to IOUs and IPPs  
22 or whoever submits a bid. And I think it goes to the sanctity  
23 or the credibility of the bidding process that all participants  
24 know that there aren't bids being submitted that are not  
25 sincere and earnest and that with all due thought and with all

1 effort to make sure that the -- that that bid is adhered to  
2 when the project is actually constructed and operated.

3 I think that gives some -- I think it maintains the  
4 credibility of the bidding process, and I think we're probably  
5 going to get more and better bids as a result, and that's what  
6 I'm trying to achieve, because I think we have an obligation to  
7 ensure the cost-effectiveness of new generation facilities. We  
8 have that obligation by statute, and that the best tool for us  
9 to achieve that is to have a fair, open bidding process. And I  
10 think that to maintain that process that all participants need  
11 to be put on notice that this is what we're going to expect.  
12 So in that regard, I think it is not a stretch to include some  
13 provision of this nature in the bidding rule itself.

14 But I want to maintain discretion on the Commission's  
15 part, and who knows, you know, five, ten years from now when a  
16 project comes to fruition, you know, I think that the  
17 Commission at that time needs to have the discretion to look at  
18 all of the circumstances and make an informed decision as to  
19 the circumstances involved. And if that's what you're trying  
20 to accomplish, I can support that.

21 COMMISSIONER BAEZ: Well --

22 COMMISSIONER DEASON: And when it comes to things  
23 like when I say "discretion," and I mentioned this earlier,  
24 when it comes to things like maybe even contemplating rewarding  
25 a utility for extraordinary achievement, if they submitted the

1 winning bid and they even surpassed their own bid, and when I  
2 say "surpass," meaning they come underneath, that there should  
3 be -- that would be within the discretion, and I don't want to  
4 take that away by any language in that rule.

5 COMMISSIONER BAEZ: Well --

6 COMMISSIONER DEASON: Not requiring it, just maintain  
7 discretion for the Commission at that time to make those  
8 decisions.

9 COMMISSIONER BAEZ: And I appreciate your words.  
10 That is, in fact, what my intent would be. Certainly we have  
11 discussed perhaps not as much as we need to or will in the  
12 future the possibility that if a self-build option ever came in  
13 under that magic number, that some discussion should be had as  
14 to how to allot the savings, perhaps that there should be some  
15 sharing. And I'm not opposed to that. I mean, I think that's  
16 the right signal to be sending our regulated companies at the  
17 end of the --

18 COMMISSIONER DEASON: And I don't think necessarily  
19 we need to get into that much detail in this as long as it's  
20 understood that those kind of things would still be within the  
21 Commission's discretion at that time whatever the circumstances  
22 dictate at --

23 COMMISSIONER BAEZ: Absolutely. In fact, I mean, I  
24 hadn't even contemplated for my part it being included in the  
25 rule since that's something that is really truly properly --

1 you know, when you identify excess savings of a sort, you know,  
2 we've always had that discretion. I think that that's  
3 something that gets properly addressed. It falls into a  
4 different bucket of benefits and becomes a straight benefit.  
5 We don't need to include that there, at least those were my  
6 thoughts, include that in the rule.

7           My prime intention in having had this discussed was  
8 that we do need to acknowledge that there are long-term  
9 ramifications to it, and that the integrity of the bidding  
10 process can only be maintained if the proposals that are  
11 submitted are done so with a legitimate belief that they can  
12 succeed. And part of creating that feeling is that a  
13 self-build option, if it is a successful project, if it does  
14 wind up being the least-cost alternative or the most  
15 cost-effective alternative, also has to have meaning. It  
16 couldn't have just been proposed for purposes of being the most  
17 successful one on paper and then have the opportunity or have  
18 the opening absent some kind of showing over and above what we  
19 already have to recover anything -- you know, to true it up, if  
20 you will, for lack of a better word. So that was really my  
21 concern. It's the only way that I feel comfortable having a  
22 transparent -- having a process that actually encourages  
23 participation, because on some level, and being part cynic, I  
24 almost cringe at saying this, that some of the cynicism gets  
25 eliminated from the process. Nobody is perfect, but I saw that

1 as one way of trying to achieve that goal.

2 CHAIRMAN JABER: Commissioner Baez, why delete the  
3 word "prudently"? Help me understand that. And I can give you  
4 an example of my concern better than I can --

5 COMMISSIONER BAEZ: I'm sorry, well, because I think  
6 the change -- you're saying that they're not recoverable unless  
7 the utility can demonstrate that such costs were incurred due  
8 to extraordinary circumstances. I think if we're coming at it  
9 from the point of view that this is somehow an incremental, I  
10 mean, I think -- I just suggested it because having -- the  
11 prudently incurred referred back to what the standard already  
12 is, so perhaps I'm not being as artful as I could in trying to  
13 clear it up.

14 CHAIRMAN JABER: Well, let me give you a hypothetical  
15 and let's see if we need the word "prudently" in there or not.  
16 Let's say the extraordinary circumstance is during the  
17 construction of the facility there's a hurricane, and it wipes  
18 out a lot of the construction. Because of the time factor of  
19 when that occurs, there would be additional costs, perhaps.  
20 There is an extraordinary circumstance. Does that mean all of  
21 those --

22 COMMISSIONER BAEZ: Blank check.

23 CHAIRMAN JABER: Yeah, does that mean --

24 COMMISSIONER BAEZ: I see what you mean.

25 CHAIRMAN JABER: -- all of those costs incurred? Or

1 I think if we delete the word "prudently," although that's our  
2 current practice, the plain meaning of the rule would be that  
3 all costs that come under the extraordinary circumstances would  
4 be recovered. I think we accomplished the same thing, and you  
5 all need to correct me if I'm wrong, if we leave prudently  
6 incurred due to extraordinary circumstances.

7 COMMISSIONER BAEZ: I don't have a problem with that  
8 modification. I think, if anything, it just clarifies.

9 CHAIRMAN JABER: And then to convolute it just a  
10 little bit more, you see a distinction between extraordinary  
11 circumstances and unforeseen and beyond its control?

12 COMMISSIONER BAEZ: I just thought it was -- I don't  
13 see necessarily a distinction, I think it's just a little bit  
14 more concise.

15 CHAIRMAN JABER: Okay. I could support that. I just  
16 didn't -- I don't think deleting "prudently" necessarily  
17 implies what we do normally will apply here.

18 COMMISSIONER BAEZ: So then your modification would  
19 be for it to read "prudently incurred and due to extraordinary  
20 circumstances"?

21 COMMISSIONER PALECKI: I would second the motion --

22 CHAIRMAN JABER: Yes.

23 COMMISSIONER PALECKI: -- as modified.

24 CHAIRMAN JABER: Well, hang on. Commissioner  
25 Bradley -- actually, I think there was a motion and a second,



1 but Commissioner Bradley had a question.

2 COMMISSIONER BRADLEY: Yes. I need someone to help  
3 the newest Commissioner out. I will be the newest one until  
4 January the 6th. I'm trying to understand the legislative -- I  
5 mean, not the legislative but the rulemaking intent of placing  
6 this back in in the rule, especially in view of the fact  
7 that -- now, maybe I'm -- I think I heard this as a part of the  
8 discussion that we're trying to lock everybody in into their  
9 bid and make sure that no one is gaming. If that is the  
10 intent, then that seems to conflict with what we just discussed  
11 as it relates to Commissioner Palecki's amendment that allows  
12 individuals to revisit -- or utility companies to revisit their  
13 bid and to sharpen their pencil. It seems to me that by adding  
14 this, then we have language that conflicts.

15 COMMISSIONER BAEZ: Well, Commissioner, the section  
16 that we're discussing now I think more properly addresses a  
17 time after all pencil sharpening, and once the determination  
18 has been made as to what the most cost-effective alternative or  
19 whatever the successful project, successful alternative is,  
20 that there's some acknowledgement and certainly some notice  
21 that that is a number that does have meaning and a meaning that  
22 carries over into whatever subsequent proceedings may follow.

23 I think what you're talking about as far as what  
24 Commissioner Palecki's suggested changes were actually refers  
25 to something that occurs before that determination is made so

1 that to offer somehow an equal opportunity or a reasonable  
2 opportunity if in the event that construction costs, for  
3 example, change, that the participants be notified of that and  
4 given a fair opportunity to revise their numbers as well, which  
5 I think, as has been mentioned, is the practice that currently  
6 occurs. So it's two different points in time, I think. The  
7 two languages, the two passages that you're referring to refer  
8 to two different points in time.

9 COMMISSIONER BRADLEY: But aren't we still  
10 complicating the process by marrying cost recovery with the RFP  
11 process? It just seems to me that those two --

12 COMMISSIONER BAEZ: I'm sorry?

13 COMMISSIONER BRADLEY: -- are separate. Well, when  
14 you add cost recovery to the rule, and the rule deals strictly  
15 with the RFP process, it would seem to me that we're marrying  
16 two concepts and two very separate and different procedures  
17 that this Commission has to consider.

18 COMMISSIONER BAEZ: I think this -- well, personally  
19 I think it's --

20 COMMISSIONER BRADLEY: Well, that's just my opinion.  
21 I'm not trying to put you on the spot.

22 COMMISSIONER BAEZ: Okay. No problem.

23 CHAIRMAN JABER: All right. There's been a motion  
24 and a second to accept a modification to -- this would be the  
25 old Paragraph 14. To reinstate the old Paragraph 14 with a

1 modification to the second sentence would read, "If the public  
2 utility selects a self-build option, costs in addition to those  
3 identified in the need determination proceeding shall not be  
4 recoverable unless the utility can demonstrate that such costs  
5 were prudently incurred and due to extraordinary  
6 circumstances."

7 All those in favor say "aye."

8 COMMISSIONER PALECKI: Aye.

9 CHAIRMAN JABER: Aye.

10 COMMISSIONER BAEZ: Aye.

11 COMMISSIONER DEASON: Aye.

12 CHAIRMAN JABER: Opposed, "nay."

13 COMMISSIONER BRADLEY: Nay.

14 CHAIRMAN JABER: That motion carries 4-1. I think,  
15 Commissioner Palecki, that that brings us to your proposed  
16 change to Paragraph 14. And in the interest of disclosure,  
17 Commissioner Palecki, I have to tell you, with the changes to  
18 the old 14, I find myself wondering why staff's language isn't  
19 sufficient to accomplish what you're trying to accomplish with  
20 the new language. Why isn't giving the utility the ability to  
21 evaluate the proposals in response to an RFP in fair comparison  
22 enough? Why do we have to tell them that they can go back to  
23 the potential participants for another negotiation?

24 COMMISSIONER PALECKI: Well, I think that what we're  
25 doing is simply codifying what is the existing practice, but

1 it's not in writing anywhere, and it's not required to be the  
2 existing practice. And basically what my amendment would  
3 accomplish is, if the utility modified the construction costs  
4 and performance parameters in a manner that affected revenue  
5 requirements, it would simply assure the other participants in  
6 the RFP process that, one, they will be informed of that  
7 modification, and that those that remain on the short list  
8 would have an opportunity to go ahead and revise their bids.

9           And I just think that, although Mr. Ballinger has  
10 pointed out that this process has actually taken place in one  
11 of the RFP processes, that it's not codified anywhere, and I'm  
12 not certain that it was mandated. This would make it a mandate  
13 so that if there were those changes, that the other  
14 participants in the RFP process would have a chance to modify  
15 their bids.

16           CHAIRMAN JABER: Okay.

17           COMMISSIONER BRADLEY: So -- a question.

18           CHAIRMAN JABER: Commissioner Bradley.

19           COMMISSIONER BRADLEY: So this is your restructuring  
20 or your competition amendment; right?

21           COMMISSIONER PALECKI: Not at all, not one bit. All  
22 it would do is add a mandate to something that has already  
23 occurred once, and that is that when there is a change in  
24 construction costs and performance parameters made by the  
25 utility that issues the RFP, that then the -- a sharpening of

1 the pencil, so to speak, that then the other participants would  
2 then have an opportunity to sharpen their pencil, and it can  
3 only work to the benefit of the ratepayers. And that's why I  
4 request that modification.

5 CHAIRMAN JABER: Staff, help me understand how it  
6 works currently. I mean, we do want those costs to be as  
7 accurate as possible because that does inure to the benefit of  
8 the ratepayers. If anything, this is a "get it right first  
9 time" amendment, you know, that it's supposed to create the  
10 incentive for all the companies and all the potential  
11 participants to get it right when they submit their  
12 first proposal. What I'm afraid of -- the difficulty I'm  
13 having in accepting this language is I don't want companies to  
14 hold back in that first proposal because there's going to be a  
15 second opportunity to sharpen the pencil. I'm looking for a  
16 way throughout the entire rule to create an incentive for  
17 everyone to get it right first time out.

18 MR. BALLINGER: I think you hit the nail on the head.  
19 And the other problem with that is with now the reinstated 14  
20 with the cost recovery, you almost provide an incentive for the  
21 utility to highball it. If they beat everybody the  
22 first go-round, they're fine. They can come in later with a  
23 lower number and ask for an incentive for that underbudget  
24 number, possibly.

25 CHAIRMAN JABER: Well, then that goes to Commissioner

1 Palecki's theory then if you make them give everyone the same  
2 opportunity in a second process, then perhaps you've removed  
3 the opportunity to highball it the first time.

4 MR. BALLINGER: Yes, but there is nothing forcing  
5 them to give a second round of bids. I agree. It is the  
6 current -- the way the process is done now, you know, you're  
7 not going to get every detail, I don't think, in a rule to  
8 govern a process when things come up. I believe that the  
9 language that says you'll do a fair comparison, what's in  
10 there, would govern such things like this, that if costs were  
11 changed, they would give people an adequate response time to  
12 update their costs, if it was material. I mean, you have to  
13 look at the facts that are before you at the time.

14 CHAIRMAN JABER: On the other hand, Commissioner  
15 Palecki's language immediately takes away the first level of  
16 objection. If the rule clearly articulates that if you modify  
17 your costs you have to give the people that made the short list  
18 the same opportunity, then we've immediately eliminated the  
19 potential for that first level of objection.

20 MR. BALLINGER: I think I see your point there.

21 CHAIRMAN JABER: Okay. Commissioner Palecki, talking  
22 it out loud, I'm all right with your language. You have a  
23 motion?

24 COMMISSIONER PALECKI: Do you want me to repeat the  
25 language?

1 CHAIRMAN JABER: No, the language I have unless  
2 Commissioners didn't write it down.

3 COMMISSIONER PALECKI: I think I've read it into the  
4 record twice.

5 CHAIRMAN JABER: Right. And you would add it to the  
6 new 14, recognize that staff is going to go back and renumber  
7 as appropriate.

8 COMMISSIONER PALECKI: Yes. The new 14 is the  
9 provision that starts off that the public utility shall  
10 evaluate the proposals. And I would go ahead and make that a  
11 motion.

12 CHAIRMAN JABER: Okay. Commissioners, the motion  
13 would be to add to that sentence that's currently reflected as  
14 new 14 language that says, "Based on updated information, the  
15 public utility may modify the construction costs and/or  
16 performance parameters affecting revenue requirements of its  
17 next planned generating unit that it included in the RFP.  
18 However, if it chooses to do so, it must inform participants of  
19 its intent, provide the participants (limited to those  
20 remaining on a short list if one has been developed) a  
21 corresponding opportunity to revise their bids."

22 Is there a second?

23 COMMISSIONER DEASON: Well, I have a question about  
24 the language.

25 CHAIRMAN JABER: Commissioner Deason.

1           COMMISSIONER DEASON: The language concerning a short  
2 list and if there is one, I guess why are we getting to that  
3 level of detail? Is the purpose of that is that the IOU can  
4 develop a short list, and if they do develop a short list, only  
5 the ones on the short list are the ones they have to notify of  
6 the pencil sharpening?

7           COMMISSIONER PALECKI: Well, I think the reason that  
8 I went with that language, and I'm not necessarily wed to it,  
9 is that if the process is fairly far down the road and the  
10 utility at a late point after there's already been elimination  
11 of, let's say, 25 bidders and there are three bidders left on a  
12 short list would not then have to go ahead and start off  
13 through the process, that it would be limited to those who have  
14 put in the most serious bids and who as far as I'm concerned  
15 should be entitled if there is a change in these parameters to  
16 sharpen their pencil further to come up with a better price  
17 that will benefit the ratepayers, but to allow that to then to  
18 go back to all the original bidders I think would be more  
19 burdensome, and that's the only reason I included that  
20 language.

21           Perhaps another way of saying that would be to  
22 provide to the remaining participants, but I thought that might  
23 be overly vague without defining what I meant by "remaining  
24 participants."

25           COMMISSIONER DEASON: I think this is the



1 first reference in this rule to the concept of a short list.  
2 Do we need to define that some way?

3 MR. BALLINGER: There's a definition on Page 15 of a  
4 finalist and that may suffice, on Line 18.

5 CHAIRMAN JABER: That's good.

6 COMMISSIONER DEASON: Well, maybe we should tie it  
7 into that definition then so we know really what we're talking  
8 about.

9 COMMISSIONER PALECKI: Perhaps rather than to --  
10 those remaining on a short list, strike "on a short list" to  
11 "those remaining finalists if" -- let's see, we were talking  
12 about a list, "if they have been determined."

13 CHAIRMAN JABER: Well, you will always have  
14 finalists. It's just a question of how many, I suppose.

15 COMMISSIONER PALECKI: Well, perhaps all we then need  
16 is "those remaining finalists" without any "if" after it.

17 CHAIRMAN JABER: Is that a correct statement,  
18 Mr. Ballinger? I mean, I don't want to complicate this. I  
19 mean, isn't it enough to say "finalists"?

20 MR. BALLINGER: I thought I heard earlier you assumed  
21 there would always be finalists?

22 CHAIRMAN JABER: Uh-huh.

23 MR. BALLINGER: That's not necessarily the case.  
24 Sometimes through the screening process they find everybody is  
25 lower than them. Normally there's a top few.

1 MR. FUTRELL: Or, Chairman Jaber, it could be that  
2 there's a small number of bidders, that's happened in the past,  
3 where there's a couple of bidders submitting maybe four, five,  
4 six bids. That's all there is. So there's no need to go to a  
5 culling process to get it down to a finalist group. They can  
6 pretty much deal with that small group. That's happened in the  
7 Hines 2 case.

8 CHAIRMAN JABER: And Commissioner Palecki --

9 COMMISSIONER PALECKI: Well, according to the  
10 definition, finalist is one or more participants selected by  
11 the utility with whom to conduct subsequent contract  
12 negotiations. I think that we could just narrow that phrase to  
13 "limited to remaining finalists." And that way if there's only  
14 one or if there are none, there's not any question.

15 CHAIRMAN JABER: And does the word "participants"  
16 change anywhere? How would you modify that sentence now,  
17 Commissioner Palecki?

18 COMMISSIONER PALECKI: It would read, "However, if it  
19 chooses to do so, it must inform participants of its intent,  
20 provide the participants (limited to remaining finalists) a  
21 corresponding opportunity to revise their bids."

22 COMMISSIONER BRADLEY: But again, doesn't this  
23 jump-start the process from the beginning? I've said it about  
24 ten times today. And, you know, I'm trying to figure out how  
25 if participants are allowed to sharpen their pencil, how this

1 does not take the process back to the beginning of the RFP  
2 process.

3 COMMISSIONER PALECKI: Well, I really don't think it  
4 does because it only will take place in such cases where the  
5 utility modifies its construction costs and performance  
6 parameters, and then the utility can set very narrow time  
7 frames for those participants to respond. I don't think it's  
8 really a time-consuming effort. And I just have to continue  
9 repeating that it only can benefit the ratepayer.

10 CHAIRMAN JABER: Yeah, Commissioner Bradley, I am not  
11 doing a good job answering your questions, so I appreciate your  
12 frustration. The alternative -- even if it's starting some of  
13 the process all over is okay with me because the alternative is  
14 worse for the ratepayers. If you don't allow that constant  
15 sharpening of the pencil and you allow a process to go forward  
16 that may actually result in greater costs and ultimately  
17 greater rates for the ratepayers, then shame on us.

18 COMMISSIONER BRADLEY: Right, and I don't disagree  
19 with that. But I think that any language that might eliminate  
20 a possible bidder (phonetic) from participating in the process  
21 would be discriminatory, and be mindful of the fact that Number  
22 9 in the process may be Number 1 if you sharpen the pencil. So  
23 Number 1 and Number 2 may not necessarily have the best bid,  
24 which means that the public isn't getting the biggest bang for  
25 its buck if Number 9 who was eliminated possibly could come up

1 with a better proposal with respect to its RFP process.

2 CHAIRMAN JABER: So are you suggesting that the list  
3 of finalists should actually be expanded? I think you're  
4 actually -- you've said what Commissioner Palecki's point is, I  
5 think.

6 COMMISSIONER BRADLEY: Well, it's my impression that  
7 Commissioner Palecki is trying -- his intent is to limit the  
8 number of participants. Is that not correct?

9 CHAIRMAN JABER: Commissioner, let me let you speak  
10 for yourself.

11 COMMISSIONER PALECKI: I wouldn't have any objection  
12 to taking out that particular provision. My main intent is  
13 that when there is one round of pencil sharpening by the  
14 utility, that either all of the bidders or all of the remaining  
15 finalists be given an opportunity to sharpen their pencils and  
16 come up with the best price that will benefit the ratepayers.  
17 And if you don't want to limit that just to the remaining  
18 finalists, I don't have any objection.

19 I was just -- the only reason I provided that  
20 particular provision was because of the -- I think it's more  
21 administratively simple to just include the remaining  
22 finalists, but --

23 COMMISSIONER BRADLEY: Would you object to addressing  
24 the issue of new and expanded or modified application fee so  
25 that this does not become a cost recovery issue?

1 CHAIRMAN JABER: Well, you know, they can do that on  
2 their own now, Commissioner Bradley. One of the benefits of  
3 taking the amount of application fees out of the rule is that  
4 the company has the flexibility to establish the application  
5 fee.

6 Now, we should be real careful to make clear to folks  
7 that it needs to be a fair, not unduly discriminatory  
8 application fee because we don't want to defeat the purpose of  
9 what we're trying to accomplish in transparency and fairness in  
10 this rule, but I think it goes without saying that their  
11 application fees should cover the cost of this process; right?

12 COMMISSIONER BRADLEY: Well, if it covers the cost of  
13 this process, then that it means that what they have done  
14 probably is to inflate the cost of the application -- inflate  
15 the applicate fee in anticipation of having this process occur  
16 which creates a problem, in my opinion, that would be a point  
17 of objection if this, in fact, does not occur. Also, those who  
18 have participated in that inflated application fee, if they're  
19 eliminated, then they're going to feel that they have been  
20 dealt with unfairly.

21 There's just a lot of unintended consequences that I  
22 can think of or anticipate because business always passes along  
23 the cost of doing business to the customer which, in my  
24 opinion, does not lower the cost of generation but increases  
25 the cost of generation. I heard someone say that, well, maybe

1 \$5 million, you know, \$5 million is a lot of money, in my  
2 opinion.

3 CHAIRMAN JABER: Well, it's a balance. I hope that  
4 this process becomes so efficient that that risk of increasing  
5 the application fee is mitigated by all the other good parts of  
6 this rule. It's a delicate balance, and I'm willing to take  
7 that risk.

8 Commissioner Palecki, I need your final motion.

9 COMMISSIONER DEASON: May I ask a question?

10 CHAIRMAN JABER: Commissioner Deason.

11 COMMISSIONER DEASON: The language begins with the  
12 phrase "Based upon updated information," and I'm just sitting  
13 here trying to contemplate or envision some of the subsequent  
14 discussions or motions or argument we may hear in future  
15 proceedings. Is the intent of that phrase meaning that only if  
16 there is new information can the utility revise the numbers in  
17 the original RFP? In other words, can they sharpen their  
18 pencil only if they've got new updated information, and is it a  
19 requirement upon them to show, well, this is the reason we're  
20 changing it, is because there's new updated information? Or do  
21 they have the latitude just to change it because they have  
22 looked at other people's bids and they still think they can be  
23 competitive and do the best job for ratepayers and they want to  
24 change their numbers? And nothing has changed, it's just that  
25 they all of a sudden have changed their mind.

1 I'm not saying one is right or one is wrong. I'm  
2 just trying to understand what this language does. And are we  
3 putting a requirement that has to be met that is subject to  
4 some type of finding by the Commission that you've got to show  
5 us that there is, in fact, new updated information before you  
6 can do this?

7 COMMISSIONER PALECKI: That's a very good point  
8 you've made, Commissioner Deason. I really didn't have any  
9 kind of restrictive intent by using the words "Based on updated  
10 information." I was just envisioning a situation where the  
11 utility and its engineers worked on developing the best  
12 performance parameters, heat rate. All I'm referring to is  
13 sharpening --

14 COMMISSIONER DEASON: So it's not necessary to have  
15 the phrase "Based upon updated information"?

16 COMMISSIONER PALECKI: Actually, since you point that  
17 out, I almost like the provision better with that phrase  
18 eliminated to read, "The public utility may modify the  
19 construction costs and/or performance parameters," because I  
20 don't think that we want to get into or this Commission would  
21 want to get into the question, is this updated information? Is  
22 it merely pencil sharpening? I mean, that wasn't the intent of  
23 why I made this suggestion.

24 COMMISSIONER DEASON: Okay. Thank you.

25 CHAIRMAN JABER: Commissioner Palecki and all

1 Commissioners, do you read this to be clear that the  
2 modification of those costs must occur before the proposal is  
3 selected; right? Is that clear?

4 COMMISSIONER PALECKI: Absolutely, it would have to  
5 be. There's no other way it occur afterwards.

6 CHAIRMAN JABER: Any other questions related to  
7 Commissioner Palecki's motion?

8 COMMISSIONER PALECKI: Chairman, would you like me to  
9 go ahead and reread the language?

10 CHAIRMAN JABER: Yes.

11 COMMISSIONER PALECKI: "The public utility may modify  
12 the construction costs and/or performance parameters affecting  
13 revenue requirements in its next planned generating unit that  
14 it included in the RFP. However, if it chooses to do so, it  
15 must inform participants of its intent, provide the  
16 participants (limited to remaining finalists) a corresponding  
17 opportunity to revise their bids."

18 CHAIRMAN JABER: Commissioners, you've heard the  
19 motion. Is there a second?

20 COMMISSIONER DEASON: Second.

21 CHAIRMAN JABER: There's a motion and a second to  
22 accept Commissioner Palecki's modification to the new Paragraph  
23 14. All those in favor say "aye."

24 COMMISSIONER BAEZ: Aye.

25 CHAIRMAN JABER: Aye.



1 COMMISSIONER PALECKI: Aye.

2 COMMISSIONER DEASON: Aye.

3 CHAIRMAN JABER: Opposed, "nay."

4 COMMISSIONER BRADLEY: Nay.

5 CHAIRMAN JABER: Motion carries 4-1.

6 Staff, I ask that you double-check us on all of the  
7 things we intended to cover based on our comments. Have we  
8 done that? And recognize that we've given you the  
9 administrative authority to renumber the paragraphs as  
10 appropriate.

11 MR. BALLINGER: I think you have.

12 CHAIRMAN JABER: Let me check my notes here. Okay.  
13 What happens next?

14 MS. BRUBAKER: Just so we're absolutely clear on the  
15 record, it seems to me we might also move to adopt, with those  
16 modifications, the rule otherwise in its entirety.

17 CHAIRMAN JABER: Thank you, Ms. Brubaker.  
18 Commissioners, just to make sure we've covered all of our  
19 bases, can we have a general motion to adopt the rule  
20 consistent with all the changes we made today?

21 COMMISSIONER DEASON: So moved.

22 COMMISSIONER BAEZ: Second.

23 CHAIRMAN JABER: There's been a motion and a second  
24 to adopt the rule based on the changes we made today. All  
25 those in favor say "aye."

1 COMMISSIONER DEASON: Aye.

2 CHAIRMAN JABER: Aye.

3 COMMISSIONER PALECKI: Aye.

4 COMMISSIONER BAEZ: Aye.

5 CHAIRMAN JABER: Opposed, "nay."

6 COMMISSIONER BRADLEY: Nay.

7 CHAIRMAN JABER: Okay. The motion carries 4-1.

8 Is there anything else?

9 MS. BRUBAKER: The next step would be -- oh, also for  
10 Issue 2, should the rule be filed with the Secretary of State,  
11 we will also need to do a notice of changes.

12 CHAIRMAN JABER: We need a motion on Issue 2.

13 COMMISSIONER DEASON: I'm sorry?

14 CHAIRMAN JABER: Motion on Issue 2, Page 13.

15 COMMISSIONER DEASON: Move staff's recommendation.

16 COMMISSIONER BAEZ: Second.

17 CHAIRMAN JABER: There's a motion and a second to  
18 accept staff's recommendation on Issue 2. All those in favor  
19 say "aye."

20 (Unanimous affirmative vote.)

21 CHAIRMAN JABER: Issue 2 is approved.

22 That's it. Thank you, staff. Commissioners, thank  
23 you. This concludes the special agenda conference today.

24 (Special Agenda Conference concluded at 3:20 p.m.)

25

- - - - -

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

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

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

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

19             DATED THIS 10th DAY OF JANUARY, 2003.

20  
21  
22  
23  
24  
25  


TRICIA DeMARTE, RPR  
FPSC Official Commission Reporter  
(850) 413-6736